EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM) 2022/0044

BETWEEN:

ICM SPC ON BEHALF OF ANCILE SPECIAL OPPORTUNITY AND RECOVERY FUND SEGREGATED PORTFOLIO

Applicant

and

[1] RYAN PAUL JARVIS
[2] RACHELLE FRISBY

(as Joint Liquidators of Phoenix Commodities Pvt Ltd

(in liquidation))

Respondents

IN OPEN COURT

Appearances:
David Alexander KC, Brian Lacy and Jeremy Snead for the Applicant.
David Chivers KC, Jeremy Child and Jhneil Stewart for the Respondent.

2023: September 20,21,25,26,27,28;
2024: May 30.

JUDGMENT

[1] **Mangatal J:** This Originating Application ("**the Application**"), filed 24 February 2022, was brought pursuant to s.193(3) of the *Insolvency Act 2003* ("**IA 2003**"). The trial took place in open Court over a six-day period in the latter part of September 2023 and was vigorously contested. The material to be absorbed was voluminous, and detailed. Over 75 authorities were cited by the parties. The matter involved many issues. This included a novel point as to the proper interpretation of s.49 of the BVI *Business Companies Act* 2004 ("**the BCA**") in respect of which neither side were able to locate any previous BVI decisions.

[2] The application was brought by ICM SPC ("**ICM**"), a segregated portfolio company incorporated in the Cayman Islands, which itself acts on behalf of Ancile Opportunity and Recovery Fund Segregated Portfolio ("**ASOR**"), a segregated portfolio created by ICM.

[3] Phoenix Commodities PVT Ltd. ("**Phoenix BVI**" or "**the Company")** was incorporated in the BVI on 25 September 2001. It was part of the Phoenix Group of Companies which specialized in commodities trading. The Group included one of the World's largest rice trading businesses.

[4] On 20 April 2020, a meeting of shareholders of Phoenix BVI was held at which Phoenix BVI was placed into voluntary liquidation by a qualifying resolution of its shareholders. ASOR was present at that meeting represented by Mr. Abdul-Massih. Mr. Abdul-Massih made certain statements seeking to qualify his presence at the meeting and I will refer to those later in this judgment.

[5] On 8 May 2020, Mr. Ryan Jarvis ("**Mr. Jarvis**") and Mr. Matthew David Smith, both of Deloitte, were appointed as joint liquidators of Phoenix BVI.

[6] On 28 April 2021, Mr. Smith was removed as one of the joint liquidators of Phoenix BVI and Ms. Rachelle Frisby ("**Ms. Frisby**" and when referred to together with Mr. Jarvis, "**the Liquidators**") was appointed as one of the joint liquidators of Phoenix BVI in place of Mr. Smith.

[7] On 16 December 2021, Mr. Jarvis wrote to ASOR stating that the Liquidators had settled a list of members ("**the List of Members**") of Phoenix BVI and ASOR was included in that list as holder of 440,935 shares in Phoenix BVI. The letter enclosed the List of Members.

[8] By letter dated 24 January 2022 ASOR objected to its inclusion on the List of Members. Mr. Jarvis responded by letter dated 4 February 2022 indicating that the Liquidators did not accept ASOR's objections.

[9] The Application, pursuant to s. 193(3) of the IA 2003, seeks to have the Court remove ASOR from the List of Members settled by the Liquidators.

[10] ASOR called three witnesses to give evidence. The main witness, Mr. Nabil Abdul-Massih gave evidence in person in Tortola, whilst Mr. Gaurav Dhawan gave evidence from Delhi, India and Mr. Indrajit Ghosh from New South Wales, Australia by video-link. Naturally, as is typical in top Commercial Courts throughout the world where witnesses are to give *viva voce* evidence, the Court, Court staff, legal practitioners and parties, had to plan and make accommodations for time differences between BVI and in the respective places where the witnesses reside. The Liquidators called Mr. Ryan Jarvis to give evidence, which he gave in person in Tortola. All the witnesses were cross-examined.

ASOR's Grounds of Objection

[11] At paragraphs 4 and 5 of the Application Notice, ASOR sets out its grounds for objection. In summary they are as follows:

(1) ASOR did not agree in writing to becoming a shareholder, as required by section 49 of the BCA;

(2) Alternatively, and without prejudice to the first ground, if ASOR did agree, such agreement was subject to conditions precedent contained within a Memorandum of Understanding dated 1 April 2018 ("**the MOU**") and its amendment dated 25 April 2019 **("the Amendment**"), which conditions precedent were not satisfied;

(3) If ASOR was a shareholder, its shareholding was temporary or provisional and therefore when the conditions precedent were not fulfilled any provisional shareholding lapsed; and

(4) If ASOR was a shareholder, the shareholding was cancelled by way of Notice dated 12 November 2019.

Breach of Contract

[12] In their Opening Skeleton Arguments, ASOR appears to have expanded the cancellation ground. I have therefore numbered ASOR's objections in my own way, which may differ from the numbering the parties have used. At paragraph 69.2 after referring to the cancellation ground, ASOR argues as follows:

> "(*and/or that (a) Phoenix BVI has been and is in breach of contract for failing to effect such cancellation with the consequence that ASOR should not be treated as a shareholder of Phoenix BVI and/or (b) Phoenix BVI is in breach of contract as aforesaid, the BVI Liquidators should not be permitted to claim that ASOR is a shareholder of Phoenix BVI based on Phoenix BVI's own breach of contract as that breach of contract has been perpetuated by the BVI Liquidators*)."

New Claim-Common Mistake

[13] Just before the start of Closing Submissions and after the completion of all the evidence, Mr. Alexander KC, leading Counsel for ASOR, filed a supplemental skeleton argument on behalf of ASOR, raising for the first time the issue of common mistake. This was said to be based on the Respondent's argument that the Articles of Association of Phoenix BVI expressly excluded the operation of section 62 of the BCA, and that therefore there was no circumstance in which a shareholder can redeem at their option.

The Liquidators' case as to ASOR's objections

[14] In his letter dated 4 February 2022, Mr. Jarvis, one of the Liquidators, gave a very clear exposition as to why the Liquidators did not accept ASOR's objections and indicated that they did not intend to amend the List of Members of Phoenix BVI. In their initial objection, the two main grounds were put forward by ASOR.

[15] As to the first ground, i.e. ASOR was never a shareholder of Phoenix BVI; the Liquidators pointed to and set out in detail what they described as "*an overwhelming body of evidence that ASOR was a shareholder of the Company".*

[16] As to s.49 of the BCA, it was stated that Mr. Abdul-Massih, as CEO of Inoks (the entity that manages ASOR) and authorized signatory of ASOR, is an authorized agent of ASOR. In the Liquidators' view it was indisputable, based on correspondence, and Mr. Abdul-Massih's specific representations, that Mr. Abdul-Massih, as an agent of ASOR, agreed in writing that ASOR become a holder of shares in Phoenix BVI.

[17] As regards Ground 2, that "*if ASOR had been a shareholder for any period of time, it no longer is*", the Liquidators made an initial comment that copies of some of the main documents relied upon by ASOR, i.e. the MOU, Amendment, and the Cancellation Notice, had not been identified by the Liquidators in the Company's records. The Liquidators stated that the Cancellation Notice does not constitute a redemption of the shares of the Company.

[18] The Liquidators also took the position that there was no documentary evidence that any debt-to-equity swap occurred at all or was reversed.

[19] The Liquidators' overall position as to Ground 2 was that there is no proper evidentiary basis for it, and that it is in direct contravention of the Company's constitutional documents and of BVI Company law.

[20] In paragraph 26, towards the end of the letter, the Liquidators had this to say:

> "***ASOR's position as shareholder as at liquidation of the Company***
>
> *26. A meeting of the shareholders of the Company was convened on 20 April 2020, which Mr. Abdul-Massih attended as ASOR's representative. At that meeting, the Company was placed into liquidation by a qualifying resolution of its shareholders. The minutes of that meeting record that 'while the nominated fund [i.e. ASOR] is the provisional shareholder and has consented to attend the meeting he believes the shares are to be returned to the company in due course and register to reflect'. As an initial comment, the BCA does not recognize the concept of 'provisional shareholder'. It is apparent from the minutes that, as at the meeting at which the Company was placed into liquidation, ASOR remained a shareholder in the Company, otherwise there would be no reference to 'return[ing]' the shares. Clearly, there cannot be any share buy-back after liquidation of the Company."*

The witnesses-Mr. Abdul-Massih

[21] Mr. Abdul-Massih in his Witness Statement dated 31 January 2023, states that his native language is French, but that he is fluent in both spoken and written English. He indicated that he is a director of ICM and is the Chief Executive Officer of Inoks Capital S.A. ("**Inoks**"), a Swiss asset manager company. Inoks is the investment manager for various investment vehicles providing capital for growth to sustainably active companies in the agriculture and food sectors.

[22] Mr. Abdul-Massih indicated that Inoks is the investment manager for a fund known as the "**Ancile Fund**", and that he is also a director of three exempted companies with limited liability incorporated in the Cayman Islands, being:

(1) Ancile Fund Limited ("**Ancile Fund**");

(2) Ancile Investment Company Limited ("**Ancile Investment**"); and

(3) Ancile Securities Company Limited ("**Ancile Securities**").

[23] Ancile Investment and Ancile Securities are wholly owned subsidiaries of the Ancile Fund. Ancile Fund, Ancile Investment and Ancile Securities are referred to collectively as "**the Ancile Companies**".

[24] The witness indicates that in 2007, the Phoenix Group approached Inoks to enquire about the provision of funding for the Phoenix Group's commodities business. Following on from that approach, between 2007 and 2020, extensive funding was provided to the Phoenix Group by the Ancile Fund through Ancile Investment, with security for such borrowing being provided to Ancile Securities.

[25] Mr. Abdul-Massih indicated that the Phoenix Group was (and remains) the Ancile Fund's largest creditor. The Phoenix Group represented close to US$130 million of debt owed at the date Phoenix BVI went into liquidation, which was the largest single group of companies' exposure in the Ancile Fund's portfolio.

[26] Mr. Abdul-Massih stated that in 2016, the Phoenix Group decided to reform its corporate structure such that Phoenix DMCC (now known as Phoenix Global DMCC) ("**Phoenix DMCC**"), being a wholly owned subsidiary of Phoenix BVI became the primary operational entity and holding vehicle for other operational entities within the Phoenix Group that utilized the Facilities extended by the Ancile Companies. In the circumstances, Ancile Fund decided to arrange its financing directly with Phoenix DMCC thereafter and keep Phoenix BVI as a co-obligor and guarantor. Mr. Abdul-Massih states that he is aware that other lenders to the

Phoenix Group, unrelated to the Ancile Companies, made a similar change around this time.

[27] By in or about 2013, Mr. Abdul Massih, who was a director for each of Inoks, the Ancile Companies and ICM, became aware that the Phoenix Group was also interested in sourcing a private equity investment in the Phoenix Group. It is ASOR's case that, with a view to pursuing a private investment in the Phoenix Group, a Memorandum of Understanding ("**the MOU"**) dated 1 April 2018, was entered into by ASOR, Inoks, Phoenix BVI and the then shareholders of Phoenix BVI.

[28] According to Mr. Abdul-Massih, the MOU was intended to be the framework to facilitate further discussions between ASOR, via Inoks as its manager, and Phoenix BVI in respect of the private equity investment ("**the PE Transaction**") to be managed and arranged by Inoks of between US$40 million and US$50 million by way of a subscription for newly issued shares in Phoenix BVI. It was envisaged that these shares would be held by and registered in the name of ASOR.

[29] The MOU provided that any investment would be "*conditional and subject to*" the satisfaction of five condition precedents, none of which were completed by the time required under the MOU, i.e. 30 June 2018.

[30] Work in relation to the PE Transaction was carried on during the rest of 2018. However, the Conditions Precedent had still not been met and this remained the case right down to 25 April 2019 when an Amendment to the MOU was entered into by the parties ("**the Amendment**").

[31] At paragraphs 36-39 of the Witness Statement, Mr. Abdul-Massih states that it was agreed that the proposed shares to be allocated to ASOR should be pre-allocated to ASOR. That the parties therefore agreed a temporary pre-allocation of shares with reversible debt equity ("**the Debt Conversion**"). According to the witness, the concept of the Debt Conversion was that, during the temporary pre-allocation of

shares, the debt due from Phoenix DMCC (and its guarantors, including Phoenix BVI) under the Phoenix Facilities would be reduced by US$40 million (being the value of the pre-allocated shares). If the pre-allocation was reversed, the Debt Conversion would also be reversed and converted back into a liability under the facilities, and the shares duly subscribed and paid for by ASOR for an amount of US$40 million, i.e. the full allocation. Mr. Abdul-Massih's evidence is that it was envisaged that any pre-allocation and Debt Conversion would be for a very short period of time as Phoenix BVI would need to comply with the Conditions Precedent quite rapidly and, failing which, the PE Transaction would be cancelled in its entirety, the shares returned/cancelled and the debt reversed. Any pre-allocation was therefore intended and agreed to be a temporary and reversible operation only.

[32] The consideration for the Debt Conversion was the temporary write-down of US$40 million of debt due to Ancile Investments from Phoenix DMCC, against ASOR assuming liability for the repayment of the US$40 million under one of the Phoenix Facilities. According to the witness, it is important at this point to bear in mind that ASOR and Ancile Investments are separate entities. He continues that it was envisaged that if the Conditions Precedent were completed and the full allocation effected, ASOR would receive funding from its investors (who were already soft committed) and would use such funding to pay the subscription price for the PE Transaction and the Debt Conversion would be reversed.

[33] Therefore, continues the evidence, the parties entered into the Amendment, which recorded that Phoenix BVI had not yet complied with the Conditions Precedent. These included, but were not limited to, the following:

(1) the selection and pre-appointment of Inoks Director;

(2) the selection and pre-appointment of the Independent Director;

(3) The agreement of the business plan; and

(4) The execution of the shareholder and share subscription agreements.

[34] The Amendment further confirmed the terms of the Debt Conversion which, in essence, and amongst other matters, provide that:

(1) while the Conditions Precedent remained unsatisfied, ASOR was entitled to request the issuance of 440,935 shares in Phoenix BVI ("**the Shares**") with the investment being met by the Debt Conversion; and

(2) ASOR could at any time while the Conditions Precedent remained unsatisfied, choose to redeem the Shares and the Debt Conversion would be reversed.

[35] Mr. Abdul-Masih was cross-examined extensively by Mr. Chivers KC, including in relation to the contents of paragraph 40 of Mr. Abdul-Massih's Witness Statement. As a result, that paragraph, which speaks to the circumstances in which the Amendment was drafted and signed, bears setting out in full:

> "*40. The* (Amendment Agreement) *was* ***drafted on 25 April 2019****. This was done at Inoks' offices in Geneva, at 32 rue de l'Athénée. Present were myself, Mr. Dhawan, Mr. Chandra and Mr. Navandher.* ***We spent a considerable amount of time on that day discussing the wording of the Amendment, and it was typed on a computer in the office by me*** *and Mr. Navandher. Once we were collectively happy with the Amendment, we printed off a version and* ***signed it in wet ink.*** *For the avoidance of doubt, the Amendment was signed on behalf of Phoenix BVI by Mr. Dhawan and Mr. Chandra. The word document was saved onto Inoks' system. As we had all been involved in its drafting and were happy with its effect, and had already* ***signed the document in person, there was not (and no need for) any correspondence between us surrounding it."***
>
> (My emphasis)

[36] At paragraph 41 Mr. Abdul-Massih states that, in addition, it was agreed that, once the Conditions Precedent had been met and a share purchase agreement and a shareholders' agreement had been executed, the MOU and Amendment would lapse. It was, therefore, he says, his understanding at this point that any shares

issued to ASOR would not be final in the sense that this was still subject to satisfaction of the Conditions Precedent, and still subject as agreed, amongst other Conditions Precedent, to:

(1) The execution of a share subscription agreement (this required the parties to exchange a 'disclosure letter' confirming acceptance of the shareholding, a draft of which was included as an annex to the subscription agreement);
(2) A shareholders' agreement; and
(3) A Directors' consent to appointment.

[37] At paragraphs 45-52 (inclusive), under sub-heading "*Events after the Amendment"* and further sub-heading "*The Provisional Allocation of Shares",* Mr. Abdul-Massih puts ASOR's position this way:

[38] "***iv. Events after the Amendment***

The Provisional Allocation of Shares

*45. In May 2019, I understood from Mr. Nitin Navandher, the Group Financial Controller of the Phoenix Group ("**Mr. Navandher**"), that Phoenix BVI wanted to open a new syndicated facility for some of its grains* [sic] *transaction based on a borrowing base structure, which was to be lead* [sic] *and arranged by BNP Paribas.*

*46. As part of the facility to be agreed with BNP Paribas, on 6 May 2019 Mr. Navandher asked me if Inoks would enter into a subordination agreement, in favour of BNP Paribas, in relation to any bilateral debt claim against Phoenix BVI, including in relation to any debt that might be subject to the Debt Conversion under the Amendment. He said that this was "*an *alternative measure if shares issuance takes time*". *Inoks refused to enter into such an agreement as the Ancile Companies were not a party to this new financing facility to be arranged by BNP Paribas, so there was no reason to either (a) subordinate any of their long existing rights or claims (existing or future) nor (b) to share them with any other creditor as the Ancile*

Companies had long standing bilateral and direct financing agreements with Phoenix BVI and the Phoenix Group. Aside from the fact that ASOR had not itself requested the issuance of shares in Phoenix BVI, this was not acceptable for a number of reasons…In the same emails, however, Mr. Navandher did say that he would 'work on issuance of shares as well at BVI level to Inoks'. I understood this simply to mean that he would work generally on setting up the mechanisms as envisaged by the MOU and the Amendment. In any event, his message was odd in circumstances where Inoks was never contemplated as a shareholder in Phoenix BVI, as per the MOU, it was to be ASOR that was to be a shareholder in Phoenix BVI.

