



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

**CICA (Civil) APPEAL No. 0024 of 2023
(Grand Court Cause No. FSD 0059 of 2023 (AWJ))**

BETWEEN

JUNIPER LIFE SCIENCES LTD

APPELLANT

AND

RBH HOLDINGS

RESPONDENT

BEFORE: **The Rt Hon Sir Jack Beatson, Justice of Appeal
The Hon Sir Anthony Smellie, Justice of Appeal
The Hon Clare Montgomery KC, Justice of Appeal**

Appearances: **Mr. Alain Choo Choy KC instructed by Mr. Denis Olarou and Ms Kalyani
Dixit of Carey Olsen for the Appellant
Mr. Richard Millett KC instructed by Mr. Jonathon Milne and Mr. Jordan
McErlean of Conyers Dill and Pearman LLP for the Respondent**

Date of hearing: **10 July 2024**

Draft circulated: **26 September 2024**

Judgment delivered: **11 October 2024**

JUDGMENT

SMELLIE JA:

CICA (Civil) Appeal No. 24 of 2023 – Juniper Life Sciences Ltd and RBH Holdings Ltd – Judgment

1. The Appellant appeals against the decision of Hon Acting Justice Alistair Walters (the “**Judge**”) as explained in his judgment of 8 June 2023 (the “**Judgment**”) and set out in his order of 30 June 2023 (the “**Order**”).
2. By the Judgment and the Order, the Judge dismissed the Appellant’s application which sought the stay of an action brought by the Respondent, in favour of arbitration of a dispute between the Appellant and the Respondent in the Republic of Singapore. The Appellant’s application was made by summons pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act (“the **FAAEA**”), alternatively by way of a discretionary stay pursuant to the Overriding Objective, or in the further alternative, a stay on *forum non conveniens* grounds pursuant to Order 12 Rule 8 of the Grand Court Rules (GCR) (altogether the “**Stay Application**”).
3. The Judge dismissed the Stay Application on the basis, essentially, that the action brought by the Respondent, which seeks rectification of the corporate share register of the Appellant (the “**Rectification Action**”), falls outside the scope of the agreement to arbitrate relied upon by the Appellant, that contained in Clause 18 of a Share Subscription Agreement (“**Clause 18**” and the “**SSA**” respectively), entered into between the Appellant, the Respondent and Sylvan Asia Growth Master Fund I PTE Ltd (“**Sylvan MF**”), on 12th January 2022¹.
4. The Rectification Action is brought by the Respondent pursuant to section 46 of the Companies Act (2023 Revision) (the “**Act**”) ². It seeks to set aside a resolution taken by the directors of the Appellant to repurchase shares which had been acquired by the Respondent in the Appellant, pursuant to the SSA (the “**Resolution**”) on the basis that in so doing, the directors acted for an impermissible and improper purpose. The Rectification Action invokes Article 9.1(c) of the articles of association of the Appellant³ and accordingly, came to be described by the Judge as the “**Article 9.1(c) Dispute**”.

¹ The SSA was later amended in May 2022. The references to it which follow in this Judgment are to its provisions as amended.

² Section 46 provides the remedy, by application to the Court, for an improper entry or omission of an entry in the register of members of a Cayman Islands company: “*If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have that person’s name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register: Provided that the Court may direct an issue to be tried, on which any question of law may be raised.*”

³ Article 9.1 (c) is set out below at [16], within the record of the Resolution.

5. The question whether the Article 9.1(c) Dispute falls outside the scope of Clause 18 of the SSA, is the crucial issue of contention on this appeal. If the Article 9.1(c) Dispute is within the scope of Clause 18 as being a matter agreed to be referred to arbitration, the Judge would have been obliged to accede to the Stay Application in keeping with the terms of section 4 of the FAAEA which state that:

“4. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings: and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.” [emphasis added]

6. The foregoing being the primary jurisdictional context for the appeal, the relevant factual background follows.

The relationships between the parties and the corporate structure

7. The Appellant, (hereinafter “**JLS**”), was incorporated in the Cayman Islands on 21 December 2021 with its registered office located at IQ EQ Corporate Services (Cayman) Limited (“**IQ EQ**”). JLS, together with its subsidiaries, including Juniper Therapeutix Pts Ltd (“**Therapeutix**”) and Juniper Biologics Pte Ltd (“**Biologics**”), comprise a private equity venture focused on the healthcare industry, with Therapeutix and Biologics reported as being the most valuable entities within the Juniper Group.
8. The Respondent (“**RBH**”) was incorporated in the Cayman Islands on 10 January 2022, with its registered office also at IQ EQ. Mr Laika Rudianto, who is the 100% shareholder and a director of RBH⁴, describes RBH as an investment holding company that is the “founding shareholder of JLS”.

⁴ Mr Rudianto also owns Margie River CS, another Cayman Islands company incorporated on 12 January 2022 with registered offices also at IQ EQ. Margie River CS owns 2.6% of the shares in Therapeutix and 2.4% of the shares in Biologics. The circumstances under which these shares were acquired are also the subject of contention but do not arise for examination now because those shares are not the subject of the Article 9(1) (c) Dispute.

RBH is indeed, identified in those terms within the SSA pursuant to which RBH came to be registered as the owner of 5000 shares representing 10% of the shares in JLS.

9. However, despite RBH being stated in the recitals to the SSA as holding those shares as “the Founder”, the circumstances under which they were acquired and allotted, are very contentiously and differently described by Mr Rudianto on behalf of RBH, than by those representing JLS (in particular Mr Aidan Chan Tiong Eyong (“**Mr Chan**”) and Mr Jeun Byong Jun (“**Mr Jeun**”). Their opposing accounts, to be further considered below, describe a dispute over the right to title in those shares which, at the instance of JLS, has, since the hearing before the Judge, been referred by JLS to arbitration in Singapore, pursuant to Clause 18 of the SSA (the “**Title Dispute**”).
10. It is JLS’s contention that the Article 9.1(c) Dispute and the Title Dispute are so inter-related as to comprise of a single matter for arbitration in Singapore pursuant to the SSA, the central contention with which RBH, through Mr Rudianto, disagrees, and the contention which was rejected by the Judge. Hence, as already mentioned, the central contention also on this appeal.
11. The other party to the SSA, (“**Sylvan MF**”), was incorporated on 26 April 2021 under the laws of Singapore. Pursuant also to the SSA, it became prior to the Resolution, the owner of 45000 shares, representing 90% of the shares in JLS, and the only other shareholder, along with RBH, in JLS. Following the Resolution and as the result of it being carried into effect, JLS has become wholly owned by Sylvan MF.
12. Sylvan MF is wholly owned by Sylvan Asia Growth GP1 Ltd (“**Sylvan GP**”), the holding company of the Juniper Group. It was incorporated on 5 January 2021 with its registered office located at Maples Corporate Services Limited, in George Town, Grand Cayman.
13. Sylvan Capital Management Pte Ltd (“**SCM**”) was incorporated on 25 September 2019 under the laws of Singapore to provide investment management services for the Sylvan Group. Even though not itself a shareholder in JLS, it is said to be responsible through Mr Jeun as managing director of SCM, for representing the interests of the Sylvan Group, including Sylvan MF. SCM became, as will be explained below, a central player in the circumstances leading up to the passing of the Resolution by JLS’s board of directors. This was by means of a letter of “recommendations” dated 27 October 2022 which it sent to the directors, without prior notice to RBH, and upon which the directors acted by way

of the Resolution for the repurchase of RBH's 5000 shares in JLS⁵. In the Rectification Action, RBH contends that it appears from the terms of the Resolution, when the Resolution is compared to the terms of SCM's letter, that the directors of JLS acted in keeping with the explicit terms of SCM's letter, without regard to RBH's interests as shareholder and for the improper purpose of serving only the interests of SCM and Sylvan MF.

14. SCM's letter of 27 October 2022 and the Resolution were of importance to the Judge's analysis and remain so to the analysis to be undertaken by this Court, in determining whether, as JLS contends, the Article 9.1(c) Dispute and the Title Dispute are together to be regarded as a matter properly to be referred to arbitration. They are therefore set out below.

15. First the letter of 27 October 2022:

"27th October 2022

For the attention of the Directors

Re: 5000 Ordinary Shares owned by RBH in Juniper Life Sciences Ltd ("JLS").

As of today, RBH Holdings ("RBH"), a Cayman vehicle beneficially owned by Laika Saputra Rudianto ("Raymond") owns 5,000 shares in JLS, which is 10% of the ordinary shares outstanding. Sylvan Asia Growth Master Fund 1 Pte Ltd ("Master Fund") owns the remaining 90%, or 45,000 shares.

Raymond invested US\$5000 into JLS and was issued 5,000 ordinary shares in JLS at par value of US\$1.00. It was agreed with Raymond that (1) he would join Sylvan Capital Management Pte Ltd ("SCM") full-time as a Managing Director ("MD") and be primarily responsible for Juniper Biologics Pts Ltd ("JBP"), the main operating subsidiary of JLS and its other subsidiary companies, (collectively, "Project Juniper") making sure that JBP in particular was well-run and managed properly, and (2) that after a five year period, a premium would be added to the value of his shares as part of his compensation package provided these conditions held.

⁵ A deed of indemnity and "consent to re-designation of shares" from Sylvan MF, dated also 27 October 2022, was also provided to the Directors of JLS, at their request prior to the passing of the Resolution.

JLS was capitalized as follows: On 12th January 2022, 5,000 ordinary shares in JLS were subscribed by RBH, a Cayman holding company incorporated and fully owned by Raymond, at par value of US\$1.00 per share. They were issued as fully paid-up and Raymond transferred US\$5,000 to the bank account of JLS in lieu of RBH. Following this, 45,000 shares were subscribed for by Sylvan Asia Growth Master Fund 1 Pte Ltd ("Master Fund"), at the price of US\$48,634,928 as documented in the Share Subscription Agreement ("SSA") dated 12th January 2022. The SSA also imposes a moratorium on transfer of the JLS shares owned by RBH for a period of 5 years from 12th January 2022.

On 14th January 2022, 29,534 shares were issued to the Master Fund for value received, and on 1st March 2022 a further 15,466 shares were issued to the Master Fund for value received. At US\$48,634,928 for 45,000 shares, this represents a price of US\$1,080.78 per share for the Master Fund.

In the 9 months since then, Raymond has (1) broken his commitment to SCM by gross under reporting of many material negative operational information, while clearly recognizing his own awareness to the contrary in managing JLS and its subsidiary companies since the Project Juniper deal was brought in and executed, and (2) he has been evading several attempts to meet and discuss SCM's findings and has not been responsive to SCM's communication effort. As such, SCM concludes to not proceed with hiring him given the poor management & less than truthful communication record of the last 9 months.

Therefore, it is the express recommendation of SCM to the Directors of JLS that the 5,000 shares owned by RBH in JLS be repurchased at par value.

Should you have any questions, please feel free to contact us.

Yours truly

Jeun Byong Jun

Director

For and on behalf of:

Sylvan Capital Management Pte Ltd.”

16. The record of the Resolution in relevant parts, reads as follows:

“Juniper Life Sciences Ltd (‘the Company’)

Written resolution of all the Directors of the Company

REDESIGNATION OF SHARES

IT IS NOTED THAT the Directors desire to re-designate the 45,000 ordinary shares held by Sylvan Asia Growth Master Fund 1 Pte Ltd (“SAGMF”) ...

COMPENSATION PACKAGE

IT IS NOTED THAT Mr Laika Saputra Rudianto (“Raymond”) invested US\$5,000 into the Company and RBH Holdings (Raymond’s company) was issued 5,000 ordinary shares in the company at par value of US\$1.00 (“Raymond’s shares”). It was agreed with Raymond that (1) he would join Sylvan Capital Management Pte Ltd (“SCM”) full-time as a Managing Director (“MD”) and be primarily responsible for Juniper Biologics Pte Ltd (“JBP”) , the main operating subsidiary of JLS, and its other subsidiary companies (collectively “Project Juniper”), making sure the JBP in particular was well-run and managed properly, and (2) that after a five year period a premium would be added to the value of his shares as part of his compensation package provided these conditions held.

IT IS NOTED THAT in the last 9 months, Raymond has (1) broken his commitment to SCM by gross under reporting of many material negative operational information, while clearly recognizing his own awareness to the contrary in managing JLS and its subsidiary companies since the Project Juniper deal was brought in and executed, and (2) he has been evading several attempts to meet and discuss SCM’s findings and has not been responsive to SCM’s communication effort. As such SCM concludes to not proceed with hiring him given the poor management & less than truthful communication record of the last 9 months. It has been recommended by SCM that Raymond’s shares be repurchased at par value.

IT IS NOTED THAT the Directors have received a letter from SCM (attached as Schedule A to these resolutions) detailing the intended role for Raymond, relevant compensation and Raymond's activity in the past 9 months together with their recommendation as investment manager of SAGMF.

REPURCHASE

IT IS NOTED THAT following the recommendation of SCM, the Directors desire to repurchase Raymond's Shares at the value he originally purchased then for and return the monies to the Bank account from which Raymond originally sent his share purchase monies.

IT IS NOTED THAT Article 9.1(c) of the Articles of Association provides:

"Subject to the Law, and to any rights for the time being conferred on the Members holding a particular class of Shares, the Company may by its directors: (c) purchase all or any of its own Shares of any class including any redeemable Shares on the terms and in the manner which the directors determine at the time of such purchase."

IT IS NOTED THAT SAGMF has provided an indemnity to the Company and its directors and officers in respect of the repurchase of Raymond's shares (attached as Schedule B to these Resolutions).

IT IS RESOLVED THAT it was in the best commercial interest of the Company and its shareholders to repurchase Raymond's Shares at par value (total US\$5,000) with immediate effect and that the payment be sent to Raymond to the bank account from which Raymond originally sent his share purchase monies.

INVESTOR NOTICE

IT IS RESOLVED THAT an (sic) repurchase notice be sent to Raymond in (sic) such form as may be approved by the Directors.

COMPANY REGISTER

IT IS RESOLVED THAT the registered office service provider of the Company be and is hereby instructed and authorized to update the Register of Members of the Company and the company books to reflect the redesignation and repurchase of shares.

...

Signed by all the Directors of the Company”

17. After the passing of the Resolution, on 16 November 2022, Mr Edgington, one of the directors of JLS, sent by email to RBH a Share Purchase Notice dated 30 October 2022 which stated, in part, as follows:

“Dear Representative of RBH Holdings

In accordance with Resolutions passed by the Directors of the Company, the Directors hereby inform you that they have determined in good faith that it is the best solution for the Company to engage in termination of your relationship with Juniper and Sylvan by repurchasing your shares ...”

18. Mr Edgington’s email also informed RBH that it was no longer a shareholder of JLS.
19. On a date likely between 27 October 2022 and 16 November 2022 (precisely when RBH avers is unknown to it), RBH was removed from JLS’s register of members. And as RBH also avers, a copy of the Resolution was only provided to it on 23 December 2022, two months after it was passed, under cover of a letter from Stuarts Humphries, JLS’s Cayman Islands attorneys at that time.

The Rectification Action/Article 9.1(c) Dispute

20. The Rectification Action was commenced by RBH’s’ Originating Summons dated 8 March 2023, seeking relief in the following terms:

“1. A declaration that the written resolution of the board of directors of Juniper Life Sciences Ltd dated 27 October 2022 exercising the discretion under Article 9.1(c) of the Articles of Association (the “Articles”) dated 21 December 2021 to redeem the 5000 ordinary shares held by RBH Holdings at the par value of USD 5,000 with effect from 27 October 2022 (the “Resolution”) constituted an exercise of a power for an improper purpose and is void (or, alternatively, voidable).

2. *An order that the Resolution be set aside ab initio.*

3. *A declaration that RBH Holdings has since 27 October 2022 been and continues to be a shareholder of Juniper Life Sciences Ltd.*

4. *Pursuant to section 46 of [the Act] the register of the members of Juniper Life Sciences Ltd shall be rectified forthwith (including re-designating and/or cancelling shares as appropriate) such that it reflects the share register immediately prior to the passing of the Resolution with retroactive effect from 27 October 2022 and in the alternative, with effect from the date of this Order, such that:*

4.1 RBH Holdings shall be recorded as the holder of 5,000 ordinary shares; and

4.2 Sylvan Asia Growth Master Fund 1 Pte Ltd shall be recorded as the holder of the remaining 45,000 shares.”⁶

21. JLS’s Defence was due to be filed by 23 May 2024 in accordance with the Judge’s Directions Order of 7 May 2024 but JLS has not yet complied. It has however, brought certain other applications, which will be considered below in the context of RBH’s argument on the appeal, that by having brought those applications, JLS has submitted itself to the jurisdiction of the Courts of this jurisdiction in the Article 9.1(c) Dispute and is therefore not entitled, in any event, to invoke Clause 18 for referring that dispute to arbitration in Singapore.

The SSA, including Clause 18, and agreements or putative agreements relied on by the Appellant.

22. On 12 January 2022, a resolution of the board of JLS recorded that JLS’s initial single issued subscriber share was transferred to RBH and that JLS also issued 4999 ordinary shares to RBH at par value, bringing its total authorised holding to 5000 ordinary shares. On the same date, and in conjunction with the transfer and issue of the 5000 ordinary shares to RBH, JLS, Sylvan MF and RBH entered into the SSA.

