



**Neutral Citation Number: [2026] CIGC (FSD) 54
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 0003 of 2026 (NSJ)

BETWEEN:

MILFAM LLC

Plaintiff

-and-

(1) SAMUEL MORROW

(2) MICHAEL SMITH

(3) SCULLY ROYALTY LTD.

Defendants

Before: The Hon Justice Segal

**Appearances: Mr Andrew Ayres KC instructed by Rupert Bell,
Jonathan Turner and Tiani Purton-Clark of Walkers
(Cayman) LLP for the Plaintiff (MILFAM)**

**Mr James Potts KC instructed by Kyle Broadhurst
and Adam Crane of Broadhurst LLC for the First and
Second Defendants**

Hearing: 27-29 May 2026

**Draft judgment
distributed: 23 June 2026**

Judgment delivered: 2 July 2026

TRIAL JUDGMENT

Introduction

1. This is my judgment following the trial on 27-29 May 2026 of (a) the Originating Summons dated 5 January 2026 (the *Originating Summons*) issued by MILFAM LLC (*MILFAM*) and (b) the counterclaim (the *Counterclaim*) advanced by the First Defendant and the Second Defendant as set out in the First Affidavit of Mr Samuel Morrow sworn on 9 April 2026 (*Morrow I*) and the First Affidavit of Michael Smith sworn on 16 May 2026 (*Smith I*). Pursuant to [5] of the directions order dated 24 April 2026 it was ordered that “*Morrow I shall stand as pleadings, and be treated as the defence and counterclaim of the First and Second Defendants, and any further affidavits filed by the parties addressing points of claim, defences or replies be delivered and stand as pleadings.*”
2. The dispute between the parties relates to the convening and purported postponement of an annual general meeting of the shareholders of Scully Royalty Ltd. (the *Company*) and the steps taken by MILFAM’s representatives to proceed with, and purportedly pass resolutions at, the annual general meeting on the basis that the postponement was ineffective.
3. The Company is a Cayman Islands exempted company limited by shares (formerly MFC Bancorp), publicly traded on the New York Stock Exchange (the *NYSE*) under ticker SRL. MILFAM is a substantial shareholder in the Company.
4. The Company’s largest shareholders are (a) a “*group*” (for the purposes of section 13(d) of the US Securities Exchange Act 1934) disclosed as beneficially owned by Mr Peter Kellogg, reported in filings with the SEC in July 2022 as amounting to 35% of the Company’s voting interests and (2) a “*group*” controlled by Mr Neil Subin, the President and Manager of MILFAM, owning approximately 13% of the Company’s shares.
5. One of the main issues to be addressed at the AGM was whether new directors were to be appointed to the board of the Company. MILFAM had nominated (pursuant to a

nomination notice) a number of individuals for election by the shareholders at the AGM. The Company's directors purported to postpone the AGM. MILFAM considered that the postponement was invalid, and its representatives went ahead with the AGM and purported to pass resolutions appointing a chairperson (Mr Bruce Sun) to chair the meeting and elect MILFAM's nominees as directors.

6. MILFAM claims that the directors (at the time) had no power to postpone the AGM and that the purported postponement was invalid and of no effect. The First and Second Defendant deny this and assert that the postponement was valid. However, they say, even if they are wrong on this point, the purported resolutions were of no effect because (a) the AGM was not properly constituted since there was no chairperson validly appointed to chair the meeting (only the directors of the Company could appoint the chairperson and none were in attendance at the AGM) and (b) MILFAM's nominees were not eligible to be considered and appointed as directors as MILFAM's nomination notice was defective by reason of inadequate disclosure.
7. At the trial, conducted remotely, Mr Andrew Ayres KC appeared for MILFAM and Mr James Potts KC appeared for the First and Second Defendants. Two witnesses gave evidence and were cross-examined. They were the First Defendant, Mr Samuel Morrow and Mr Skyler Wichers, an employee of MILFAM.
8. I have reached, for the reasons explained below, the following conclusions on the main issues in dispute:
 - (a). the directors did not have the power to postpone the AGM.
 - (b). the Company's articles of association do not include an implied term, and there is no proper or sufficient basis for implying into the articles a term or provision, giving the members (or their proxies) present at the AGM the power to appoint the chairperson of that meeting when no directors are present at the meeting.
 - (c). accordingly, Mr Sun was not validly appointed to be the chairperson at the AGM and the AGM was unable to move to and conduct any business.

- (d). therefore, the resolutions purportedly appointing the individuals nominated by MILFAM for election as directors were not validly passed and those individuals were not elected as directors at the purported AGM on 27 December 2025.
- (e). even if, contrary to my decision at (b), a term permitting the shareholders present at a shareholders meeting to appoint the chairperson in the absence of any of the directors is to be implied into the articles, and Mr Sun was properly appointed as the chairperson at the AGM, and the resolutions for the election of the MILFAM nominees to be directors were properly moved and voted on, MILFAM's nomination notice and proxy statement failed to disclose relevant and material matters concerning its relationship with, and the positions held by, Mr Howe and Mr Holliday which, had these matters been disclosed, could have affected the decision made by those shareholders who had given proxies to vote in favour of those resolutions and caused them to change their decision/vote, with the consequence that the resolutions approving the appointment of Mr Howe and Mr Holliday (but not those approving the appointment of the other MILFAM nominees) would be treated as invalid.
- (f). MILFAM was not entitled to rely on the disclosures made by the Company in its press release on 22 December 2025 because the evidence did not establish, and MILFAM had not proved, that shareholders received the further information in time to enable them to withdraw their proxies or be able to travel to and attend the AGM and thereby to cast their vote and make their decision as to how to vote on the resolutions to appoint the MILFAM nominees having regard to and taking into account the further information disclosed in the press release.
9. I have dealt with and decided the issues in dispute at the hearing and will ask the parties to prepare and seek to agree a suitable form of order to give effect to this judgment and to deal with relevant consequential matters (including costs). If and to the extent that the parties are unable to reach agreement they should file within 21 days of the date on which this judgment is handed down, a draft order identifying the parts that are agreed and those which are disputed, with brief explanations of their respective positions on the points in dispute and I shall then review these submissions and settle the order on the papers (unless any of the parties wish me to list a hearing to deal with the issues in dispute).

Previous proceedings

10. This is the second set of proceedings in this jurisdiction concerning MILFAM's attempt to nominate directors to the Company's board at the AGM. The Company asserted that the notice filed by MILFAM nominating directors for appointment to the board was not served in time in accordance with the timing requirements of Article 20.2 of the Company's articles of association adopted by special resolution dated 12 July 2017 (as amended) (the *Articles*). As a result, MILFAM commenced proceedings (the *Nomination Timing Proceedings*) by way of an originating summons in December 2025 which was heard by me on 19 December 2025. MILFAM sought a declaration that MILFAM's nomination notice was validly delivered and served on the Company in accordance with the relevant provisions in the Articles. In view of the urgency of the matter at the end of the hearing I informed the parties that I would grant MILFAM's application (subject to certain clarificatory amendments) and an order to that effect was made on 19 December 2025 (the *Nomination Proceedings Order*). On 23 December 2025 I handed down my written judgment (the *Nomination Notice Judgment*) setting out the reasons for my decision. Some of the relevant background to the present dispute is discussed in the Nomination Notice Judgment. Also on 23 December 2025 the Company filed a Notice of Appeal. The appeal is still pending.

The Originating Summons

11. In the Originating Summons MILFAM seeks declarations that:
- (a) the purported postponement of the annual general meeting of the Company which was to be held in Hong Kong on 27 December 2025 (Hong Kong time (the *AGM*)) was invalid and of no effect.
 - (b) the AGM was quorate and validly held on 27 December 2025 (Hong Kong time).
 - (c) the election of Mr Jerrod Freund, Mr Mark Holliday, Mr Alan Howe, Mr Nimesh Patel and Mr Skyler Wichers (together the *MILFAM Nominees*) as directors of the Company, and the non-re-election of the First and Second Defendants, Dr Shuming Zhao, Mr Jochen Dümmler and Ms Silke S. Stenger (together the *Original Directors*)

by poll of the members represented at the AGM was valid and is binding on the Company.