47. I now understand that Mr. Navandher and Mr. Dhawan (and potentially other directors and/or shareholders of Phoenix BVI) set about purporting to register ASOR on the same day as a shareholder without ASOR's specific consent. For the avoidance of doubt, the provisions of the MOU meant that any such registration was not to take place before the satisfaction of the Conditions Precedent and, whilst the provisions of the Amendment provided a mechanism for the pre-allocation of shares in Phoenix BVI, this was only in circumstances where such a pre-allocation was requested by ASOR, and in circumstances where a debt-to-equity swap… had taken place. None of these events happened.

48. Notwithstanding this, I did correspond with Mr. Navandher and Mr. Dhawan about the wording of various announcements and notices which, I understood, would be circulated once the shares had been issued (that is, after the events detailed in the previous paragraph). I understood that this was simply for administrative purposes at the time, namely so that the completion of the PE Transaction could proceed as quickly as possible once the Conditions Precedent were satisfied.

49. Specifically, on 7 May 2019, and partly in response to Mr. Navandher's erroneous belief that Inoks would be the target of any issued shares, I wrote to confirm ASOR's 'full style', by which I meant its full name and identification details. It was obvious to me that this would be useful in

preparing for the potential issuance of shares. On the next day, 8 May 2019, Mr. Navandher told me that the shares would be issued that coming Friday, such that ASOR would be included in the Register of Members of Phoenix BVI the following Monday (being 10 May 2019). I never confirmed my agreement to this on behalf of ASOR or at all, whether orally or in writing, and likewise never received confirmation at the time that this issuance and registration had taken place. Nor had the Conditions Precedent been met. Nor had ASOR made a request for the temporary issuance of shares in accordance with the Amendment.

50. However, on 10 May 2019, Mr. Navandher sent me by email a draft of an announcement which was going to be sent by Mr. Dhawan to Phoenix BVI's lenders and prospective lenders. The announcement said that Mr. Dhawan was 'pleased to advise that after much anticipation, we have finally closed the issuance of equity in Phoenix to Inoks Capital-Geneva. Post this issuance, Inoks would hold approx….9.96% of the equity base…'. He also sent me a document setting out the then current shareholders of Phoenix BVI and the proposed shareholding from 10 May 2019, listing ASOR as holding 440,935 shares at 90.72 per share and a total value of US$40,000,000. I replied to confirm my agreement with the proposed shareholding and to correct the names in the announcement from 'Inoks' to ASOR. Mr. Dhawan sent out the announcement on 10 May 2019 with my corrections.

51. Importantly, I never expressly sanctioned the release of that announcement, as to my knowledge ASOR was not a shareholder of Phoenix BVI at that point. If I had done so, it would only have been for the purposes of a deal announcement which is customary in practice., but it is not a confirmation that any deal has actually been implemented. To my understanding, the shares in Phoenix BVI would be issued to ASOR on a provisional basis only. Furthermore, the shares themselves would be held in escrow, as ASOR could not exercise any of the rights attributed to a shareholder, pending the finalization, if any, of the ESPE Investment.

Importantly, however, ASOR did not pay the subscription price for the shares and there was no public announcement of ASOR subscribing to shares in Phoenix BVI, or indeed being issued shares. We were very clear that no public announcement was to be made unless and until ASOR had fully subscribed to the shares in Phoenix BVI and paid the subscription price. There was no subscription to shares by ASOR, only an issuance of shares to ASOR on a temporary or escrow basis. And even that without there having been any request by ASOR as required under the Amendment and on the express condition that ASOR could cancel any issuance at any time of its choosing.

52. Although I do not know what the intention was behind the announcement, it would have obviously been an important milestone for the Phoenix Group and its investors. For us, we accepted the announcement as part of the process of the PE Transaction but did not consider that we would be bound by anything until the Conditions Precedent had been met. Further, in my experience, it is not uncommon in these kinds of private equity transactions for announcements to lenders of the subject company only to be made pending the finalization of a deal and, in circumstances where the deal never actually completes, for updating announcements to be made. The announcement in the email of 10 May 2019 therefore did not contradict my understanding that ASOR was not a shareholder of Phoenix BVI as it had not subscribed any shares; it had merely been issued them on a temporary escrow basis, and in circumstances where Phoenix BVI had agreed that ASOR could unilaterally cancel this."

[39] At paragraph 56 of his Witness Statement, Mr. Abdul-Massih indicates that he received the Share certificate in June 2019 in ASOR's name. However, he claims that, the share issuance purported to be effected to ASOR on 10 May 2019, the Phoenix BVI Written Resolution and the certificate of incumbency dated 28 May 2019, accepting and recording ASOR as a shareholder of the 440,935 shares, which was approximately 10 % of the shares in Phoenix BVI did not come to his attention

at that time. (para 58). In any event, his understanding was that the shares had only been provisionally allocated, and he was unaware of anything that would contradict that understanding.

[40] In the course of reviewing the documentation in ICM's control for the purposes of disclosure, Mr. Abdul-Massih states that he came across a number of emails sent from Phoenix BVI which he had not reviewed before because he was not involved in the KYC and Compliance issue processes (para 59-62).

The Draft Certificate to BNP Paribas

[41] At paragraphs 65 to 72, Mr. Abdul Massih speaks to the process by which Mr. Navandher asked him to sign a draft certificate to BNP Paribas which essentially confirmed that Phoenix BVI had issued 440,935 fully paid-up shares to ASOR against a capital contribution of US$40 million. He says that he understood that this was necessary to explain and verify the PE Transaction to BNP Paribas. Mr. Abdul-Massih says that he signed the document but deliberately did not date it so that it could be held in escrow. He says that he understood that the Phoenix Group wanted the dated certificate because it was a condition precedent to the provision of a further facility with BNP Paribas. He claims, however, that ASOR made it quite clear that an undated certificate that did not contain any suggestion that shares had been paid for was the maximum that it could provide.

[42] Mr. Abdul-Massih says that he was not aware at the time but became aware around 12 September 2021 from emails provided by the Liquidators, that, on or around 9 July 2019, the certificate was in fact retrospectively dated 6 July 2019 without his nor ASOR's consent.

[43] At paragraphs 73 and 74, Mr. Abfdul-Massih states as follows:

> "*73. As I have explained above, I have been advised by my BVI lawyers(privilege in which advice is not waived) that without ICM, ASOR and /or myself having agreed in writing to ASOR becoming the holder of shares in*

Phoenix BVI, any purported issue of shares to ASOR is void. In addition to the correspondence in and around May 2022, in which there is no agreement in writing to which the Liquidators can point, it appears the Liquidators also consider the Draft Certificate to BNP Paribas to potentially constitute such written consent. Such an argument seems to me to be wrong, when, for example, the certificate was expressly not dated and executed, when the certificate was not provided to Phoenix BVI but to HFS and where the correspondence set out above, shows my intention, on behalf of ASOR, clearly to deny explicitly the suggestion that shares had been issued pending the completion (as I saw it at the time) of the PE Transaction.

74. By email on 28 June 2019, I proposed the Four Seasons Hotel in Geneva as the venue for the celebration of the closing of the BNP Paribas facility…. I suggested the venue on the basis of my familiarity with Geneva and the director of the hotel. I reject any suggestion that this implies I was aware that the certificate was not a draft but had been finalized. As above, this is not the case. The celebration was attended by many other lenders of the Phoenix Group who were not involved with the facility. To my mind, there was no link between this event and any suggestion that the draft certificate I had signed (but not dated and executed) was intended to be final."

The Cancellation Notice

[44] At paragraphs 78-80, and 82-86 of his Witness Statement, Mr. Abdul-Massih discusses the Cancellation Notice as follows:

"78. By late October 2019, Inoks and the Phoenix Group had been working hard on completing the Conditions Precedent for the PE Investment. However, by October 2019, the Conditions Precedent were still not satisfied. At no point did ASOR request the issuance of the shares pursuant

to the Amendment. At no point was the debt- to -equity swap confirmed as effected by Phoenix BVI….

*79. At this stage, ASOR /INOKS considered that the Phoenix Group were preferring a transaction with another party, the Kazakhstan Investment Development Fund ("**KIDF**") over the PE Transaction. We did not want a repeat of the waste of time and resources that had happened in 2015….*

80. In any event, even if Phoenix Group pursued a transaction with KIDF, we would be unable to complete the PE Transaction because, in summary, ASOR/INOKS could not own shares in a corporate entity that would be partially owned by a politically exposed person or a government -controlled entity. KIDF is a sovereign wealth fund that is not, as determined by Inoks, a DFI. As such, if Phoenix BVI completed the KIDF Transaction, Phoenix BVI would never satisfy the due diligence requirements of the Conditions Precedent.

…..

82. In November 2019 we decided to pull the plug on the PE Transaction but leave the door open to re-commencing it in the same or another form if it was possible or beneficial in the future. Accordingly, on 12 November 2019, ASOR provided a notice of cancellation of the issue of the Shares to Phoenix BVI, Mr. Chandra and Mr. Dhawan. …The Cancellation Notice was given pursuant to the terms of the Amendment, to cancel ASOR's provisional shareholding and cause the shares in Phoenix BVI to be redeemed….

83. ASOR required in the Cancellation Notice that the Required Actions be completed within 120 days, being by 11 March 2020. It is noted that the Required Actions included the re-conversion of equity into debt, although, as far as I am aware, the Debt Conversion had never in fact occurred.

84. In order to ensure we could potentially revive the PE Transaction in the future, we provided Phoenix BVI with time to remedy and satisfy the Conditions Precedent and said that if the Conditions Precedent were

satisfied within that time, we might re-consider the PE Transaction in the same or a different form. The Cancellation Notice also recorded that if the transaction with KIDF did not proceed and the Conditions Precedent were satisfied before 11 March 2020, ASOR could assess the feasibility of a transaction similar to that set out in the MOU.

85. The Cancellation Notice was drafted in the same manner as the Amendment, at Inoks' offices in Geneva. Present on that occasion were again myself and Mr. Dhawan."

Events after the Cancellation Notice

[45] At paragraphs 89, 91-93, Mr. Abdul-Massih provides interesting information/commentary about some events after the Cancellation Notice. He stated as follows:

"89. In January 2020, the Phoenix Group contacted us about the PE Transaction again. They were trying to revive the deal and asked for copies of shareholder and share subscription agreements because they had 'lost sight of them'. My colleague, Ivan, sent the drafts on 13 January 2020. They confirmed that the KDIF transaction was over and that they would like to potentially resume the PE Transaction. Various further discussions took place at this time and it is clear from the correspondence that focus had shifted away from the PE Transaction from that point onwards…..

……

91. On 22 February 2020, responsAbility Investments AG wrote to me, purporting to do so in my role as a 'shareholder and director'. By mistake, I did not comment on this statement and did not correct the author by informing him that ICM was not a shareholder (nor, for that matter, was I a Director) of Phoenix BVI. My email response was typed on my iPhone on a Saturday when I was not in my office but out for the day with my wife (who I had not seen for about a month) and when I was somewhat irked at having received the email from responsAbility and being required to manage my own relationship (i.e.Inoks' own bilateral as asset manager) with

responsAbility in such circumstances. My intention was to convey the consequences of being a non-executive director in the conditional sense, as evidenced by the subsequent email correspondence whereby responsibility accepted the fact that I was not a Director at the time.

92. By 11 March 2020, Phoenix BVI had failed to comply with the requirements of the Cancellation Notice. This despite the fact that the contractual arrangements between Phoenix BVI and ASOR came to an end on 11 November 2019 (the date of the Cancellation Notice) or, at the very latest, on 11 march 2020 (120 days after the Cancellation Notice).

93. Furthermore, in what seems to me to be a breach of Phoenix BVI's obligations under the terms of the Amendment, by 11 March 2020 Phoenix BVI had failed to allow ASOR to redeem the shares in Phoenix BVI which had been temporarily pre-allocated to ASOR. Instead of allowing ASOR to redeem those temporarily pre-allocated shares, Phoenix BVI wrongfully kept the name of ASOR on its share register in respect of them. If Phoenix BVI was to comply with its obligations, that should not have happened. ASOR should not, therefore, have been on the Register of Phoenix BVI from, the latest, 11 March 2020, and it certainly should not be on the Register of Members now. On this basis, it does not seem to me fair for the Liquidators to be seeking to assert that ASOR should properly be on the Register of Phoenix BVI (and therefore, on the List of Members) when the only reason that Phoenix BVI [sic] *was on the Register of Members at all when the Liquidators were appointed is because the company of which the Liquidators are liquidators (i.e. Phoenix BVI) had wrongfully failed to remove ASOR from the Register of Members, by latest, 11 March 2020."*

Mr. Ghosh and Mr. Dhawan

[46] Mr. Abdul-Massih has provided the main substantial witness evidence of contemporaneous fact. Mr. Ghosh who gave his evidence by videoconference from Australia stated that he had never seen either the MOU or the Amendment before the proceedings commenced, and he denies having authorized Mr. Dhawan to sign

it on his behalf, or on behalf of Auro Nominee Pty Ltd, (a company that belonged to his Family Trust). Mr. Dhawan has denied this and claims he had the authority. On a whole, Mr. Ghosh did not seem to have much direct knowledge of contemporaneous occurrences and said so. I found him to be a candid witness.

[47] At paragraphs 23, and 26, Mr. Ghosh stated as follows:

> "*23. After I left, I was told that Nabil had started the Ancile Companies and I knew that Inoks or the Ancile Companies were lending money to Phoenix….*
>
> *26. I never saw any document purporting to be an agreement between Phoenix and Inoks. I have been shown a copy of the document titled "Memorandum of Understanding" ("**MOU**") as part of making this statement and I had not seen this document before and have no idea about it. Similarly, I have been shown a copy of the document which appears to be an amendment to MOU as part of making this statement and I had not seen this document before and have no idea about it. I can see that Gaurav signed these documents purportedly as my representative and as the representative of Auto Nominees. Gaurav was not authorized to sign anything on my behalf and I have never authorized Gaurav to represent Auto Nominees. I definitely would not allow someone to enter into an agreement on my behalf, especially after coming to Australia. It does not give me any pleasure to point this out, because I am very fond of Gaurav."*

[48] Mr. Dhawan, who gave evidence from Delhi, India, speaks of recalling both the MOU and the Amendment. At paragraphs 31,32 and 37-39 of his Witness Statement, Mr. Dhawan stated as follows:

> **"***31. On 8 May 2019 I sent an email to the shareholders stating 'we need to change shareholding and issue shares to Inoks. This needs to be done by tomorrow, as else it's a default covenant, and we would NOT be able to do the BNP-BB2.' I do not remember exactly the sequence of these events, but my recollection and understanding of this statement is that Phoenix*

Finance Team was working on a new credit line called BB2 which was being led by BNP Geneva, which was one of our older institutions. As a part of the covenants the bank required that the shares be issued to ASOR.

32. I have seen an email sent by Nitin Navandher on my behalf on 10 May 2019 stating 'we have finally closed the issue of equity in Phoenix to the ASOR Fund…Post this issuance, 'ASOR' would hold approximately 9.96% of the equity base and please join me in welcoming Mr. Nabil Massih as a member of the advisory board.' As I have explained above, my understanding was that allocating the shares in this way would not give ASOR shareholder rights until the conditions precedent were met and a shareholder agreement or subscription agreement was executed.

……..

THE CANCELLATION NOTICE

37. On 12 November 2019, we received a notice from ICM and ASOR … We received this as an ultimatum to ensure that the conditions precedent would be complied with and, amongst those, that a share purchase and a share subscription signed. Reviewing the Notice, I can confirm that the manuscript note on it has been written by me. I do not recall writing it specifically but can presume that I would have done that in my own office in Dubai. Usually, all these notes were cleared from my office desk by the relevant staff and delivered to the relevant recipients.

38. The reference to 'KIDF' would be a reference to the Kazakh government who were also looking to invest equity in Phoenix to support the growth of agriculture in Kazakhstan. We would have been required to complete the share purchase or the share agreement with ASOR before this transaction.

39. We were working to remedy the situation with ASOR. We were very confident of meeting the conditions precedent and ensuring that the transaction would be completed as envisaged."