⁶On 21 November 2023 JLS filed a summons to strike out RBH’s Originating Summons or in the alternative an order that the Rectification Action shall continue as if begun by writ. The Judge dismissed the strike out application but granted the alternative relief by a Directions Order on 7 May 2024 and on 9 May 2024 RBH filed its Statement of Claim.

23. Recital A to the SSA itself states that immediately prior to the Closing (ie: 20 days from 12 January 2022), RBH, (the “**Founder**”) will hold 5000 Ordinary Shares in the capital of JLS, representing 100% of the issued shares at that time. Recital B states that Sylvan MF (identified in the SSA as “**the Investor**”) has agreed to subscribe for and that JLS has agreed to allot and issue 45000 Ordinary Shares (“**Subscription Shares**”) to the Investor, representing 90% of JLS’s total issued shares, in consideration for US\$48,634,928 (the “**Subscription Amount**”) subject to the terms and conditions set forth in the SSA.

24. Certain other provisions of the SSA are relevant to the present enquiry:

- Clause 9 provides, in favour of Sylvan MF, the Investor, for certain restrictions on transfers of RBH’s 5000 shares, by imposing upon RBH as Founder, a moratorium in that regard of 60 days from the date of closing of the SSA. Clause 9 commensurately also required RBH as the Founder to undertake not to encumber with indebtedness, dispose of or grant any option over, or enter into any agreement in respect of the voting rights attached to more than 1666 of its 5000 shares, during the moratorium.
- Clause 9.3 further provides that JLS shall not register in its share register, any embargoed transfer unless it also registers in favour of Sylvan MF, a Drag Along Right as defined in the SSA [in effect, inter alia, a prior right to acquire those shares ahead of any third party, at a defined price].
- Clause 11 provides, in favour of RBH as Founder, a right, in the event Sylvan MF the Investor, decides to sell any of its shares to a third party, the right also to sell its shares on the same terms and conditions (defined as a “Tag Along Right”).
- Clause 17 provides that the SSA shall be governed by, and construed in accordance with, the laws of the Republic of Singapore.
- Most significantly for present purposes, Clause 18 provides as follows:

“Dispute Resolution

Any dispute, controversy or conflict arising from or in relation to this Agreement, including a dispute on its validity, conclusion, binding effect, breach, amendment, expiration and termination, shall be initially referred to mediation under the Singapore Mediation Centre, and if unresolved, shall be finally resolved by arbitration administered by the Singapore Rules of the Singapore International Arbitration Center for the time being in force, which rules are deemed to be incorporated by reference in this clause. The arbitration tribunal shall consist of 1 arbitrator. The seat of the arbitration shall be Singapore. The language of the arbitration shall be English.”

- Finally, Clause 20.7 provides:

“ This Agreement constitutes the entire agreement of the Parties with respect to the subject matters hereof, and there is no other correspondence understanding, agreement or contract that has any bearing on this Agreement”.

25. It will be apparent from the foregoing summary of its relevant terms, that the SSA itself contains no provision which expressly allows for or contemplates the repurchase of RBH’s shares in the manner of the Resolution. Nor is it therefore immediately apparent, how Clause 18 of the SSA would apply so as to bring the Article 9.1(c) Dispute within its reach, for requiring its submission to arbitration in Singapore.
26. Notwithstanding that circumstance and the terms of Clause 20.7 (above), JLS contends that there are other arrangements amounting to agreements which must be construed with the SSA and which, when so construed, have the effect for which JLS contends. They are said on behalf of JLS to have that effect because, when they are construed in the light of the SSA, they relate to and govern the entitlement to the 5000 shares allotted to RBH and so the Article 9.1(c) Dispute, as does the Title Dispute, “(arise) from or in relation to” the SSA, in terms of Clause 18.
27. In this regard there is one other relevant agreement and two arrangements which JLS and Mr Jeun allege are agreements and which I refer to as “putative” agreements, to be considered. The agreement is a written Employment Agreement of 16 July 2021 (the “**Employment Agreement**”) by which Mr

Rudianto was engaged as a Managing Director, not of JLS but of SCM. The other two matters are what JLS alleges are unwritten agreements; an alleged unwritten Employee Stock Option Agreement (ESOP Agreement) and an alleged unwritten Share Return Agreement. The ESOP Agreement and Share Return Agreements are presented in the evidence as having arisen, prior to the signing of the SSA, over a rather tortuous course of negotiations by way of oral or email exchanges between representatives of SCM and Mr Rudianto.

28. Relevant aspects of the evidence about these negotiations, are summarized below.
29. On behalf of JLS, the evidence comes primarily from the affidavits of Mr Jeun.
30. As regards the Employment Agreement, Mr Jeun avers at [15] of his first affidavit that:

“On or around 16 July 2021, SCM entered into an employment agreement with Mr Rudianto ... with Mr Rudianto agreeing that he would start employment on 1 October 2021 as a Managing Director of SCM. The Employment Agreement provided for an annual salary of US\$100,000 and an incentive of US\$100,000 as a signing-on bonus with the condition that Mr Rudianto was to return the incentive on a pro rata basis if he were to leave SCM within a year. In addition, I also highlight the following terms:

- (a) Clause 2.1 which provides that “[t]he Employment shall commence on the Start Date set out in Schedule A and shall be for a one (1) year period and renewed automatically for every subsequent one (1) year of Employment unless terminated ...”*
- (b) Clause 6.1 (f) which provides that during “his employment with the Company, the Employee will ... devote his full time, attention, skill and best endeavours to the performance of his duties and responsibilities under this Agreement ...”*
- (c) Clause 19.1, which provides that “ [t]his Agreement and the Employment is governed by and is to be construed in accordance with Singapore law and the parties submit to the exclusive jurisdiction of the courts of Singapore in respect of all matters relating to this Agreement and/or the Employment.”*

31. Mr Jeun goes on to quote certain provisions of the Schedule to the Employment Agreement, in particular those which provide for the “Start Date” of “October 1st 2021”; that the “Job duties and

Responsibilities” include “*proactively networking and sourcing potential investments and managing due diligence, valuation, structuring and overall deal execution ...*” and “*being responsible for proactive management of the [investment] fund existing and new limited partnership relationships*”; and that the Place of Employment shall be at the Company’s [ie: SCM’s] offices in Singapore; and, finally, that the “*Employee is employed on the full-time basis*”.

32. It is signed on behalf of SCM by Mr Jeun himself (who is identified in the Schedule as the “*Employee’s supervisor*”) and by Mr Rudianto, as the “*Employee*”. RBH is not a party to the Employee Agreement, nor is JLS. The agreement makes no reference to the SSA, nor therefore to Clause 18. It also makes no reference to the 5000 shares held by RBH in JLS, which is not surprising as its date of execution is as mentioned above, 16 July 2021, whereas the shares were acquired some 6 months later, in late January 2022.
33. There is however, what appears to be implicit reference to the Employment Agreement both in SCM’s Letter of 27 October 2022 and in the Resolution, in both of which it is asserted as regards Mr Rudianto that (as already set out above): “*It was agreed with Raymond that (1) he would join Sylvan Capital Management Pte Ltd (“SCM”) full-time as a Managing Director (“MD”) etc ...*” and further that “*Raymond’s*” breaches of that agreement by having “*broken his commitment to SCM by gross under reporting of many material negative operational information... and has been evading attempts to meet to discuss SCM’s findings..*”
34. As regards the ESOP Agreement, Mr Jeun sets out his account of the factual matrix at [22] to [43] of his first affidavit. At [22] he avers that: “*Starting from in or around November 2021 to December 2021, there were various discussions about the structuring of the Project Juniper Investment. One of the discussions centered on a proposal by Mr Gerald Leong (“Mr Leong”), a former managing director of SCM, and Mr Rudianto to set up an employee Stock Option (“ESOP”) for senior key employees of SCM working on the Project Juniper investment, including Mr Rudianto. This would be separate from the salary components of the employees’ remuneration.*”
35. Mr Jeun then describes misgivings said to have arisen about Mr Rudianto’s commitment to full-time employment with SCM (including Mr Rudianto having “*abruptly announced*” on 8 November 2021 that he had accepted employment with an Indonesian state-owned enterprise). This raised concerns whether he was fully committed to the responsibilities he had agreed to assume in relation to making

Project Juniper successful. These misgivings and others which Mr Jeun describes at length in his first affidavit, led to the protracted period of negotiations before the alleged agreement over the allocation of ESOP shares was reached. The chronology leading up to what JLS and Mr Jeun say was a final agreement reached orally on or around 10 January 2022, is more fully set out at [31] to [37] of Mr Chan's first affidavit and by the Judge at [15] – [18] of the Judgment (albeit there citing the secondhand account of Mr Chan, as passed on to him by Mr Jeun).

36. At [38] of his first affidavit the terms of the ESOP Agreement as said there to have been “concluded”, are described by Mr Jeun as follows:

“... by 10 January 2022, the oral agreement concluded between myself (on behalf of SCM and the Sylvan Master Fund) and Mr Rudianto (acting for himself and his corporate vehicles) (the ESOP Agreement) was on the following terms:

- (a) Mr Rudianto would join SCM as a full-time managing director in August 2022 and be primarily responsible for [Biologic], and any other subsidiaries which may be subsequently incorporated or included as part of the Project Juniper Investment, for a period of five years. He would also be responsible for achieving a profitable exit from the Project Juniper investment at the end of the five-year period.*
- (b) Mr Rudianto would be initially allocated a percentage of the shares in the Company in the region of 10% which represented the pool of ESOP shares for the management (including Mr Rudianto), with the precise percentage of Mr Rudianto's shares to be agreed at a future date. Mr Rudianto would be entitled to retain a small minority percentage of the shares (in a percentage to be agreed), subject to the ESOP arrangement with the remaining shares to be transferred in due course to other incoming key senior personnel of the Project Juniper entities, as part of the ESOP program.*
- (c) Mr Rudianto would also be allocated a percentage of the shares in [Biologic] in the region of 2-3%, with the precise percentage to be agreed at a future date. Those shares would be allocated directly by way of holding shares in [Biologic], and through another of Mr Rudianto's wholly owned entities, Margie River CS.*

(d) Should Mr Rudianto cease his full-time employment with SCM in less than five years, he would be required to return his share allocation in the Project Juniper entities on a pro rata basis based on the period he was employed.

(e) Provided that Mr Rudianto remained employed by SCM for the anticipated full five-year period, a premium would be added to the value of his shares as part of his compensation package.”

37. But even at that time_as immediately set out above, no final agreement had yet been reached on the start date of the employment of Mr Rudianto, according to Mr Jeun. As he goes on to explain in his first affidavit at [40], at around end May 2022, Mr Rudianto requested yet again to delay his starting date at SCM to January 2023. Mr Jeun continued:

“... I was increasingly apprehensive about Mr Rudianto’s repeated requests to delay his starting date and I reminded him again that the Sylvan Group had entered into the Project Juniper investment on the basis that (he) would be taking the lead in managing it for SCM, as well as finding an exit within 5 years. The ESOP agreement was therefore designed on this basis. Mr Rudianto assured me that he would be joining SCM”.

38. And continuing at [41]:

“In or around June to July 202, I met with Mr Rudianto. He wanted to know the specific percentage of ESOP shares that would be allocated to him. I again reminded him that any ESOP shares allocated to him would be conditional on him commencing his employment at SCM and managing the Juniper investment (with a view to securing an exit within 5 years). Mr Rudianto reassured me that he would be willing to join SCM and he was aware of the conditions of the ESOP shares. Based on this mutual understanding, I was prepared to discuss and agree with Mr Rudianto on the percentage of the Company’s shares that he was entitled to under the ESOP Agreement. We orally agreed that Mr Rudianto would be entitled to effectively retain a minority shareholding of roughly 3.75% in [Biologic]. This would be structured as follows:

- (a) *Of the 10% shares held by RBH in [JLS], 1.4% would be allocated to Mr Rudianto (held through RBH), and the remaining 8.6% would be held on behalf and reserved for incoming key personnel of the Project Juniper Entities in due course.*
- (b) *Roughly 2.6% shares in [Biologic] would be allocated to Mr Rudianto, held through Margie River CS”*

39. Mr Jeun goes on at [45] to [48] of his first affidavit to explain what he describes as “*Mr Rudianto’s breaches and the Share Return Agreement*”. Given that the central issue on the appeal does not involve passing on the merits of the alleged breaches or on the actual existence of either the ESOP Agreement or the Share Return Agreement, it will suffice here simply to extract from Mr Jeun’s account:

“45. In or around 1 August 2022, I discovered that material information had been concealed by Mr Leong from the Sylvan Group and myself relating to the operation of the Project Juniper Entities. There were, amongst other things, attempts to materially conceal unauthorized cash outlays made by the Project Juniper Entities and mismanagement that resulted in the Sylvan Group being put at risk of losing its controlling stake in the Project Juniper Entities. Many of these unauthorized approvals included/cc’d Mr Rudianto but omitted myself.

46. Based on the information that came to my attention, I was increasingly concerned that Mr Rudianto was working in tandem with Mr Leong to advance their personal agendas at the expense of the Sylvan Group’s interest. I was determined to regularize the issues relating to the Project Juniper Entities and emailed Mr Leong, Mr Rudianto and Mr Chan to set out my concerns. [He then refers to copies of emails exhibited to his affidavit].

47. By then, Mr Leong had already tendered his resignation as managing director of SCM in or around July 2022.

48. As I explained above, I had already started having doubts as a result of Mr Rudianto’s repeated requests to delay his starting date with SCM. My suspicions about Mr Rudianto were deepened having discovered his acts of wrongdoing. On 5 August 2022, I arranged to meet Mr Rudianto for lunch. I firmly told him over lunch that the Sylvan Group could no

longer tolerate having his repeated delays and empty promises. I stated that, since he had not commenced employment with SCM, all of the shares that had been allocated to him pursuant to the ESOP Agreement would have to be returned to a 'clean slate'. I also stated that Mr Rudianto would only receive shares in the Project Juniper Entities, if he commenced his employment at SCM, at which time, he would be re-awarded the shares in tranches, and pro-rated according to each year that he continued to remain employed with SCM. Mr Rudianto was apologetic and verbally agreed to effect the return of the shares in (JLS) and in the Project Juniper Entities, and to the arrangement for him to be re-awarded the shares, upon the commencement of his employment at SCM.

49. After lunch on 5 August 2022, I briefed Mr Chan that Mr Rudianto would be returning his shares as was agreed.

50. As it transpired, Mr Rudianto never returned the ESOP shares in either [JLS] or the Project Juniper Entities, despite multiple reminders from myself and the staff at SCM.”

40. Mr Jeun goes on to explain that it was in response to this refusal by Mr Rudianto to honour the Share Return Agreement reached as he describes above that the Letter of 27 October 2022 was sent to the directors of JLS, leading to the Resolution and reacquisition of RBH’s 5000 shares in JLS. He posits, by way of further justification, at [52], that:

“It appears that Mr Rudianto was holding out for a better employment opportunity and once he had found himself what he thought to be a better opportunity, he had no intention of joining SCM full time to manage the Project Juniper investments. Unjustly, however, Mr Rudianto wanted to secure and retain the benefit of the ESOP shares which were transferred or issued to RBH at par value and hence at a significant discount to the real value of the shares, and which was intended to be allocated only to long-term key employees involved in the Project Juniper investment.”

41. Mr Rudianto’s response can be taken, for present purposes, from [14] to [23] of his second affidavit. In sum, he refutes Mr Jeun’s (as well as Mr Chan’s) versions of events, denies the alleged relationship between the RBH shares and any employment incentive arrangements and the existence of any agreement for the return of the shares:

“14. RBH’s 10% stake in JLS represented consideration for originating the opportunity and supporting execution of the transaction until closing. As such, RBH was referred to as the “Founder”. This was akin to a finder’s fee arrangement.

15. As such, RBH became a shareholder of JLS in substantially different circumstances than a typical employee with stock options and the shareholding was not characterized as an employee incentive arrangement. This is consistent with WhatsApp messages exchanges during January 2022 in a group chat which included myself, [Mr Chan] and another, which are exhibited [with this affidavit]. The conversation references bringing and executing the deal. As explained in the messages, in return for that origination and closing assistance, RBH was to be rewarded with compensation and a payment-in-kind.

16. The origination arrangement was documented in contemporaneous records of SCM’s Investment Committee, such as the memorandum dated 15 December 2021 agreed to by members of SCM’s Investment Committee at the conclusion of the relevant Investment Committee meetings [citing this document at page 2 of the exhibits]. I note that Mr Singh’s⁷ shares were also awarded in his capacity as founder [(in Therapeutix and Biologics)] with no vesting period or clawback rights attached.

17. RBH’s shares were not held for the benefit of other employees. That would be a bizarre arrangement. As far as I am aware, there were no tax benefits for RBH to hold shares as nominee for the benefit of future unnamed employees. There is no trusteeship or nomineehip documentation.

18. The proper way of holding shares for future employees would have been for JLS to hold such shares in treasury or for new shares to be issued by the JLS by way of new allotments to future employees, which would need to be properly documented in writing such as the

⁷ This is a reference to Mr Ramandeep Singh who is acknowledged by Mr Chan, in his first affidavit, as having been introduced to the Sylvan Group by Mr Rudianto, as a friend who was in the pharmaceutical business. Mr Chan avers that Mr Singh presented “an idea to acquire the in-licensing rights for three oncology drugs in certain geographies and was in discussion with a pharmaceutical intellectual property owner to acquire these rights. Mr Singh also had a company called (Biologics), that could be used as the entity to acquire the in-licensing rights of the oncology drugs. (Biologics) was intended to be a science-led healthcare company focused on researching, developing and commercializing novel therapies in oncology, rare/orphan diseases and gene therapy. This was the so-called “Project Juniper” investment opportunity introduced by Mr Rudianto”. Mr Jeun also speaks of Mr Singh in similar terms at [16] of his first affidavit.

memorandum as referred to in paragraph 16 above, or some written agreement. This was not done.