- (d). that the Company cause the Register of Directors to be updated to remove the Original Directors as the Company's current directors and to name the MILFAM Nominees as the Company's current directors.
- (e). dismissing the Counterclaim that MILFAM's Shareholder's Notice of Director Nomination (the *MILFAM Nomination Notice*) (which was delivered by hand to the Company's registered office on 25 November 2025) and the proxy statement prepared by MILFAM in connection with the solicitation of proxies by MILFAM for use at the AGM (the *MILFAM Proxy Statement*) which was filed on 8 December 2025 on the United States EDGAR system, both failed to comply with the Company's articles and the requirements of Cayman Islands law.
- (f). that the First and Second Defendants pay MILFAM's costs of and occasioned by the Originating Summons and the Counterclaim.

The Counterclaim

12. Mr Morrow set out in his first affidavit (*Morrow I*) the First and Second Defendant's challenge to the MILFAM Nomination Notice as follows (my underlining):

83. *I am concerned that there were significant and material misstatements and nondisclosures in the MILFAM Nomination Notice and in the MILFAM Proxy Circular. As a result, they may have been contrary to the Company's Articles and the Company's shareholders did not receive the full, fair, or frank information to which they were entitled for the purpose of assessing the proposed resolutions and considering whether and how to vote on them. The upshot is that the decision-making of shareholders may have been impaired and the will of the shareholders at the purported AGM not fairly or correctly ascertained.*

84. *The MILFAM Nomination Notice failed to comply with the Articles. Article 20.3 (a) and (b) require the "Nominating Shareholder" to provide, among other things, the following information in the notice:*

"(a) as to each person who the Nominating Shareholder proposes to nominate for election as a Director: (i) the name, age, business

address and residential address of the person; (ii) the principal occupation or employment of the person and the principal occupation or employment within the five years preceding the notice; (iii) the citizenship of such person; (iv) the class or series and number of Shares in the capital of the Company which are controlled, directly or indirectly, or which are owned, beneficially or of record, by the person as of the record date for the meeting of Members (if such date shall then have been made publicly available and shall have occurred) and as of the date of such notice; (v) a statement as to whether such person would be "independent" of the Company if elected as a Director at such meeting and the reasons and basis for such determination; and (vi) any other information relating to the person that would be required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law; and

- (b) *as to the Nominating Shareholder giving the notice, (i) full particulars regarding any proxy, contract, agreement, arrangement or understanding pursuant to which such Nominating Shareholder has a right to vote or direct the voting of any Shares of the Company and (ii) any other information relating to such Nominating Shareholder that would be required to be made in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law.*

The Company may require any proposed nominee to furnish such other information as may reasonably be required by the Company to comply with applicable law and determine the eligibility of such proposed nominee to serve as a Director of the Company or that could be material to a reasonable Member's understanding of the experience, independence, or qualifications (or lack thereof) of such proposed nominee.

85. *It is our case that the reference to the information required "in a dissident's proxy circular in connection with the solicitation of proxies for election of Directors pursuant to applicable law" is a reference to: (1) the common law rules applicable to circulars under the laws of the Cayman Islands (the content of which rules would be informed, in part, by US securities laws given the listing of shares in the Company on the New York Stock Exchange); and/or (2) the rules applicable to circulars arising from the Company's listing on the New York Stock Exchange, including the requirements of Section 13D.*
87. *The requirements of Section 13D are a matter for expert evidence. However, in broad terms, it is our case that MILFAM and/or the Kellogg Group were each required to make updated filings under Section 13D in relation to their ownership of shares and arrangements directed towards control of the board of the Company, and did not do so.*

13. The First and Second Defendants subsequently dropped their case based on US law.

Agreed List of Issues

14. The parties (eventually) agreed a list of issues for the trial following the Pre-Trial Review on 15 May 2026 (at which both Mr Ayres and Mr Potts appeared) at which the scope and formulation of the list was debated. The final agreed list is as follows:

The (disputed) AGM

1. *Did the Incumbent Directors have the power to postpone the AGM?*
2. *If not, was the AGM quorate?*
3. *Do the Articles of Association include an implied term empowering the Members (or their proxies) present at an annual general meeting of the Company to appoint a chairman of that meeting in the absence of any Directors present at the meeting?*
4. *If so, was Mr Sun validly appointed to act as chairman of the AGM that the Plaintiff avers was held on 27 December 2025?*

The MILFAM Nomination Notice and the MILFAM Proxy Statement

5. *Did the MILFAM Nomination Notice comply with Article 20.3(a) and/or (b)? In particular:*
 - a. *Did the Nomination Notice state all “other information relating to the [MILFAM Nominees] that would be required to be disclosed in a dissident’s proxy circular in connection with solicitations of proxies for election of Directors pursuant” to Cayman Islands law having regard in particular to the facts as stated in paragraphs 5-8 of Smith 1 and 30-32, 83-85 and 87(1) of Morrow 1?*
 - b. *Did the Nomination Notice disclose all “other information relating to [MILFAM] that would be required to be made in a dissident’s proxy circular in connection with solicitations of proxies for election of Directors pursuant” to Cayman Islands law, having regard in particular to the facts as stated in paragraphs 5-8 of Smith 1 and 30-32, 83-85 and 87(1) of Morrow 1?*
6. *Did the proposed nominees comply with a request by the Company for certain information (as set out in its letter of 17 December) such as to comply with the proviso to Article 20.3?*
7. *What are the requirements of Cayman Islands law regarding statements in dissident proxy circulars in connection with the solicitation of proxies for the election of Directors of a Cayman Islands exempted limited company?*

8. *Did the MILFAM Proxy Statement comply with the requirements of Cayman Islands law having regard in particular to the facts as stated in paragraphs 5-8 of Smith 1 and 30-32, 83-85 and 87(1) of Morrow 1?*
 9. *If any of the answers to issues 5, 6 and/or 8 above are 'no', were the resolutions that the Plaintiff avers were passed at the AGM to elect the MILFAM Nominees invalid as a result?*
15. I would note that at the Pre-Trial Review (a) following a question from me, Mr Ayres confirmed that MILFAM did not allege that if the directors had a power to postpone the AGM they had exercised it for an improper purpose or in breach of duty (so that no issue arose relating to the manner in which the power to postpone which the directors had asserted and relied on had been exercised) and (b) I was told and accepted that the parties had agreed that no further issues arose regarding the conduct of the purported AGM beyond the question of whether Mr Sun had validly been appointed as chairman (so that there was no dispute as to whether the purported AGM had been validly conducted, for example it was conducted only outside the venue designated in the notice convening the AGM, so that if Mr Sun had been properly appointed it was accepted that the AGM was validly constituted and conducted subject only to the question of whether the resolutions purportedly passed to elect the MILFAM Nominees were properly passed or should stand in view of the First and Second Defendants' claim that the MILFAM Nomination Notice and the MILFAM Proxy Statement were flawed and deficient).

The written evidence

16. The parties have filed affidavits from four people.
17. MILFAM has adduced:
 - (a). the first affidavit of Mr Bruce Sun dated 20 January 2026 (*Sun 1*). Mr Sun is an Assistant Vice President of MILFAM who purported to act as chair of the AGM. Mr Sun gives evidence of the events at the purported meeting.
 - (b). the first to seventh affidavits of Mr Wichers dated 20 January (*Wichers 1*), 28 January, 4 February (the third and fourth affidavits were filed on the same date), 7 April 2026, 13 April and 6 May 2026 (*Wichers 7*). Mr Wichers has been employed

by MILFAM since 2019 and is presently employed as an executive and portfolio manager.

- (c). the first affidavit of Mr Andrew Calamari. Mr Calamari is a partner in Finn, Dixon & Herting LLP, a US law firm based in Stamford, Connecticut. He was instructed by the Plaintiff to prepare an independent expert report on certain questions of U.S. federal and state securities law and the listing rules of the New York Stock Exchange. His report on these issues was dated 5 May 2026. Because the First and Second Defendants dropped the parts of their counterclaim based on an asserted breach by MILFAM of US securities laws Mr Calamari's report was not referred to during the trial.