The Liquidators' Evidence-Mr. Ryan Jarvis

[49] The evidence from Mr. Jarvis was of necessity limited in scope, since the Liquidators are essentially, as described by Mr. Chivers K.C. in his Closing Submissions, "strangers to events". Mr. Jarvis did however provide analysis and comment upon numerous emails and on the MOU, Amendment and Cancellation Notice, which have been dealt with by way of legal argument also. The Liquidators letter dated 4 February 2022 setting out their reasons for rejecting ASOR's objections has also been set out fulsomely in paragraph [14] – [20] (inclusive) above. At paragraph 12 of his First Witness Statement dated 30 January 2023, addressing documentary disclosure by ASOR and the MOU, Amendment and Cancellation Notice, Mr. Jarvis stated as follows:

> *"12. In respect of the Amendment and the November 2019 Notice:*
>
> *(a) Although the Amendment is purportedly dated 25 April 2019 and the November 2019 Notice purportedly dated 12 November 2019, the earliest (electronic) copies of the Amendment and the November 2019 Notice provided on disclosure by the Applicant bear creation dates in April 2020. The Applicant has been asked to explain why this is the case in correspondence, but has offered no such explanation;*
>
> *(b) Despite the fact that the November 2019 Notice was apparently prepared by the Applicant and/or Mr. Abdul-Massih, it claims not to hold any draft copies;*
>
> *(c) The Applicant has confirmed in correspondence that it does not hold any emails attaching soft copy versions of the Amendment or the November 2019 Notice and has stated that the November 2019 Notice at least was never circulated by email;*
>
> *(d) The Applicant has refused in correspondence to provide a full explanation of the circumstances surrounding the preparation and execution of the Amendment (and presumably the November 2019 Notice) on the basis that it is a "matter for evidence";*

(e) *It is apparent in any event that the MOU itself, which is dated 1 April 2018, was backdated since Mr. Abdul-Massih on 21 June 2018 circulated a copy of an unsigned version and a signed version was only circulated on 12 July 2018;*

(f) *Subject to any explanation to be offered on behalf of the Applicant by the evidence of its witnesses of fact, it therefore appears to the JLs that there are good reasons for believing that the Amendment and the November 2019 Notice may well have been backdated."*

Documents upon which ASOR relies

[50] I now turn to look at some of the main documents upon which ASOR relies, i.e. the MOU, the Amendment, and the Cancellation Notice. I bear in mind Mr. Chivers KC's comment that however, the dates, origins and execution of some documents purporting to be "*contemporaneous"* were quite different from what appeared on the face of the documents and from ASOR's witness statements. This was brought out in cross-examination. I also bear in mind the Liquidators' comment in the letter dated 4 February 2022 that they did not find any of the main documents on which ASOR relies, i.e. the MOU, Amendment, and Cancellation Notice in the Company's records.

The MOU

[51] In the MOU, Ancile is stated to be the "*Investor*", Inoks as the "*Arranger*", Phoenix BVI as the "*Investee*" and the then shareholders of Phoenix BVI, including Mr. Dhawan, Mr. Ghosh, and Auro Nominee Pty Ltd, as "*Sponsors*". Under "Terms and Condition of the ESPE Investment", the MOU states as follows:

> "***SECTION II: TERMS AND CONDITIONS OF THE ESPE INVESTMENT***
>
> *….*
>
> ***Investment amount(s)****: The investor will invest up to US 50 .00 million in the Hold Co (the "**Maximum investable amount**"), with a minimum of US$40.00 million.*

Type of Security: *Newly issued common shares ranking pari passu and having all the rights of existing ordinary shares (Common Shares)..."*

[52] However, although certain Conditions Precedent are discussed in the MOU, the MOU expressly on its face was a non-binding agreement, in that Sections V and VI, "***ENFORCEABILITY***" and "***NO EXPECTATION***" state as follows:

"SECTION *V-ENFORCEABILITY*

1. *This MOU is not intended to be a binding contract in respect of any obligations of the Parties but instead represent the commitment of the parties to realise the objectives of the MOU.*
2. *The intention of the Parties is to formalise the broad parameters of their relationship and the positions of principle which will serve as the basis for further negotiation and agreement.*

Section VI-NO EXPECTATION

The parties hereby acknowledge and agree that nothing in this MOU shall give rise to any expectation of the establishment of any business relationship."

[53] The Amendment states that it was made on 25 April 2019. However, based upon Mr. Abdul-Massih's evidence under cross-examination, it is clear that the Amendment was not signed on that date but was signed at some other unknown time.

[54] The Amendment acknowledged that the Sponsors and the Investee had not yet complied fully with certain of the Conditions Precedent. However, the Amendment expressly contemplated an issue to ASSOR of shares notwithstanding the non-fulfillment of the Conditions Precedent.

[55] Section II of the Amendment "***The Parties Declared Intents and Agreements***", *reads as follows:*

"***SECTION II-THE PARTIES DECLARED INTENTS AND AGREEMENTS***

1. *The Parties intent and irrevocably agree that:*

(a) *The parties restate all the terms and conditions of the MOU by way of this Amendment, and*

(b) *The parties agree that:*

(i) *The Investor may request the Issuance until the Pending Conditions Precedent remain unmet, and*

(ii) *The Investee and the Sponsor(s) will have to subsequently proceed with the Issuance against the condition of partial and temporary conversion from liability to equity of the Investee's existing liability with an Investor's related party up-to an amount of US$40,000,000 (THE "**Investee's Patrial Debt Conversion**") and*

(iii) *The Investee and the Sponsor(s) agree and undertake that, as long as the Pending Conditions Precedent are not fully met, they will individually and together:*

…..

…….

*…allow the Investor to at any time and on its own decision to redeem the Common Shares totalling 440,935 shares with a par value of US $1.00 by the Investee's Partial Debt Conversion being converted back into liability of the Investee in his books and in favour of the Investor's related party (the "**Investee's Partial Debt De-Conversion**").*

(iv) *Upon the Compliance being fully met, noticeably by the execution of the SPA and the SHA and the appointment of the IM's Director and the*

Independent Director, the MOU and the Amendment shall have no surviving effects.

2. *All other recitals, definitions, clauses, paragraphs and schedules of the MOU remain unchanged.* "

(my emphasis)

[56] At this point it may be useful to refer to the fact that at an earlier case management conference in this matter held on 3 May 2022 Jack J (Ag) dismissed ASOR's application for this Application to be heard together with draft proceedings contemplated by the Company against Mr. Abdul-Massih, Ancile Securities and Ancile Investment. In giving his judgment, the transcript of the hearing shows that Jack J stated as follows (page 68 of the Transcript), in quoting from the Amendment Section II 1(b) (i)-(iii) :

" *And then it says at (iv):*

'Upon the compliance being fully met, noticeably by the execution of the SPA and the SHA and the appointment of the IM's Director and the Independent Director, the MOU and the Amendment shall have no surviving effects.

3. *All other recitals, definitions, clauses, paragraphs and schedules of the MOU remain unchanged.'*

I take from that, that the provision that the amendment is expressly not legally binding is carried over and equally the Swiss law and jurisdiction provision is carried over.'

(My emphasis)

[57] Jack J rejected both the application for proceedings to be heard together as well as a direction sought by ASOR that expert evidence on Swiss law be served. Jack J (who also held a further CMC on 11 July 2022, held that there was no basis upon which the MOU and the Amendment could be understood to be anything other than non-binding, whether as a matter of Swiss law or BVI law.

[58] It may be that it was not open to ASOR to re-open that point before me. However, in any event, I independently arrive at the same conclusion, that both the MOU and the Amendment were of a non-binding nature, in the case of the Amendment, particularly having regard to the terms of Section II, 1(a), 1(b)(iv) and 2, quoted above at paragraph [55].

The Cancellation Notice

[59] The Notice dated 12 November 2019, is addressed to Phoenix BVI, Mr. Chandra and Mr. Dhawan, and expressly states that it was "*by hand delivery to the attention of Mr. Dhawan".*

[60] The Cancellation Notice, in part reads as follows:

> "***Re**: Cancellation of the Issuance and Redeem 440,935 Common Shares with a par value of U.S.$1.00 of the Investee's (the "**Notice**")*
>
> *Dear Sirs,*
>
> *Based on the Memorandum of Undertstanding dated April 01 2018 (the "**MOU**") and subsequently amended on April 25th 2019 (the "**Amendment**'),…..*
> *Notwithstanding the Issuance having been made on May 10th 2019 as per the Investee's share certificate number 27(the "**Share Certificate**"), the Investor has not been able to assert shareholding to the date of this Notice as the Pending Conditions Precedent and the Compliance have not been met by the Investee and or the Sponsor(s)*
> *The Investor recognises that substantial and fair efforts have been made by the Sponsor(s) to:*
>
> - *adequately select and propose the appointment of an expected 3 non-executive Independent Directors of the Investee…, or*

- *propose the appointment, amidst not initiated of the IM's Director as a non-executive Director of the Investee, or*
- *finalise with the support of top-tier consultants the 5 year FBP and the SHA, or*
- *to agree the SPA within the respective counsels amidst unexecuted to this date.*

However, until the Pending Conditions Precedent have been met by the Investee and/ or the Sponsor/s, the Investor can't assert shareholding of the Investee as per the Share Certificate.

*Subsequently the Sponsor(s) have last month of October 2019 also informed the Arranger of their strong intent to sell shares of the Investee to a CIS Country's Sovereign Wealth Fund ("**SWF")** for a yet to be defined shareholding, amidst not in participant amount inferior to US$20 M, such on the basis of tentative term sheet between the Investee and the SWF calling for and a third party valuation to be shortly commissioned within the same month of November 2019 (the "**Sovereign PE Transaction**").*

*It is not foreign knowledge to the Investee and Sponsor(s) that the Investor and Arranger are required to obey by a strict ESG and Impact Policy which substantially restricts the Investor's capacity to own shares in a corporate entity, that would be partially owned by politically exposed persons or governmental controlled entity , unless the last is defined as development financial institutions ("**DFI**"). After due research and review by the Arranger, whilst the SWF isn't object of any AML/KYC adverse assessment, the Investor has been informed by the Arranger that the SWF doesn't qualify as a DFI. Thus, the DDP (which is a Condition Precedent that was met by the Investee until now) wouldn't ne compliant as to its ESG review/compliance part, was the Sovereign PE Transaction be finalized by the Investee.*

Considering that Pending Conditions Precedent and Compliance have not been met to this date, and further that the Sovereign PE Transaction is to

be initiated by the Investee with no power for the Investor to acquiesce or object to it, the Arranger has therefore recommended to the Investors and the Investor resultantly seeks by this Notice (a) the full and immediate cancellation of the Issuance and (b) the Investee's Partial Debt De-Conversion, both as defined in the MOU and the Amendment.

*Accordingly, the Investee and the Sponsor(s) are kindly instructed by this Notice to diligently and within at the latest the next 120 calendar days (the "**Transition Period**") to have:*

(1) the Investee's share certificate number 27 redeemed and cancelled, and
(2) the Investee's shares register to reflect accordingly, and
(3) the books and accounts of the investee to reflect accordingly, and
*(4) any notification and disclosure to the relevant authorities and third parties be accordingly made (above (1) to (4) hereinafter defined as the "**Required Actions**").*

All costs involved with the Required Actions are to be at the expense of the Investee and/or the Sponsors. Failure by the Investee and/or the Sponsors to duly instruct and ensure the effectiveness of the Required Actions will be their sole liability. The Investee and or the Sponsor(s) resultantly hold harmless the Investor and Arranger for any direct or indirect liability that may arise from the Investee and /or the Sponsor (s) failure to perform the Required Actions within the Transition Period.

If during the Transition Period,

(a) the Sovereign PE Transaction was to not complete, and
*(b) the Investee and the Sponsor(s) are able to complete the Pending Conditions Precedent and so obtain the Compliance ((a) and (B) together the "**Remedy**"),*

then the Investor may be open to assess anew the feasibility of a transaction as initially envisaged under the MOU and at Investor's sole option if not based on equal terms and conditions.

This signed Notice is issued by the Investor in four originals, one for each of the Parties.

Amidst the non-positive conclusion of the transaction intended by the Parties in the MOU and the Amendment, the investor very much appreciated the opportunity to finalise in good faith the envisaged ESPE Investment transaction. Even if not evidently feasible anymore to the mutual interest of the Parties, we hope that Investee and Sponsors will seek to within the Transition Period achieve remedy.

….

Authorised Signatory

[Signed by Mr. Abdul-Massih]

Signed by ICM on behalf of and for the account of [ASOR]"

Documents, email correspondence upon which The Liquidators rely

[61] There are numerous pieces of email correspondence that were referred to during the trial. Obviously, reference cannot be made to all of them, but I will discuss some of these emails later in this Judgment at the points where I am analysing the parties arguments in respect of ASOR's various objections.

Objection One: ASOR did not agree in writing to becoming a shareholder, as required by section 49 of the BCA

ASOR's Submissions

[62] Extensive submissions were made by both sides, but I will simply try to set out the main thrust of the arguments. ASOR submits that what is required in order for a company to avoid the consequence of s.49 of the BCA (i.e. that the issuance of a

share is void), is that the proposed shareholder (or his authorized agent) must agree in writing to become the holder of the share in question in the sense that they must have entered into a written agreement with the company to become the holder of the share in the company. Mr. Alexander KC submitted that that is the ordinary and natural meaning of the words used in s.49 of the BCA and that it is also the grammatical meaning.

[63] In addition, ASOR argues that the BVI legislature deliberately changed the wording in s.49 of the BCA from that used in s. 50 of the BCA. Instead of the words "*does not consent in writing*" (as appears in s.50 of the NZCA), it has required "*does not agree in writing*" in s.49 of the BCA. It was submitted that the latter is a higher requirement than the former and reflects the fact that what the BVI legislature meant in s.49 of the BCA is that there needed to be an agreement in writing to satisfy s.49.

[64] This does not ask very much of either the company in question or the proposed shareholder, opines ASOR, as the necessary agreement can be quite brief. It simply needs to identify the company and the proposed shareholder as well as setting out the number of shares to be issued and the consideration for which that is to take place. At paragraph 103 of ASOR's written Opening Submissions, the argument continues that "It is then hardly onerous to require the proposed shareholder to sign such a document".

[65] Thus, the argument continues, s.49 is designed to ensure that to the maximum extent possible, the position is clear and unarguable. Either there is an agreement in writing between the company and the proposed shareholder-in which case, the proposed shareholder will plainly be a shareholder of the company in question-or there has not been an agreement in writing between the company and the proposed shareholder- in which case the proposed shareholder will plainly not be a shareholder of the company in question.

[66] Mr. Alexander KC asked the Court to utilize well-known principles of statutory construction, including that the words in s.49 should be given their ordinary and natural meaning in context. Further, that the words should be given their grammatical meaning, and their grammatical meaning should be pre-eminent.

[67] ASOR brought the Court's attention to a number of English Dictionaries, as follows:

(1) In the Cambridge English Dictionary, the word "*agree*", noted to be a verb, is stated to mean "*to have the same opinion*".;

(2) In the Collins English Dictionary, it says this about "*agree*":
"*If people agree with each other about something, they have the same opinion about it or say that they have the same opinion…. if you agree to do something, you say that you will do it."; and*

(3) In Black's Law Dictionary, "*agree*" is defined as: "*to concur; to come into harmony; to give mutual assent; to unite in mental action; to exchange promises; to make an agreement. To concur or acquiesce in; to approve or adopt".*

[68] Mr. Alexander KC referred the Court to the decision of the English Court of Appeal in ***Gluck v Secretary of State for Housing, Communities and Local Government*** [2020] EWCA Civ 1756 where, among other things, the English Court of Appeal had to determine whether article 7(c) of the English *Town and Country Planning (General Permitted Development) Order 2015* (which provides for a decision in relation to an application to be made "*within such longer period as may be agreed by the applicant and the authority in writing"*). In ***Gluck****,* the Court of Appeal decided that the agreement being evidenced in writing was sufficient. However, learned Counsel referred to the judgment of Newy L.J. (now in the U.K. Supreme Court) where he said that, in a different context, he might accept that the words "*agree.in writing"* called for an agreement made in writing rather than one merely evidenced in writing. The argument advanced on behalf of ASOR is that the instant case does present just such a different context for construing the words "*does agree in writing*" as meaning that the proposed shareholder has to have entered into a written

agreement to become the holder of the shares, failing which the issuance of shares is void.

[69] ASOR also opined that it is worth noting that in the BVI itself the view has been expressed that at least some form of subscription letter (i.e. a relatively short agreement in writing signed by the proposed shareholder) to meet the requirements of s.49 of the BCA would be a solution to the potential problem posed by the section. Reference was made to the law firm Harneys' Legal Guide:" Buyer *Beware: How to Ensure the Valid Issuance of BVI Company Shares"* by Jacqueline Daley-Aspina and Rachel Graham, at page 4.

[70] ASOR has indicated that, as an alternative to its final submission, its secondary submission is that, for a company to avoid the consequence of s.49 of the BCA, whilst the proposed shareholder must still have entered into an agreement to become the holder of the share in the company, it is sufficient if that agreement is evidenced in writing including all its terms, i.e. every term or element of the agreement must be capable of being found in a document (or documents) and the agreement of the proposed shareholder to that agreement is in writing. Thus, for example, on this secondary submission, ASOR avers that it would be enough for s.49 if there was an oral agreement to become a holder of the share in question which oral agreement was then recorded in writing and in respect of which the proposed shareholder confirmed, in writing, that he or she was in agreement-***Gluck***.