19. SCM is a professionally-managed asset manager for a private equity fund, and is regulated by the Monetary Authority of Singapore (MAS). It therefore seems illogical for such an institution to use a nominee structure to hold shares for other employees. It also seems highly unlikely that such a nominee arrangement involving future transfer of shares would not be properly documented.

20. The [SSA] (as amended) is not tied to any alleged employment incentive arrangements. Mr (Chan) appears to suggest that amendments to the [SSA] were made over time to reflect other oral agreements in relation to employment schemes. However, as far as I am aware, this connection is not recorded anywhere and the amendments were not introduced on that basis. In my experience it is common in private equity transactions to include lock-in periods for particular shareholders. For example, at clause 7 of Biologics (sic) Shareholders' Agreement, there is a similar moratorium on transfer. (citing page 181 of the exhibits to Mr Chan's first affidavit).

21. At paragraph 66 of [Mr Chan's first affidavit], it is said that the decision of the directors of JLS to repurchase RBH's 5000 shares at par value meant that RBH was "fairly compensated". I refer to the valuation evidence at paragraphs 69 to 71 of [my] First Affidavit, which confirms that RBH's shares were worth significantly more than par value of US\$1 per share in circumstances where, for example, the LEK valuation report dated 8 July 2022 valued Biologics at approximately US\$ 1 billion to US\$ 1.8 billion."

- 42.** Mr Rudianto proceeds at [23] of his Second Affidavit to also address the putative Share Return Agreement in the following terms:

"23 There was no such agreement reached with Mr Jeun on behalf of JLS and/or SCM. There were no specific discussions in relation to arrangements for RBH to return shares on 5 August 2022, much less any concluded agreement. I recall that Mr Jeun did call me in August or September 2022 to propose that (a) RBH and/or I might return a portion of shares whilst retaining the remainder: and (b) the employment agreement be finalized. However, it was a

brief conversation and I did not commit to returning any shares or executing any employment agreement.”

43. And finally, for present purposes, at [25] Mr. Rudianto asserts that in passing the Resolution the directors of JLS failed to consider RBH’s position, in that:

“Based on the written resolution and the evidence of Mr [Chan], the directors of JLS appear to have acted solely at the direction of SCM, and relied entirely on the one-sided and unverified version of events provided by SCM in its letter dated 27 October 2022...”

44. Mr Chan, provided a response to the foregoing evidence from Mr Rudianto in his brief second affidavit dated 24 April 2023. There, in summary, he seeks to refute much of what Mr Rudianto says and asserts more detailed points in relation to tax reasons for RBH being allocated the shares in JLS, which he also asserts were understood by all concerned and benefited both the Sylvan Group and Mr Rudianto.

The Judgment

45. In the Judgment, the Judge (at [50] to [81]) sets out the respective positions and arguments of the parties before turning at [82] to [89] to set out his primary analysis and conclusions on the Stay Application. It is convenient here to adopt for the purposes of the appeal, his summaries of the positions and arguments as follows.

46. First, the position of the Appellant, JLS:

“50.1 That it is plain on the evidence before the Court that there is a real and substantial dispute between RBH and JLS regarding the basis upon which RBH was allotted and held 5000 ordinary shares in the capital of JLS and the basis upon which RBH might be required to return those shares to JLS. This is the subject of the Title Dispute.

50.2 For the purposes of the Stay (Application), the Court is only concerned to establish whether there is a “real or genuine dispute” (or a “reasonably substantial” dispute)

disclosed by the evidence filed which falls within the scope of the relevant arbitration clause⁸. The Court cannot and is not required to make a final or summary determination of the merits of disputed factual accounts as to the basis upon which the 5000 shares were allotted to RBH.

50.3 The Title Dispute is a dispute which clearly falls within the scope of Clause 18. It was pursuant to and/or in connection with the SSA that the 5000 shares were first allotted to RBH and an additional 45000 ordinary shares were immediately thereafter allotted to Sylvan MF, resulting in RBH holding the agreed 10% shareholding in JLS. The [Title] Dispute is therefore a “dispute, controversy or conflict arising from or in relation to [the SSA]” within the meaning of Clause 18.

50.4 The Title Dispute is inextricably linked with the question whether JLS was entitled to repurchase the 5000 shares at par value on the ground, as appears from the JLS’s witness evidence, that Mr Rudianto and his company RBH, were no longer intent on honouring the ESOP Agreement (or related Share Return Agreement). [JLS] asserts that the evidence shows that JLS’s exercise of its power of repurchase under Article 9.1 (c) was a form of self-help⁹ in response to the perceived breach by Mr Rudianto and RBH of the terms of the ESOP Agreement (and related Share Return Agreement). Hence, the Article 9.1(c) Dispute as to whether JLS was entitled to recover the 5000 shares from RBH is, in substance, part and parcel of the wider Title Dispute as to the basis upon which RBH was allotted and held the 5000 shares and might be required to return the shares to JLS.

50.5 [JLS] also argued that the way RBH has sought to portray the dispute in its Originating Summons mischaracterizes matters because the relief sought does not constitute proceedings by JLS against its Directors for breach of fiduciary duty. It says that, in the absence of special circumstances (which are not alleged, and do not exist in the present case), a director’s fiduciary duty to use his powers for proper purposes is a duty owed to the company of which he is a director, not to the company’s individual shareholders¹⁰. In the instant case, it says, no

⁸ Citing *SC Global Vision Fund SPC v Oasis Buono Ltd* (FSD No. 39 of 2020, 8 July 2020 (unreported)) (“*SC Global*”)

⁹ As the Judge also noted here, paragraph 16 (c) of the Appellant’s written submissions to him go further and refers to JLS having “... sought to sanction the perceived breach by RBH (through Mr Rudianto) of the terms of the ESOP Agreement by exercising JLS’s power of repurchase...”

¹⁰ Here citing e.g para 8.2402 of *Palmer’s Company Law* and *Sharp v Blank* [2015] EWHC 3220 (Ch), esp at [9]–[13]; and *China Shanshui Cement Group Ltd v Tianrui (International) Holding Company Ltd* (unreported), CICA 11 of 2021, 1 July 2022) at [50]-[51]

breach of fiduciary duty has been alleged by JLS against the Directors. Hence, the issue as to the propriety of the Directors' purpose does not truly arise.

50.6 Instead, it is argued by [JLS] that the dispute raised by the Originating Summons is, in substance, a dispute as to RBH's right to the 5000 shares as against JLS itself (and, indirectly, as against Sylvan MF); as such, it is a dispute that necessarily requires consideration of the basis upon which those shares were originally allotted to and held by RBH.

*50.7 [JLS] says that once the above is understood, it is impossible to escape the conclusion that the dispute raised by the Originating Summons is a dispute "arising from or in relation to" within the meaning of Clause 18. Moreover, that the words in quotation are broad words which, pursuant to the case law exemplified by the decision in **Fiona Trust & Holding Corp v Privalov** [2007] UKHL 40, ("**Fiona Trust**") as followed in this jurisdiction in , for example, **In the Matter of Ren Ci & Ors** (FSD No. 210 of 2022, 16 Feb. 2023, Unreported ("**Ren Ci**")), fairly extend to the dispute raised in the Originating Summons and any issues which it is reasonably foreseeable the Originating Summons (if not stayed) will give rise to.*

50.8 In relation to the question of whether the dispute raised by the Rectification Action is arbitrable, [JLS] says that whilst it is accepted that only the Grand Court of this jurisdiction can make an order for the rectification of the register of members of JLS pursuant to section 46 of the Companies Act, the question of RBH's entitlement to the 5000 shares having regard to what has been agreed between RBH, JLS and Sylvan MF (i.e. as between the shareholders and their company JLS) is a question that is recognized in the case law as being eminently arbitrable¹¹. Hence, it is argued, the determination of whether or not the Court should make an order for rectification as sought by RBH can simply await the outcome of the arbitration of RBH's claim to the 5000 shares as against JLS and Sylvan MF pursuant to Clause 18 of the SSA.

50.9 It is further argued [by JLS], that if, contrary to the foregoing arguments, the Article 9.1(c). Dispute does not fall within the scope of Clause 18, that dispute is nevertheless closely

¹¹ Citing **NDK Ltd v HUO Holding & Anor** [2022] EWHC 1682 (Comm) (NDK), as applied by the Grand Court in **Ren Ci** , at [82]-[84]. As the Judge also notes, the general proposition that the Dispute is arbitrable was accepted by RBH.

connected with the Title Dispute as the basis upon which RBH was allotted its shares in JLS. Hence, as a matter of case management, the Court ought to stay the Rectification Action pending the resolution by (mediation or) arbitration in Singapore in respect of the Title Dispute, including the dispute between the parties in respect of the existence of and compliance with the ESOP Agreement and Share Return Agreement. Alternatively, the Court ought to stay the proceedings of the Rectification Action on the ground that Singapore is clearly the more appropriate forum for the resolution of the Title Dispute.

50.10 Finally, [JLS] submitted that if the Court were to rule against a stay of the Rectification Action, on any of the grounds relied on (subject to the question of appeal) directions for the disposal of the Action would have to be made and would have to provide for what will, in effect, be a full trial of the Title Dispute.” [Following the Judgment, directions were in fact given by the Order of 10 April 2024, as mentioned above, but for trial only of the Article 9.1(c) Dispute].

47. In this regard JLS also submitted as recorded at [62] that the enquiry for the Court to undertake in relation to the application of an arbitration clause is the two-fold test, then as set out by the Court of Appeal of England and Wales in *The Republic of Mozambique v Credit Suisse International* [2021] EWCA Civ 329 at [64] (“*Mozambique*”).¹²

“64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the “matters” in respect of which the proceedings are brought; secondly, to assess whether those matters are “matters” which the parties have agreed are “to be referred to arbitration. That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context. Not every matter that could theoretically be arbitrable is one that the parties are necessarily to be taken to have agreed as a matter that must be referred to arbitration.”

Summary of RBH’s position and arguments before the Judge

48. Following is a summary also as helpfully presented in the Judgment:

¹² Later, on final appeal, approved in principle by the UKSC: [2023] UKSC 32 at [35], a decision to be more fully considered below.

“51. [RBH] says that the sole substantive question before the Court on the Originating Summons is whether the board of JLS, in passing the Resolutions, acted for a proper purpose, and whether, in consequence, the register of members should be rectified under section 46 (the Article 9.1(c) Dispute). [RBH] says that it is not disputed whether that question is wholly governed by Cayman Islands law. Nor does there appear to be a dispute that both parties are properly before the Grand Court as a matter of personal jurisdiction and that the Grand Court has the subject-matter jurisdiction to decide that question and make such order.

52. (RBH) says that it is plain and obvious from the material that the Directors considered when passing the Resolutions that they failed to exercise their powers of redemption for a proper purpose, and/or abused their discretion, and that rectification of the share register under section 46 should follow.

53. [RBH] notes that it is argued that the purported redemption of its shares pursuant to the Resolutions was no more than the peremptory exercise of a self-help power by the Board in unilateral and one-sided furtherance of a case advanced by SCM, which was not even a shareholder of JLS, in a dispute it has with Mr Rudianto, who was also not a shareholder of JLS. [RBH] argues that the entire set of facts forming the basis for the exercise of the discretion were disclosed on the face of the (Written) Resolution, namely, the contents of the letter dated 27 October 2022 to the Board from SCM.

54. [RBH] says that by expropriating its shares, JLS delivered to SCM at least a very substantial part of the relief it would otherwise have sought in any Singapore-based dispute resolution procedure. It contends that this explains why neither SCM, Sylvan MF nor JLS has sought to trigger any mediation or start an arbitration¹³.

55. [RBH] relies on an open letter dated 10 April 2023 in which its counsel proposed to [JLS] that if it agreed to reverse the redemption and put RBH back on its register of members then that would be without prejudice to the parties respective positions and without prejudice to any prospective claims that SCM and/or other third parties may wish to bring in the future. In

¹³ As matters stood then. As the Judge accepted at [66] of the Judgment “There is no requirement that the reference to arbitration must have started. This is clear from the words in section 9(1) [of the equivalent English legislation to the FAAEA] which refer to “ a matter which under the agreement is to be referred to arbitration” Indeed , the fact that the dispute cannot immediately be referred to arbitration, because the exhaustion of other dispute resolution procedures is first required, will not prevent the court from ordering a stay” - citing **Russell on Arbitration** 7th Ed. 2015, para 7-026.

addition, RBH offered a “drop hands” on costs. On 15 April 2023 the offer was rejected by counsel for [JLS]. Instead, they proposed a stay of these proceedings pending resolution by mediation or arbitration in Singapore. RBH says that this was no more than an invitation to consent to the relief in the Stay Application, and of no value and, more importantly, RBH says that [JLS]’s rejection of the offer proves the very point of its case; namely, that the entire essence and purpose of the Board’s conduct in redeeming RBH’s shares in the first place was a self-help remedy in order to deliver substantive relief to SCM in its claims against Mr Rudianto.

56. RBH says that the Stay Application is being pursued with an aim not to have the dispute determined by a Singapore tribunal but so as not to have it determined at all. Thus, that the Stay Application is being pursued in bad faith and for a collateral advantage and so the Court should unhesitatingly dismiss it.”

49. As the Judge records at [70] of the Judgment, RBH also made submissions as to the legal bases upon which the decision of the directors as embodied in the Resolutions might be impugned. These submissions were again relied upon by RBH on the appeal and are relevant to the question of what matters might fall within the ambit of Clause 18 of the SSA. It is therefore convenient to set them out here:

“70.1 *The Directors acted improperly when taking the decision [to pass the Resolution thus rendering the Resolution voidable]. The Resolution engages what is known in English and Cayman Islands company law as the “proper purpose rule”. In essence, that provides that directors are required to exercise the powers conferred on them for the purposes for which they were conferred and not for some collateral purpose. If they fail to do so, the exercise of powers will be open to challenge even if the directors believed in good faith that the exercise was in the best interests of the company.* [citing the well-known cases of *Hogg v Crampton* [1967] Ch 254; *Bamford v Bamford* [1970] Ch 212, *Howard Smith v Ampol* [1974] AC 821 (PC) (“*Howard Smith*”); and most recently Lord Sumption’s analysis of the law in the U.K. Supreme Court in *Eclairs Group Ltd Jkx Oil & Gas Plc* [2015] UKSC 71 (“*Eclairs*”). By way of a brief summary of the principle, at [37] Lord Sumption said:

[]he rule that the fiduciary powers of directors may be exercised only for the purpose for which they were conferred is one of the main means by which equity enforces the

proper conduct of directors. It is also fundamental to the constitutional distinction between respective domains of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs.”^{14]}

“ 70.2 *The purpose of the Resolution is plain; namely to remove RBH as a shareholder in JLS, at the behest of SCM, expressly on the basis of SCM’s allegations against Mr Rudianto. [RBH] says that the only facts that the directors had before them were the contents of the letter of 27 October 2022 from SCM and the consent of Sylvan MF [as given in its Deed of Indemnity and Consent to Redistribution of Shares].¹⁵ RBH argues that the purpose was self-evidently improper for the following reasons:*

(i) The Board unquestionably took SCM’s side in a personal dispute between Mr Rudianto and SCM and assisted SCM with a remedy.

(ii) The dispute was between SCM and Mr Rudianto (not with RBH which is a separate legal entity) so JLS could have had no interest in whether RBH remained a shareholder or not.

(iii) SCM is not a shareholder in JLS.

(iv) The Directors were aware that the share repurchase was risky because the indemnity given to JLS in that regard was from Sylvan MF, the majority shareholder and not from SCM which had recommended that the repurchase be effected.”

50. RBH argued further before the Judge, that although bad faith is not a necessary ingredient in the improper purpose doctrine, Cayman Islands law (and English law) nonetheless requires that a unilateral discretionary power conferred on one party must be exercised “ *honestly, rationally and in good faith and without arbitrariness, capriciousness, perversity and irrationality*”: ***Socimer International Bank Ltd v Standard Bank London Ltd*** [2008] EWCA Civ 116¹⁶ (“**Socimer**”),

¹⁴ Further extracts from these and related cases will be considered below in the analysis of the nature of the Article 9.1(c) Dispute.

¹⁵ During his oral submissions Mr Choo Choy KC argued before this Court (as he did before the Judge below) that this was too narrow a view of what information the directors had available to them because, as he said, they also had the benefit of the knowledge of Mr Chan as to reasons for terminating the relationship with Mr Rudianto.

¹⁶ As Rix LJ concluded at [66]; “*It is plain (from the case authorities) that a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and*

Braganza v BP Shipping Ltd [2015] UKSC 17 (“*the Braganza Principles*”) (“*Braganza*”). Both *Braganza* and *Socimer* have been considered by the Grand Court¹⁷.