18. The First and Second Defendants adduced:

- (a). the first, second, third affidavits of Mr Morrow dated 26 March 2026 (sworn on 9 April 2026), 16 April 2026 (sworn on 15 May 2026) and 20 April 2026 (sworn on 19 May 2026). Mr Morrow has been the Chief Financial Officer of the Company since it was formed and has been a director, President and CEO since May 2021. He has also been a director of a number of the Company's subsidiaries, and the beneficial owner of approximately 9,888 shares in the Company as of 31 December 2024.
- (b). the first (*Smith 1*) and second affidavits of Mr Michael Smith dated 4 (but sworn on 16) and 21 May 2026. Mr Smith has been the Executive Chairman and a director of the Company and has been involved with the group for several decades. He was previously the President and Chief Executive Officer of the Company from June 2017 to May 2021. He is the beneficial owner of 28,393 shares in the Company as of 31 December 2024.

The relevant facts in outline

19. The relevant facts relating to the convening of the AGM were not disputed. They can be summarised as follows:

- (a). on 10 November 2025, the Company filed on the Canadian SEDAR system a notice of the AGM to take place in Hong Kong on 27 December 2025 (as it had in the previous year).
- (b). on 28 November 2025, the Company filed a Form 6K including a further notice of AGM to be held at 8am on 27 December 2025 in Hong Kong (the two notices being the *AGM Notices*).
- (c). on 25 November 2025, MILFAM gave notice by the MILFAM Nomination Notice of its nomination of a slate of candidates (the MILFAM Nominees) for election to the board in the place of the existing directors.
- (d). on 5 December 2025, the Company filed on the United States' EDGAR system a proxy statement in connection with the solicitation of proxies by the Company for use at the AGM (the *Company Proxy Statement*), which included a white card by which shareholders could appoint a proxy and vote in respect of, *inter alia*, resolutions at the AGM relating to the re-election of the Original Directors to the board of directors of the Company.
- (e). also on 5 December 2025, the Company's Compensation, Nominating and Corporate Governance Committee (the *Governance Committee*) passed resolutions to declare the MILFAM Nomination Notice defective and invalid.
- (f). on 8 December 2025, MILFAM published the MILFAM Proxy Statement soliciting proxies for the MILFAM Nominees. The MILFAM Proxy Statement included a gold card by which shareholders could appoint Mr Sun as their proxy and vote in respect of, *inter alia*, resolutions being proposed at the AGM relating to the election of the MILFAM Nominees to the board of directors of the Company. In addition, the MILFAM Proxy Statement was conveyed to proxy distribution and tabulation agents, including Broadridge Financial Solutions, Inc., Mediant Communications, Inc., and Say Technologies LLC, who were engaged by banks, broker/dealers, and other custodians for the purpose of shareholders voting at the AGM.

- (g). on 10 December 2025, MILFAM issued the originating summons in the Nomination Timing Proceedings seeking a declaration that the MILFAM Nomination Notice had been validly delivered.
- (h). on 17 December 2025, MILFAM received a letter from the Company raising a number of requests for information in respect of certain of the MILFAM Nominees. MILFAM responded on the same day.
- (i). on 18 December 2025, the Company made further requests for information in respect of certain of the MILFAM Nominees. MILFAM responded to each of the additional queries on 19 December 2025.
- (j). on 19 December 2025, MILFAM's application in the Nomination Timing Proceedings was heard and the Nomination Order was made and it appears that the Original Directors made the decision to postpone the AGM when draft resolutions were circulated to this effect during the Nomination Timing Proceedings, which were executed by the Second Defendant, Mr Smith, and Mr Jochen Dümmler on the same day.
- (k). on 22 December 2025, the Company issued a press release (the ***December Press Release***) stating that it would be appealing the Nomination Order to the Cayman Islands Court of Appeal and which, under the heading "*The MILFAM Circular Omits Critical Information for Shareholders and is Materially Misleading*", made various criticisms of the disclosure made by MILFAM in the MILFAM Proxy Statement. The press release alleged that MILFAM had failed to disclose purported connections or associations between MILFAM and the MILFAM Nominees and set out each of the purported undisclosed relationships that were allegedly withheld by MILFAM. It concluded by urging shareholders to vote for the Original Directors to be re-elected to the board (see [24] and [27] of Wichers 1).
- (l). also on 22 December 2025, AMRL, acting for the Company on the instruction of the First and Second Defendants, wrote to Walkers (MILFAM's Cayman attorneys) confirming various arrangements in respect of the AGM, including the address, attendance and other administrative matters.

- (m). on 23 December 2025, the last of the Original Directors to do so executed the written resolutions to postpone the AGM which had been circulated on 19 December 2025, the Nomination Notice Judgment was handed down and the Company filed a Notice of Appeal.
- (n). on 24 December 2025, the Company issued a press release announcing the purported postponement. The Company stated that the AGM had been *"temporarily postponed for a short duration of time to allow a hearing before the Cayman Islands Court of Appeal to be heard as soon as practicable"* for various reasons, including *"that a short postponement will assist in addressing the uncertainty created by the recent decision and appeal, the need to provide shareholders sufficient opportunity to assess purported nominations of MILFAM pending the outcome of the court proceedings, and to allow the Meeting to take place in an orderly manner that promotes and is conducive [sic] of informed shareholder decision-making with full disclosure by each party of all material information"* (see [34] of Wichers 1). Later that day, Walkers wrote to AMRL noting that the postponement had been announced without any reference to the Articles, which did not confer upon the Original Directors any power to postpone the AGM. The letter sought confirmation that the postponement would be cancelled.
- (o). on 26 December 2025, MILFAM issued a press release announcing its intention to proceed with the AGM as scheduled and noting (asserting) that the Articles did not confer any power on the board of directors of the Company to postpone the AGM (see [37] of Wichers 1).
20. As regards what happened when Mr Sun and his colleagues turned up to attend the AGM, this is dealt with in Mr Sun's unchallenged evidence as follows:
- (a). between 5 December 2025 and the voting cutoff deadline of 8:00am (Hong Kong time) on 23 December 2025, the Company's shareholders submitted votes for the election of directors, voting either (a) for the Original Directors using the white card (who as the incumbent directors and in accordance with Article 19.3 of the Articles ceased to hold office immediately prior to the AGM and were eligible to

stand for re-election) or (b) for the Original Directors or the MILFAM Nominees using the gold card. Shareholders in attendance at the AGM in person had the ability to cast their votes in person and those who could not attend the AGM in person could vote either on the white card or the gold card to appoint proxies who would cast votes on their behalf at the AGM. The gold card authorised and directed Mr Sun as proxy to cast votes at the AGM for or against the MILFAM Nominees or the Original Directors in accordance with the shareholders' instructions.

- (b). at approximately 7:30am (Hong Kong time) on 27 December 2025, Mr Sun and Ms Anna Petrosian (an Assistant VP at MILFAM) arrived at the elevator bank of Dina House, Rutonjee Centre at 11 Duddell Street, Central, Hong Kong. They were accompanied by Mr Eugene Y. Leung and Mr Alvin Lam from K&L Gates LLP and Mr John Crook of Walkers (Hong Kong) LLP. After taking the elevator to the 8th floor of Dina House, they arrived outside Unit 803, the allocated meeting room as specified by the Company's notice of the AGM. The doors to the venue were locked, and upon ringing the doorbell, no person responded to open the door. Mr Sun said that by looking through the glass door of the venue, he could see that the lights were off, and it appeared that no one was in the office.
- (c). in the absence of the chairman and other directors in advance of the scheduled start time of the AGM, Ms Petrosian and Mr Sun determined that they would take steps to allow the AGM to proceed in the immediate vicinity of the allocated meeting room. Purportedly in accordance with Article 18.1 of the Articles they determined that the AGM could and should take place subject to there being a quorum present. Mr Sun concluded, based on an initial tabulation report that MILFAM received from Sodali & Co, MILFAM's proxy solicitors, 8,992,562 shares (or 59.06% of the total outstanding shares) of the Company were represented by proxy so that a quorum was present. Mr Sun said that he and Ms Petrosian believed that there was a residual right for the shareholders to appoint a non-director to chair the AGM. He also said that the final tabulation report from Sodali & Co confirmed that 8,992,562 shares of the Company were represented in person or by proxy at the AGM, thereby constituting a quorum.