[71] Mr. Alexander KC went on to advance that what is simply not good enough to enable a company to avoid the consequences of s.49 of the BCA is for the company (or its liquidators) simply to rely upon a random collection of events recorded in a number of pieces of paper (many after the shares have been issued). This in order to somehow attempt to say that the person had agreed in writing in some form of general way to become a holder of the shares and where it is not possible instantaneously to say what all (or indeed, any) of the terms of that agreement actually were or are. Equally, it was suggested that it is not good enough to rely

upon matters recorded in pieces of paper which matters the proposed shareholder did not know at the time. ASOR's submission further suggests that the agreement does have to emanate from the proposed shareholder and that pointing to documents that do not emanate from the proposed shareholder as demonstrating agreement is faulty. Another point made was that the prospective shareholder must have agreed by the time when the shares have been issued. In that respect, asserts ASOR, it is not legitimate to rely on subsequent events, unless those subsequent events plainly demonstrate that prior to the issuance of the shares the proposed shareholder had agreed in writing.

[72] In conclusion on this point, it was ASOR's position that there is no agreement, nor is there any agreement evidenced in writing, by which ASOR/ICM (or its authorized agent) agreed in writing to become the shareholder of any shares in Phoenix. ASOR therefore asks this Court to declare that the issuance of shares in Phoenix BVI to ASOR was void in accordance with s.49 of the BCA.

Objection one-The Liquidators' Submissions

[73] It is the Liquidators' position that, although ASOR relies upon the MOU and the Amendment in particular in support of its case that it was accorded some special status as a shareholder, those agreements are non-binding, and in the events that have happened, irrelevant. However, what Mr. Chivers KC points out in his Closing Submissions is that, in light of the evidence, ASOR cannot both rely upon the Amendment and assert in these proceedings that s. 49 of the BCA was not satisfied.

[74] The Company, was, the Liquidators describe, over the course of the summer of 2019, seeking funding from BNP Paribas (Suisse) SA ("**BNP**"). It is common ground between Mr. Abdul-Massih and Mr. Dhawan that BNP had made it a condition precedent to the grant of the BNP Facility that ASOR had subscribed for shares in the Company.

[75] To that end, say the Liquidators, ASOR duly became a shareholder. As ASOR was entered in the register of members on 10th May 2019, with ASOR recorded as being the holder of 440,935 shares, with consideration paid of US$90.72 per share (a total of us$40,001,623.20) and records a share certificate also dated 10th May 2019. It is argued that therefore s. 42(1) of the BCA, i.e. "*The entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that legal title in the share vests in that person",* is duly engaged. On the other hand, the Liquidators indicate that the stated consideration has never been paid.

[76] As a wider point, the Liquidators contend that ASOR's position in seeking to remove itself from the List of Members settled by them is no doubt to avoid the liability that would arise in the liquidation as a holder of unpaid shares. The Liquidators accept that that is not an issue that ASOR has sought to raise directly in the Application, but the Liquidators' position is that, because the liability of past members nevertheless arises because of IA 2003, s.196 (i.e. a 12 month "lookback" period), it makes no difference to ASOR's liability to contribute whether or not ASOR ceased to be a member, or was entitled to be removed from the register, at some time between 10th May 2019 and 20th April 2020.

[77] The Liquidators submit that there is both contemporaneous and later documentation that satisfy the requirements of s.49 of the BCA.

[78] It was submitted that the statutory framework demonstrates that the identity of a company's shareholders must be visible from an inspection of the Register of Members. The admissible background continues the submission, for the purposes of construing its contents must be limited to what is required to be stated on the register under the BCA together with that which any reader of that document would reasonably be supposed to know.

[79] Accordingly, it was asserted that that admissible background cannot include extrinsic facts known only to some of the people involved. Reference was made to

Zavarco plc v Sidhu[1] (in the context of a memorandum of association), citing ***Bratton Seymour Service v Oxborough***[2], and ***Attorney General of Belize v Belize Telecom***[3].

[80] It was submitted that the statutory purpose of s.49 is to promote certainty. Shares may, if fully paid, be a benefit. If unpaid, a potential burden. The burden is of the nature of a guarantee since the shareholder is guaranteeing the debts of the company up to the amount paid.

[81] It was common ground that there is no BVI authority that deals directly with the wording of s.49 of the BCA. However, Mr. Chivers KC referred to two New Zealand authorities that mention s.50 of the NZCA.

[82] Reference was made to the decision of the New Zealand Supreme Court in ***Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership***[4]. Learned Counsel argued that although a competition case, a passing reference in the decision at [37]-[42] supports the proposition that compliance can be achieved by entering into a collateral contract. In that case, an application to supply milk constituted an irrevocable application to become a shareholder, such that no further application to become a shareholder was necessary.

[83] The Court's attention was also drawn to another passing reference in the decision ***Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy New Zealand Ltd***[5]. This case, which concerned a creditor compromise under Part 14 of the 1993 Act it was argued, emphasized that the statutory purpose underpinning s.50 is to ensure that there will be a written record of consent. It was submitted that in the instant case there is a written record of that consent being given.

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[1] [2022] EWCA Civ 1040 at [90].
[2] [1992] BCLC 693.
[3] [2009] 1 WLR 1988 (PC) at [35]-[37].
[4] [2018] 1 NZLR 812; [2017] NZSC 197 at [37]-[42].
[5] [2013] NZHC 3458 at [110].

[84] The Liquidators also provided two useful sources of comparison. They refer to the fact that, under English law, there is no equivalent need for an agreement to be evidenced in writing; Companies Act ("**CA**") s. 112(1). However, another useful comparison, particularly given the contingent nature of the liability, was made with section 4 of the *Statute of Frauds 1677*, in the context of contracts of guarantee. It was proposed that this longstanding provision was designed to address the mischief of parties orally agreeing to be answerable for another's debt, and then reneging on that promise when the time came for payment. In that regard, the Liquidators point to and rely on the decision in ***Golden Ocean Group Ltd. v Salgaocar Mining Industries Pvt Ltd***[6].

[85] Mr. Chivers KC sought to drive home the point that it is enough for such agreements to be evidenced by a sequence of emails or (as in ***Golden Ocean***) other industry-specific documents. In such circumstances, asserts learned Counsel, the Court is entitled to look at *all* documents (Mr. Chivers KC's emphasis) in order to determine what the underlying agreement was; it does not require the entire agreement to be condensed into one document, and the requirement that an agreement be "*in writing*" certainly does not require it to be dated or for other '*execution*' to take place: ***Golden Ocean*** at [21]-[22],[29]. Learned Counsel postulated that there is no reason to suppose that the ordinary business of negotiating and agreeing the issue of shares, not least in relation to an offshore jurisdiction, is conducted in any specific way beyond the exchange of correspondence, or in this case emails.

[86] As regards the Harneys note, it was submitted that if it was put forward as evidence it is inadmissible since the BVI Court will not hear evidence of BVI law. In any case, the Liquidators opine, it purports to do no more than give sensible advice, namely that incorporation packs should contain as routine a document on which to record the shareholder's agreement. If anything, the argument continues, the document demonstrates that the section may easily be breached inadvertently and without any

[6] [2012] EWCA Civ 265 at [2], [6].

"*mischief*". Further, the desirability of being able tor rectify the position after the event is evident.

[87] It was submitted that the ordinary meaning of the word "*agree*" is wide enough to encompass many expressions of agreement. Thus, even ASOR's reliance on Black's Law Dictionary, suggests that "*agree*" can include -concur, acquiesce, approve, adopt.

[88] The Liquidators propose that the crux of the matter in relation to Objection One, and the question for the Court is whether the words used by Mr. Abdul-Massih in the context in which he used them amount to ASOR having agreed in writing to be the holder of the shares. It was suggested that it might be tested this way: Looking at the statements made by Mr. Abdul-Massih in the context of the documents in which they were made-and without the benefit of oral evidence- would a reasonable commercial person say that ASOR had agreed to the issue of shares?

Does the agreement have to pre-date the issue of the shares?

[89] In New Zealand, comment the Liquidators, the answer to the above question is "yes" because the statute says so. ASOR the Liquidators describe as having said that those words are otiose. However, the Liquidators propose that it is more likely that the BVI legislature considered the words unduly restrictive. It was suggested that indeed, there are strong policy reasons for not rendering an issue void *ab initio* for all time.

[90] Looking again at the comparator with New Zealand, it was argued that the commercial circumstances in which shares are issued in an offshore jurisdiction may (and almost certainly are) very different from the commercial circumstances in which shares are which shares are issued in New Zealand. Accordingly, there are very good reasons why the legislature might have chosen to allow shareholders to agree in writing, after the event, to regularize the position. The Court was asked to also note that whereas under the New Zealand Statute, written authority was required to

be given to an agent, this is absent from the BCA, and, it was surmised that evidently this was thought to be undesirable in the commercial landscape of the BVI.

[91] In conclusion on this point, the Liquidators put forward that it is no contradiction to find that, but for a subsequent written consent and issue of shares is void. The question for the Court as to whether the issue is void is assessed at the time of testing. Therefore, there is no obvious statutory purpose-and no obvious mischief to be addressed- by finding that a written agreement after the event is ineffective for the purpose of the statute. Such a construction, it was proffered, is commercial as well as realistic in a jurisdiction in which the issue of shares is itself a business rather than an activity ancillary to a business.

Objection 2- Alternatively, and without prejudice to the first ground, if ASOR did agree, such agreement was subject to conditions precedent contained within a Memorandum of Understanding dated 1 April 2018 ("the MOU") and its amendment dated 25 April 2019 ("the Amendment"), which conditions precedent were not satisfied;

Objection 3- If ASOR was a shareholder, its shareholding was temporary or provisional and therefore when the conditions precedent were not fulfilled any provisional shareholding lapsed;

ASOR'S Submissions

[92] The above two grounds can conveniently be taken together. In that regard, ASOR relies essentially on the terms of the MOU and the Amendment, and more the Amendment. On these points, ASOR submits that under the terms of the Amendment and (1) after ASOR had requested the issuance of shares in Phoenix BVI; and (2) after Phoenix BVI had proceeded with such an issuance then ASOR had the right "*at any time and on its own decision*" to redeem the 440,935 shares in Phoenix BVI.

[93] ASOR relies quite heavily on the witness evidence in support of these objections. However, I agree with Mr. Chivers KC that these issues will ultimately be a matter of legal rather than factual analysis.

The Liquidators'' Submissions on Objections 2 and 3

[94] The Liquidators acknowledge that the Amendment contemplated the issue of shares notwithstanding the non-fulfillment of the MOU Conditions Precedent. However, they say that neither the email exchanges prior to, nor after the registration of ASOR as a shareholder, suggest any conditionality as regards ASOR's status as shareholder. Nor, the argument continues, is it suggested in the resolution authorizing the issue of the shares or the terms of the share certificate, or the entry on the Register of Members that the shares were redeemable or agreed to be redeemable. On the contrary, they were common shares subject to all the rights and liabilities of the BCA and the Articles of Association, but to none other.

[95] The Liquidators have also referred to the public representations and statements made to BNP to persuade them to close the facility as being equally unqualified. ASOR was represented to have become a shareholder -and not on some provisional or temporary basis. It was further argued that whatever the original intention was in relation to the MOU, any conditionality was abandoned in the face of the urgent need to obtain the BNP facility. Further, the legal landscape of membership under the BCA and the Articles provides no room for the operation of any private condition to reverse that membership.

[96] It was again reiterated that the terms of the Amendment were in any event not binding. The Liquidators assert that ASOR took no legal advice concerning the Amendment. Further that if this document, which dealt with extremely complex quadripartite arrangements (Phoenix BVI. DMCC, Ancile and ASOR), involving the possible issue of shares and release of debt by and in favour of two key non-parties in the sum of $40m, was intended to be relied upon, the failure to take legal advice was "*breathtakingly reckless and of itself puts in doubt the likelihood that this was*

intended to be a binding document."-paragraph 101 of the Liquidators' Note for Closing Submissions.

[97] The Liquidators comment that it is of course ironic that ASOR relies upon the Amendment at all. This is because (they reason) if the shares were issued pursuant to the terms of the Amendment (even if all the terms of the MOU and the Amendment were not complied with), then evidently ASOR did agree in writing to become a member of the Company (my emphasis). The Liquidators had not sought to rely on the Amendment to demonstrate agreement in writing because, the submissions continue, it is the Liquidators' case that the issue of shares was independent of any such agreement. Indeed, as the Liquidators correctly point out, the evidence from Mr. Abdul Massih was initially that he had not requested the issue of shares and that there had been no debt for equity swap. However, as the oral evidence developed, and as put by Mr. Dhawan, it became apparent that ASOR's evidence is now that the shares were agreed to be issued on the terms of the Amendment.

[98] Mr. Chivers KC asserts that indeed, ASOR's Closing proceeded on the basis that the Amendment must have been in place before 10th May because the shares were going to be issued pursuant to this agreement. (Learned Counsel's emphasis). It was submitted that if the Court accepts this evidence as true then the Amendment amounts to an agreement in writing and the claim fails on ASOR's own case. That, it was indicated, is not the Liquidators' position, but would be fatal to the Application.

[99] The Liquidators contend that ASOR cannot finesse a position where it accepts that the shares were issued on the terms of the Amendment but *without* having agreed to their issue in writing (Learned Counsel's emphasis).

Objection 4 -If ASOR was a shareholder, was the shareholding cancelled by way of notice dated 12 November 2019?

ASOR'S Submissions

[100] ASOR's position is that on 19 November 2019 the Cancellation Notice was given by Mr. Abdul-Massih to Mr. Dhawan (as accepted by Mr. Dhawan) by which ASOR exercised its contractual right to redeem the 440,935 shares in Phoenix BVI.

[101] Accordingly, on that basis, says ASOR, by no later than 11 March 2020, Phoenix BVI ceased to be a shareholder in Phoenix BVI. That in order to cease to be a shareholder in Phoenix BVI, all ASOR had to do was to inform Phoenix BVI, as it did, that ASOR wanted the shares represented by Certificate 27 to be redeemed and cancelled.

[102] ASOR states that the Liquidators are correct that there is no evidence that any debt-to-equity swap occurred. ASOR says that therefore the debt conversion does not need to be undone. All that needs to be undone is the notion that ASOR remains a shareholder of Phoenix BVI.

[103] ASOR acknowledge that the Liquidators have said that the Cancellation Notice cannot constitute a redemption of the shares on the basis that Phoenix BVI was insolvent (or any repurchase would have rendered it insolvent). Further the Liquidators say that any repurchase would not have been in compliance with the solvency requirement set out in Phoenix BVI's Articles of Association (in accordance with s.59 of the BCA). The Liquidators also say that pursuant to Article 24 of Phoenix BVI's Articles, Phoenix BVI could only offer to acquire Shares if at the relevant time the directors determined by a Resolution of the Directors that immediately after the acquisition the value of Phoenix BVI assets would exceed its liabilities and that Phoenix BVI would be able to pay their debts as they fall due. ASOR's response is that this may or may not well be the case. However, ASOR avers that this is no answer to the fact that ASOR could unilaterally redeem the shares.

The Liquidators' Submission on Objection 4

[104] Mr. Chivers KC submitted that the Cancellation Notice is problematic for ASOR for the following reasons:

(1) The Notice acknowledges ASOR's entry on the Register and makes no complaint. While the notice alleges that Inoks "*has not been able to assert shareholding*" no evidence has been given of any attempt to do so that has been refused. As a matter of law, ASOR had all the rights of a shareholder under the BCA and Articles. Whether it chose to assert them was a matter for ASOR;

(2) The notice expressly asserts that ASOR's status as a member will continue for not less than 120 days. ASOR is acknowledging (i.e. agreeing to) its status as member on the register in writing;

(3) The notice purports to request "cancellation" of the shares issued to it. Such cancellation was impossible in law at the option of ASOR, (the shares did not purport to be redeemable at the option of ASOR, but in any event, such a condition would have been contrary to the Articles and hence the BCA). There is no suggestion that the Company agreed to cancel (or otherwise acquire or redeem the shares; and

(4) The Company could not cancel, acquire or redeem the shares without a resolution certifying solvency. No such resolution was passed or could (at the expiry of 120 days) have been passed given the evident insolvency of the Company.

BREACH OF CONTRACT AND *EX PARTE JAMES* POINT

Further or alternatively, has Phoenix BVI been in breach of contract for failing to effect such cancellation, with the consequence that ASOR should not be treated as a shareholder of Phoenix BVI and/or (b) if Phoenix BVI is in breach of contract as aforesaid, should the Liquidators not be permitted to claim that ASOR is a shareholder of Phoenix BVI based on Phoenix BVI 's own breach of contract and whether that breach of contract can be said to have been perpetuated by the Liquidators?

ASOR'S Submissions

[105] ASOR's further or alternative submission is that by no later than 11 March 2020, Phoenix BVI was obliged to redeem the 440,935 shares in Phoenix BVI and was in

breach of contract in not doing so. The argument continues, that had Phoenix BVI not been in breach of contract as aforesaid, ASOR would no longer have been a shareholder of Phoenix BVI from 11 March 2020 (i.e. before the date of the commencement of the liquidation of PHOENIX BVI). Accordingly, ASOR should not have been included in the List of members by the BVI Liquidators. Further, that ASOR was only included therein by the BVI Liquidators on the basis that the BVI Liquidators caused Phoenix BVI to continue to act in breach of contract.