51. As the Judge noted at [71] of the Judgment, it was accepted by Mr Choo Choy that the Braganza Principles apply to the Article 9.1(c) Dispute and to the decision of the directors which was the exercise of a discretionary power arising under the Articles which govern the corporate contractual relationship between RBH and JLS. Accordingly, while reminding himself (*ibid*) that the directors’ decision was not itself the immediate subject of his review, the Judge proceeded to set out and consider the relevant dicta from *Braganza* by extensive citation from Lady Hale’s judgment given on behalf of the majority.
52. The case involved the disappearance of Mr Braganza from a BP oil tanker at sea. His employer BP formed the view that he had committed suicide having been so persuaded by a report from a study which had been undertaken, not for the purpose of an enquiry into his disappearance but for reporting on the safety of the ship. The question before the Court was whether BP, through its general manager, was entitled on the basis of the report to conclude that there had been willful default within the meaning of Mr Braganza’s employment contract so that “death in service” benefits were not payable to his widow. The following is a summary of the ratio decidendi of the case, as appears on the UKSC’s website, but citing the relevant paragraphs:

“The appeal raises two inter-linked questions of principle: (1) the meaning of the general requirement that the decision of a contractual fact-finder must be a reasonable one and (ii) the proper approach of a contractual fact-finder who is considering whether a person may have committed suicide [17].

The court is not the primary decision-maker but will seek to ensure that where there is a conflict of interest for the party charged with making a decision under the contract (which is heightened where there is a significant imbalance of power between the contracting parties), such contractual powers are not abused. The standard of review of contractual decisions is

irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness..” This dictum was approved by Lady Hale in her judgment for the majority in *Braganza* (at [22].)

¹⁷ See for example: *In the Matter of China Agrotech Holdings Limited* [2019] (2) CILR 302, at [77].

akin to that adopted for judicial review of administrative action [19]. That test involves two limbs: the first focusing on the decision-making process and the second focused on its outcome [24]. The court will imply a term into the contract that the decision-making process be lawful and rational in the public law sense, ie. that the decision is made rationally, in good faith and consistently with its contractual purpose [30], but much depends on the context of the particular contract involved...

Lord Neuberger agrees with the majority that where a contract allocates a power to a party to make decisions which have an effect on both parties the court should review the decision in the same way as it reviews administrative decisions [103]. BP had to carry out the investigation with honesty, good faith and genuineness, and avoid arbitrariness, capriciousness, perversity and irrationality. The court's approach when reviewing this decision should be similar to that of an appellate court reviewing a trial judge's decision. [However, unlike the majority] (i)n the present case, Lord Neuberger would have held that there was a combination of reasons which could fairly be said to be sufficiently cogent to justify the finding that Mr Braganza had taken the unusual and tragic course of committing suicide.]”

53. The Judgment, at [73] to [75] sets out RBH's arguments on the applicability of the Braganza Principles to the decision-making process of the JLS Board, explaining why, in RBH's view, that process violated the Braganza Principles. These arguments were repeated and expanded upon on the appeal but I set them out here for a fuller understanding of the Judgment:

“ 73. [RBH] argues that the process of decision-making by the Board was flawed because the Board failed to take account of relevant matters, namely (i) the fact that the person making the demand (SCM) was not a shareholder (ii) its claims were not against a shareholder (RBH) but Mr Rudianto; (iii) it had not heard and could not take account of any response by RBH or Mr Rudianto because SCM had not actually made its claims against him (at least formally) so as to give him an opportunity to set out his position. Moreover, the conclusion, to strip him of his shares which he says are worth millions of dollars for US\$5000, was so outrageous that no reasonable board could come to it on the information it did take account of (namely the SCM letter).

74. Further it argues that it is hard to see how removing RBH as a shareholder was bona fide and in the interests of JLS. It says that SCM might regard it as highly desirable, in furtherance of its case, but a company is not normally interested in who are its shareholders and the board had no business preferring SCM's interests. It contends that JLS has not identified what proper corporate interests the redemption of RBH's shares serve. If JLS shares were to be issued as part of an employee share scheme, then new shares could always be created and issued. It was never necessary to redeem RBH's shares in order to carry forward any employee reward scheme.

75. It argues that there are three further features of the redemption that indicate that the Board was acting in bad faith or acting arbitrarily such as to vitiate the exercise of the discretion under the Braganza Principles.

75.1 It does not appear from the Resolutions that the Board considered whether a price of par value for the shares was a fair price or not. It was obvious that it was not.

75.2 The Notice of Redemption was sent on 30 October after the redemption had purportedly taken effect on 27 October 2022. It was a fait accompli. Although the notice might be valid under the articles, the result is that RBH ceased to be a shareholder before it had even known of the fact (although in para 72 of Chan 1, Mr Chan does discuss the delay).

75.3 Despite the apparent intensity of the discussions between Mr Jeun and Mr Rudianto from early August to early October 2022 about what should happen to the shares, once the redemption occurred there was silence for a number of weeks. Thereafter, the interactions were only between Mr Rudianto and Mr Edgington, who was not involved in the Sylvan business. Mr Edgington did not tell Mr Rudianto what had actually happened, or why. There is no evidence that Mr Edgington actually knew any more than what was contained in the written resolutions and the SCM letter.

75.4 RBH did not actually see the Written Resolutions or learn of the basis on which its shares had been redeemed, until two months later on 23 December 2022. That is a powerful indication (RBH) says that, whatever the merits of SCM's position, SCM knew very well that it had procured JLS to do something it should not have done and that it had overreached."

54. The Judgment then records RBH's submissions on whether the Article 9.1 (c) Dispute is a matter for arbitration as follows:

" 76. Adopting the two-stage approach used in **The Republic of Mozambique** case, [RBH] addresses the question of stay as follows, dealing first with the matter in dispute:

76.1 [RBH] says that the entire basis of the exercise of the discretion by the Board is plain from the face of the Written Resolution, and most importantly the SCM letter appended to the Resolution. The SCM letter was a set of representations of fact by SCM, a third party, to the Board. It set out (in broad summary):

76.1.1 The fact of the agreement by Rudianto to join SCM as managing director,

76.1.2 Mr Rudianto's investment into JLS and his acquisition of 5000 shares,

76.1.3 the Subscription Agreement and subscription by Sylvan MF for 45000 shares (and the 5 year moratorium on transfer by RBH): and,

76.1.4 the allegations of breach by Mr Rudianto personally of his commitments to SCM; and the decision by SCM no longer to hire Mr Rudianto.

76.2 On that basis, SCM made the "express recommendation" to the Directors that the 5000 shares in JLS owned by RBH be repurchased at par.

76.3 [RBH] compares that to what JLS's witnesses say in their evidence. It points out that there was no reference in the SCM letter to:

76.3.1 the alleged ESOP Agreement:

76.3.2 any conditions on which Mr Rudianto or RBH held his shares;

76.3.3 any link of his right to retain the shares to the length of his tenure as managing director or his performance; and/or

76.3.4 any Share Return Agreement or other oral agreement reached in August 2022, or any other time”.

55. The Judgment at [76.4] to [76.6] sets out RBH’s argument as to the state of knowledge to be attributed to the Directors, having regard to the fact that on the evidence, the only information with which they were presented and the only reasons expressed by them in the Resolution, relate to the SCM letter. RBH says the point is that SCM’s claims against Mr Rudianto as set out in the SCM letter and which formed the basis of the Directors’ decision and the Resolution, were never based on a failure to perform agreements to return shares, or to honour the conditions on which he held the shares as now alleged. There was simply no dispute about that, and it did not form any part of the basis for the Directors’ decision. Once the Board had made its decision to redeem, based on SCM’s request, that was the end of the matter so far as JLS was concerned. There was no dispute between JLS and Mr Rudianto or RBH.
56. Having also set out RBH’s arguments on the significance of the exclusive jurisdiction clause in the SSA, the Judgment then turned to conclude its summary of RBH’s arguments as follows at [80] – [81], before turning to set out the Judge’s analysis and conclusions:

“80. Although the Articles do not have a jurisdiction clause, [RBH] argues that the subject-matter of the SSA was the acquisition of shares by Sylvan MF in JLS. The regulation of the relationship between JLS and its shareholders is dealt with by the Articles. [RBH] argues that the “broad, purposive and commercially minded approach” would lead rational businessmen to conclude that all disputes arising out of the relationship of shareholder with each other and with JLS under the Articles were matters for the Cayman Islands Court, and not governed by Singapore mediation and arbitration. Indeed, it is said that would apply to all kinds of claims that might arise under the Articles that might have no bearing on the parties’ commercial relationship.

81. [RBH's] conclusion is that the SSA and Articles deal with separate and distinct matters, acquiring shares and then the on-going relationship of company and shareholder. It says that it is not possible to stretch the dispute resolution clause in the SSA, Clause 18, to cover the relationships under the Articles."

The Judge's analysis and conclusions

57. The Judge begins his analysis by seeking to identify whether the subject-matter of the Rectification Action is a "matter" agreed to be referred to arbitration under the SSA and proceeds on the basis of his findings in that regard, to his conclusions. It is convenient here to quote from the Judgment as follows:

"The Matter

82. *A great deal of the evidence and submissions touch on the substance of the Article 9(1) (c) Dispute and the Title Dispute which are not matters currently for consideration by this court. Indeed, the latter may never be a dispute dealt with in this jurisdiction. I have therefore taken care not to trespass into the facts or potential legal arguments too deeply when setting out below my views. It seems to me that the obvious starting point is the application of the two-fold test set out in **The Republic of Mozambique**. Therefore, the first issue is to identify the matter in respect of which these proceedings have been brought. As I have set out above, [JLS] has argued that a wider approach should be taken to this. It is clear that the Directors exercised their discretionary powers under Article 9(1)(c) when taking the Decision. It is common ground that when doing so the Directors had to act within the Braganza Principles. I have set out at some length passages from **Braganza** to illustrate the approach taken by courts in such circumstances. The focus is very much on the decision-making process.*

83. *There seems to be a real and substantial dispute between Mr Rudianto and SCM about the Employment Agreement and the extent to which Mr Rudianto might have breached its terms. That is the basis upon which SCM's letter to JLS dated 27 October 2022 appears to have been written as does the letter from Allen & Gledhill dated 23 November 2022¹⁸. Also*

¹⁸ Addressed to Mr Rudianto in person, on behalf of their client SCM, and stating at [32]: "In light of your conduct and the various serious breaches of the Employment Contract, we are instructed to notify you that the Employment Contract, if not already discharged for the reasons stated, is hereby terminated forthwith: Pursuant to the Employment Contract and in law, upon termination of your employment, all of your entitlements and benefits will "immediately cease". These include but are not limited to your short and long-term compensation, incentives

relevant to that dispute is the alleged ESOP Agreement and the alleged Share Return Agreement which have a bearing on what Mr Rudianto did or did not agree to do with the shares held by RBH in JLS.

84. As can be seen from the submissions on behalf of [JLS], its approach has been to seek to show that, in effect, the relationship between JLS, RBH, Mr Rudianto, Sylvan MF and SCM is intertwined by virtue of the Employment Agreement, ESOP Agreement and Amended Subscription Agreement; intertwined to such an extent that at least the Amended Subscription Agreement gives effect to the ESOP Agreement so that the issue about RBH's retention of shares in JLS and therefore the [Directors'] Decision, is caught by Clause 18.

85. The alleged ESOP Agreement appears to essentially be an oral agreement. It is not clear what law might apply to it or whether according to that law it constitutes a valid contract. The evidence given on behalf of [JLS] suggests that it was between Mr Jeun (on behalf of SCM and Sylvan MF) and Mr Rudianto (acting for himself and any corporate vehicle owned by himself; RBH was incorporated on 10 January 2022). Even if I had to do so I would be limited in drawing any conclusions that as a matter of Singapore law, and therefore a matter of fact, the Amended Subscription Agreement which is between JLS, RBH and Sylvan MF gave effect to the ESOP Agreement. As it stands, the Amended Subscription Agreement provides for the subscription by Sylvan MF for shares in JLS. It then goes on as previously mentioned to deal essentially with certain, limited aspects of the relationship between RBH and Sylvan MF as shareholders in JLS, although I do not think that one can go as far as saying that it is a general shareholders' agreement intended to govern all aspects of the relationship between shareholders in JLS, present and future. Furthermore, despite what is alleged, the ESOP Agreement and Amended Subscription Agreement do not appear to be interrelated and interdependent contracts between common parties and the latter certainly has not been drafted in that way. I am not in a position therefore to assume that the Amended Subscription Agreement gave effect to the ESOP Agreement. [Emphases added]

86. Even if it did, in my view, the Article 9(1)(c) Dispute is entirely separate and distinct from the Title Dispute. The Title Dispute may have provided the backdrop to the [Directors'] Decision but, in my view, the Decision is liable to scrutiny as a matter of Cayman Islands law

and/or benefits which are conditional upon your continuing employment and which Sylvan is forthwith entitled to recover from you.”

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*in its own right. Indeed, a review of the Decision itself is quite possibly a secondary issue. As some of the authorities reviewed in **Nilon Ltd v Royal Westminster Investments** [2015] UKPC 2 suggest, first, it may be necessary to consider as a matter of Cayman Islands law whether JLS (an investment holding company) and the Board should have got involved at all in a dispute between Mr Rudianto and SCM. They are third parties as far as JLS was concerned and even if they had been shareholders, the same issue arises. This is also a case that seems to be distinguishable from e.g. **Nilon** because it does not involve a dispute as to whether RBH should be registered as a member of JLS. At the time of the Decision, it was already a registered member and the register of members is conclusive as to that¹⁹. [Emphases added]*

87. It seems to me therefore that the matter that is the subject of these proceedings (and about which there is a real or genuine dispute) is the Article 9(1)(c) Dispute; namely, whether the Board should have exercised its Article 9(1)(c) discretion at all and, if it was appropriate for it to have done so, whether the exercise of that discretion leading to the Decision was honest, rational and in good faith and in the absence of arbitrariness, capriciousness, perversity, and irrationality. Depending on the outcome of that analysis, an order may be made under s.46 of the Act rectifying the register of members of JLS. [Emphases added]

88. Despite Mr Choo Choy KC's submission to the contrary, I am not of the view that the exercise described above will involve this Court having to decide any of the substantive issues which might flow from the Employment Agreement, ESOP Agreement, Share Return Agreement or the Amended Subscription Agreement or investigate the actual dispute much further than has already been canvassed in the evidence before the court. In my view, those are matters of background only. [Emphases added]

Clause 18

*89. Applying the principles from **SC Global, McAlpine** and **Fiona Trust** the next question is whether the Article 9(1)(c) Dispute falls within Clause 18. The clause is expressed to cover a "... dispute, controversy or conflict arising from or in relation to this Agreement, including a dispute on its validity, conclusion, binding effect, breach, amendment, expiration and*

¹⁹ Having earlier at [49] cited Section 48 of the Companies Act which provides that the register shall be prima facie evidence of any matters directed or authorized by the Act to be inserted therein.

termination...”. There are clearly rights and obligations set out in the Amended Subscription Agreement that might form the subject matter of a dispute that would stand to be dealt with under Clause 18. However, would the parties to that agreement have expected that JLS would choose to exercise a self-help remedy to assist SCM with its position vis a vis Mr Rudianto in the Title Dispute? The fact is that JLS is a party to the Amended Subscription Agreement, and yet having taken its own legal advice it chose to act as it did, suggesting that it did not regard the issue as one falling within the terms of the agreement and therefore within Clause 18. It is that conduct that has given rise to the Article 9(1)(c) Dispute. Somewhat inconsistently, it now argues that Article 9(1)(c) Dispute is covered by Clause 18. In my view the Article 9(1)(c) Dispute is not one that can be treated as falling within Clause 18 as I do not believe that it is related to any of the rights and obligations arising under and from the Amended Subscription Agreement. [Emphasis added]

90. Having reached the conclusion that the Article 9(1)(c) Dispute does not fall within Clause 18, then, in my view, there are no grounds to impose a mandatory stay of these proceedings.”

58. The Judge then addressed the alternative arguments in support of the Stay Application before expressing his decision to dismiss it entirely, as follows:

“Case Management Stay

91. The Defendant has also raised two alternative arguments in the event that a mandatory stay is not ordered. Its secondary position is that pursuant to its inherent jurisdiction and case management powers the court should order a case management stay. This would be on the basis that the final disposal of this action is dependent on the prior determination of the Title Dispute which will have to be resolved by mediation or arbitration under the Amended Subscription Agreement or presumably litigation under the Employment Agreement which by virtue of clause 19 (sic) is subject to Singapore law and the exclusive jurisdictions of the courts of Singapore. In support of its argument for a case management stay the Defendant refers to the cases of *In the matter of Nanfong International Investments Limited*²⁰ (“Nanfong”) and *SC Global*. *Nanfong* involved a situation in which there was a question as

²⁰ Citation 2018 (2) CILR 321.

to whether there was authority for one of its shareholders (a Samoan company) to have issued a winding up petition against a Cayman Islands company. That issue had to be either decided by a court in Samoa or the Grand Court. The Court of Appeal decided that there were the necessary strong and compelling reasons and little prejudice to the shareholder in question for a case management stay to be ordered whilst that issue was resolved by the courts in Samoa.

92. As I have already indicated, I do not regard the Title Dispute as likely to be determinative of the Article 9(1)(c) Dispute or vice versa. If it turns out that the Decision can be impugned, the register of members of JLS will be rectified to restore RBH to the position that it was in before the Decision was taken. In such circumstances, RBH will still however be subject to the restrictions in the Amended Subscription Agreement and its ultimate interest in JLS will be the subject of mediation, arbitration or litigation in Singapore.

93. On the basis of the above, I am not of the view that there are strong and compelling reasons to grant a case management stay.