- (d). at approximately 7:50am (Hong Kong time), Mr Sun procured chairs from the building staff at Dina House in preparation for conducting the AGM outside of the door of Unit 803. At approximately 7:55am (Hong Kong time), he and those with him posted what he described as clear and visible signage next to the door of Unit 803 for other shareholders and duly elected proxies seeking to attend the meeting in person. Mr Sun said that an online meeting invitation was also circulated via Microsoft Teams for Sodali & Co, other MILFAM officers, as well as for other members of K&L Gates and Walkers (Cayman) LLP to attend virtually.
- (e). at 8:03am (Hong Kong time), Mr Sun declared that he had been duly appointed as the proxy for MILFAM and certain other shareholders and opened the AGM. Mr Sun said that Mr Jonathan Eyl of Sodali & Co, in his capacity as inspector of elections and scrutineer, was in attendance virtually to tabulate the votes cast at the AGM. Sodali & Co had been engaged (by MILFAM) ahead of the AGM on 26 December 2025 in case the chairman and other directors (or another inspector of elections and scrutineer) did not attend at, and or failed to conduct, the AGM.
- (f). the AGM had been observed virtually via Microsoft Teams by Mr Jonathan Barron, Mr Eugene Yeung, and Ms Katherine O'Neal of K&L Gates; by Mr Jason Allison and Ms Miriam El Ofir of Walkers Cayman; by Mr Anthony Lanza and Mr Skyler Wichers of MILFAM and by Mr William Dooley (in addition to Mr Eyl) of Sodali & Co. He said that no representatives from the Company were present at the venue.
- (g). purportedly pursuant to Article 18.1 of the Articles, following the opening of the AGM, Mr Sun waited to see if the chairman or any other director would attend the AGM. At 8:19am, sixteen minutes after opening the AGM, Mr Sun determined to continue the AGM and proposed a resolution to appoint himself as chair of the AGM. Mr Sun said that this resolution was passed unanimously with the approval of the shareholders present by proxy with him voting in favour of the resolution as those shareholders' proxy. He then proceeded to propose the resolutions to elect the Original Directors but based on the votes by proxy he had received in advance of the AGM (and indications from the floor) he noted for the record that none of the resolutions to elect the Original Directors had received sufficient votes in favour.

This was subsequently confirmed by Sodali & Co in its final tabulation report for the AGM that this was correct.

- (h). Mr Sun then proceeded to propose the resolutions for the election of the MILFAM Nominees and that these were passed by a sufficient majority (as subsequently also confirmed by Sodali & Co in their final tabulation report).
- (i). Mr Sun thereafter proceeded to propose the resolution to ratify the appointment of AOGB CPA Limited as the Company's auditors and to authorise the directors to fix the remuneration for the auditors, for the fiscal year ending 31 December 2025. He said that based on the votes by proxy received in advance of the AGM and indications from the floor, he noted that the resolution had not received sufficient votes in favour (which was subsequently confirmed by Sodali & Co).
- (j). Mr Sun then sought to ascertain whether there was any other business to come before the AGM but since there was none, he had closed the AGM at 8:30am (Hong Kong time) and left the building.

The board's decision to postpone the AGM

21. Mr Morrow explained in Morrow 1 the action taken by the Company's board following the handing down of the Nomination Notice Judgment:

- 41. *In light of the pending appeal, the Board convened to consider the appropriate course of action in respect of the AGM. Based on a recommendation from the Company's independent Compensation, Nominating and Corporate Governance Committee (constituted exclusively of Scully's independent directors) to postpone the AGM, the Board resolved on 24 December 2025 to postpone the AGM (Pages 459 - 466). In reaching that decision, the Board carefully considered the uncertainty created by the Nomination Timing Proceedings, the Appeal and the MILFAM Nomination Notice and the need for shareholders to have all necessary information in order to form an informed decision on the matters to be considered at the AGM.*
- 42. *Accordingly, the Board formed the view that the postponement of the AGM was in the best interests of both the Company and its shareholders and was necessary to preserve the integrity of the shareholder meeting process and the orderly conduct of the Company's affairs. It was therefore my belief at*

the time that the postponement was valid and that the AGM could not properly have proceeded on 27 December 2025 in the circumstances then prevailing. For that reason, I did not attend the AGM on 27 December 2025.

22. Mr Morrow exhibited to Morrow 1 a copy of a written (consent) resolution of the directors dealing with their decision to postpone the AGM (following a recommendation to do so from the Governance Committee).

Issue 1: the disputed AGM - did the Original Directors have the power to postpone the AGM?

MILFAM's submissions

23. MILFAM submitted that the Articles did not give the directors the power to postpone the AGM. They submitted that once a general meeting had properly been called, the Articles vested no power in the directors unilaterally to postpone such a meeting. The meeting may only be adjourned by the Chairman with the consent or direction of those present at the meeting as provided in Article 18.2 of the Articles which stated that:

The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. It is not necessary to give any notice of an adjourned meeting or of the business to be transacted at an adjourned meeting except that when a meeting is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of the original meeting.

24. MILFAM said that the authorities made it clear that absent an express power in the Company's articles neither the chairman, nor the directors, had a discretion to postpone or abandon a duly convened shareholder meeting. That power rested with the meeting which could decide whether to resolve to adjourn or go on with the business for which the meeting had been convened (citing *Smith v Paringa Mines Ltd* [1906] 2 Ch. 193 (Ch D); *National Dwellings Society v Sykes* [1894] 3 Ch. 159 and *Byng v London Life Association Ltd* [1990] Ch. 170).
25. MILFAM cited the following passage from the well-known textbook on meetings, *Shackleton on The Law and Practice of Meetings* at [13-26] (my underlining):

Once a general meeting has been convened upon due notice, it cannot be postponed or cancelled, but can only be adjourned. The correct procedure, where the purpose for which a meeting has been convened has ceased to exist, is to hold the meeting as convened and adjourn it sine die without putting the resolution to the members. A purported cancellation will not be valid: “A notice was issued postponing a general meeting already called. In the belief that the attempted postponement was illegal, an aggrieved director advertised the meeting in the press for the same date as previously arranged. He, with several other shareholders, attended this meeting, and resolutions were approved re-electing himself as a director, refusing to re-appoint another director, and adjourning the meeting to the date of the postponed meeting. The resolutions were held to be valid, for in the absence of express authority in the articles, the directors of a company have no power to postpone a general meeting properly convened... The meeting must be formally opened at the initial venue, with a quorum of members, and formally adjourned to the new meeting place.

26. MILFAM submitted that the authorities also made it clear that it could not be said that the directors had a power to postpone by necessary implication merely because they had the power to appoint the time and place of any meeting. This was held to be the case by Kekewich J in *Smith v Paringa Mines Ltd* at pages 197-198:

"The articles provide for the adjournment of a general meeting in certain events, but they contain no provision for postponement. It is said that the directors must be able to postpone the meeting because they may fix the time and place at which the meeting is to be held; but in my opinion that is not so. On the other hand, if the directors had power to postpone, and a meeting adverse to the directors was called, they might postpone it for a week or a month, or perhaps sine die. I cannot see that there is any doubt upon the point."

27. MILFAM said that the First and Second Defendants were wrong to rely (as I explain below) on the reference to “*postponement*” of a shareholder meeting in Article 20.2 as the basis for their submission that the Articles must be interpreted as giving the directors a power to postpone such meetings. The First and Second Defendants argued that because of the inclusion of the word “*postponement*” in Article 20.2 the directors must be taken to possess a freestanding power to postpone a duly convened general meeting. That argument involved an impermissible leap of logic.
28. MILFAM argued that Article 20.2 was concerned solely with the timing requirements for the submission of nomination notices of shareholders. Whilst it may contemplate that a meeting of members may be postponed, it did not purport to identify who may exercise any such power, still less to confer that power on the directors. It was, MILFAM submitted, nonsensical to conflate a descriptive reference to “*postponement*” as a source

of substantive authority. The directors' power to postpone a general meeting must be found in clear words in the Articles, not inferred indirectly from passing references in provisions directed to an entirely different subject-matter.