[106] ASOR asserts that the Court should therefore treat Phoenix BVI's contractual commitment to ensure that ASOR was no longer a shareholder as having been carried out by Phoenix BVI and/or the BVI Liquidators. This is because the Court, says ASOR, will not permit its officers to act in such a way which does not accord with the standards which right-thinking people, or as it may be put, society would think should govern the Court or its officers.

[107] Mr. Alexander KC described the governing principle of the rule in ***Re Condon, ex parte James***[7], as being that the Court should apply to its officers those standards that society expects of the Court itself. Thus, the principle is a principle that applies to any acts of the Court's officers and the Court applies the standard on an objective basis. Learned Counsel states that the Court has used different terms over the years to describe behaviour it will not accept from its officers (eg. that they have been dishonest, unworthy, unfair and/or shabby). However, it was submitted that it is clear that the principle is now simply that a liquidator should not stand upon his legal rights where it is not fair for him to do so. Reference was made to authorities, including ***In re Lune Metal Products Ltd***[8] and ***Lehman Brothers Australia v MacNamara***[9]

[108] Accordingly, the argument continues, in the circumstances of the present case, it is not fair for the BVI Liquidators to seek to stand upon the alleged legal rights when to do so involves them having to condone and/or perpetuate and/or assist and/or

[7] (1873-1874) LR 9 Ch App 609.
[8] [2007] Bus LR 589.
[9] [2020] EWCA Civ 321.

induce in a continuing breach of contract by Phoenix BVI in order to assert that ASOR is still a shareholder of Phoenix BVI (i.e. in the present case, it is not right or fair for the BVI Liquidators to seek to rely upon a wrong committed- and still being committed- by Phoenix BVI, a company under their control, to assert that ASOR is somehow still a shareholder of Phoenix BVI). The Court may apply this power i.e. under ***Ex Parte, James*** to insolvency office holders (including liquidators) even where there is no breach of contract by them or the company of which they are officeholders. *A fortiori* when to achieve what the Liquidators have tried to achieve by asserting that ASOR is a shareholder of Phoenix BVI involves a continuing breach of contract by the company of which they are liquidators. Put simply, ASOR declares that that cannot be right or fair on the part of the Liquidators.

The Liquidators' Submission on the Breach of Vontract and *Ex Parte James* Point

[109] Mr. Chivers KC submitted that the ***Ex Parte James*** principles have no application in the face of a statutory obligation. Reference was made to the decision of the UK Supreme Court in ***In re Nortel GmbH (in administration) and related companies In re Lehman Brothers International (Europe) (in administration) and related companies.***[10]

[110] It was submitted that here the statutory scheme is clear. Under section 193 the Liquidator must settle a list of members in the form prescribed. The liquidator has no discretion in the matter. The liquidator cannot act "unfairly" or "dishonourably" by acting in accordance with this statutory obligation.

[111] In any case, the submission continues, the statutory regime of who is liable to contribute to the assets of an insolvent Company is governed by ss. 195 and 196 of the IA 2003. Neither the liquidator nor the Court has any power to relieve a member of these liabilities.

[10] [2013] UKSC 52, paragraphs 116,117 and 123.

[112] The Liquidators referred to section 175 of the IA 2003 which indicates that the Court has a discretion to allow a transfer of shares after the commencement of the winding up but has no discretion to allow a change in the status of a member or to the liabilities of a member.

[113] Mr. Chivers KC argues that accordingly, there is no possibility of treating a member (ASOR) as if it were not a member, because that would be contrary to the statutory regime. Neither the Liquidators nor the Court can do so.

[114] In a nutshell, the court does not have a general discretion to treat as "not a member" a person who is at the date of the winding up "a member".

[115] However, the Liquidators contend that even if the Court did have a discretion to exercise it would not, in any case, exercise it in favour of the Applicant.

[116] It was argued that there is no unfairness in settling a true list of members in circumstances where ASOR's case turns on its right to be removed from the register at some time no earlier than 11 March 2020 (or at a pinch some time in November 2019). If ASOR had been removed from the Register it would have the exact same liability in the winding up as if it had not been removed. -s.196(2). The Liquidators state that ASOR has not suggested that its position in the winding up would be any different had the shares been redeemed on, say, 11 March 2020.

[117] The Liquidators say that there is a question as to whether "member" in s.193 includes a "past member" who is liable under s.196(2). It was submitted that it would be strange if a mechanism designed to give an opportunity to a member to be removed from the settled list of members (and hence liability under s.195(1)) did not allow a past member to be given an opportunity to avoid liability under s.196(1). Given that ASOR is not in fact a past member, it is the Liquidators stance that the issue does not strictly arise for determination.

[118] The Liquidators address the argument that the Company is in breach of contract for failing to redeem the shares on demand in a number of ways, including extensive reference to the evidence and cross-examination.

[119] It was submitted that there is serious doubt as to whether the Amendment or Cancellation Notice were in existence prior to April 2020. The Liquidators say that they have never "alleged" that these documents did not exist or were backdated, but they have consistently doubted their status given the lack of contemporaneous evidence. They further say that now that all the evidence is in, those doubts have been amply justified.

[120] It was argued that neither the MOU nor the Amendment were entered into on the date the documents bear. It was submitted that both were back-dated and that Mr. Abdul-Massih's insistence in his witness statement and live evidence to the contrary was untrue. Indeed, say the Liquidators, the witness' evidence in relation to the MOU was that a *different* document had been produced and signed on 1st April 2018 but that the only copy had been stolen. It was submitted that even if that last-minute and bizarre story is true, it does not justify the falsehood in the witness statement and given during the cross-examination on Day 1.

[121] The Liquidators comment that there is no contemporaneous evidence at all as to when the Amendment was signed. It was submitted that Mr. Dhawan's evidence that he must have signed prior to the issue of the shares is unsupported by any contemporaneous evidence. The Liquidators submit that the signatures are equally consistent with an attempt to repair the position after the event:

(1) Transcript Day 2- Page 51-52. There Mr. Dhawan claims that he signed the Amendment "*through a process*" at his offices in early May but "*much before, or before"* 10 May.

[122] The Liquidators submit that this question is important. They assert that the only "contemporaneous" Amendment agreement is a single copy signed by al parties in

wet ink. They assert that it was the double fact of (a) a single wet ink signature document and (b) the lack of any correspondence concerning the document that led to the doubts as to its dating. According to the Liquidators, the explanation first given by Mr. Abdul-Massih had to (and did) explain (a) and (b).

[123] However, it was submitted that the second version (now given during a resumption of examination-in-chief of Mr. Abdul-Massih by Mr. Alexander KC by the Court's permission) falls down on both limbs.

Mr. Abdul-Massih's first explanation

[124] Mr. Chivers KC argued that the witness' witness statement and witness evidence the first time around, concerning the creation of the Amendment, was a complete fabrication.

Mr. Abdul-Massih's second explanation

[125] The Liquidators assert that the Transcript Day 3 pages 141-147 provide a completely different story.

[126] The Liquidators' position is that this new explanation fails on both limbs since there is no explanation as to why the document travelled from Geneva to Dubai and back again to collect all the signatures. This is particularly inexplicable since the MOU (to which the Amendment was an amendment) was exchanged in soft copy.

[127] On the second limb, there is no explanation as to why there is no correspondence on the issue (or, as one would expect, a draft sent for approval by soft copy before a signature copy was circulated.

[128] The Liquidators also say that they were only provided with the Amendment (and Cancellation Notice) in Word format with associated properties on 12 September 2023- the week prior to commencement of the trial:

(1) The Liquidators point out that the document was clearly discoverable. They say that given the lateness in the provision of the document, it was obviously impracticable to obtain expert evidence, although they say Mr. Jarvis did give relevant evidence which was not challenged;

(2) Substantively, they assert that the documents and their properties prove nothing, since Word document properties are easily manipulated by persons without great technical knowledge; and

(3) The Word document was originally said to come from Mr. Abdul-Massih's desktop, but his second round of evidence now is that he edited the document on a flight to New York on his laptop.

The Liquidators say that overnight the evidence changed from the "flight laptop being stolen in January 2023- well after the date for discovery- to the very same laptop being swapped for another during Covid.

[129] The Liquidators say that it is ASOR that has put in document properties and who asks the Court to use those properties as probative. That it is for ASOR to prove the relevance of the data, not for the Liquidators to disprove it.

[130] The point was made that the Court has not been told by any qualified person how those properties came about. However, as to the reliability of the data, Mr. Jarvis gave evidence on Day 4 Transcript page

[131] It is also the Liquidators' case that Mr. Abdul-Massih's evidence concerning the creation of the Cancellation Notice was also untrue.

[132] The Liquidators say that, despite prior requests in correspondence no explanation was given as to how ASOR had come into possession of the Cancellation Notice until cross-examination.

[133] The Liquidators also argue that Mr. Abdul-Massih could not explain how the copy of the Cancellation Notice does not contain the typo contained in the Word document provided on 13 September 2023- Transcript Day 3 Page 186-187.

[134] The Liquidators say that there was no contract in the first place. Further that if there was such a contract, it would be unenforceable. In sum, they assert that the Liquidators did not act unfairly by failing to give effect to an ineffective or unlawful redemption.

New Claim-Common Mistake

ASOR'S Submissions

[135] After all the evidence was in, and at the start of Closing Submissions, ASOR now raised the issue of common mistake, which it is alleged, arises from the Liquidators' argument that the cancellation was impossible in law at the option of ASOR.

The underlying factual position

[136] ASOR contends as one of the possibilities as to what may or may not have been agreed between Phoenix BVI and ASOR, that the following was agreed in relation to 440,935 shares in Phoenix BVI:

> "[Phoenix BVI] *and* [its shareholders] *agree and undertake that, as long as the Pending Conditions Precedent are not fully met, they will individually and together:*
>
> *….*
>
> *Allow* [ASOR*] to at any time and on its own decision to redeem the Common Shares totalling 440,935 shares with a par value of US$1.00 by the Investee's Partial Debt Conversion being converted back into liability of the Investee in his books and in favor* [ASOR] I's *related party…"*

The Legal Position

[137] Mr. Alexander KC argues that, on the basis of the Liquidators' contention that there is no circumstance in which a shareholder of Phoenix BVI can redeem shares in Phoenix BVI at their option, performance of the agreement under which ASOR was to be able to redeem such shares is, and was from inception, impossible.

[138] ASOR's submission continues that a binding contract cannot arise from a promise which is manifestly incapable of performance, either in fact or in law, at the time when it is made. Where the relevant fact or event pre-dates the making of the agreement, the question for the courts is whether the contract is void for mistake. Where the relevant fact or event post-dates the making of the agreement, the question is whether the contract is discharged for frustration. Reference was made to *Halsbury's Laws of England*, Vol 22, paragraph 258.

[139] The Court was also referred to the leading English decision ***The Great Peace***[11], where the English Court of Appeal set out a five limb test if common (or mutual mistake) is to avoid a contract as follows (at [76]):

(1) There must be a common assumption as to the existence of a state of affairs;
(2) There must be no warranty by either party that the state of affairs exists;
(3) The non-existence of the state of affairs must not be attributable to the fault of either party;
(4) The non-existence of the state of affairs must render performance of the contract impossible; and
(5) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

[11] [2002] EWCA Civ 1407.

[140] Learned Counsel also made reference to ***Triple Seven NSN 27251 Ltd v Azman Air Services Ltd***[12], where the English High Court discussed the test as follows:

> *"the test determining the application of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical".*

[141] Reference was also made to my fairly recent BVI decision in ***Happy Lion Ventures v RZ326019 Limited.***[13]

The Present Case

[142] It was ASOR's position that all five limbs of the guidance set out in ***The Great Peace*** are satisfied:

(1) As to the first limb, ASOR and Phoenix BVI shared the fundamental misunderstanding that ASOR would be able to redeem the 440,935 shares in Phoenix BVI at ASOR's own election when that was impossible;

(2) As to the second limb, neither party gave any warranty that ASOR would be able to redeem 440,935 shares in Phoenix BVI at ASOR's own election, nor was the risk of mistake otherwise expressly or impliedly allocated between the parties by the contract;

(3) As to the third, neither ASOR nor Phoenix BVI is at fault in relation to the fact that ASOR is not able to redeem 440,935 shares in Phoenix BVI at ASOR's own election;

(4) Fourthly, the performance of the contract whereby ASOR was to take 440,935 shares in Phoenix BVI on pre-allocation or temporary basis and was to have the right to require the shares

[12] [2018] EWHC (Comm).
[13] BVIHCM (COM) 2022/0126 at paragraphs [98] to [100].

to be redeemed by Phoenix BVI whenever ASOR wished that to happen is impossible; and

(5) Fifthly, this limb is satisfied where ASOR was to have shares in Phoenix BVI pre-allocated or temporarily issued to ASOR in circumstances where ASOR could always, and whenever it wanted to, call for those shares to be redeemed by Phoenix BVI and the shareholders of Phoenix BVI and those redeeming parties were obliged to carry out that redemption.

Remedy

[143] As to the appropriate remedy, it was submitted that a common mistake, of either fact or law, in relation to a contract, renders the contract void. Reference was made to paragraph [73] where it was discussed this way:

> "*…. where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding. The avoidance of a contract on the ground of common mistake results from the rule of law under which, if it transpires that one or both parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement."*

The Liquidators' submissions on common mistake

[144] Mr. Chivers' KC in his Note for Closing Submissions makes the point that if this action had pleadings, there would have had to be an application to amend post-witness evidence. Here the witnesses have neither given evidence, nor been cross-examined, on the basis of the extremely late allegation of common mistake. It was submitted that no amendment would have been allowed and that ASOR should not be in any better position in an action without pleadings.

[145] Notwithstanding, the Liquidators advanced arguments on this issue in the event that the Court allowed ASOR to make the point. The Liquidators contend that the tests laid down in ***the Great Peace*** are not satisfied.

DISCUSSION AND ANALYSIS

The Statutory Framework

[146] The process of becoming a member, and the legal consequences that flow from that change in status, are governed by the BCA, and, once a company enters into liquidation, by the IA 2003

[147] .Section 41 of the BCA creates the obligation to keep a register of members. The register or a copy must be kept at the office of the Registered Agent (BCA-s.96(1)). It is open to inspection by Members of the Company (BCA-s.100(2)(b)).

[148] A key purpose of the Register of Members is that it makes the identity of a company's shareholders readily ascertainable. It enables the Company, other shareholders, third parties and any liquidator to see as Mr. Chivers KC puts it in his Closing Arguments, 'at a glance' who the members are and the extent that they have contributed (or have promised to contribute to the company's capital).

[149] Section 42 of the BCA, "*Register of members as evidence of legal title"* provides:

"***42****. (1) The entry of the name of a person in the register of members as a holder of a share in a company is* ***prima facie*** *evidence that legal title in that share vests in that person.*

(2) A company may treat the holder of a registered share as the only person entitled to:

(a) exercise any voting rights attaching to the share;

(b) receive notices;

(c) receive a distribution in respect of the share; and

(d) exercise other rights and powers attaching to the share."

[150] Section 49 of the BCA, "*Consent to issue of shares* "which is of central importance in relation to ASOR'S first ground summarised in paragraph [11] above, provides:

"***49**. The issue by a company of a share that*

(a) increases a liability of a person to the company; or

(b) imposes a new liability on a person to the company,

***is void if that person**, or an authorized agent of that person, **does not agree in writing to becoming the holder of the share**."*

(my emphasis)

[151] Both parties have pointed out that they have been unable to find any BVI authority directly on the interpretation of section 49. However, it is common ground that there are similarities to section 50 of the *New Zealand Companies Act, 1993.* That section, "*Consent to issue of shares",* provides:

"**50.** *The issue by a company of a share that---*

(a) Increases a liability of a person to a company; or

(b) Imposes a new liability on a person to the company-

***Is void if that person** or an agent of that person authorized in writing **does not consent in writing to becoming the holder of the share before it is issued**."*

(my emphasis)

[152] BCA, section 50, "*Time of issue*" provides:
"*A share is deemed to be issued when the name of the shareholder is entered in the register of members*."

[153] Sub-section 59(1), which addresses a company redeeming its own shares is subject to section 57. Section 57 requires a directors' resolution confirming solvency. Subject to a solvency resolution a company may
"*purchase, redeem or otherwise acquire its own shares in accordance with either*

(a) Sections 60, 61 and 62; or

(b) Such other provisions for the purchase, redemption or acquisition of its own shares as may be specified in its memorandum or articles."

[154] However, subsection 59(2) states that sections 60, 61 and 62 do not apply to a company to the extent that:

"…they are negated, modified or inconsistent with provisions for the purchase, redemption or acquisition of its own shares specified in the company's memorandum or articles."

[155] Section 62 provides for the criteria that must be met before a share can be redeemed and that is only if a share is "*redeemable at the option of the shareholder*".

[156] However, the Company's Articles, in particular, Article 25, exclude the operation of section 62.

[157] The provisions 57-62 of the Act, and the Articles of Association of Phoenix BVI, are relevant to a discussion of the status of the Cancellation Notice. This is dealt with in relation to Objection 4 below.