Forum Non Conveniens

94. The final issue raised by the Defendant in the alternative is that if a mandatory or discretionary stay is not ordered, then the proceedings should still be stayed on forum grounds on the basis that there is another available forum, and the other forum (Singapore) is clearly more appropriate than this jurisdiction²¹. The reasons for this it says are as follows:

- 94.1 the ESOP Agreement arises from discussions between individuals who primarily reside in Singapore;*
- 94.2 the principal witnesses and documents are therefore located in Singapore;*
- 94.3 the ESOP Agreement is closely related to the Employment Agreement and the Subscription Agreement, both of which are governed by Singapore law;*

²¹ Citing, for example, *Spiliada Maritime Corp. v Cansulex Ltd* [1986] 3 All ER 843.

- 94.4 *Issues as to the inter-relationship between the ESOP Agreement, Employment Agreement and the Subscription Agreement are therefore likely to be governed by Singapore law;*
- 94.5 *clause 19 of the Employment Agreement provides for the Singapore courts to have exclusive jurisdiction in relation to any disputes “relating to this Agreement and/or the Employment” – in so far as the issues arising in relation to the ESOP Agreement are not caught by the Singapore arbitration clause in the Subscription Agreement, they are likely to be covered by the Singapore jurisdiction clause (and the presence of an exclusive jurisdiction agreement in favour of another forum is usually a weighty factor in favour of that other forum);*
- 94.6 *the place of performance of both the Employment Agreement and the ESOP Agreement (at least in so far as the taking up of employment by Mr. Rudianto with SCM was concerned) is Singapore;*
- 94.7 *whilst JLS is incorporated in this jurisdiction, the underlying businesses (i.e. Biologics and Therapeutix) are incorporated in Singapore; and,*
- 94.8 *whilst the JLS directors’ duty to exercise their powers for proper purposes arises under Cayman law, the content of that law is most unlikely to be disputed; rather it is the application of that law to the facts of the case that is likely to be contentious and in the latter connection the Singapore courts (which are also common law courts) are just as well placed as the Cayman courts to assess whether the directors complied with or breached their duty.*

95. *In my view, those are predominantly arguments related to the Title Dispute. The parties have shown themselves quite capable of instructing counsel and filing detailed evidence in relation to the Stay Summons²². The Article 9(1)(c) Dispute is subject to Cayman Islands law relating to a Cayman Islands company and a contract between that company and its shareholders that is governed by Cayman Islands law. One of the three directors is resident*

²² Indeed, it is difficult to see what more evidence might be required other than perhaps affidavits from Mr Edgington and Mr Kanchanadul dealing with their knowledge of events at the time the Decision was taken.

here. I accept that, in principle, the issue might be one that is capable of being dealt with by an arbitral panel or court in Singapore with the benefit of expert evidence. However, the outcomes of the Article 9(1)(c) Dispute and the Title Dispute are not in my view interdependent. SCM might succeed with the Title Dispute but that still does not mean that the Decision might not be impugned. In my view the Defendant has not discharged the burden of showing that Singapore is the more appropriate forum to deal with the Article 9(1)(c) Dispute.

Stay Summons

96. On the basis of the above, the Stay Summons is dismissed.”

The Appeal

59. It is important to consider the nature of the rectification remedy provided by section 46 of the Act. This was done by the Judge, as shown above, at [67] to [69] of the Judgment, by reference to *Nilon*, which he went on to recognize but also distinguish in arriving at his decision as set out above. *Nilon* involved a claim, inter alia, for rectification in circumstances where the reason for rectification was an untried and therefore unproved allegation that the sole registered shareholder in the company had agreed to allot shares in the company to the claimant on the basis of an alleged unwritten joint venture agreement. The relevant company was a BVI entity and the statutory rectification provisions were similar to those in section 46 of the Act. After reviewing many of the cases dealing with rectification, the JCPC stated (per Lord Collins):

“51. In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows that Re Hoicrest Ltd²³ was wrong as a matter of principle, however sensible it might have been as a matter of case management.”

60. And as to the nature of the procedure:

²³ *Re Hoicrest Ltd; Keene v Martin* [2000] 1 WLR 414

“37. There are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute: e.g. Re Russian (Vyksounsky) Iron Works Co; Stewart’s Case (1865-66) L.R. 1 Ch App. 574, 585-586; Re Heaton Steel and Iron Co; Simpson’s Case (1869-70) L.R. 9 Eq. 91.”

- 61.** And further, as the Judge noted at [68] of the Judgment, citing the following passages from *Nilon*: a claim for rectification is, emphatically, not one to be invoked for the vindication of putative or unproven equitable claims to membership:

“43. On the other hand, in a decision ultimately resting on the principle that the company is not concerned with beneficial interests⁴⁰, the applicant sought rectification of the company’s register to remove individuals on the ground that transfers executed in favour of such individuals had been carried out in breach of trust. Rectification was refused on the basis that even if the shares had been transferred in breach of trust, that was not a matter which concerned the company, or which invalidated the registration of the transferees’ names: Elliot v Mackie & Sons Ltd, Elliot v Whyte, 1935 SC 81, in which Lord President Clyde said (at 90): “According to the averments in the petition, these transfers were granted and registered in breach of the trust set up by the testator’s trust-disposition and settlement; and, constituting, as they do, the transferees members of the company (ex facie in their own right), expose the shares to the deeds of the transferees, to the diligence of their creditors, and to any lien competent to the company. Assuming all this to be true, it discloses no ground on which it can be said, in the words of section 100(1) of the Act of 1929, that the names of the transferees have been entered in the register ‘without sufficient cause’. The company is not the judge of whether a transfer has been executed contrary to some trust reposed in the transferor, and, indeed, is not concerned with considerations of that kind, assuming them to exist. The fact – if it be a fact – that a transfer may be subject to challenge in respect that the transferor, albeit himself a registered holder of the shares, is in breach of some trust in executing it is a matter between the transferor and the persons interested in the trust, and not a matter for the company.”

46. In Re Diamond Rock Boring Co Ltd, Ex p Shaw (1877) 2 QBD 463 a strong Court of Appeal (Lord Coleridge CJ and Bramwell and Brett LJJ) confirmed that a claim for

rectification was maintainable where the company took no active part in the proceedings and the real dispute was between rival members. In that case an agent (A) acted for both purchaser (Shaw) and seller (Piers) on the sale and purchase of shares in the company. Piers executed a transfer in favour of Shaw and sent it to the secretary of the company, but A did not pay over the price to Piers and falsely told Piers that Shaw would not complete, whereupon Piers demanded back the transfer. A cut off Piers' signature and absconded. Shaw sought and obtained rectification because, although the company was not at fault in failing to register the shares, the transfer had been duly executed and Shaw had legal title."

62. It seems to me that for present purposes, the following relevant principles and considerations can be distilled from the foregoing dicta from *Nilon*:

- First, the summary nature of the rectification jurisdiction which makes it unsuitable for the resolution of substantial factual disputes. This is an important consideration from RBH's point, the benefit of which it says it should not be deprived. It insists that its claim should involve no more than the examination of whether the Directors acted for an improper purpose and by reference only to the information which they themselves expressly acknowledge in the Resolution as having informed their decision. Viewed in that way, the Article 9.1 (c) Dispute is clearly given to resolution by way of the summary procedure allowed by section 46. And while acknowledging that in principle, the dispute over the exercise of the Article 9 power is arbitrable, RBH also emphasizes the fact that it would nonetheless require an order of the Cayman Court under section 46 of the Act to give effect to any decision of an arbitration panel; see *NDK Limited v HUO Holding Limited and KXF Trading Ltd* [202] EWHC 1682 (Comm) at [61] and [70].
- The learning from *Nilon* also informs the enquiry to be undertaken in the Rectification Action as it recognizes (see extract from [43] above) that - and consistently with Article 2.6 of JLS's Articles of Association²⁴ - a company (and so its directors), "*is not concerned with beneficial interests ... The company is not the judge of whether a transfer has been executed contrary to some trust reposed in the transferor, and indeed, is not concerned with considerations of that kind, assuming them to exist...*"

²⁴ Which provides that: "Except as required by law: (a) no person shall be recognized by the Company as holding any share on any trust: and (b) no person other than the Member shall be recognized by the Company as having any right in a Share."

- Accordingly, on RBH's case, where its legal title to the 5000 shares had already been recognized and established by the entry of its name in the register of members of JLS, it says that it is *prima facie* entitled to bring the rectification claim and to have its registration restored by way of the Rectification Action, the Directors having acted contrary to the Articles and for the improper purpose of preferring a disputed beneficial interest asserted by SCM on behalf of Sylvan MF. Requiring it to submit to arbitration in the wider Title Dispute would therefore not only be wrong in circumstances where Clause 18 does not clearly or expressly cover the Article 9.1 (c) Dispute but would also unjustly deprive it of the summary remedy to which it would be entitled in the Rectification Action where the substance of its claim clearly falls within the remit of section 46 of the Act.
- It would follow, as Mr Millett also emphasized in his submissions on appeal, that RBH's claim in the Rectification Action is advanced by reference to the Articles of Association and RBH's status as a member of JLS. He argues that it does not relate to or depend upon and is not connected with, the putative ongoing relationships under the SSA. Instead, that RBH's rights as a member which it seeks to have restored, arise from the statutory contract embodied within the Articles themselves and that is not a matter which it can be said has been agreed between the parties as being referable to arbitration under the SSA.
- In this regard, I also note *en passant*, that while a shareholders' agreement and articles of association of a related company will usually be regarded as inter-dependent, unlike in many commercial arrangements where the shareholders' agreement provides that the terms of those agreements take supremacy over the articles of association of the related company (see for instance *NDK Limited* above, at [46.xiii] per Foxton J), no such provision appears in the SSA. It therefore cannot be said (and has not been said) that other than by way of construction of the SSA with the other putatively related agreements imposing the requirement to arbitrate, remedies which arise under the articles may be regarded as relegated to that requirement.

63. It will therefore be convenient here to note, as Mr Choo Choy submitted (citing *Eclairs* (above) and *Grand View Private Trust v Wong & Ors*, [2022] UKPC 47) that the proper purpose test requires, when reviewing the motives of directors, that the reviewing court determines:

“ (a) the range of proper purposes for which the power in the articles was conferred; and
(b) the actual purposes for which the power was exercised by the directors, before a comparison is done to ascertain if the actual purpose of the decision-maker(s) [ie. the Directors] fell within the range of permissible purposes.”

64. This test, as Mr Choo Choy also submitted, is well established and has been recently elaborated on in England in the decision of *TMO Renewables v Yeo* [2021] EWHC 2033 and in terms which I might helpfully adopt here:

- “...i) first, the application of the purpose test turns on the ascertainment of, and a comparison between, the purpose for which the power was conferred and the purpose for which it was exercised by the directors.
- ii) second, this enquiry encompasses both legal issues (construing the power) and factual issues (the actual purpose for which the power was exercised) in the relevant legal and factual context – see Lord Sumption in *Eclairs* at [31]: “...[t]he purpose of a power conferred by a company's articles is rarely expressed in the instrument itself...But it is usually obvious from its context and effect why a power has been conferred”.
- iii) third, where powers are exercised for a variety of purposes (only some of which may be improper), the exercise of the power will be tainted if the “substantial or primary” (*Howard Smith*), or “primary or dominant” purpose (*Eclairs* in the Supreme Court) was improper.
- iv) fourth, the test is necessarily subjective – see Lord Sumption in *Eclairs* at [15]: “the proper purpose rule is not concerned with the excess of power by

*doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers' said Viscount Finlay in **Hindle v John Cotton Ltd** 1919 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'.*"

v) *fifth, the duty is strict in the sense that it does not depend on establishing bad faith (see Lord Sumption in **Eclairs** at [16] and also **Hogg v Cramphorn Ltd** [1967] 1 Ch 254)."*

65. The legal framework for the Article 9.1(c) Dispute being recognized as above, the next task is to complete the legal framework for the identification of the matters in dispute and so, whether the Article 9.1 (c) Dispute is a matter referable to arbitration under the SSA.
66. As Mr Choo Choy submits, JLS's primary position is that there are identifiable discrete "matters" in dispute raised by RBH's Originating Summons ("OS") that are matters "*arising from or in relation to*" the SSA within the meaning of Clause 18. That these are broad words which, pursuant to the case law exemplified by the UKSC's decision in **Fiona Trust**, fairly extend to the matters raised by the OS and any matters which it is reasonably foreseeable the OS will give rise to. That they should therefore be stayed in favour of arbitration under Clause 18 of the SSA in keeping with section 4 of the FAAEA.
67. As he submits, there is now definitive guidance as to how the court should identify a matter in dispute to be found in the highly authoritative decisions of **Family Mart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp.** [2023] UKPC 33 and **Republic of Mozambique v Prinvest Shipbuilding SAL (Holding)** [2023] UKSC 32, both of which were then not yet decided by the JCPC or UKSC and so not available to the Judge at first instance. As mentioned above though, the two-stage test propounded by the Court of Appeal in **Republic of Mozambique** which was later affirmed by the UKSC was adopted by the Judge - see [47] at p.21, above. The law as it currently stands may be summarized as follows, as uncontroversially and helpfully presented by Mr Choo Choy:

- (a) *In identifying matters in dispute, the court ought to be wary of formulations in the claimant's pleadings which "may be aimed at avoiding a reference to arbitration". Conversely, the court should consider "all reasonably foreseeable defences" to the claim (FamilyMart [59]; Mozambique [72-73]).*
- (b) *A matter must be "a substantial issue" which is "legally relevant to a claim or defence, or foreseeable defence" and be susceptible to determination "as a discrete dispute". It must be an essential element of the claim or defence, and not simply a "mere issue or question" that might fall for decision (FamilyMart [61]; Mozambique [75]).*
- (c) *Identification of a matter requires judgement and common sense and is not a mechanistic exercise (FamilyMart [65]; Mozambique [77]).*
- (d) *A matter need not encompass the whole dispute raised in court proceedings (FamilyMart [60]; Mozambique [74]). Consequently, this may involve the fragmentation of the parties' disputes "with some matters being determined by an arbitral panel and other matters being resolved by the court" (FamilyMart [66]).*

2. *Applying this guidance, the Privy Council in FamilyMart cautioned against the treatment of a just and equitable winding up petition or an application for unfair prejudice as "an indivisible issue" and held that the proper approach required a court to adopt a granular identification of the "series of discrete disputes or matters" (FamilyMart [67]). It is apparent from the Privy Council's resulting analysis just how granular each matter is to be defined. [Here noting the granularity with which the JCPC analysed each of the five matters in dispute].*

68. Mr Choo Choy submits that, had the Judge adopted the same granular approach, and identified, with specificity, the discrete "matters" raised in the Rectification Action, including by reference to JLS's reasonably foreseeable (indeed, he says, its explicitly articulated) defences to RBH's claim, he would

have concluded that there were some (albeit not all) matters in dispute which fell within the scope of the Parties' arbitration agreement.

69. He notes that the liberal and broad construction of arbitration clauses was confirmed by the Grand Court in *Ren Ci* (which like the present case, comprised a claim for rectification of a company's register of members pursuant to section 46 of the Act). The legal principles in this regard can be summarized as follows:

(a). the modern case law suggests a move away from the strict construction of the formal requirements of contracts towards a "*reasonable practical construction which seeks to give commercial efficacy to what the parties really intended*" (*Ren Ci* [37]).

(b) There is a strong public interest in allowing commercial parties to refer their disputes to arbitration and holding them to their agreements to do so (*Ren Ci*, at [38]).

(c) An agreement to arbitrate must be construed in such a way as to give effect to the reasonable commercial expectations of the parties (*Ren Ci*, at [41]).

(d) The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising from their relationship to be decided by the same tribunal; the clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (*Ren Ci* at [41]).

(e) The well-established principle followed by the English and Cayman courts is that there should be a presumption in favour of adjudication by a single tribunal; there is nothing to detract from that in a company law context; and there is no special carve-out for company law cases in respect of the Fiona Trust approach to the interpretation of arbitration clauses under Cayman law (*Ren Ci*, at [56]).

70. Finally in this regard, in his comprehensive submissions, Mr Choo Choy notes that the ambit of the Fiona Trust principle has been extended to a multi-contract dispute such that an arbitration clause in one contract is held to be applicable to disputes arising in connection with another related contract.

Known as the “Extended Fiona Trust Principle”²⁵, it follows he says, that the arbitration clause in the SSA is capable of applying to disputes arising out of the orally concluded ESOP Agreement and the Share Return Agreement, both of which, he also asserts, had no self-contained arbitration clause.

71. The circumstances under which the Extended Fiona Trust Principle is said to apply were helpfully summarized by Justice Bryan in *Terre Neuve* at [31] and applied by Justice Foxton in **NDK** at [30] and [57]-[62]:

“The following six points can be made about the Extended Fiona Trust Principle:-

(1) The principle is based on the construction of the relevant jurisdiction clause (which I will refer to as being contained in 'Contract A'): it is not based on an implication or implied incorporation of the jurisdiction clause from Contract A into a related contract (henceforth known as 'Contract B').

(2) As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause which stated that 'any dispute under this contract shall be referred to arbitration' may not apply to disputes arising out of a (related) Contract B.

(3) It is not legally or commercially odd or improbable that an agreement should have no jurisdiction clause. Equally an agreement may have no jurisdiction clause and not be covered by a jurisdiction clause in a different agreement ... However, the absence of any competing jurisdiction clauses in any agreements within a particular set of agreements concluded by the parties for the same purpose, at the same time, and with the same subject matter, can be a relevant consideration.