29. MILFAM also argued that the First and Second Defendants' construction made no commercial or practical sense. On their case, the directors would enjoy an unchecked and unconfined power to postpone a meeting of shareholders notwithstanding the absence of any express grant of such authority, and notwithstanding the detailed provisions elsewhere in the Articles governing the calling and conduct of general meetings. That would permit the board to frustrate the exercise of shareholders' voting rights at will and without express authority, an outcome which the Articles cannot sensibly be taken to contemplate. In this case the Original Directors' stated reasons for the postponement (to allow the Court of Appeal hearing to take place and to afford shareholders time to assess the MILFAM Nomination Notice) were, in substance, an attempt by the Original Directors indefinitely to delay the AGM at which they knew their removal was a forgone conclusion. Such conduct was precisely the mischief that the prohibition on unilateral postponement was designed to prevent, as Kekewich J had observed in *Smith v Paringa Mines* (as noted in the extract from his judgment quoted above, he had said that "*if the directors had power to postpone, and a meeting adverse to the directors was called, they might postpone it for a week or a month, or perhaps sine die*").
30. MILFAM also submitted that the reliance placed by the First and Second Defendants on statements in the MILFAM Proxy Statement acknowledging that a meeting may be postponed (see [94] of Morrow 1 and my summary of the First and Second Defendants' submissions below) did not assist their case. Those statements did not identify, still less concede, that the directors possessed the unilateral power asserted. The MILFAM Proxy Statement could not be used as an aide to the interpretation of the Articles.

The First and Second Defendants' submissions

31. The First and Second Defendants accepted that at common law, in the absence of a power in the Articles to do so, the directors have no power to postpone the AGM (that is to reschedule the date or time of the AGM before the AGM has started with a quorum present). In their skeleton argument they said as follows:

The Directors accept that there is established authority in other common law jurisdictions that the directors have no power to postpone a meeting implied by law. In Kaye v Oxford House (Wimbledon) Management Co Ltd [2020] B.C.C. 117, a Deputy Judge of the High Court [Lance Ashworth KC] held that:

“... Once a meeting has been duly called, in the absence of something in the articles of the company allowing for a meeting to be postponed by a subsequent notice, it cannot be so postponed (Smith v Paringa Mines Ltd [1906] 2 Ch. 193 at 197). ...”

32. The critical question, however, the First and Second Defendants submitted, was what on their proper interpretation the Articles provide.
33. The First and Second Defendants said that the approach of the Court to the interpretation of articles of association was summarised by Mr Justice Snowden (as he then was) in *Re Euro Accessories Limited* [2021] EWHC 47 (Ch) at [27]-[34] (which paragraphs I had cited in the Nomination Notice Judgment at [18]).
34. While the Articles did not include an explicit provision granting the directors the power to postpone a shareholders' meeting there were two reasons, the First and Second Defendants argued, why the Articles in this case were to be interpreted as granting the directors such a power.
35. First, the Articles grant the directors extremely wide powers that were sufficiently broad to allow the directors to postpone a meeting that they had called. Article 22.1 provides that (my underlining):

Management by Directors. *Subject to the provisions of the Companies Law, the Memorandum, these Articles and any directions given by Ordinary Resolution, the business and affairs of the Company shall be managed by, or under the direction or supervision of, the Directors. The Directors shall have all the powers necessary for managing, and for directing and supervising, the business and affairs of the Company as are not by the Companies Law, the Memorandum, these Articles or the terms of any Special Resolution required to be exercised by the Members. No alteration of the Memorandum or these Articles or any direction given by Ordinary or Special Resolution shall invalidate any prior act of the Directors that was valid at the time undertaken. A duly convened meeting of Directors at which a quorum is present may exercise all powers exercisable by the Directors.*

36. The First and Second Defendants submitted that it was difficult to conceive of a grant of power to the directors in broader terms. The directors were granted “all” necessary powers that were not granted, or required to be granted, to the shareholders. It could not be suggested that the power to “postpone” was granted or required to be granted to the shareholders. It was a power that necessarily needed to be exercised in advance of the meeting, so that it could only be exercised by the directors (since the shareholders with limited exceptions could only act in a general meeting).
37. The second and key reason was that it could be inferred that the Articles gave and were intended to give the directors the power to postpone the AGM because Article 20.2 expressly *assumed* or clearly *contemplated* that the directors had such a power to postpone. This could only mean that the broad powers under Article 22.1 granted to the directors were to be understood as extending to the postponement of a shareholder meeting and the Articles should be interpreted as providing that. The assumption in Article 20.2 of the existence of a power to postpone threw light on the understanding of the scope of the Article 22.1 powers and should be taken as indicating and confirming that those powers were intended to extend to a power of postponement.
38. Article 20.2 is in the following terms (my underlining):

Timing. A Nominating Shareholder must provide notice to the president of the Company: (a) in the case of an annual general meeting of Members, not less than thirty (30) nor more than sixty-five (65) days prior to the date of such annual general meeting of Members; provided, however, that in the event that the annual general meeting of Members is to be held on a date that is less than fifty (50) days after the notice date on which the first public announcement of the date of such annual general meeting was made, notice by the Member may be given not later than the close of business on the tenth (10th) day following the notice date; and (b) in the case of any other meeting (which is not also an annual general meeting) of Members called for the purpose of electing Directors (whether or not called for other purposes), not later than the close of business on the fifteenth (15th) day following the day on which the first public announcement of the date of such other meeting of Members was made.

The time periods for the giving of a Nominating Shareholder’s notice set forth above shall in all cases be determined based on the original date of the applicable annual general meeting or other meeting of Members, and in no event shall any adjournment or postponement of a meeting of Members or the announcement thereof commence a new time period for the giving of such notice.

39. The First and Second Defendants said that Article 20.2 referred in express terms to the “*adjournment or postponement*” of a meeting and argued that these words were inexplicable if the directors did not have a power to postpone a meeting. The distinct meaning of the words “*adjournment*” and “*postponement*” were well known. An “*adjournment*” was concerned with the suspension of a meeting which had already been convened and was in progress (and results in a continuation of the same meeting at a later time: see *National Dwellings Society v Sykes* [1894] 3 Ch. 159) whereas any decision to defer a meeting prior to its commencement was properly characterised as a “*postponement*.” Given that the decision to defer is taken before the commencement of the meeting, it followed that the only organ of the company that would be competent or able to exercise such a power would be the directors.
40. The First and Second Defendants argued that the only interpretation of the Articles consistent with Article 20.2 was that the directors’ powers extended to the postponement of a meeting. The words “*adjournment or postponement*” could only be read away by a process of construction if MILFAM could establish that they were the product of a qualifying mistake that could be corrected by a process of construction. But MILFAM had not sought to argue that there was some mistake by the parties so there was therefore no legitimate process of construction by which those words could be read away. The reference to postponement of a meeting had to be given a meaning and could not be ignored. The Court ordinarily strives to give effect to all parts of a contract and did not rob words of any legal (or other) effect (they cited the authorities gathered in Lewison’s *The Interpretation of Contracts*, 8th ed., (Sweet & Maxwell 2023) in chapter 7, section. 3).
41. If it was accepted that Article 20.2 showed that the Articles made provision for a power to postpone, this was a power that only the directors could exercise. The First and Second Defendants said that only the directors were capable of holding a meeting on very short notice to pass a directors’ resolution to postpone the AGM. Further, Article 20.2 contemplated that there would be an announcement of a postponement, and it was only the directors who had the authority on behalf of the Company to make such an announcement.