Relevant provisions of the IA 2003

[158] The relevant sub-sections of section 193, "*Settlement of List of Members* "in relation to the Application provide:

"**193**. *(1) Subject to sub-section (7), the liquidator of a company shall, as soon as practicable after his appointment, settle a list of the members of the company containing the information and in the form prescribed.*

(2)……..

(3) If a person objects to any entry in, or exclusion from, the list of members as settled by the liquidator, which is not accepted by the liquidator, he may apply to the Court for an order removing the entry to which he objects or, as the case may be, modifying the entry.

(4) An application under subsection (3) shall be made within 21 days of the service on the applicant of the liquidator's notice declining to accept the objection.

(5)…..

(6)……

(7) The liquidator is not required to settle a list of members under this section if it appears to him that it will not be necessary to require any member to contribute to the assets of the company or to adjust the rights of members."

[159] Sub-section 195(1), "*Liability of members limited*" provides:

"**195**. *(1) Unless the memorandum of a company provides that the liability of a member is unlimited, the liability of a member to contribute to the assets of a company in liquidation for the payment of its liabilities, for the expenses of the liquidation and for the adjustment of the rights of the members between themselves is limited to*

(a) Any amount unpaid on a share held by the member, including any liability for calls; and

(b) Any liability expressly provided for in the memorandum or articles, including such contribution as the member of a company limited by guarantee, or by shares and guarantee, may have undertaken to make in the event of the company being would up."

[160] It is plain that a person who has an objection or is aggrieved by the liquidators' List of Members is mounting a challenge as to their status. Clearly a person's status qua member cannot change in consequence of a liquidation; their rights in the winding up fall to be examined by reference to their status immediately prior to the commencement of the winding up.

[161] Another issue that the Liquidators have raised in response to ASOR's first argument that it was not a member, is the issue of ASOR's potential status as a "*past member*". Section 196 of the IA 2003, "*Liability of past members*" provides:

"*(1) For the purposes of this section, a "past member" of a company is a person who ceased to be a member of the company at anytime during the period of one year before the commencement of the liquidation of the company.*

*(2) Unless **the Court** is satisfied that the members of a company are able to discharge the liabilities set out in s195(1), a past member of a company is liable to contribute to the assets of the company for the purposes specified in that subsection to the same extent as a member.*

(3) Notwithstanding subsection (2), a past member is not liable to contribute to the assets of the company in respect of any liability of the company contracted after he ceased to be a member."

(my emphasis)

[162] Section 196 provides a 'look back' period to ensure that members cannot escape liability when the company's solvency had already taken, or was on its way to taking, a downturn. This is designed to ensure that the company's capital is maintained according to the promises previously given by those shareholders.

I note that pursuant to section 196 "*past members"* are liable to contribute unless the Court/Judge presiding over the liquidation decides that the members are able to discharge the liabilities set out in s.195(1)

Objection one: ASOR did not agree in writing to becoming a shareholder, as required by section 49 of the BCA

[163] In my judgment, it is quite plain, that the ordinary and natural meaning of the words used in section 49, when construed contextually and purposively, address the agreement in writing of the prospective shareholder alone; they do not address an agreement between a company and shareholder as ASOR has interpreted it.

[164] It is plain, particularly having regard to, for example, *Black's Law Dictionary*, that the ordinary meaning of the word "*agree*" is wide enough to encompass the action or state of mind of one party in relation to certain circumstances, whether put forward by another party or otherwise. This is why the meaning of "*agree*" is there stated to include "*concur"*, "*acquiesce*", "*approve*" or "*adopt*". On the other hand, the word "*agree*" can also mean, as stated in the *Cambridge English Dictionary* and the *Collins English Dictionary* respectively, "*to have the same opinion*" or "*if people*

agree with each other about something, they have the same opinion about it or say they have the same opinion." Thus, it is clear that the precise words used, not just the word "*agree*", as well as the context in the provision and the Statute as a whole, are important.

[165] Thus, it is important, and indeed, in my view decisive, that section 49 addresses the issuance of a share being void if the person who has a liability to the company increased, or has a new liability to the company imposed, does not agree in writing to becoming the holder of the share. (My emphasis). The Company's agreement to issue the shares is obvious because it is in control of the process of issuance of the shares. Further, section 50 of the BCA, which follows immediately after section 49, states that a share is deemed to be issued when the name of the shareholder is entered in the register of members. Section 49 is therefore concerned with ensuring that the person upon whom a new or increased liability will be imposed to the company, signifies his, her or its agreement in writing to becoming placed or being in the position of being the holder of the share.

[166] I do not accept the argument of ASOR that the BVI legislature in using the words "*does not agree in writing*" in s.49 of the BCA instead of the words "*does not consent in writing*" in s.50 of the NZCA, has put in place a higher standard, i.e. that there should be a written agreement between the Company and the shareholder. It is in my view plain that that conclusion cannot be arrived at based on utilizing the general rules of statutory construction. Further, no evidence has been led as to the intentions of the legislature, or discussions leading up to the passing of the Statute, and nor was any attempt made by either side to lay the foundation for the admission of such evidence. That was in my view the correct approach since the language of the BCA is not ambiguous. The important point is that in both pieces of legislation, i.e. in the BCA and the NZCA, it is the shareholder by whom writing is required. By agreeing in writing, a potential shareholder (under s.49 of the BCA) is signaling the same thing as is required by a potential shareholder under s.50 of the NZCA, i.e. his consent to being issued with the shares.

[167] I agree with Mr. Chivers KC that the rationale in s.49 is similar to that set out in section 4 of *the Statute of Frauds*, the main difference being that section 4 states that it requires the relevant document to be signed. The intention of both provisions, it seems to me, is to ensure that there is documentary, and not just oral evidence, of the agreement of the person who stands to have a liability imposed upon him. In a different context, this also is the rationale, for example, in the case of a transfer of land under certain land title systems, where it is the person who is relinquishing rights of ownership in the land, i e the transferor who is required to agree in writing to the transfer.

[168] Section 4 of the Statute of Frauds, provides as follows:

> "***Statute of Frauds 1677***
>
> **4. *No Action against Executors, & c. upon a special promise, or upon any Agreement, or Contract for Sale of Lands, & c. unless Agreement & c. be in Writing and signed***
>
> *Noe action shall be brought […] whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriages of another person[…..] unless the Agreement upon which such Action shall be brought* ***or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged therewith*** *or some other person there unto by him lawfully authorized."*
>
> (my emphasis)

[169] In my judgment, the decision in ***Gluck***, which was cited by ASOR, is distinguishable to the extent that there the Court had for consideration a Statute where the language required agreement between both parties in writing, i.e. "*within such longer period as may be* **"*agreed by the applicant and the authority in writing***" (my emphasis). It follows that I accept the submission by the Liquidators that the obiter dicta of Newby LJ referred to by ASOR cannot bear on the meaning of a statute that requires only one party to record that he, she or it agreed in writing.

[170] In ***Gluck***, it was held that it was sufficient that the agreement was evidenced in writing, and that the statutory language did not require that the agreement be made in writing. However, I bear in mind that the case has to be approached with some caution as it concerned a Statute having to do with planning permission where the Courts have warned against the dangers of an overly mechanical or legalistic approach.

[171] On the other hand, I found the decision in ***Golden Ocean***, which was cited by the Liquidators, to be useful. This case involved charter parties, but in my view, expressed its ratio in terms wide enough to apply to other commercial contracts or transactions. In that case, the Defendants had applied for an order setting aside permission for service out of jurisdiction and for a declaration that the court had no jurisdiction to entertain the claim on the ground, amongst others, that the claim had no reasonable prospect of success since the guarantee was unenforceable for non-compliance with section 4 of the Statute of Frauds. The judge refused the application. The headnote accurately summarises the English Court of Appeal's reasoning in dismissing the appeal, at pages 3675-3675 as follows:

> "*Held, dismissing the appeal, that the purpose of section 4 of the Statute of Frauds, 1677, which was where possible to be construed so as to accommodate accepted contemporary business practice, was to prevent the court having to resolve disputes as to oral utterances, not to prevent it considering continuing negotiations; that a contract of guarantee identified from a sequence of negotiating emails or other documents of the type used commonly in ship chartering, ship sale and purchase could constitute an "agreement…in writing" for the purpose of the first limb of section 4,…. And the court was entitled to look at all documents which were said to constitute the agreement, however many they might be, in order to determine what the agreement was; that it was sufficient authentication of the contract of guarantee contained in the sequence of emails that the broker, whether or not acting as agent of the guarantor, had appended his forename to the emails; that section 4 would be satisfied provided it could be shown that the*

broker had authority to sign the emails, irrespective of the intention with which he had put his name on the document and without further inquiry as to the capacity in which he had done so; and that, accordingly, since there was a good arguable case that ***the broker had the authority of the guarantor*** *to sign the emails the judge had been right to conclude that there were serious issues to be tried as between the claimants and the defendants..."*
(my emphasis)

[172] At paragraph 22 of the judgment, Tomlinson LJ discussed the issues in this way:

> "*22. The conclusion of commercial contracts, particularly charter parties, by an exchange of emails, once telexes and faxes, in which the terms agreed early on are not repeated verbatim later in the exchanges, is entirely commonplace. It causes no difficulty whatever in the parties knowing at exactly what point they have undertaken a binding obligation and upon what terms. As Mr. Young pointed out, it is often a matter of happenstance, or metaphorically, the pressing of a button, whether a sequence of emails manifest itself in a single document as a thread or string of emails or in a series of individual documents."*

[173] The decision in ***Golden Ocean*** in my judgment supports the Liquidators' view that it is sufficient under the Statute of Frauds, or analogous types of legislation for the agreement or memorandum to be evidenced by a sequence of emails or other specific industry-practice documents. In such circumstances, the Court is entitled to look at all the documents in order to determine what the underlying agreement was; it does not require the entire agreement to be condensed in one document and it does not require signature on a formal document.

[174] I think it is to be noted also, that at paragraph 29 the English Court of Appeal indicated that the purpose of the Statute of Frauds is not to prevent the court

considering continuing negotiations, but is rather, in part, to prevent the court having to resolve disputes upon oral utterances. However, for the purposes of this case, and an appreciation of the importance of the agreement of the party to be bound, or liable, emanating in writing, or evidenced in writing, what is stated at paragraph 21 provides useful analysis as follows:

> *"Moreover the purpose of the requirement that the agreement must be both in writing and signed* ***by the guarantor*** *is not so much to ensure that the documentation is economical but rather* ***to ensure that a person is not held liable as a guarantor*** *on the basis of an oral utterance which is ill-considered, ambiguous or even completely fictitious."*
> (my emphasis)

[175] At paragraphs 31-33 the question of signature is discussed, and it was held that the broker putting his first name on the email was sufficient authentication. I note that s.49 of the BCA does not say anything about requiring the agreement to be signed or signature, but ***Golden Ocean*** is useful to the extent that it shows that even where the language of the Statute speaks to "signed", an email making an informal use of a first name, or of initials, may be sufficient.

[176] I now turn to examine the New Zealand cases cited on behalf of the Liquidators. In the ***Fonterra*** case, which is a decision of the Supreme Court of New Zealand, Fonterra was a Co-Operative, and at the relevant time the largest processor of milk in New Zealand. There really was in this decision only a passing reference to section 50 of the NZCA. But the case is useful in showing that to meet the requirements of the section Fonterra had included in its constitution an application form to be filled out not by Fonterra, but by the proposed shareholders or milk suppliers, the party with potential liabilities. The case is useful because it demonstrates that here the applicant filling out a supply of milk form satisfied the requirements of s.50 and a supply of milk thereafter constituted an irrevocable application to become a shareholder.

[177] It is useful to take a look at paragraphs 18, and 41 (including footnote 40) of the judgment, as follows:

> *"**Fonterra's constitution***
>
> ***……***
>
> ***[18].** Other provisions of the Constitution which are relevant are:*
>
> ***2. SHAREHOLDERS***
>
> ***2.1 Applications for supply:** Any person that intends to commence the supply of Milk to the Company shall give written notice of that intention to the Company and complete such application in the form and by the time the Board may from time to time determine in a manner consistent with any applicable enactment.*
>
> ***2.2 Irrevocable application:** The supply by any person of Milk to the Company is an irrevocable application by that person to become a Shareholder and to hold the number of Co-Operative shares from time to time required……*
>
> ***2.3 Board may accept application:** The Board may in its absolute discretion decide:*
>
> > *(a) whether or not to accept an application by a person to become a Shareholder made in accordance with clause 2.2 or any application procedure which the Board may from time to time determine; and*
> >
> > *(b) whether or not to accept the supply of Milk from any person, on such terms and conditions as the Board thinks fit, without requiring that person to become a Shareholder in respect of that supply.*
>
> ***……..***
>
> ***[41]** Fonterra's constitution described the supply of milk to Fonterra as "an irrevocable application" to become a shareholder and to hold the requisite number of shares. ….*
>
> ***Footnote** 40*

Clause 2.2, set out above at [18]. The application to supply form completed by the respondents was necessary to comply with the requirements of s.50 of the Companies Act 1993 (regarding the need for written consent to the issue of shares that impose liabilities on a shareholder to the company)"

(underlining emphasis mine)

[178] Similarly, as Mr. Chivers KC suggested, in the ***Bank of Tokyo-Mitsubishi*** case, there was a brief reference to s. 50 of the New Zealand Act, and it was in the context of acknowledging that liability should not be imposed without there being a record of the consent of the person with potential liability-paragraph [110].

[179] The question therefore is whether ASOR agreed or is to be taken as having agreed "*in writing*" to become a member of the Company, i.e. to be the holder of shares?

[180] The case law clearly shows that the Court is entitled to look at all the relevant documents to see whether ASOR agreed in writing. In my judgment, ASOR quite plainly did agree in writing, and there is ample evidence to demonstrate that.

[181] In particular, there is an email exchange as follows.

- <u>6 and 7 May 2019</u>

  There is an email from Mr. Abdul-Massih to Mr. Navandher dated 7 May 2019, in response to Mr. Navandher's email of 6 May 2019 in which Mr. Navandher (Phoenix BVI) had, amongst other things, said that he would "*work on issuance of shares as well at BVI level to Inoks".* Mr. Abdul-Massih in his email of 7 May 2019 wrote and said "*Please kindly find the Shareholder's full style:*

  Ancile Special Opportunity and Recovery Fund Segregated Portfolio".
- *<u>May 8 2019</u>*-

  Mr. Nivandher responds and says: "Many thanks and pleased to advise shares will be issued this Friday and below mentioned entity included in the Register of members by coming Monday.

We have also requested for revised certificate of Incumbency with the addition of the new shareholder."

- *May 10 2019*

  Mr. Navandher writes to Mr. Abdul-Massih as follows:

  "In line with our discussions, please find below the note being sent to the Phoenix lenders/prospective lenders. We will also initiate formal invitation to you for joining the Advisory Board effective July 1, 2019.

  Have also attached the current and revised shareholding of Phoenix post issuance of shares to INOKS nominated entity and transfer of Raja shares to Gaurav.

  We are ready with the Board resolution copy dated today and upon confirmation, will submit to the registered agent. Execution and revised register of members followed by revised certificate of incumbency will be available by 13th or 14th May.

  Message from Phoenix Executive Chairman's Desk

  Dear all,

  I am pleased to advise that after much anticipation, we have finally closed the issuance of equity in Phoenix to Inoks-Capital- Geneva. Post this issuance, Inoks would hold approximately 9.96% of the equity base, and please join me in welcoming Mr. Nabil Massih as a member of the advisory board.

  Nabil comes with years of experience of not only the commodity and finance industry globally, but a very deep understanding of Phoenix as a lender, and we look forward to working together with Nabil on the Phoenix journey forward.

  ….." (my emphasis)

- *May 10 2019*

  On the very same day, a mere few hours later, Mr. Abdul-Massih responds and apologises for the time taken to reply. He then states:

  "..The Team looks very much forward to be of support to PHOENIX's development.

We do confirm good receipt of the revised Shareholder structure and adequacy of the same.

May I humbly propose a small change to the Executive Chairman's message as follows:

-'INOKS Capital-Geneva" replaced with the 'ASORFund managed by Inoks Capital-Geneva" and

-'INOKS' by 'ASOR' " (my emphasis)

- *May 10 2019*

  On the very same day, Mr. Navandher responds saying:

  "Many thanks for your revert and confirmation.

  Noted yours on the change and will send out message accordingly."

  *(*my emphasis)

[182] In my judgment, it could not be clearer that this exchange of emails between Phoenix BVI and ASOR's representative Mr. Abdul-Massih amounts to written consent by ASOR to its entry on the Register of Members. ASOR agreed in writing to becoming a member. It is very plain that the requirements of s.49 of the BCA have been satisfied. ASOR was obviously content to have the message sent out to Phoenix BVI, including BNP, (which was another Geneva entity) that it was a shareholder, a significant shareholder at that (almost 10% of the equity base), thereby approving/acquiescing/concurring in such representations being made to third parties.

[183] Regarding the *Harneys Note*, I do not think it is inadmissible. However, it does not assist the Court in carrying out its task as it does not even seek to give evidence as to the practice in the BVI. It merely states the opinion of the legal practitioners who authored the article that a basic subscription letter could usefully be included in incorporation packs circulated by BVI registered agents, in the same way as consent letters for a person to act as a director are. It may well be that the *Harneys Note* purports to give sensible advice. However, the present case, as was stated in ***Golden Ocean*** at paragraph 22, is not concerned with prescribing best or prudent

practice. My task is to decide whether on the evidence before me, ASOR agreed in writing to becoming the holder of the shares within the meaning of s.49 of the BCA. It is my finding that it did so.