(5) The Extended Fiona Trust Principle normally applies where Contract A and Contract B are interdependent (Point (5a)) or have been concluded at the same time as part of a single package or transaction (Point (5b)), or (if concluded at different times) dealt with the same subject-matter (Point (5c)).

²⁵ As so described by Justice Bryan in *Terre Neuve SARL & Ors v Yewdale Limited & Ors* [2020] EWHC 772 (Comm) at [30] (“*Terra Neuve*”)

(6) *A jurisdiction agreement in Contract A will generally apply to Contract B where that contract was entered into at the same or a similar time as Contract A. In this regard:*

(a) *In **Etihad**²⁶ at [104], the judge noted that jurisdiction agreements in Contract A generally did not apply to a different agreement (Contract B) which had been concluded prior to the jurisdiction agreement coming into existence:*

*'Whilst it is not impossible for a jurisdiction agreement to have, on its true construction, such retrospective effect, a party seeking to rely upon a subsequently agreed jurisdiction agreement, in a separate contract, is likely to face an uphill struggle: see e.g. **Satyam**²⁷ One reason is that the earlier contract had an existence of its own, and hence an applicable law, prior to the conclusion of the subsequent agreements. If there was no jurisdiction agreement at the time it was concluded, then it may be difficult to conclude that it is to be found in a subsequent agreement, particularly if (as in **Choi**²⁸) the disputes arising under the later agreement are likely to have a very different character to disputes arising under the earlier agreement.'*
[...]" [emphases added]

72. Accordingly, says Mr Choo Choy, where the contracts are part of an overall package of agreements and the wording of the clause is capable of applying to disputes brought under the other contract, parties (and their affiliates) are assumed to have intended to apply an arbitration clause in one contract to contemporaneous contracts which contain no jurisdiction clause. [my emphasis].

73. The Judge erred, says Mr Choo Choy, by treating the Article 9.1 (c) Dispute as an “indivisible issue” when it was self-evidently a composite amalgamation of multiple discrete matters. The Judge’s focus on identifying a singular issue in dispute compelled him to pick between the Article 9.1(c) Dispute and the related Title Dispute (i.e. whether RBH remained entitled to the shares under the agreements).

²⁶ *Etihad Airways PJSC v Prof. Dr Lucas Flother* [2019] EWHC 3107 (Comm), per Jacobs J

²⁷ *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487

²⁸ *Choi Trading SA v Addax Energy SA* [2009] EWHC 2472

Having found himself in that position, the Judge was consigned to relegating the Title Dispute to mere "backdrop"²⁹ and treating the Article 9.1(c) Dispute as an isolated dispute "liable to scrutiny as a matter of Cayman Islands law in its own right" without reference to the agreements (**Ground of Appeal No. 2**).

74. In reality, he continued, "the Title Dispute was a discrete matter to be determined as part of the broader Article 9.1(c) Dispute. The dispute as to the basis upon which the shares were allocated to and to be held by RBH is central to the dispute over whether the Company's exercise of its power of repurchase and redemption of the shares held by RBH was properly exercised – the latter dispute cannot fairly be resolved without a proper understanding of the circumstances in which and terms on which the shares in the Company were agreed to be allotted to and to be held by RBH under the agreements, including in particular the ESOP Agreement".
75. Citing the summary from *TMO Renewables* (above at [65]) he submitted that "the precise relationship between the Title Dispute and the Article 9.1(c) Dispute is apparent on a proper application of the proper purpose test set out in the leading cases of *Eclairs* and *Grand View*. This proper purpose test obliges the reviewing court to determine:

a. the range of proper purposes for which the power was conferred; and³⁰

b. the actual purpose for which the power was exercised by the directors, before a comparison is done to ascertain if the actual purpose of the decision-maker(s) fell within the range of permissible purposes³¹.

76. The Judge noted, but failed, he submitted, "to pay proper regard to the fact that RBH's case on the Article 9.1(c) Dispute is predicated on the application of the proper purpose rule in *Eclairs* and *Grand View*, which was a central feature of both Parties' pleadings³². Instead, and when identifying the "matter in respect of which these [Rectification Proceedings] have been brought", the Judge was

²⁹ The Judgment at [88].

³⁰ *Eclairs* at [30]

³¹ *Grand View* at [72]

³² Citing the Judgment at [70].

*focused solely on the principles applied in Braganza v BP Shipping Ltd (the “Braganza Principles”)*³³ *which formed a narrow component of RBH's case”.*³⁴ (**Ground of Appeal No. 3**).

77. This led the Judge to conclude (wrongly, says Mr Choo Choy), “*that the Article 9.1(c) Dispute could be resolved without reference to the Title Dispute, and solely by considering whether the exercise of the directors' Decision could be said to be "honest, rational and in good faith and in the absence of arbitrariness, capriciousness, perversity and irrationality" under the Braganza Principles*”.
78. Had the Judge applied the correct formulation of this test in *Eclairs* and *Grand View*, coupled with the *Braganza* Principles, “*he would have identified the following discrete matters that had to be determined as part of the proper purpose Article 9.1(c) Dispute.*
- a. *First, what is the range of permissible purposes (for) which the power under Article 9.1(c) can be exercised (“Matter One”)?*³⁵
 - b. *Second, what was the actual purpose*³⁶ *which the power under Article 9.1(c) was exercised by the directors of the Company having regard to the need to act honestly, rationally, in good faith, and absent arbitrariness, capriciousness, perversity & irrationality (“Matter Two”)?*³⁷
 - c. *Third, was the actual purpose for the exercise of power under Article 9.1(c) within the range of permissible purposes, taking account of the subjective state of mind of those who acted and the motive on which they acted (“Matter Three”)?*
 - d. *Fourth, and having regard to the Court's discretion, should the Register of the Company be rectified in the circumstances (“Matter Four”)?*³⁸

³³ Citing the Judgment at [82]

³⁴ Citing the Judgment at [71]

³⁵ *Eclairs* at [32]; *Grand View* at [77]

³⁶ Noting that where multiple purposes exist for a director's exercise of the power, the principal purpose motivating exercise of the fiduciary power is identified by using a causal but-for test: *Eclairs* at [19]-[22]

³⁷ *Braganza* at [23]- [24]

³⁸ *Lewis Ebanks v Waterfront Developments Ltd et al* (unreported) CICA, 21 June 2018 at [37]

79. This list of discrete matters submits Mr Choo Choy, “*properly enumerates where the Title Dispute features within the Article 9.1(c) Dispute. It is the Company's position that Matters One to Three cannot be resolved without first considering the basis on which such shares were originally issued and held by RBH (i.e. the Title Dispute):*”
- a. *The terms upon which and the purpose for which RBH originally received its shares is directly relevant to the question of the range of the permissible purposes of the exercise of the Article 9.1(c) power (i.e. Matter One). It would be impossible to construe the range of permissible purposes for the exercise of a power to redeem shares from RBH without an inquiry into the basis on which such shares were issued and held by RBH.*
 - b. *Further, and, if as the Company asserts, there was an agreement for RBH's shares to be returned and/or that the allotment of shares was contingent on Mr Rudianto's employment with SCM, whether such power to repurchase the shares could conceivably be said to have been exercised improperly (i.e. Matter Two).*
 - c. *While Matter Three is the logical conclusion to the proper purpose inquiry (it) will require close reference to the factual findings in Matters One and Two.”*
80. For completeness says Mr Choo Choy, “*RBH's position for all intents and purposes is that Matters One and Two need not be considered because it can be summarily disposed at Matter Three – namely, an exercise of the Article 9.1 (c) power at the behest of one shareholder could never be within the range of permissible purposes*”.³⁹
81. Faced with this competing position the Judge he asserts, “*should have applied the principle that the nature of the dispute should not be based solely on the claimant's framing of the dispute which "may be aimed at avoiding a reference to arbitration", but with consideration of "all reasonably foreseeable defences to the claim"*”.⁴⁰

³⁹ Judgment at [70]

⁴⁰ *FamilyMart* at [59]

82. This meant that “as long as it was a foreseeable defence that the directors of JLS had independently considered the agreed terms upon which the RBH shares were issued when exercising the right of redemption under Article 9.1(c), the Judge was obliged to have regard to the Company's defence and consider each discrete Matters One to Three as a matter in dispute. Consequently, if these matters in dispute fall within the scope of the arbitration agreement, the Court would be obliged to stay these proceedings to the extent of those matters”.

83. Accordingly says Mr Choo Choy, the Judge should have found that:

- a. consideration of the Subscription Agreement alone (or along with the ESOP Agreement and the Share Return Agreement (collectively he proposes, the "**Contemporaneous Agreements**")) was relevant to resolving Matters One to Three of the Article 9.1(c) Dispute; and
- b. these were matters “arising from or in relation to” the Subscription Agreement within the meaning of the arbitration agreement at clause 18, with the result that there would be a mandatory stay of such Matters One to Three of the Article 9.1(c) Dispute and the Judge erred by holding otherwise (**Ground of Appeal No. 5**).

84. Furthermore, he submits that “the proposition [in paragraph [83](a) above] is a simple logical step from the earlier conclusion that the Title Dispute is central to the Article 9.1(c) Dispute. Since the Contemporaneous Agreements set out the basis on which such shares were issued and held by RBH (i.e. the Title Dispute), the Contemporaneous Agreements must be consulted as a precursor to resolving the Article 9.1(c) Dispute.

On any view,

- a. the Contemporaneous Agreements ((or) affidavit evidence of their contents where they are oral) are plainly relevant to Matter One because they are "substantially contemporaneous documents which are intended to be read with the [Articles]"⁴¹

⁴¹ Citing **Grand View** at [63]

that could explain the "context and effect for why a power has been conferred"⁴² under the Articles and enumerate the range of permissible purposes for which the Article 9.1(c) power could be exercised.

b. it is also JLS's case that RBH had agreed, pursuant to the Contemporaneous Agreements, to return the shares, and that there is no longer any basis for RBH to assert its entitlement to the same. The director's exercise of the Article 9.1(c) power sought to give effect to these Contemporaneous Agreements, and the Title Dispute therefore is relevant to the question of whether such power was exercised improperly or in bad faith (i.e., Matters Two and Three).

- 85.** While reference is made to the Contemporaneous Agreements, it bears noting, the submissions continue, *"that the Subscription Agreement is the only written agreement between the Company, Sylvan Master Fund and RBH (i.e. the Company and its shareholders) that records the agreed allocation of the shares to RBH (at Recital A thereof); and this is also the very agreement that contains the relevant arbitration clause. The Company's argument therefore is that the underlying dispute as to whether RBH was entitled to retain the shares originally allocated to it is a dispute that arises from or relates to the Subscription Agreement, is readily understandable and has obvious prima facie force."*
- 86.** In this regard, he continues and as set out in (b) of paragraph 86(above), *"the Article 9.1(c) Dispute (or more specifically, Matters One to Three) fall within the scope of the arbitration agreement under the generous breadth afforded by the Fiona Trust principle, if not, the Extended Fiona Trust Principle."*
- 87.** He also submits that *"the parties would have presumed that clause 18 of the Subscription Agreement would have applied to the ESOP Agreement and the Share Return Agreement. This being the case as these governed the same aspect of the parties' relationship viz. the issuance and allotment of shares in the Company. Accordingly, clause 18 would have covered the orally concluded ESOP Agreement (as this marked the impetus for the Company allotting the shares to RBH under the Subscription*

⁴² Citing *Eclairs* at [31]

Agreement) and the Share Return Agreement (as this concerned the reversal of the initial allotment of those shares to RBH under the Subscription Agreement). [emphasis added]

88. This liberal construction of the arbitration agreement he submits, “*plainly applied in the context of this multi-contract dispute since it can be established that the Contemporaneous Agreements were part of an overall package of agreements and the wording of the arbitration clause is capable of applying to disputes arising under agreements concluded contemporaneously with and/or otherwise closely related to the Subscription Agreement.*

With regard to the inquiry underlined above, the Judge erred by finding that the ESOP Agreement and Subscription Agreement were not interrelated or interdependent, and not concluded between identical parties, with the result that the Arbitration Agreement could not apply (Ground of Appeal No. 1). [emphasis added]”

89. It was “*sufficient that the ESOP Agreement and Subscription Agreement represented contracts concluded as part of a single transaction which shared the same subject matter (i.e. the terms and purpose for granting RBH shares), which were formed around the same time (i.e. 10 and 12 January 2022), and shared common overlapping parties (albeit not identical) in such a way that it can be presumed that the Parties would have intended the Arbitration Agreement to govern all aspects of RBH's entitlement to the shares”.*⁴³ [emphasis added]

90. Mr Choo Choy concludes that “*a mandatory stay in relation to Matters One to Three in favour of arbitration under clause 18 should accordingly be granted under section 4 of the FAAEA*”.

91. Whether the balance of the Originating Application (i.e. Matter Four) should be stayed is then properly considered, he says, “*as a discretionary matter, although it is difficult to envisage the discretion not being exercised in favour of the grant of a stay. This is especially so since Matters One to Three are an essential precursor before the Court can determine Matter Four (i.e. whether the Company's Register should be rectified)*⁴⁴.”

⁴³ Citing *NDK* at [57]. With Mr Choo Choy also noting here, argumentatively in my view given their wholly unwritten status, that it is pertinent that there was no competing jurisdiction clauses in the ESOP Agreement and the Share Return Agreement. This was a proposition specifically rejected by the Judge at [57] above, citing [85] of the Judgment.

⁴⁴ Citing *FamilyMart* at [105], and *Ren Ci* at [83]-[84] which states that, although only the Court has jurisdiction to rectify the Register, a tribunal is not precluded from ruling on Matter Four and referring the matter to the Court to grant rectification.

92. It follows, says Mr Choo Choy., that a discretionary stay should be granted in relation to Matter Four and that the Rectification Proceedings should be stayed entirely.

RBH’s arguments in response on the appeal

93. Mr Millett’s opening remark was that the Judge was right for the reasons he gave. The Judge correctly perceived a substantive difference between the Title Dispute and the Article 9.1(c) Dispute for the purposes of a stay. That although the *FamilyMart* and *Mozambique* cases were decided by the JCPC and the UKSC respectively after the Judge had given the Judgment, his reasoning remains entirely in line with the principles confirmed in those cases.
94. Properly analysed he continues, “JLS’ real complaint is that the Judge characterised the dispute before him too narrowly because he thought that the underlying legal basis on which JLS now alleges that RBH had acquired the shares in the first place was not relevant. The Judge was right about that”.
95. That becomes clear he says, “when one studies:
- a. *the one document RBH relies on, namely the 27 October 2022 JLS Board resolution (and its two schedules) (the “Resolution”), which evidences the purpose for which JLS’ Board in fact exercised the power under Article 9.1(c) of JLS’ articles, and*
 - b. *the legal ambit of the purpose of the power conferred thereby.*

As to (a), there can be no dispute.”

96. “As to (b)”, he continues, “the legal ambit of the purpose conferred by Article 9.1(c) did not extend to compulsorily redeeming a member’s shares in order to favour a third party professional service provider over another individual in a private dispute between them: see *Howard Smith v Ampol* (above); *Independent Asset Management Co Ltd v Swiss Forfeiting* (Eastern Caribbean Court of Appeal, 24 November 2017 BVIHCMAP 2016/0034 at [41]-[44]). This was not even a case of the JLS

Board taking sides in a shareholder dispute, which would still be wrong - it was a case of the JLS Board taking sides in a dispute between an investment management entity (SCM) and a potential employee (Mr. Rudianto).

97. The purpose, he continues, “*certainly did not extend to conferring on the JLS Board the power to act as ultimate decision-maker in relation to underlying disputes between RBH and JLS or the Master Fund [Sylvan MF] or SCM about whether RBH remained entitled to retain its shares and then to act on what it decided*”.

98. “*When properly understood, JLS’ case is really quite brazen. It amounts to saying that the JLS Board was entitled to exercise the power to redeem RBH’s shares in vindication of the purported rights that the Master Fund (qua majority shareholder) claimed against RBH. In other words, the power of redemption extended to adjudication on the merits of a shareholder dispute, which, what is more, it is now said by JLS should be arbitrated in Singapore and not decided by the JLS Board or the Grand Court in the Cayman Islands. One can readily see the paradox.*

It is even more brazen because that was not the dispute that was the subject of the Resolution. Rather, the dispute was one between SCM (the manager) and Mr. Rudianto personally, which had nothing to do with the ESOP or the basis on which RBH got its shares in the first place”.

99. The Judge, says Mr Millett, “*saw clearly that the merits of that dispute (indeed either dispute) are irrelevant to RBH’s section 46 claim for rectification. The only issue in this case is whether the exercise of the power of redemption was a proper one, not whether it could be justified on the basis of some vague underlying arrangements that the JLS Board self-evidently did not consider.*

One of the key flaws in JLS’ case is that, even if JLS is correct about what it says was the justification for the exercise of the power, it was still motivated by an improper purpose. It was improper because it is no part of the JLS Board’s function to play arbitrator in a dispute between shareholders (let alone non-shareholders, which was what it was considering). The power to redeem was not conferred for that purpose”.

100. As a fall-back, RBH also now contends, by its Respondent’s Notice dated 29 May 2024 , “*that JLS has submitted unequivocally to the jurisdiction of this court. It did so by applying by its 21 November*

2023 summons (the “**November Summons**”) to strike out the claim on the merits, or for directions down to a trial on the merits, having lost on the stay and having not sought a stay pending appeal”.