42. In addition, and importantly, as I have already noted the First and Second Defendants argued that shareholders could with only limited exceptions only act in a meeting. Mr Potts during his oral submissions accepted that the shareholders could act outside a general meeting where they all consented to a particular course of action (applying the principle in *Re Duomatic*) including the postponement of an AGM. But he argued that in this case, where the Articles included numerous references to the fact that the Company is listed on the NYSE, as a matter of contractual interpretation it was not possible or correct to say that objectively speaking the shareholders are to be taken to have contemplated that a postponement of the kind referred to in Article 20.2 would be the result of a unanimous decision of all the shareholders. Unanimous decision making of this kind was inconceivable in the context of a NYSE listed company. This was particularly the case where, as in this case, this is not just a question of theory. The shares are held indirectly through a chain of custodians and sub-custodians (including brokers) all of whom would need to be involved in the process of obtaining such consent. This fact was part of the admissible factual matrix for a listed company. In practice too, there was no realistic chance of all the Company's shareholders coming together and unanimously reaching agreement on a decision to postpone.
43. The First and Second Defendants argued that their approach to the interpretation of the Articles did not involve the application of a presumption against surplusage or a presumption against redundancy but only the ordinary process of construction, which was necessarily anchored to the terms by which the parties had chosen to express their contract, and which did not permit the Court simply to read terms into non-existence. They cited two extracts from judgments by Lord Hodge:

“... there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement because it was unwise to gamble on future economic circumstances in a long term contract or because subsequent events have shown that the natural meaning of the words has produced a bad bargain for one side. ...” Arnold v Britton [2015] A.C. 1619 at [77]

“The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording

of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. ...” Wood v Capita Insurance Services Ltd [2017] A.C. 1173 at [10]:

44. The First and Second Defendants argued that MILFAM’s case on construction could only be that Article 22.1 was to be read down for some reason and that the words “*or postponement*” in Article 20.2 were to be given no meaning or legal effect at all. That, they said, was wrong and illegitimate.
45. The First and Second Defendants also noted that the Company and MILFAM had previously assumed that the directors had a power to postpone. They said that the Articles had been interpreted as granting the directors the power to postpone a meeting for some years and to convene a meeting on such a basis. They referred, by way of example, to the Notice of AGM given on 28 November 2022 for the AGM held on 29 December 2022 which stated that the meeting was convened: “... *for the following purposes: to transact such other business as may properly come before the Meeting and any and all adjournment(s) or postponement(s) thereof.*”. That Notice of meeting had also stated that: “*The board of the directors of the Company has fixed the close of business (Hong Kong time) on November 22, 2022 as the record date for determining shareholders who are entitled to receive notice of the Meeting and attend and vote at the Meeting and any adjournment(s) or postponement(s) thereof...*”. The First and Second Defendants said that the very purpose of the Notice itself plainly indicated both that the directors clearly considered that they had the power to convene a meeting and also that they considered that they had the power to convene a meeting by a notice given on such terms. The Notice plainly indicated to members that the meeting was liable to be postponed by the directors. The Company had then repeated, twice, the reference to “*postponement*” of the AGM in the Proxy Statement which was referred to in the notice. It was also referenced four times in the Proxy Card. The Notices of AGM for 2024 and 2025 were to the same effect (the Notice of meeting for the 2023 year was not in the hearing bundle). The First and Second Defendants also noted that MILFAM had first interpreted the Articles as giving the directors such a power until, they said, it became convenient for MILFAM to deny that the directors had this power of postponement. In the first paragraph of the MILFAM Proxy Statement MILFAM had set out its definition of “*the Meeting*” for the purposes of

its Proxy Statement as being the AGM to be held on 27 December 2025 at 8am “*and any adjournment(s) or postponement(s) thereof ...*”. The Proxy Card that MILFAM had circulated to shareholders as part of its Proxy Statement also referred three times to “*adjournments or postponements*” of the meeting.

46. The First and Second Defendants submitted that the directors had the power to postpone and properly exercised that power (which was not disputed by MILFAM) so that the business purportedly transacted at the purported meeting on 27 December was invalid and of no effect (citing *In Re Portuguese Consolidated Copper Mines, Limited* (1899) 42 Ch. D. 160).

Issue 2: the disputed AGM – if the purported postponement of the AGM was invalid and of no effect was the AGM quorate?

47. This issue is not in dispute. The First and Second Defendants do not claim that the purported AGM was inquorate.
48. MILFAM note that Article 18.6 of the Articles provides that:

A meeting of Members is duly constituted if, at the commencement of the meeting, there are present in person, through their authorised representative or by proxy, two or more Members, representing at least 20% of the class or series of Shares, entitled to vote on the resolutions of Members to be considered at the meeting, except where there is only one Member entitled to vote on resolutions of Members to be considered at the meeting, in which case the quorum shall be one Member. Where a quorum comprises a single Member or proxy, such person may pass a resolution of Members and a certificate signed by such person accompanied, where such person be a proxy, by a copy of the proxy instrument shall constitute a valid resolution of Members.

49. MILFAM relied on the Final Tabulation Report, as verified by the inspector of elections and scrutineer engaged to tabulate the poll at the AGM, which confirmed that the AGM proceeded at the scheduled time and place as specified in the notice of AGM dated 10 November 2025 with multiple shareholders holding 8,992,562 shares (approximately 59.06% of the issued share capital) represented in person or by proxy, thereby constituting a quorum under Article 18.6.

Issue 3: the disputed AGM – were the members present at the purported meeting entitled to appoint Mr Sun as chairman of the meeting notwithstanding the terms of Art 18.1 of the Articles?

MILFAM's submissions

50. Article 18.1 is in the following terms (my underlining):

At every meeting of Members, the chairman of the board of Directors shall preside as chairman of the meeting. If there is no chairman of the board of Directors or if he is not present at the meeting within fifteen (15) minutes after the time appointed for the meeting or if he is unwilling to act, the Directors present shall elect the chairman of the meeting.

51. MILFAM argued that an implied term should be read into Article 18.1 to the effect that in the absence of the directors of the Company at a duly convened meeting of members, those members present at the meeting, in person or proxy, who were entitled to vote, may elect a chairman of the meeting in order to permit the meeting to proceed (the ***MILFAM Implied Term***).

52. MILFAM argued that the Articles should not be read so as to provide that the directors could unilaterally prevent business being conducted at a properly convened shareholders' meeting (particularly an AGM at which important and time-sensitive business needed to be conducted). The MILFAM Implied Term was required as a matter of necessity to ensure that the business of a shareholders meeting could be dealt with and to respect the importance and primacy of shareholder decision making.

53. MILFAM submitted that it was clear that there was a lacuna in Article 18.1 in that it failed to make any provision for what would happen if no directors were present at the commencement of a duly convened meeting. Article 18.1 (as understood in the context of the Articles as a whole) could not be interpreted as requiring such a meeting to be dissolved (because no business could be conducted without a chairman and in the absence of a chairman there could be no adjournment).

54. MILFAM said that directors might be unable to attend (Mr Ayres gave the example during his oral submissions of all the directors travelling to the meeting by a minibus that broke down or crashed) or unwilling to do so. Either way, the members needed to have the ability to conduct the business of the meeting. This required the MILFAM Implied Term to be

read into Article 18.1 in order to make the machinery for conducting members' meetings work effectively.

55. MILFAM submitted that the proper approach to the implication of terms was still set out in the judgment of Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 (JCPC) (at [21]) (an articles of association case). He said that in reading an implied term into a company's articles (my underlining):

in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

56. MILFAM said that in reaching that decision Lord Hoffmann had regard to Bowen LJ's "well known formulation in *The Moorcock* (1889) 14 PD 64, 68" that:

In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen ...

57. MILFAM submitted that after *Attorney-General of Belize*, the UK Supreme Court had held the following with regard to implied terms in contracts:

- (a). in *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and others* [2024] UKSC 28, Lord Burrows held at [35] that: "*It is sufficient for our purposes simply to reiterate that, to imply a term by fact, the term must be necessary for business efficacy or the term must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract.*"
- (b). in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, it was held, *inter alia*, that in construing the terms of any contract, the express terms must first be construed, and if the clause fails to meet the necessity tests, the court may imply a term into a contract if, viewed objectively from the parties' position at formation, the implied term is necessary to give

business efficacy to the contract, or otherwise where it is so obvious "*it goes without saying.*"

58. MILFAM also relied on the judgment of Lord Reid in *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235 where he said that "*The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.*"
59. MILFAM argued that various provisions in the Articles taken together recognised the possibility that no directors may be present at a validly convened members' meeting at which the members had pressing business to conduct. A construction which treated Article 18.1 as complete, as suggested by the First and Second Defendants, and thereby which deprived the members of any ability to save the meeting in that situation, produced an unreasonable result contrary to commercial common sense which was also antithetical to the basic tenet of company law that the general meeting represented the ultimate authority within the company.
60. MILFAM submitted that Article 18.1 must be read and construed in light of the Articles as a whole. MILFAM argued that the Articles revealed a clear intention that the members should be able to conduct business even in the absence of the directors. MILFAM relied in particular on Articles 16.3, 16.4 and 16.5:
- (a). Article 16.3: which provides that upon a written request of members entitled to exercise 20% or more of the relevant voting rights, "*any one or more of the Directors shall forthwith proceed to convene a meeting of Members to be held within four months of receiving the requisition.*"
- (b). Article 16.4: which provides that if the directors do not proceed to convene the meeting within 21 days "*the requisitionists, or any of them together holding at least half of the voting rights of all of them, may convene the meeting of Members in the same manner as nearly as possible as that in which a meeting of Members may be convened by a Director.*"