[184] Even in the New Zealand case of ***Fonterra*** where a Form is discussed, there is nothing to suggest that this Form which Fonterra by its particular constitution required potential suppliers of milk to sign, was the only way to comply with s. 50 of the NZLA. In ***Fonterra***, unlike ***Golden*** Ocean, the Court did not have for consideration the question of what type of documentation or agreement, or consent would satisfy the requirements of s. 50 of the NZCA. Further, here in the BVI, there is no Form proscribed under the BCA in relation to section 49.

[185] On the issue of whether the agreement has to pre-date the issue of the shares, I agree with the Liquidators' submission that this is the position in New Zealand because s.50 of the NZCA states so expressly. The Liquidators have put forward an argument that in the BVI the position is different, submitting that there may be good policy and commercial reasons for construing s.49 as allowing the potential member to agree in writing after the event. This, it was argued, is particularly so since the BVI legislature did not include the words "*before it is issued*". It was submitted that it is more "*likely that the BVI legislature considered the words unduly restrictive".* As attractive as the Liquidators' arguments are, the submission in relation to the BVI legislature is essentially speculative, and as to the question of interpretation of s.49, no authority was cited in support of the arguments advanced as to this wide interpretation. In my judgment, ASOR's arguments are correct on this point. The ordinary and natural meaning of the words in s.49 suggest that the agreement should pre-date the issue of the shares as the section uses the term "*does not agree*", not "*did not agree*" or "*has not agreed*". This in combination with the word "*becoming"* as opposed to the word "*being*" suggests that the process of agreeing should pre-date the issuance.

[186] However, the documents after the issuance can lend support to /corroboration of, the conclusions drawn as to an earlier agreement. This in my judgment applies to

the certificates given to BNP on the 6th and 10th July 2019. Mr. Abdul-Massih's evidence about insisting on not dating the documents until subscription took place, is inconsistent and contradictory. But at the end of the day, the issue of dating does not matter since on Day 2-pages 125-126, Mr. Abdul-Massih, after much prevarication and in my regrettable view, attempts at obfuscation, stated that BNP could rely on the certificate for the purpose of the BNP Condition Precedent.

[187] Alternatively, if I am wrong on the issue about the timing of agreement, and s.49 of the BCA does permit of agreement after the issuance, there is material in this case, including the BNP Certificates that provide agreement in writing post the date of issuance of the shares.

The Amendment

[188] This case, ASOR's case is quite convoluted, and has contorted through many twists and turns. Initially, ASOR's case was that ASOR had not requested the issue of shares, and that although the Amendment provided a mechanism of pre-allocation of the shares at no point did ASOR request the issuance of the shares pursuant to the Amendment-Affidavit of Mr. Abdul-Massih and his Witness Statement at paragraphs 47 and 104.

[189] However, as the oral evidence evolved, and also based on Mr. Dhawan's evidence, ASOR's evidence is now that the shares were agreed to be issued on the terms of the Amendment, Mr. Abdul-Massih-Transcript Day 2-pages 52- 53. Importantly, this culminated on this point as follows on Day 2page 78-79:

> *"Q…. Now to be clear, is it your case that the shares that had been issued were subject to an agreement that they could be cancelled?*
>
> *A. Yes.*
>
> *Q. And that agreement, you say, is the amendment agreement; is that right?*
>
> *A. That is correct."*

[190] The Liquidators do not rely on the Amendment because they say that the issue of the shares was independent of any such agreement (plus, the Amendment was not found by them in the Company's records). However, I accept the submission that ASOR cannot logically maintain that it did not agree in writing to the issuance of the shares, and at the same time, rely upon the Amendment (even if all the terms of it were not complied with) since the Amendment was plainly an agreement by ASOR in writing.

[191] In my judgment, ASOR's first objection is flawed and without foundation. It fails outright.

Objection 2- Alternatively, and without prejudice to the first ground, if ASOR did agree, such agreement was subject to conditions precedent contained within a Memorandum of Understanding dated 1 April 2018 ("the MOU") and its amendment dated 25 April 2019 ("the Amendment"), which conditions precedent were not satisfied.

Objection 3- If ASOR was a shareholder, its shareholding was temporary or provisional and therefore when the conditions precedent were not fulfilled any provisional shareholding lapsed.

Court's Assessment of the Witnesses

[192] I have to say that I found Mr. Abdul-Massih to be a very unsatisfactory witness. The various stories he advanced to the Court about his understanding as to the provisional issue of the shares and as to the circumstances in which the MOU, Amendment, and Cancellation Notice came to be created, dated, signed or sent, are quite incredible, often inconsistent and I find them to be incapable of belief. As to Mr. Ghosh and Mr. Dhawan, they both clearly do not remember many of the alleged contemporary occurrences. However, where their evidence varied, I am of the view that Mr. Ghosh's evidence was to be preferred.

[193] As I have stated at paragraph [58] above, I am of the view that, even if entered into, both the MOU and the Amendment were non-binding. Further, quite frankly, although there has been no expert evidence advanced before me, as to the documents and their properties so that the Court could make a finding as to whether they existed at the dates ASOR says, or the dates the documents themselves purport to have existed, I have real concerns about these documents. This is because (a) they seem to be a convenient way for ASOR to attempt to shy away from any liabilities it may have to Phoenix BVI as a shareholder;(b) they were not in the Company's Records up to the time when the Liquidators prepared the List of Members; and (c) portions of Mr. Abdul-Massih's evidence as to these documents is plainly improbable and at times seemed to be invented or concocted as he went along. For example, his evidence as to the MOU that a different document had been signed on 1st April 2018, but that the only copy was stolen, and his evidence at first that the Word copy of the Amendment was edited by him on a flight, but he was mugged on a train on 22 January 2023, but later said it wasn't the same laptop because all laptops were changed at the beginning of April/end of March 2020(because of Covid), is bizarre. In terms of the documents also, I found Mr. Ghosh to be a more sincere and helpful witness than Mr. Dhawan and I accept his evidence over that of Mr. Dhawan when, for example, he said that he knew nothing about the MOU or the Amendment and that he had not authorized Mr. Dhawan to sign on his behalf or that of Auro Nominees. I bear in mind that these two witnesses, who gave conflicting accounts about the documents, and who both spoke of failing memories, were witnesses called on behalf of ASOR, the Applicant. Thus, there are inconsistencies and discrepancies even within ASOR's own case about these documents.

[194] Further, and in any event, the Amendment contemplated the issue of shares notwithstanding the non-fulfillment of the MOU Conditions. Ultimately, at trial ASOR's case did not seem to turn on the matter of Conditions Precedent not being fulfilled, because ASOR accepted that it was issued shares, and it relies more on the assertion that it was entitled to redeem.

[195] ASOR's description of its shareholding being on a provisional or temporary basis indeed, as Mr. Chivers KC and the Liquidators opined, is not a type of membership recognised by BVI company law. In my judgment, there could be no question of the shareholding lapsing if the conditions precedent were not fulfilled. I note that, other than relying on the terms of the Amendment, no authorities were cited in support of the propositions advanced on these matters, which plainly involve propositions of law. Further, ASOR took no legal advice concerning the effects of the Amendment.

[196] Factually, and in terms of the evidence, neither the email exchanges prior to, nor after the registration of ASOR as a shareholder support any conditionality as regards ASOR's status as a shareholder. Nor is this suggested in the resolution authorising the issue of the shares or the terms of the share certificate, or the entry on the Register of Members; there is nothing to suggest that the shares were redeemable or agreed to be redeemable. In fact, the pointers were to the opposite effect. The shares were common shares, subject to all the rights and liabilities of the BCA and the Articles of Association. Further, and in any event, the ***Zavarco*** decision cited by the Liquidators is authority for the proposition that in deciding on the nature of ASOR's shareholding, as represented on the Register of Members, and the share certificates, the admissible background cannot include any private dealings or understandings that ASOR claims to have had with Phoenix BVI via the Amendment or otherwise.

[197] As discussed previously, the public statements and the representations made to BNP to facilitate Phoenix BVI obtaining the desired facility were not qualified in any way, or such as to suggest the shareholding was on a temporary or provisional basis.

[198] It is not part of the Court's task to resolve whether there was a debt for equity swap. The evidence on this is odd, since Mr. Dhawan and the Company's management accounts showed that a capital contribution of $40 million had been converted into

equity. However, Mr. Abdul-Massih, who was elusive on this point, (repeating that he didn't have confirmation that a debt for equity swap had taken place), gave evidence at variance from that of Phoenix BVI. His position was that Ancile had never released Phoenix BVI, no credit note was ever issued and Ancile is still proving in the liquidation for the US$40 million.

[199] Two things are clear, as argued by the Liquidators: (1) ASOR could never assert both that there *was* a debt for equity swap *and* that the shares are unpaid for the purpose of s.49 (learned Counsel's emphasis); and (2) The accounts and Mr. Dhawan's evidence are clearly false since Phoenix BVI could not unilaterally release itself from a third-party debt, a debt which Ancile's representative, Mr. Abdul-Massih said remained outstanding (he said that all the debts signed by the Ancile companies were without a deduction-Day 2-Transcript, page 39).

[200] In my judgment, ASOR's 2nd and 3rd Objection also fail.

Objection 4 -if ASOR was a shareholder, was the shareholding cancelled by way of notice dated 12 November 2019?

[201] I entirely accept Mr. Chivers KC's submissions that the Cancellation Notice is problematic for ASOR for the following reasons:

(1) The Notice acknowledges ASOR's entry on the Register and makes no complaint. While the notice alleges that Inoks "*has not been able to assert shareholding*" no evidence has been given of any attempt to do so that has been refused. As a matter of law, ASOR had all the rights of a shareholder under the BCA and Articles. Whether it chose to assert them was a matter for ASOR;

(2) The notice expressly asserts that ASOR's status as a member will continue for not less than 120 days. ASOR is acknowledging its status as member on the register in writing. Thus, the Notice is either corroborative of the emails referred to in this judgment at paragraphs [181]-[182] above, or, if, contrary to my holding at paragraph [185] above, s.49 does allow for agreement in writing after the issue of the shares, then the Notice would

itself constitute ASOR's agreement or further proof of ASOR'S agreement in writing;

(3) The notice purports to request "cancellation" of the shares issued to it. Such cancellation was impossible in law at the option of ASOR, (the shares did not purport to be redeemable at the option of ASOR, but in any event, such a condition would have been contrary to the Articles and hence the BCA). There is no suggestion that the Company agreed to cancel (or otherwise acquire or redeem the shares; and

(4) The Company could not cancel, acquire or redeem the shares without a resolution certifying solvency. No such resolution was passed or could (at the expiry of 120 days) have been passed given the evident insolvency of the Company.

[202] The sections of the BCA that are directly relevant to the redeeming issue are discussed above, at paragraphs [153]-[157]. As stated, section 62 provides for the criteria that must be met before a share can be redeemed and that is only if a share is "*redeemable at the option of the shareholder*".

[203] However, the Company's Articles, in particular, Article 25, exclude the operation of section 62. Under the heading "*Redemption of Shares and Treasury Shares"*, Articles 24 (in essence sections 57 and 59 of the BCA) and 25 relevantly provide as follows:

> *"24. The Company may only offer to acquire Shares if at the relevant time the directors determine by Resolution of Directors that immediately after the acquisition the value of the Company's assets will exceed its liabilities and the Company will be able to pay its debts as they fall due.*
>
> *25. Sections 60 (Process for acquisition of own shares), 61 (Offer to one or more shareholders) and 62 (Shares redeemed otherwise than at the option of company) of the Act shall not apply to the Company."*

[204] The short answer to this objection is that the Cancellation Notice was ineffective. The Company did not pass a solvency resolution as required by s. 57 of the BCA and Article 24. ASOR remained a shareholder, and indeed, remained a shareholder right up to the date of commencement of the winding up.

Breach of Contract and E*x Parte James* Point

[205] In my view, it is plain that the ***Ex Parte James*** principles have no application in the face of a statutory obligation. ***In re Nortel GmbH (in administration) and related companies In re Lehman Brothers International (Europe) (in administration) and related companies*** [2013] UKSC 52, at paragraphs 116,117 and 123, Lord Neuberger provided the following guidance:

> *"116. At any rate, at first sight, it would be extraordinary if a court, which had decided that a liability did not fall within the definition of provable debts in rule 13.12, could none the less go on to decide that it was to be so treated, in the absence of any specific statutory power to do so. Such a course would appear to be wrong in principle because it would involve a judge effectively overruling the lawful provisions of a statute or statutory instrument. It would also be highly problematic in practice because it would throw many liquidations and administrations into confusion; the law would be uncertain, and many creditors who felt that the statutory ranking caused them unfair prejudice would make applications to the court.*
>
> *117. If further reasons were required for this conclusion, they may be found in rule 2.67 and in **In re Toshoku Finance**. Rule 2.67(2)(3), referred to in paragraph 42 above, show that, where the Insolvency Rules wish to give the Court the ability to change the priority rules, they say so. In the course of his speech in **In re Toshoku Finance** [2002] 1 WLR 671, para 38, Lord Hoffman referred to the proposition 'whether debts should count as expenses of the liquidation is a matter for the discretion of the court' and held that there was no such discretion and disapproved Sir Donald Nicholls V-C's comments in **In re Kentish Homes Ltd** [1993] BCLC 1375. As Lord*

Hoffman made clear in para 41, how a particular liability was to be ranked depended solely on the proper interpretation of the Insolvency Rules.

……

123. However, none of these cases begin to justify the contention that an administrator can be ordered to change the ranking of a particular debt simply because the statutory ranking appears unattractive- in this case because it means that a particular debt is ranked lower than other unsecured debts because (as I am assuming) it is not provable according to the statutory formula. Indeed, observations in the ***Lune Metal*** *case, at paras 35-38, tend to support the notion that the court cannot sanction a course which would be outside an administrator's statutory powers. "*

[206] In my judgment, here the statutory scheme is clear. Under section 193 the Liquidator must settle a list of members in the form prescribed. The liquidator has no discretion in the matter. Accordingly, the Liquidators acting in accordance with this statutory obligation cannot properly be described as acting "unfairly" or "dishonourably".

[207] In any case, the statutory regime of who is liable to contribute to the assets of an insolvent Company is governed by ss. 195 and 196 of the IA 2003. Neither the liquidator nor the Court has any power to relieve a member of these liabilities.

[208] The Liquidators referred to section 175 of the IA 2003, which provides:

"Effect of liquidation

175. (1) Subject to subsection (2), with effect from the liquidation of a company-

(a)

(b)

(c)

(d) unless the Court otherwise orders, no share in the company may be transferred;

(e) no alteration may be made in the status of or to the rights or liabilities of a member, whether by an amendment of the memorandum or articles or otherwise;

(f) no member may exercise any power under the memorandum or articles, or otherwise, except for the purposes of this Act; and

(g) no amendment may be made to the memorandum or articles of the company.

(2)

(3) Anything or matter done or purported to be done in contravention of subsection (1) is void and of no effect."

[209] It is plain that section 175 indicates that the Court has a discretion to allow a transfer of shares after the commencement of the liquidation but has no discretion to allow a change in the status of a member or to the liabilities of a member.

[210] I find that accordingly, there is no possibility of treating a member (ASOR) as if it were not a member, because that would be contrary to the statutory regime. Neither the Liquidators, nor indeed the Court, can do so.

[211] In a nutshell, the court does not have a general discretion to treat as "not a member" a person who is at the date of the winding up "a member". In ***Lune Metals***, the Court was exercising a specific statutory power in the interest of all creditors. The Court did not-as Neuberger J made clear at para 35-have jurisdiction to sanction a course of action which was "*wholly outside the ambit of an administrator's powers."*

[212] Further, I accept the Liquidators contention that even if the Court did have a discretion to exercise it would not, in any case, exercise it in favour of the Applicant for the reasons that follow in the next four paragraphs.

[213] ASOR knew that it was a shareholder and allowed itself to be represented to creditors and prospective creditors as a shareholder. Far from it being unfair to the shareholder to remain on the list of members, it would be unfair, unconscionable and an affront to ordinary commercial people for ASOR to be removed.

[214] Even if the creditors knew (or were taken to know) that the shares might be redeemable, they would have known (or be taken to know) that they could not be redeemed if the company was insolvent. Further (i) the shares were common shares which carried no right of redemption; and (ii) under the articles of association shares could not be redeemed at a shareholders' option in any event. Lenders conducting due diligence (such as BNP) would know this.

[215] Further, there is no unfairness in settling a true list of members in circumstances where ASOR's case turns on its right to be removed from the register at some time no earlier than 11 March 2020 (or at a pinch some time in November 2019). If ASOR had been removed from the Register it would have the exact same liability in the winding up as if it had not been removed. -s.196(2). As the Liquidators remarked, ASOR has not suggested that its position in the winding up would be any different had the shares been redeemed on, say, 11 March 2020.