101. The supposed caveat that JLS was not thereby submitting to the jurisdiction is legally vacuous, says Mr Millett, “– merely saying it does not make it so. And although the events amounting to submission post-date the Judge’s judgment now under appeal, this particular after-event is equivalent to the abandonment of the appeal”. The question of JLS’s submission to the jurisdiction is dealt with separately below.

The Resolution and the purpose

102. Under this heading, RBH’s case says Mr Millett, “is that the JLS Board acted improperly by passing the Resolution to redeem RBH’s shares by way of adjudication and remedy in a dispute between Mr. Rudianto and SCM. It was quite simply none of its business, whoever might be right or wrong.

RBH is content to adopt, as correct, JLS’ statement of the four stage test as articulated by Mr Choo Choy (set out at [80] above).

*Applying that analysis, together with the observations in **FamilyMart** and **Mozambique**, RBH’s case is very simple.*

Matter One

As to Matter One (i.e. the range of permissible purposes for which the power to redeem was conferred by Article 9(1)(c)), the power of redemption was not conferred on the JLS Board for the purposes of resolving disputes between warring shareholders or third parties.

*In **Howard Smith v Ampol** (above), Lord Wilberforce said (at 837) that:*

“it must be unconstitutional for directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority which did not previously exist. To do this is to interfere with that element of the company’s constitution which is separate from and set against their powers ...

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... to use their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares are to be sold cannot be related to any purpose for which the power over which the share capital of the company was conferred upon them.”

*Further, in the earlier case of **Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL** (1968) 121 CLR 483, the High Court of Australia said this:*

*“The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, **so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends.**” (emphasis added).*

*As the Eastern Caribbean Court of Appeal said in **Independent Asset Management Co Ltd v Swiss Forfeiting** (Eastern Caribbean Court of Appeal, 24 November 2017 BVIHCMAF 2016/0034 at [41], citing **Harlowe’s Nominees**):*

“This case confirms the basic rule that the directors’ purpose, however noble, should not be used to affect the balance of power in the company. If it is used in this way, it is an improper use of the power and is liable to be set aside.”³

These cases are all concerned with the issue by the directors of new shares, but the same principles must apply to the redemption of existing shares, which is simply the other side of the coin.

Accordingly, the answer to Matter One is that the range of permissible purposes for which Article 9.1(c) may be exercised did not extend to the purposes of affecting the balance of power in the company. It is not material that RBH only had 10% and, therefore, relatively little power: the principle must extend to using the power to get rid of shareholders whom the board or its friends do not want there, by redeeming their shares (at par). It is no answer that the JLS Board might have been well-intentioned or honest and may have thought that getting rid of RBH was best for the company.

This is not really capable of dispute. If it is disputed, JLS has not set out its case. However, as JLS says, the question for this Court on this appeal is whether any such dispute falls within the arbitration agreement in the Subscription Agreement or Amended Subscription Agreement. It plainly does not.

This is a dispute about the meaning, ambit and legal effect of the Article 9.1(c). The “background story” (i.e. the alleged ESOP and the alleged Share Return Agreement, which are the subject of JLS’ evidence) has no bearing on that. Matter One does not involve adjudication on the merits of those matters, even had they been the subject of the Resolution (which they were not).

*On Matter One, the basis on which RBH acquired the shares is not even a “mere issue or question” that might fall for decision (**FamilyMart** [61]; **Mozambique** [75]). The facts comprising the ESOP story are legally irrelevant to the defence which JLS will mount and form no part of the claim by RBH (nor do they need to). It is not a reasonably foreseeable defence to the claim: **FamilyMart** [59]; **Mozambique** [72-73]).”*

Matter Two: the actual purpose

103. As to matter two (following from *Eclairs* -the actual purpose for which the Article 9.1 (c) power was exercised by the Directors), this says Mr Millett, “*is plain from the text of the Resolution:*

- 1. It is not clear whether this is actually disputed. The purpose of the Resolution was to accede to SCM’s request to redeem the shares from RBH because SCM had a series of personal complaints and alleged claims against Mr. Rudianto personally. The text of the Resolution, and the 27 October 2022 letter from SCM to the JLS Board appended thereto, make that incapable of serious dispute.*
- 2. However, the gist of JLS’ evidence in support of the stay was that the decision was justified because the basis on which RBH, as Mr. Rudianto’s corporate vehicle, had acquired its 5,000 shares in JLS was an understanding contained in certain arrangements or agreements, namely the ESOP, and since those arrangements were no longer to be carried into effect, RBH should no longer hold the shares, and also that Mr. Rudianto had agreed to return them.*

3. *It is an enduring mystery of this case – and one which JLS has been in no hurry to solve – why the Resolution referred to none of those matters, but a totally different dispute involving SCM and Mr. Rudianto (neither of whom were shareholders).*
4. *In truth, of course, there is no mystery about it. JLS' ESOP story, whether it is true or false, has been used as a means of confecting a dispute, after the fact, that is said to fall within the arbitration agreement in the Subscription Agreement because, it is now asserted, it is all about how RBH got its shares in the first place.*
5. *But the Resolution comprising and evidencing the exercise by the JLS Board of its power of redemption under Article 9.1(c) was not concerned with how RBH got its shares in the first place: nothing was said about that. It is legally irrelevant. (JLS' argument) is simply wrong and contradicts the Resolution.*
6. *Properly analysed, the ESOP story put forward by JLS, if it is true, is no more than an ex post facto justification for why SCM (and/or the Master Fund) wanted the JLS Board to exercise the power to redeem RBH's shares. But it was not its purpose. The purpose was to get rid of RBH because SCM asked it to, as a form of relief in respect of its personal claims against Mr. Rudianto as set out in the 27 October 2022 letter at Schedule A to the Resolution.*
7. *Even supposing that the Resolution had referred instead to the ESOP story and the claim that the basis on which RBH had received the shares no longer held good, that would still be an improper purpose. The Judge's judgment implicitly accepts, rightly, that a defence of justification is no defence to improper purpose, and that is correct on **Howard Ampol** and the other authorities in that line.*
8. *The answer to Matter Two, therefore, is that the actual purpose for which the power was conferred fell outside the range of permissible purposes. To repeat, it was not a proper purpose of the power of redemption to use it as a means of preferring one shareholder over another in a dispute between them, and particularly not a dispute which, on the face of the*

Resolution, did not actually involve title to the shares at all in any event, and particularly not where the dispute was not even between shareholders.

9. *As with Matter One, this is not really capable of serious dispute. The actual purpose is contained in the Resolution. If it is disputed, JLS has not set out its case. Again, however, the question for this Court on this appeal is whether any such dispute falls within the arbitration agreement in the Subscription Agreement or Amended Subscription Agreement. It plainly does not. The ESOP story is legally irrelevant to the question of what was the actual purpose for which the board exercised power. The actual purpose is plain from the face of the Resolution. If JLS says that the ESOP story was the true purpose of the Resolution, then the Resolution is a false document.*
10. *Any factual dispute about what was the actual purpose for which the directors acted on 27 October 2022 does not fall within the scope of the arbitration agreement because it has nothing to do with the subscription for the shares in the first place. JLS, in relying on its ESOP story, is simply providing background as an ex post facto justification for the exercise of the power (which is Matter Three). But it says nothing about the actual purpose. Its purpose is, as the Resolution says, "to do what SCM asked of it (whether justified or not)".*
11. On Matter Two, therefore, says Mr Millett, "*the basis on which RBH acquired the shares is not even a "mere issue or question" that might fall for decision (**FamilyMart** [61]; **Mozambique** [75]. Matter Two falls outside the scope of the arbitration agreement. It cannot be dragged into it by a legally irrelevant set of factual background issues. It is not a reasonably foreseeable defence to the claim: **FamilyMart** [59]; **Mozambique** [72-73])."*

Matter Three

104. As to Matter Three (was the actual purpose within the range of permissible purposes for which Article 9.1(c) was conferred), Mr Millett submits that the answer is obviously "no".

1. *"First, the JLS Board was unquestioningly taking SCM's side in a personal dispute between Mr. Rudianto and SCM and assisting SCM to remove him as a form of remedy in that dispute, based on a unilateral request from SCM which the JLS Board simply parroted without any independent analysis.*

2. *Secondly, the dispute itself, as described in the SCM letter, was nothing to do with either the JLS Board or indeed JLS. It was between SCM and Mr Rudianto. Therefore, JLS could have had no interest in whether RBH remained a shareholder or not. Crucially, there was no suggestion in the SCM letter that RBH held the shares under any kind of condition subsequent which had failed, or on trust for anyone, or subject to any agreement that in certain circumstances they would be given up to JLS.*
3. *Thirdly, SCM is not even a shareholder in JLS. It is not as if the JLS Board was even preferring one shareholder's view of the dispute over another, but that of a non-shareholder. JLS has never pretended that SCM has any corporate interest in JLS, and it does not.*
4. *Fourthly, SCM's dispute was not with RBH, but with Mr. Rudianto, who was not the holder of the shares being redeemed. The directors overlooked the most basic principle of company law, that of separate corporate personality, in failing to distinguish between RBH and Mr Rudianto.*
5. *Fifthly, the directors knew that what they were doing was at least risky, hence the request for the indemnity. The fact that the indemnity did not come from SCM, who had requested the redemption, but from the Master Fund, the majority shareholder, who had not requested the redemption but had merely consented to it, should have rung alarm bells with the JLS Board that something was amiss.”*

Applying the tenets of **FamilyMart** and **Mozambique**, it is immediately obvious says Mr Millett, “that the ESOP story has no bearing on whether the actual purpose for which the JLS Board acted in passing the Resolution fell within the scope of the permissible purposes of the power under Article 9.1(c).

105. *One can test it by asking how the ESOP story and the Share Return Agreement could ever be properly pleaded by way of defence to the claim. Even assuming that RBH was in breach of some kind of duty to the Master Fund or SCM to give up its shares, based on those background arrangements, it could be no defence to the claim for improper purpose that the JLS Board's purpose was to vindicate the*

Master Fund's or SCM's rights. Any such plea would not only contradict the terms of the Resolution itself but would also amount to an admission of improper purpose and no defence at all.

*Standing back from Matter Three, as explained further below, the question of how and why RBH got its shares in the first place is legally irrelevant. Again, it is not a reasonably foreseeable defence to the claim: **FamilyMart** [59]; **Mozambique** [72-73]). The real question is whether the JLS Board was entitled to arrogate to itself the adjudicative or executionary function of recovering them in order to carry out those alleged arrangements. JLS can only defend the claim on the basis that the JLS Board was so empowered. Right or wrong, that question is not within the scope of the arbitration agreement.*

*Put another way, the only issue in this case is whether the JLS Board's power under Article 9.1(c) was broad enough to permit the JLS Board to do what it did according to the Resolution, namely to oust a minority shareholder in the service of a claim against it by an associate of the majority shareholder who claims that the minority should no longer have its shares. It is not a reasonably foreseeable defence (indeed no defence) that there might have been some underlying justification for the JLS Board's actions: **FamilyMart** [59]; **Mozambique** [72-73])."*

Matter Four

- 106.** Matter Four is whether JLS' register of members should be rectified to show RBH as the holder of 5,000 ordinary shares with effect from the time of the redemption. JLS appears to accept, correctly, that Matter Four is not within the scope of the arbitration agreement.

However, says Mr Millett, "its importance to the analysis should not be overlooked. RBH has always maintained that being re-registered on the register of members of JLS as a result of these proceedings does not prejudice any of the claims that the Master Fund or SCM (or JLS) might have to get the 5,000 shares back again.

That is why it made repeated open offers, including but not limited to the offer of 10 April 2023. Critically, JLS has never identified any grounds on which a decision in favour of RBH in this litigation would create a res judicata or an issue estoppel which would provide RBH with a defence to the claims to recover the shares from it which are set out in JLS' evidence.

It has not done so because it cannot. The basis of RBH's claim is set out in the Statement of Claim. It is no defence to the claim that there was some purpose, unspoken in the Resolution, but derived from the commercial history, which made the exercise of the power proper.

*To adopt the legal tests in **FamilyMart** and **Mozambique**, the ESOP story is not “legally relevant to a claim or defence, or foreseeable defence”; it is not an essential element of the claim or defence, and is simply a “mere issue or question” that might fall for decision (**FamilyMart** [61]; **Mozambique** [75]).*

The precise scope of the Court's jurisdiction under section 46 to decide questions of title is not clear, but as the Judge said in his judgment of 10 April 2024 upon analysing the authorities⁴⁵ and dismissing JLS' November Summons, it was not a matter he had to decide because, as he said at paragraph 78.1 of the Judgment:

“In my view, this is not a case involving a dispute over equitable or legal ownership. It is a dispute over the propriety of a corporate action undertaken by the Company.”

The basis of JLS' strike-out application was that these proceedings involved the court adjudicating as to whether RBH was entitled to retain the JLS shares, i.e. it was deciding a title dispute. Had it succeeded on that issue, it would have succeeded on its strike-out and the action would be at an end on the merits.

But it is not about title, which is why, if the decision to redeem is struck down as improper and RBH is restored to the register, the judgment creates no res judicata against JLS or SCM or the Master Fund in respect of the underlying background agreements or arrangements forming the basis on which JLS now says it was justified in acting when it compulsorily redeemed RBH's shares”.

107. The foregoing analysis is enough, says Mr Millett, to lead this Court to dismiss the appeal.

Discussion on the application for a mandatory stay

⁴⁵ Principally *Nilon*, as further discussed above

108. As both sides accept, the crucial question for this Court on this aspect of the appeal, is whether the Article 9.1 (c) Dispute should be regarded, together with the Title Dispute, as being a “matter” required under Clause 18 of the SSA to be referred to arbitration (mediation being no longer considered), and so whether a compulsory stay of the Article 9.1 (c) Dispute should be ordered pursuant to section 4 of the FAAEA.
109. The correct approach to that question does not involve - as the Judge properly recognized - passing on the merits of either of the two Disputes.
110. Nonetheless, the analyses presented to the Court, in the clear and comprehensive arguments, are of great assistance in identifying the boundaries between the two Disputes for the purposes of deciding the crucial question.
111. It is not disputed by JLS that the Article 9.1 (c) Dispute is to be decided by the application of principles which govern the conduct of directors in the exercise of their fiduciary powers and duties. In the present context, those are the principles embodied in the Proper Purpose rule, the Braganza Principles and, as regards the nature of a rectification claim and its procedure, the principles from *Nilon*.
112. The Article 9.1 Dispute, as set out by RBH in its pleadings, is about whether, when they passed the Resolution, the JLS Directors did or did not exercise their powers under Article 9.1 (c) properly and that is to be determined by application of the **Braganza** Principles and by those emerging from the line of cases culminating in *Éclair* and *Grand View* (and as summarized from *TMO Renewables*, above).
113. However, JLS’s case is that as the true entitlement to the 5000 shares formerly registered in RBH’s name may not be determined without a determination also of the Title Dispute and of the relevance in that context of what Mr Choo Choy came to describe as the “*Contemporaneous Agreements*” and their relationship with the SSA, the real “*matter in dispute*” is one which “*arises from or in relation to*” the SSA and so must be referred to arbitration in keeping with Clause 18 of the SSA. It follows, says Mr Choo Choy, that by application of the **Fiona Trust** or **Extended Fiona Trust Principles**, a stay must be ordered pursuant to section 4 of the FAAEA.

114. It will be immediately apparent from the context so described, that JLS has had to assume the burden of establishing the necessary pivotal link between the two Disputes and between them and the SSA⁴⁶. Absent that pivotal link, RBH’s rectification claim clearly stands as an arguable, viable and self-contained cause of action, one which is subject to the jurisdiction of the Cayman Courts and properly to be tried here where the Courts may also exercise personal jurisdiction over the Parties.
115. For the following several reasons, JLS has failed, in my view, to establish the pivotal link:
- a. It appears on the face of the Resolution that the sole basis for the JLS Directors’ decision is that SCM, who is not a shareholder, had a personal employment dispute with Mr Rudianto, who is himself also not a shareholder of JLS.
 - b. There is no reference in the Resolution itself to any of the putative “Contemporaneous Agreements” that JLS relies upon for forging the pivotal link. The Contemporaneous Agreements are criticised by Mr Millett as being deployed “*as a means of confecting a dispute, after the fact that is said to fall within the (SSA)*” and “*as ex post facto justification*” for the improper exercise of power by the Directors. While it is fair, as he also observes, that “*it is an enduring mystery, why the Resolution referred to none of those matters*”, I do not think that this Court should or needs to form a conclusive view as to whether the ESOP story is genuine.
 - c. What I think is important in this context, is the essentially unproven status of the “Contemporaneous Agreements”. They are not accepted by RBH and remain but putative alleged bases for the Directors’ decision. They may not therefore in my view, as yet, be insisted upon by JLS as to be regarded as actual agreements for the application of the Fiona Trust (in the sense of being the subject of further disputes intended to be covered by the agreement to arbitrate) or the Extended Fiona Trust Principles, the latter as explained in *Terre Neuve* (above).
 - d. There, references to “*the inter-dependency of multi-contractual arrangements*” (“Contract A” and “Contract B”), clearly contemplate the actual existence of different contracts, not

⁴⁶ While, as opined by Kawaley J in *SC Global*, (above, at [16]) a plaintiff resisting a mandatory stay of an action under section 4 of the FAAEA based upon an agreement to arbitrate will have the burden of resisting the application; that must be taken in my view, as relating to a dispute which is clearly or indisputably, the subject of an agreement to arbitrate. That for all the reasons discussed above, is not this case.

contracts, the existence of which is disputed and therefore must first be proven before the inter-dependency can be established and so their commonality of addressing the same or similar subject-matter.