- (c). Article 16.5: which further provides that notice of a meeting of members shall specify the place, day, hour and general nature of the business and shall be given *“in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the Company.”*
61. MILFAM noted that Article 16.4 expressly anticipated the situation where members, as opposed to directors, have been obliged to convene a members’ meeting because the directors had failed to do so. In that situation, there was a real possibility that no director would attend the meeting. The reference in Article 16.5 to notice being given in such manner as may be prescribed by the Company – not the directors – acknowledged that the members’ right to requisition, convene and hold meetings, and to pass resolutions at those meetings.
62. MILFAM argued that in these circumstances all the elements of the legal test for implying a term (the MILFAM Implied Term) were satisfied. The MILFAM Implied Term was necessary for business efficacy; was so obvious that it went without saying; was capable of clear expression and formulated in clear and precise terms and it did not contradict any express provision in the Articles.
63. MILFAM said that the necessity test was satisfied because, as Mr Ayres put it during his oral submissions, otherwise a validly convened meeting may not have a chairperson. That created a gap in the arrangements for the conduct of a shareholders meeting that needed to be filled as a matter of necessity. Incorporating the power to appoint a chair in default of an appointment by the directors was necessary to make the machinery for the conduct of shareholder meetings in the Articles work.
64. MILFAM also argued that since the Articles (and the general law) provided that the general meeting was the ultimate source of authority in the Company it could not have been the intention of the Articles, and they should not be read as meaning, that a general meeting would not be able to transact business merely by reason of the directors’ failure to attend and appoint a chairperson.
65. MILFAM referred to the implied power of members to act at a meeting of members where the board is unable or unwilling to function. This power was recognised by the House of

Lords in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 1 W.L.R. 673. Lord Hailsham cited (at page 679) with approval the following extract from *Gower's Modern Company Law*, 3rd ed. (1969), pp. 136–137 My underlining):

"It seems that if for some reason the board cannot or will not exercise the powers vested in them, the general meeting may do so. On this ground, action by the general meeting has been held effective where there was a deadlock on the board, where an effective quorum could not be obtained, where the directors are disqualified from voting, or, more obviously, where the directors have purported to borrow in excess of the amount authorised by the articles..."

66. Mr Ayres confirmed that MILFAM did not argue in this case that, applying the principle referred to in *Alexander Ward*, the power to appoint the chair at the AGM had reverted to the members (acting at the AGM) because the directors had refused and been unwilling to attend the AGM and exercise the power to appoint the chairman. *Alexander Ward* was cited in support of the proposition that the general meeting was the ultimate source of authority in the Company and that the scheme of the Articles and the relevant provisions in the Companies Act was that the absence of or inactivity by directors would and should not be allowed to interfere with the conduct of business by the general meeting and the general meeting's role as the ultimate and residual decision maker for the Company.
67. MILFAM said that the importance of not interfering with the ability of shareholders to act in general meeting had been noted by Lance Ashworth KC sitting as a Deputy High Court Judge in *Kaye v Oxford House (Wimbledon) Management Co Ltd* [2020] B.C.C. 117. At [90] of his judgment, Mr Ashworth had referred to the observations of Cotton LJ in *Isle of White Railway Co v Tahourdin* (1883) 25 Ch. D. 320 (at 329) in the following terms:

"It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company."

68. MILFAM submitted that there was no natural inference that Article 18.1 contained a complete statement of the persons that may act as chair of a shareholders' meeting so that there was room to imply a term, nor did the MILFAM Implied Term contradict an express term of the Articles. There was no express term in Article 18.1 excluding members from appointing the chairman of a members' meeting where no director was

present. Article 18.1 merely identified who was to be the chairman in the ordinary case where the chairman of the board or other directors attended the meeting. It did not address what was to happen when they did not do so. This was a gap and not a prohibition on the members having the power to appoint the chairman when the parties explicitly identified in Article 18.1 was not present and unable to exercise the power granted to them by the Articles.

69. Further, MILFAM argued that the fact that the articles of association of the Company's British Columbian predecessor (the shares of which were exchanged for shares in the Company pursuant to a court-supervised plan of arrangement) contained an express provision empowering the shareholders to elect a chairman in the absence of directors was of no assistance to the First and Second Defendants. There could be no inference that when the Company was incorporated in the Cayman Islands and its Articles later amended the omission of an equivalent provision was deliberate. That conclusion did not follow without evidence to justify and support it (of which there was none). In the absence of such evidence, it was equally arguable that the inclusion of such a term in the previous articles demonstrated that it was an unintentional mistake to leave it out of the Articles.
70. During his oral submissions, I suggested to Mr Ayres that in deciding whether an article that gave the exclusive power to appoint the chairman at a general meeting was unworkable and failed to establish adequate machinery for the conduct of shareholder business (and failed adequately to protect shareholders), it was necessary to consider what duties the directors had regarding attendance at such a meeting. It might be said that even though they were not parties to and bound by the Articles, in such a case their duty to exercise their powers in the best interests of the Company and its shareholders (when solvent) would require them to attend unless there was a proper reason why they were unable or unwilling to do so. The following exchange took place (my underlining):

Justice Segal:

Well, can I just ask you one other question? So just following that particular line of thought, you have the articles in the form of article 18.1. The directors alone, can appoint the chair. Would you submit or do you say that, an implied, there's another implied term which is implicit in such an arrangement, namely if the articles do say that only the directors can appoint the chair at a general meeting, it

must be an implied term, it must be implicit that the directors, have a duty to attend and to exercise that power? There may well be questions about remedies and whether any remedy effective to enable what's your response to the suggestion that it must be an implied term, in Article 18.1 that the directors have a duty to attend and to exercise the power if that power is exclusively theirs?

Andrew Ayres KC:

Well, My Lord, my answer to that, to that is that I certainly, accept and submit that the directors have a duty to attend in those circumstances, but I wouldn't put my submission on the basis that it's another implied term, analogous to 18.1. And My Lord, the reason for that is because it's not necessary to imply that term as a matter of, the contract contained in the articles and the reason it's not necessary is because I have my main implied term. And ... this point, this last question you've asked me links in with this question of breach of duty ... because My Lord, I'm very keen to, impress upon you a distinction between ensuring that the company and the company in general meeting has a properly workable legal framework to transact its business and as distinct from the question of whether the directors are in breach of duty, because, we had some discussion during, opening submissions about, you know, just and equitable winding up petitions to require a meeting to be, called, personal claims being brought under Tianrui. And My Lord, in my submission, they're all irrelevant because they don't address the gap, or the need for the company to have a viable legal framework for ensuring that a general meeting can proceed...

Justice Segal:

... as I understand what [your] submission is even if, shareholders have, some protections because the directors have a duty .. either because of an implied term [or] because of their duties, fiduciary and common [law], ... even if the directors have a duty to attend, that doesn't, you [say], undermine the main thrust of your necessity argument, which is a necessity [meaning] business efficacy, which [means that] it's necessary for the shareholders, if [you] like, to have a self-help remedy, to be able immediately to appoint a chair so that they don't have to bring proceeding[s], they don't have to wait and the business of the meeting, which may well be urgent, doesn't have to get delayed. So, necessity on your case runs into business efficacy and it is to be understood as necessary for the practical conduct of shareholder meetings, which may well require, that shareholder meetings take place without any delay. Is that a fair summary?