[216] There was a question as to whether "member" in s.193 includes a "past member" who is liable under s.196(2). I am of the view and accept the Liquidators' suggestion that it would be strange if a mechanism designed to give an opportunity to a member to be removed from the settled list of members (and hence liability under s.195(1)) did not allow a past member to be given an opportunity to avoid liability under s.196(1). However, given that ASOR is not in fact a past member, the issue does not strictly arise for determination.

[217] The Liquidators addressed the argument that the Company is in breach of .contract for failing to redeem the shares on demand in a number of ways, including extensive reference to the evidence and cross-examination.

[218] I must reiterate that there is serious doubt as to whether the Amendment or Cancellation Notice were in existence prior to April 2020. Although the Liquidators say that they have never "alleged" that these documents did not exist or were backdated, they have consistently doubted their status given the lack of contemporaneous evidence. They further say that now that all the evidence is in, those doubts have been amply justified. I share those doubts.

[219] After all the evidence was in, it was plain that neither the MOU nor the Amendment were entered into on the date the documents bear. Mr. Abdul-Massih's insistence in his witness statement and live evidence to the contrary was in my view untrue. Indeed, the witness' evidence in relation to the MOU was that a *different* document had been produced and signed on 1st April 2018 but that the only copy had been stolen. Even if that last-minute and bizarre story is true, it does not justify the untruth or inaccuracy in the witness statement and given during the cross-examination on Day 1.

(1) In his Affidavit dated 23 February 2022-at paragraph 16 Mr. Abdul-Massih states MOU appended to the affidavit was entered into on 1 April 2018.

(2) In his Witness Statement dated 31 January 2023 at paragraph 22 Mr. Abdul-Massih states "A Memorandum of Understanding was entered into on 1 April 2018"

(3) Transcript Day 1, page 100-

Q. *At Tab 1 we find the memorandum of understanding. You say it was entered into on 1 April. You told her Ladyship that that's when its terms were agreed. I think it's right to say, isn't it, that it wasn't signed on 1 April? Would that be right?*

A. *No. I disagree.*

Q. *You say it was signed on 1 April?*

A. *Yes.*

(4) Transcript Day 1-Page 101

Q. *So I just again ask how you can be sure that it was signed on 1 April?*

A. *I am sure because I was there when it was signed by the parties.*

(5) Transcript Day 3-Page 153

A. *Yes. I'm sure the document is dated 1 April, okay, but I cannot guarantee that it was signed on 1 April. I know that it was contemporaneous in April 2018. I know that for a fact, and I know that my colleague Mr. Malky, circulated these documents in June or July 2018 again. To…what is their name...? Phoenix because they had lost their copy, and that is why he sent it back to them in July 2018……*

……

And you have a copy of that fully executed document in July 2018, and that was the purpose that Phoenix had lost their copy because Mr. Nitin Navandher was stolen his briefcase between Geneva and Lausanne or Zurich, I can't recall, in some of his travelling between April and July.

(6) Transcript Day 3-Page 155

Q. *So how could the document have been executed in April 2018 if it was still in draft in June 2018?*

A. *Yes, as I said, this document was strictly the same. There was a document like that in April that was circulated. The difference between the April one and the June one and the July one is the variation. That's the only difference. And there were some other various non-material elements that were taken up between this one and April.*

[220] There is indeed no contemporaneous evidence at all as to when the Amendment was signed. Mr. Dhawan's evidence that he must have signed prior to the issue of the shares is unsupported by any contemporaneous evidence. Sadly, based on the evidence, lack of contemporaneous evidence and my assessment of the credibility and reliability of the witnesses called by ASOR, I accept the Liquidators submission

that the signatures are equally consistent with an attempt to repair the position after the event.

(4) Transcript Day 2- Page 51-52. There Mr. Dhawan claims that he signed the Amendment "*through a process*" at his offices in early May but "*much before, or before"* 10 May.

[221] This question is, as Mr. Chivers KC submitted, important. That is because the only "contemporaneous" Amendment agreement is a single copy signed by all parties in wet ink. The Liquidators have asserted that it was the double fact of (a) a single wet ink signature document and (b) the lack of any correspondence concerning the document that led to their doubts as to its dating. According to the Liquidators, the explanation first given by Mr. Abdul-Massih had to (and did) explain (a) and (b).

[222] However, it was submitted by the Liquidators that the second version (now given during a resumption of examination-in-chief of Mr. Abdul-Massih by Mr. Alexander KC by the Court's permission) falls down on both limbs. This second explanation came after the Liquidators had produced a series of emails and given to ASOR's legal practitioners. The Liquidators had indicated that originally they had intended to try to cross-examine Mr Dhawan about them as they were relevant to the matter of whether Mr. Dhawan was in fact in Geneva on 25 April 2019(the date when Mr. Abdul-Massih had claimed that Mr. Dhawan had signed the Amendment). ASOR's legal practitioners then sought to introduce a further witness statement from Mr. Abdul-Massih as well as two further witnesses. There was objection from the Liquidators legal practitioners. We were by now half- way through the trial and I refused to admit such new evidence. I took the view that to admit this new evidence produced in such circumstances, would not be appropriate and would derail the trial, prolong it, and end up causing much back and forth and "rewinding and playing again" parts of the testimony. It was after this that Mr. Abdul-Massih gave his second bout of evidence in cross-examination.

Mr. Abdul-Massih's first explanation

[223] The witness' witness statement and witness evidence on these matters the first time around, concerning the creation of the Amendment, was, it seems to me, a complete fabrication.

(1) "*This mechanism was recorded, by the same parties to the MOU, in an 'Amendment' to the MOU on 25 April 2019"*-paragraph 23 of Affidavit of Abdul-Massih dated 23 February 2022.

(2) "*the finalization and the execution of the MOU and Amendment were carried out* ***in person****"*-paragraph 14 of the Second Affidavit of Abdul-Massih dated 1 April 2022.

(3) "***it was typed up on a computer in the office by me****"* -paragraph 40 of Mr. Abdul-Massih's Witness Statement dated 31 January 2023.

(my emphasis)

Mr. Abdul-Massih's second explanation

[224] At the Transcript Day 3 pages 141-147 Mr. Abdul-Massih provided a completely different story. It is hard to summarise, but essentially, what Mr. Abdul-Massih now says, having looked at the emails(mentioned in paragraph [222] above) and other documents, including his credit card statements, he realized that while he may have seen Mr. Dhawan some weeks before in Geneva, he never saw Mr. Dhawan sign the Amendment on 25 April 2019 or at all. He now says he does not know how Mr. Dhawan or Mr. Malky or Mr. Agabekov signed it because he wasn't there. He travelled to New York on 24, 25 April, and was there until 1 or 2 May probably. At page 173 Mr. Abdul-Massih agreed that in reality he was completely unable to say when anyone signed the Amendment.

[225] This new explanation does not show why the document travelled from Geneva to Dubai and back again to collect all the signatures. This is particularly inexplicable since the MOU (to which the Amendment was an amendment) was exchanged in soft copy.

[226] There is no explanation as to why there is no correspondence on the issue.

[227] The Liquidators also asserted that they were only provided with the Amendment (and Cancellation Notice) in Word format with associated properties on 12 September 2023- the week prior to commencement of the trial.

(a) The Liquidators pointed out that the document was clearly discoverable. They say that given the lateness in the provision of the document, it was obviously impracticable to obtain expert evidence, although they say Mr. Jarvis did give relevant evidence which was not challenged.

(b) Substantively, they assert that the documents and their properties prove nothing, since Word document properties are easily manipulated by persons without great technical knowledge.

(c) The Word document was originally said to come from Mr. Abdul-Massih's desktop, but his second round of evidence now is that he edited the document on a flight to New York on his laptop. As to the whereabouts of his laptop he said:

(d) Transcript Day 3 page 164-165

Q. *And have you given your laptop, have you produced that for examination by your solicitors?*

A. *By the way, my laptop doesn't exist anymore. I was mugged on 22 January 2023 in the train between Zurich to Geneva, between Olten and Aurau.*

(e) However, remarkably at Transcript Day 4 page 53, lines 7-13:

Q. *Now, as I understand it, your current evidence is that you used your laptop to edit the amendment document while you were on the flight to New York?*

A. *It is not the same laptop. All laptops were changed the beginning of April/ end of March 2020 due to Covid. The desktop is the same, though."*

[228] Thus overnight the evidence changed from the "flight laptop" being stolen in January 2023- well after the date for discovery- to the very same laptop being swapped for another during Covid.

[229] The Liquidators argued that it is ASOR that has put in document properties and who asks the Court to use those properties as probative. That it is for ASOR to prove the relevance of the data, not for the Liquidators to disprove it.

[230] The point was made that the Court has not been told by any qualified person how those properties came about. However, as to the reliability of the data, Mr. Jarvis on Day 4 Transcript page 136, lines 4-11 said during cross-examination:

> Q. *And what I have just shown you, if it is right, suggests that the original metadata dates were correct, doesn't it?*
>
> A. *No, I don't necessarily agree with the VCS file, it is possible to change metadata and change dates. You can change the date on your computer, for example, save it, and then you can go back and that will be the date stamp on that document. So I don't agree that is categorically the metadata.*

[231] This Court has been left with serious doubts as to the veracity of the dates and document properties put forward by ASOR with regard to the Amendment. The unusual thing about this case is that the doubts have arisen on ASOR's own case as put forward in its totality.

[232] It is also the Liquidators' case that Mr. Abdul-Massih's evidence concerning the creation of the Cancellation Notice was also untrue. Reference was made to:

(a) At paragraph 85 of the Witness Statement, it was stated that "*The Cancellation Notice was drafted in the same manner as the Amendment, at Inok's offices in Geneva."*

(b) *Transcript Day 3-page 183-185:*

Q. *You say:*

'The cancellation Notice was drafted in the same manner as the Amendment, in Inoks'office in Geneva. Present on that occasion were again myself and Mr. Dhawan'

Leaving aside the mistake in respect of the amendment

A. Yes.

Q. You say…

A. I think this is probably not a mistake but a (inaudible) because he was not there. I just handed him the notice and I didn't want to discuss it.

….

Q.I was going to say, are you able to say when you handed this notice to Mr….

A. It was on or about that week or after that week. I couldn't remember exactly, but I know I was very unhappy with the situation.

[233] The Liquidators say that, despite prior requests in correspondence no explanation was given as to how ASOR had come into possession of the Cancellation Notice until cross-examination.

[234] At paragraph 87 of his Witness Statement dated 31 January 2023, Mr. Abdul-Massih stated "*I know now that on 20 November Mr. Dhawan made an internal note on the Cancellation Notice".*

[235] Transcript Day 3 page 191-192:

Q. *And how did this document come into your possession?*

A. *I asked, at the time Mr. Navandher provided it to me, I asked him when he visited us to restart the ESPE transaction and they had asked us to provide us again the subscription agreement, the shareholders' agreement and everything, and I tell him I need to see any document and he gave me the photocopy.*

[236] Transcript Day 4 page 6-7:

A… *A s to the specific wording to (inaudible) I apologise to the court and I have heard and I said yesterday when it says:*

'*I now know that on 20 November…*'

I should have said, 'I know'. It is not, 'I now know' , on the date of signing the witness statement, so I present my apologies for that.

[237] Mr. Abdul-Massih could not explain how the copy of the Cancellation Notice does not contain the typo contained in the Word document provided on 13 September 2023- Transcript Day 3 Page 186-187.

[238] I do have doubts whether there was a contract in the first place. In any event, as discussed above if there was such a contract, it would be unenforceable. In my judgment, the Liquidators did not act unfairly by failing to give effect to an ineffective or unlawful redemption.

New Claim-Common Mistake

[239] Mr. Chivers' KC in his Note for Closing Submissions made the not insubstantial point that if this action had pleadings, there would have had to be an application to amend post-witness evidence. Here the witnesses have neither given evidence, nor been cross-examined, on the basis of the extremely late allegation of common mistake. It was submitted that no amendment would have been allowed and that ASOR should not be in any better position in an action without pleadings. There is force in the Liquidators argument. However, I have decided to allow this new point raised by Mr. Alexander KC because in essence, although as I will come to discuss, there should have been some foundational evidence, it is really a point of law. I am also of the view that the Liquidators are not prejudiced by allowing the point to proceed.

[240] The Liquidators describe the common mistake argument as proceeding on the assumption that the terms of issue of the shares included the terms as to redemption. They harken back to their assertion, which I have accepted, that there is no contemporaneous evidence that the company issued the shares pursuant to any such agreement. However, even if I am wrong on that, I will discuss this issue of common mistake on the basis that there was such an agreement that preceded the issue of shares, and that the agreement was that the shares were redeemable. I can state at the outset that in my judgment, the tests laid down in ***the Great Peace*** are not satisfied in the circumstance of this case.

First Limb-Common Assumption as to the Existence of a State of Affairs

[241] It is unclear what exactly is the alleged basis for a shared misunderstanding. Even assuming for the sake of the argument that ASOR may have believed that the Articles of Association did allow for redemption, there is no evidence that Phoenix BVI was not aware of its own Articles of Association or that it misunderstood their effect.

[242] This, if it occurred, would not be a mistake of fact, but would be a mistake of law. However, the parties have not given any evidence as to what they thought the law was. None of the witnesses spoke of taking legal advice and neither of the parties have said they thought the law was (x) or (y). I find that they were reckless in their approach and that there is no evidence that they entered into the Amendment with any understanding of the law at all. I accept the Liquidators' submission that the parties did not "misunderstand" the law-they simply had never even addressed their minds to the point.

[243] The law of common mistake protects against a parties' mistaken assumption, not against their willful ignorance. As indicated in ***the Great Peace*** at paragraphs 90 to 91, a mistake that is "*no more than a belief which is entertained…without any reasonable grounds"* does not fall within the principle of common mistake.

The Second Limb-Warranty

[244] The parties did not address this issue in evidence at all, since this is a last minute point being raised by ASOR. There is therefore no evidence about whether any of the parties warranted or did not warrant a particular state of affairs.

Third Limb-Non-Existence of the State of Affairs Must Not be Attributable to the Fault of either party

[245] There is in my judgment clear fault in respect of both parties. If Phoenix BVI and the shareholders who agreed the document (Mr. Ghosh excepted, because he said he did not know of the MOU or the Amendment and did not authorize Mr. Dhawan to sign on his behalf) were obliged to procure the issue of redeemable shares, then

they were also obliged to amend the Articles of Association. They were at fault for not doing so.

Fourth Limb-The non-existence of the state of affairs must render performance impossible

[246] In my judgment, it was possible to perform the contract; it just needed the Articles to be altered prior to (or perhaps even after) the issue of the shares. That was within the power of the parties to the Amendment to bring it about. This remained possible up to the date of the liquidation.

[247] As the Liquidators argued, this was a further indication that the Amendment was never intended to be binding. This is because the sort of due diligence that would have been required to put the amendment in place was neither contemplated nor performed by the parties.

Fifth Limb-existence or vital attribute, circumstances which must subsist

[248] I understand ASOR's argument to mean that ASOR would be entitled to redeem whatever the circumstances (i.e. even in an insolvency). However, there is no evidence that the parties intended that redemption would take place if the company was insolvent. Further, there was no evidence that the parties understood the law to allow that.

[249] For this argument to be sustainable, there would in any event, have needed to be evidence of the parties' belief as to solvency in the period anticipated between issue and redemption and whether the parties considered that the risk of insolvency during that period was real. The evidence is that the parties thought the period to be short. There is further no evidence that some assumed ability to redeem in insolvency was within the contemplation of the parties at all.

[250] In any case, the (assumed) ability to redeem in the event of insolvency cannot be considered an integral part of a contract to issue shares with an option to redeem.

Liquidators not seeking to enforce the alleged contract

[251] Mr. Chivers KC's final salvo on this point was that ultimately it makes no difference. I accept that submission. The Liquidators are not seeking to enforce the contract. If an application for rectification had been made on the basis of "common mistake" it might-had all the requirements been satisfied- have succeeded as at some earlier date, say, 1st June 2019. However, even then the Court would be unlikely to have allowed rectification without evidence that no lender had acted to their detriment on the announcement of 10th May 2019. However, once BNP relied on the allotment as having satisfied the Condition precedent it would have been impossible for ASOR to get rectification. In any event, the issue in this case is not one of contract, but rather of ASOR's status.

Conclusion

[252] ASOR (acting by Mr. Abdul-Massih) agreed in writing to becoming, and in due course became a shareholder.

[253] There is no such state of provisional or temporary ownership of the shares or of ASOR being a partial member known to BVI law and the shareholding could not lapse on the non-fulfillment of the alleged Conditions Precedent or at all.

[254] The essential question is a binary one as to ASOR's status at the relevant time: was ASOR a member when Phoenix BVI entered into liquidation, or not? In my judgment it was plainly a member at that time. The Company could not redeem its shares at the option of a shareholder without changing its articles. Nor could it do so while insolvent.

Disposition

[255] The Originating Application filed 24 February 2022 is dismissed. Costs are awarded against ICM/ASOR to be assessed or agreed within 21 days.

[256] It just remains for me to thank leading Counsel and the teams on both sides for their excellent submissions, both written and oral, delivered with great skill and clarity. This has been of great assistance to the Court in resolving the issues, including the novel point as to the proper construction of s.49 of the BCA.

Ingrid Mangatal
High Court Judge

By the Court

Registrar