- e. In this regard, I think that the Judge was right in the view he took at [85] of the Judgment that, unlike in the case of the written Employment Agreement “ ..(he) would be very limited in drawing any conclusions that as a matter of Singapore law, and therefore as a matter of fact, the [SSA] which is between JLS, RBH and Sylvan MF gave effect to the ESOP Agreement... Furthermore, despite what is alleged, the ESOP Agreement and [SSA] do not appear to be interrelated and interdependent contracts between common parties and the latter certainly has not been drafted in that way. I am not in a position therefore to assume that the [SSA] gave effect to the ESOP Agreement”.
- f. This view of the matter is strengthened, in my view, by point (2) of the Principles, which (as also set out above from *Terre Nueve*) states that “As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause which stated that “any dispute under this contract shall be referred to arbitration” may not apply to disputes arising out of a (related) Contract B”.
- g. The difficulties this presents for JLS’s contentions are obvious where, as it asserts here, the “Contemporaneous Agreements” are wholly unwritten oral agreements and so their meaning, let alone their “wording” cannot be established without a contest which, as matters stand, is that to be arbitrated in Singapore and not that to be resolved by the Article 9.1(c) Dispute.
- h. It follows now before this Court that, again as matters stand and as they stood before the Judge, it has not been established that the wording of the “Contemporaneous Agreements” are “fairly capable of applying to” the Article 9.1(c) Dispute. At best on the contested state of the evidence, they are only allegedly so. Indeed, there is nothing in the evidence to suggest that in the exchanges which are said to have informed them, the parties had in mind that the “Contemporaneous Agreements” would be regulated by the provisions of the SSA which was yet to be agreed and in which therefore, one might expect reference to have been made to them. On the contrary, the SSA is entirely silent about them.

- i. Nor was the difficulty this state of things presents for JLS lost on Mr Choo Choy. As he perceptively asserts as shown at [74], [89] and [91], above, JLS’s case must depend upon the proposition that the “*parties would have presumed*” that the SSA extended to the “Contemporaneous Agreements” and thus further implicitly, that the Directors would have considered them when talking their decision. This is rather circular reasoning which would, if accepted, unfairly shift the burden of establishing the necessary pivotal link, yet to be proven in the Title Dispute, from JLS to RBH.
- j. For the purposes of deciding now whether a mandatory stay must be ordered in keeping with section 4 of the FAAEA, on the required basis that the Article 9.1(c) Dispute is a dispute commenced before the Cayman Court “*in respect of any matter agreed to be referred*” to arbitration, that would be putting the proverbial cart before the horse.
- k. There is further compelling but related reason why JLS has failed to establish the necessary link by reliance on the Fiona Trust or Extended Fiona Trust Principles. As is shown above in point (6)(a) of the latter Principles but conveniently repeated here: “*Whilst it is not impossible for a jurisdiction agreement to have, on its true construction, ... retrospective effect, a party seeking to rely upon a subsequently agreed jurisdiction agreement in a separate contract [as is the SSA here relative to the “Contemporaneous Agreements”] is likely to face an uphill struggle: see e.g Satyam. One reason is that the earlier contract [here, albeit only by a matter of a couple of days, the “Contemporaneous Agreements”] had an existence of (their) own, and hence an applicable law, prior to the conclusion of the subsequent agreements. If there was no jurisdiction agreement at the time (they were) concluded, then it may be difficult to conclude that it is to be found in a subsequent agreement, particularly if (as in **Choil**) the disputes arising under the later agreement are likely to have a very different character to disputes arising under the earlier agreement.*”
- l. The Judge at [85] of the Judgment was being justifiably agnostic about the issue of the governing law of the putative agreements that are said to have been concluded between Mr Chan and Mr Rudianto. Even if Mr Rudianto was then acting on behalf of his companies, the contracts would nonetheless have been concluded between different parties than those to the subsequent SSA. Accordingly, even as explained by Mr Chan in his evidence, the

“Contemporaneous Agreements” and the SSA do not appear to be interrelated and interdependent contracts between common parties.

- m.* Without the “Contemporaneous Agreements” being shown to be covered by the SSA, it cannot, in the circumstances of this case be said as required by the Fiona Trust or Extended Fiona Trust Principles, that RBH’s Originating Summons (now Statement of Claim) “*fairly extends not only to the matters raised*” in the Article 9.1 (c) Dispute itself, but also to “*any matters which it is reasonably foreseeable the claim would give rise to*”, ie. the matters raised by the Contemporaneous Agreements. Unless and until the “Contemporaneous Agreements” are proven to exist in keeping with their alleged terms, it is entirely at large whether they relate to and are covered by Clause 18 of the SSA. Simply put, as the Judge found, it was not open to him, on the present state of the evidence, positively to conclude in the terms of section 4 of the FAAEA, that the Article 9.1 (c) Dispute, because of its relationship to the “Contemporaneous Agreements” and thus with the Title Dispute, is a matter “*agreed to be referred*” to arbitration by virtue of Clause 18 of the SSA.
- 116.** One could perhaps leave the matter at that. But in deference to the very able arguments presented, I think it worthwhile examining the issue also on the basis of the further principles derived from the case law, and on the assumption that the “Contemporaneous Agreements” exist and would be provable in the context of the Title Dispute. The question then becomes whether the issues raised by them would also be a matter in dispute in the Article 9.1 (c) Dispute, so as to require that dispute to be stayed in deference to the arbitration.
- 117.** As both sides accept and as was confirmed both in *Family Mart* at [65] and *Mozambique* at [77], the identification of a “*matter in dispute*” requires judgment and common sense and is not a mechanistic exercise. A matter must be “*a substantial issue*” which is “*legally relevant to a claim or defence or foreseeable defence*” and be susceptible to determination “*as a discrete issue*”. While in identifying matters in dispute, the Court ought to be wary of formulations in the pleadings which “*may be aimed at avoiding reference to arbitration*”, that can hardly be a fitting description of RBH’s pleadings here, filed as they then were without notice that JLS would seek to invoke Clause 18 of the SSA by reliance on the “Contemporaneous Agreements”. After all, RBH’s Rectification Action is a direct response to JLS’s admittedly “self-help” approach, itself taken apparently without regard to the Parties’ alleged obligations to mediate or arbitrate.

118. The task of identifying matters in dispute does however, require the Court to consider “*all reasonably foreseeable defences*” to the claim (*FamilyMart* [59] and *Mozambique* [72-73]). It is in this way that it is said that JLS’s claim to RBH’s shares relying on the Contemporaneous Agreements, was already known to RBH (through Mr Rudianto) and so should also be regarded as its reasonably foreseeable defence to the Article 9.1 (c) Dispute. On this basis it is also said that the Article 9.1(c) Dispute was known to be “*a matter agreed to be referred to arbitration*” by virtue of Clause 18 of the SSA, rendering it subject to a stay in deference to arbitration of the Title Dispute in Singapore.
119. However, it is by the application of the foregoing principles, when analysed alongside those from the line of cases culminating in *Éclair* and *Grand View*, that I am most persuaded that the “Contemporaneous Agreements” provide no legally relevant or foreseeable defence to RBH’s Rectification Action. In addition to those of Mr Millett’s persuasive arguments set out above in response to the Four Matters identified by Mr Choo Choy, I note the following points, in quotations, which I also accept (with my additions or qualifications in emphasis):

“(a) *The dispute which is the subject of the proceedings, as set out in the Originating Summons and Statement of Claim, is about whether, when it passed the Resolution, the JLS Board did or did not exercise its powers under Article 9.1(c) for a proper purpose, or within the ambit of what the law regards as the proper exercise of the contractual discretion established in Braganza, and if not, what is the legal effect of that outcome and to what relief is RBH entitled?*

(b) *In order to see what the JLS Board decided and the basis for its decision, the Court will need to examine the Resolution and the letter from SCM attached to it as Schedule A. This is set out verbatim at paragraph 38 of the Judgment [and as above at [15] –[16], pp5-8]. The Court should also consider the terms of the indemnity from Sylvan MF, exhibited at Schedule B to the Resolution.*

(c) *It appears on the face of those documents that the sole basis of the JLS Board’s decision is that SCM, who was not a shareholder, had a personal employment dispute with Mr. Rudianto.*

(d) *There is no reference in the Resolution to any of the background matters such as the ESOP agreement or the return of shares agreement [(the “Contemporaneous Agreements”)] that JLS now wishes to deploy as explanatory or exculpatory. Nor is there any evidence that the directors other than Mr Chan, (ie. Mr. Edgington and Mr. Kanchanadul), even knew about, let alone had anything in mind, other than what is set out on the face of the Resolution. Mr. Chan does not say otherwise: see Chan I at [63], [67], [68] and [70].*

(e) *Thus, there is an inherent and insurmountable evidential problem for JLS. It seeks to rely on a purpose or basis for the decision that does not appear on the face of the Resolution. That is not merely a point about credibility (although it is a serious point on that score, too). It is about the distance of what JLS relies on as the underlying dispute from the basis on which the power was exercised and which RBH says was improper.*

(f) *The nub of JLS’ attack on the Judgment is to say that the background against which, or the basis on which, RBH got its 5,000 JLS shares in the first place, and the terms on which it did so, are relevant matters that the Court must take into account when assessing the JLS Board’s conduct, and that they engage the arbitration agreement in the Subscription Agreement. That is plainly wrong. To the extent that the members of the JLS Board knew of those matters at all, they did not appear to think that they were relevant, and did not appear to take them into account, and so they did not appear to form part of the decision. That is uncontroversial, as can be seen from the terms of the Resolution and the SCM letter. Therefore, the FamilyMart formulation [(ie.” a legally relevant” or “reasonably foreseeable defence”)] now relied on by JLS is not engaged.”*

(g) *RBH, for reasons also already discussed above (by reference to **Nilon**), is entitled in this regard to have not only its Rectification Claim but also the present stay application, determined on the basis of the evidence as it presently stands, not on the basis of how it might or might not unfold in the context of the Title Dispute.*

(h) *“(Further and by way of emphasis), JLS’ case is not based on the idea that the JLS Board could have reached the same decision and exercised the power in the same way based on those further reasons. That has never been its case and it would not be open to it*

in law anyway. The Judge was alive to this point - see footnote 50 to [76.4] of his Judgment.

120. Therefore, at trial, the Grand Court will not be deciding whether or not there was an ESOP agreement or a share return agreement or any of the so-called “background matters”. They are matters which might support a claim by SCM, or the Master Fund, against RBH, to which JLS might be joined as a necessary or proper party. But they cannot found the basis of a defence by JLS itself to the Rectification Action.

121. And here is what Mr Millett says is the heart of it:

“RBH’s complaint is that the JLS Board lent itself to taking sides in a dispute as to who should hold its shares. The dispute set out in RBH’s Originating Summons (and now the Statement of Claim) is not about the terms on which RBH was to hold the shares, but about the power of the JLS Board to resolve that dispute itself. Who is right or wrong in a potential underlying dispute between different parties is irrelevant.

Put another way, JLS had no claim of its own, based on the alleged ESOP Agreement or any other background arrangement, to recover the shares from RBH. RBH’s claim to reverse the effect of the Resolution is based solely on the fact that the JLS Board not only decided the dispute between SCM and Mr Rudianto, but then executed the result by expropriating RBH’s shares – all in breach of the Proper Purpose Rule and the Braganza Principles.”

122. When the Rectification Action/Article 9.1 (c) Dispute is seen in that light, I accept, as did the Judge at [88] of the Judgment, that the fact that there might be some other underlying dispute about entitlement to RBH’s shares which might be arbitrable, and the merits of that dispute, are quite irrelevant. Whatever the merits of that other dispute, they can have no bearing on whether or not the JLS Directors complied with the Proper Purpose Rule as required by the Articles or whether they exercised their powers properly in keeping with the Braganza Principles. Those questions are of the essence of the Article 9.1 (c) Dispute and, whether or not SCM or Sylvan MF might have a provable claim against the RBH shares in the context of the Title Dispute, for all the reasons discussed above, can have no bearing on those essential questions about the Directors’ conduct. It cannot therefore be said

that the Article 9.1 (c) Dispute is covered by Clause 18 of the SSA and so should be stayed in deference to the arbitration of the Title Dispute in Singapore.

Case Management Stay and Forum Non Conveniens

- 123.** As set out above, JLS's secondary position is that pursuant to its inherent jurisdiction and case management powers, the Court should order a case management stay. This would be on the basis that the final disposal of the Rectification Action/Article 9.1 (c) Dispute is dependent on the prior determination of the Title Dispute and the latter will have to be resolved by arbitration under the SSA in Singapore.
- 124.** In support of this argument, JLS refers to the cases of *Nanfong* and *SC Global* (both above). *Nanfong* involved a situation in which there was a question as to whether there was authority for one of its shareholders (a Samoan company) to have issued a winding up petition against a Cayman Islands company. That issue had to be either decided by a court in Samoa or the Grand Court. This Court decided that there were the necessary strong and compelling reasons and little prejudice to the shareholder in question for a case management stay to be ordered whilst that issue was resolved by the courts in Samoa.
- 125.** In the present case, RBH has brought its Rectification Action as of right in this jurisdiction, invoking the statutory procedure which, as we have seen, will afford it a timely and summary determination of its claim. This is not an advantage which it might readily be denied in the absence of some strong countervailing reason in favour of a discretionary stay. On the contrary, no such reason arises here. Like the Judge, I do not regard the Title Dispute as likely to be determinative of the Article 9(1)(c) Dispute or vice versa. If it turns out that the Directors' Decision and the deregistration of RBH's membership are reversed, the register of members of JLS will be rectified to restore RBH to the position that it was in before the Decision was taken. In that event, RBH will still be subject to the restrictions in the SSA and its ultimate interest in JLS will be subject to arbitration or litigation in Singapore in the Title Dispute.
- 126.** When the case is seen overall in that light, and again in agreement with the Judge, I do not find any strong and compelling reason for the grant of a case management stay as required by the principles as approved by this Court (per Moses JA) in *Nanfong* at [17] to [20]:

“17. Any stay of the hearing of the petition must therefore be based on principles other than those identified in *Spiliada* [ie. *forum non conveniens*]. Those relevant to the grant of a stay on case management grounds are to be found in *Reichold Norway ASA v Goldman Sachs Intl* [[1999] 2 Lloyds Rep. 567). In that case, the Court of Appeal approved the principles applied by Moore-Bick J. who stayed the hearing of an action for negligent misstatement by Goldman Sachs in relation to the sale of shares in a Norwegian company pending an arbitration in Norway to be brought by Reichold alleging breach of warranty under the sale agreement. If the arbitration proceedings were successful there would be no need for Reichold to sue Goldman Sachs, the vendors’ advisers.

18. Moore-Bick J. emphasized ([1999] C.L.C. at 492) that before a temporary stay of proceedings properly started in England should be granted there must be “very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff”

19. Moore-Bick J. recognized (*ibid*, at 495) that the grant of a temporary stay was a lesser interference with the plaintiff’s rights than a stay on grounds of *forum non conveniens*, which in practice determines whether a plaintiff can proceed at all in the jurisdiction of its choice. There is, he said a “very real burden” on the applicant for a case management stay to satisfy the court that the “ends of justice” would be served by granting a stay, even if no greater than on the grounds of *forum non conveniens*, but that the factors to be taken into account in a case management decision will differ.

20. Applying those principles, Moore-Bick J. concluded (*ibid*, at 491) that a temporary stay should be granted in order to manage the order in which the proceedings were to be heard: “... not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other.”

127. In my view, and in the light of those principles, the circumstances of the present case do not justify the grant of a case management stay.

128. As to JLS's application for a stay on *forum non conveniens* grounds⁴⁷, I endorse the reasons of the Judge for refusing it. I would only add that, for all the reasons given on the appeal for refusing the mandatory stay application, it cannot be concluded that Singapore, as the other available forum, is also the proper and convenient forum for the disposal of the Article 9.1 (c) Dispute.

Submission to the jurisdiction: RBH's Notice

129. In light of the conclusion that the applications for a stay should be dismissed, this application by RBH, filed for the first time on the appeal, may be regarded as no longer requiring a decision. I therefore do not see the need to deal with it in detail. Suffice to say that I found JLS's response to be persuasive, in its contention that it has not, as required by the case law (see *Carmody* and *Ren Ci* both above) unequivocally submitted to the jurisdiction of the Grand Court simply by virtue of its applications made by its summons filed on 21 November 2023 in these proceedings.

Conclusions

130. Accordingly, in my view: (i) JLS's appeal should be dismissed; and (ii) RBH's Notice contending that JLS has submitted to the jurisdiction should also be dismissed. My provisional view is that 95% of the costs of the appeal should be borne by the Appellant who did not succeed on the substantive issue (to be taxed on the standard basis if not agreed): but if either party wishes to propose a different order, they may do so in writing to be filed within 10 working days from the circulation in draft of this judgment.

131. **Montgomery JA:** I agree.

132. **Beatson JA:** I also agree. Accordingly, JLS's appeal is dismissed. As to costs, absent either party seeking a different order, as proposed by Smellie JA, RBH will have 95% of its costs to be taxed on the standard basis, if not agreed. Any further submissions as to costs will be determined on the papers.

⁴⁷ Here relying on *Spiliada* (above).