Andrew Ayres KC: Yes, My Lord. It's a fair summary, and in addition to that fair summary is the question of practicalities, which includes the question of remedies that Your Lordship has just mentioned. And My Lord, in order for, the company in general meeting to have, a clear and practical remedy in circumstances where it needs ... to prove, on whatever basis, whether on injunctive relief basis or a trial basis, breach of duty by the directors, My Lord, that is, that is going to, cause a lot of difficulties if that is effectively the test for whether or not business can continue to be transacted, because, for example, you know, it may well be said, by the director that, he was acting bona fide in what he considered to be the best interest of the company by absenting himself, and the, you know, he would not necessarily agree with the suggestion I made earlier on that he is under a duty to attend the meeting in circumstances where he or other directors are the sole repositories of the power to appoint the chairman. He may say there's some overriding, consideration. And so My Lord, you know, there's a real danger of effectively getting into a huge debate about whether or not an individual director has breached his duty in circumstances where all we're looking at here is mechanics, and workability.

71. During his oral submissions I also asked whether Mr Ayres accepted that a consequence of his case was that it was impermissible (and impossible) for shareholders to decide to give the exclusive power to directors to appoint the chairman. The following discussion took place (my underlining):

Justice Segal: Well, can I, can I just raise just looking at that and thinking what Mr Potts has said. Obviously, the argument against you is, that, it's not necessary or there's no inherent reason articles can't provide that the chair has to be elected by the directors. I suppose what one question for you is, Mr Potts raised this point, is it part of your [case] that articles can never provide and just provide that the chair at a general meeting is to be elected by the directors?

Andrew Ayres KC: Well, My Lord, as a matter of the words of an articles, I'd accept that articles can provide in that limited way, but My Lord, I think the real answer to your question is as a matter of implication, no, the articles can't simply provide for that because they always have to have - whether it's a waterfall with two or three provisions, they always have to have effectively a default provision which, enables the company to, elect a chairman if there is no one there. And My Lord, otherwise –

Justice Segal:

And you said, you say that is, that is critical as part of the corporate machinery for conducting meetings because if there is no alternative method, if the, if the meeting itself and the members don't have the ability to appoint a chairman, you say, that the machinery of governance and the machinery conducting meetings of shareholders, which are, an extremely important part of the governance arrangements for a company. You say those, arrangements for conducting business and the meeting, cannot in all relevant circumstances be, effective. And I suppose one example where there would be a problem, what would happen if there were no directors? So let's say all the directors resign if all the directors resign, now there may be, there may be ways around it and Alexander Ward may be a case, in point. Obviously no- nobody's addressed this yet, in submissions, but it does seem to me to be relevant and important... - if the articles, given the construction that Mr Potts contends for, and as he says, no term is to be implied, how is the, how is the company to deal with the situation, where all the directors resign?

Andrew Ayres KC:

Yes, My Lord. And the, my answer is obviously only by, by way of an implied term. And, it comes back to the submission I repeated two or three times, which is, Your Lordship's expressed better than I have, but, you know, where the company in general meeting is the ultimate source of authority, it has to be able to address the question of there being no directors.

The First and Second Defendants' submissions

72. The First and Second Defendants argued that MILFAM's attempt to introduce an implied term into the Articles must be rejected for each of the following two reasons.
73. The first reason was that since by the Articles the shareholders had contracted out of two default regimes concerning the appointment and role of the chairperson at a general meeting, which expressly provided for the shareholders to have the power to appoint the chairman in certain circumstances, it would be wrong to imply a term which overrode and was inconsistent with the choice.
74. Articles 46 and 47 of the model articles set out in Table A in the First Schedule to the Companies Act provide as follows:

46. *The chairperson, if any, of the board of directors shall preside as chairperson at every general meeting of the company.*
47. *If there is no such chairperson, or if at any meeting that person is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairperson, the members present shall choose one of their number to be chairperson.*

75. In addition, Section 61 of the Companies Act provides for a separate default regime in the event the model articles are not adopted, which the shareholders could contract out of by making “*any regulations*” about the chairperson:

In default of any regulations as to voting, every member shall have one vote, and in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned of which five days’ notice has been served on every member; and in default of any regulations as to the persons to summon meetings, three members shall be competent to summon the same; and in default of any regulations as to who is to be chairperson of such meeting, it shall be competent for any person elected by the members present to preside.

76. In this case, by Article 1.1 the members chose to disapply the entirety of the model articles, thereby contracting out of the first relevant default rule. The First and Second Defendants argued that by setting out an alternative regime for the election of a chairman in Article 18.1, the members had chosen also to disapply the second relevant default rule. When the shareholders have chosen to contract out of the contractual default regimes, the Court could and should not imply a term with the same content as that which had twice been contracted out of. If the Court were to imply the MILFAM Implied Term, it would in effect be introducing a third default rule dealing with the election of the chairman of a meeting with the effect that the shareholders could only effectively contract out of the two default regimes by an express term contradicting model Article 47 and Section 61, such as “... *the members present shall have no power to appoint a chairperson.*”. The First and Second Defendants said that this could not be the correct approach to the implication of a term in the context of default rules.
77. The second reason was that the natural inference was that Article 18.1 was a complete statement of the persons that may act as chairman of the meeting, with both a primary choice (i.e. the Chairman) and a fall-back mechanism, and there was no room for an implied term that supplemented that statement. The First and Second Defendants said

that it was wrong to suggest that because a contract did not deal with a particular eventuality that a term can and should be implied. As the Privy Council had held in *Belize Telecom Ltd* at [17] “*The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed.*” MILFAM’s case for the implication of the MILFAM Implied Term was all the more difficult because the parties had in fact dealt with the particular subject-matter of the implication in Article 18.1.

78. Mr Potts argued that there was nothing inherently objectionable or impermissible about shareholders deciding to adopt an article which only gave the directors the power to appoint the chairman at a shareholders meeting. Indeed, the statutory regime established by the Companies Act permitted this. During his oral submissions Mr Potts made the point in the following way (my underlining):

I certainly would adopt what Your Lordship said this morning, I think is, you said it must be a conscious decision, and also that there's nothing fundamentally wrong for a company and its shareholders not to include what you call a safety valve, I'd say a particular mechanism. The fact is that parties are - there is party autonomy in relation to Articles of Association. this is a deliberate - must be viewed in a matter of interpretation as a deliberate choice. and, the cases are full of cases saying, well, the fact that the judge may think, well, there might have been a better bargain or a different bargain or a bargain which it now appears doesn't really suit one of the, participants, is completely irrelevant and inadmissible as an aid to, and complete the wrong approach, as a matter of interpretation. So, we say, My Lord, yes. and it's not just that. It also, as I said, I also took the point a little bit further in opening and I was also making the point that in order to effectively get past, to get to my learned friend's point, you'd effectively have to put in an express provision saying, no, we are definitely saying, we really mean it, that the members shall not have this power. And that ... would run a [coach and horses]. Firstly, it makes it more difficult to contract out of this default provision than the parties have done. And also specifically, when one looks at the language of the statute, the language of the statute, Section 61, it provides that you can contract out if there are any regulations as to who is to be the chairperson. So we would also say it's not - it's also actually would be directly contrary to the statutory scheme itself, which has a light touch approach, to the opting out, and this- and what my learned friend is suggesting would go, through that.

79. Mr Potts noted the discussion that I had had with Mr Ayres regarding whether the Original Directors had a duty to attend general meetings in circumstances if and where

the Company's constitution gave them the sole power to appoint a chairman. He accepted that the directors might well have a qualified duty to attend (subject to not being required to attend when they considered that attendance was not in the best interests of the Company or was impracticable and unavoidable) and argued that on the basis that they did, the existence of such a duty meant that the constitution provided effective and proper machinery for regulating the appointment of the chairman at shareholder meetings.

80. Mr Potts said that it was clear from the Judicial Committee of the Privy Council's (*JCPC*) advice in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2025] AC 709 that the exercise by directors of powers given to them by the corporate constitution must be for a proper purpose and that if the powers were exercised for an improper purpose in circumstances where a shareholder was adversely affected they would have personal cause of action against the company. But, Mr Potts said, MILFAM had neither based its claim on such a personal cause of action nor argued for the implication of an implied term regulating or relating to the exercise by the directors of their power to appoint the chairman. The only implied term for which MILFAM contended was the MILFAM Implied Term and his submission MILFAM was unable to show that such a term should be implied. In addition to the implication of such a term being impermissible for the two main reasons set out above, MILFAM was unable, in view of the directors' duties just discussed, to satisfy the necessity requirement for the implication of such a term. The following exchange took place between me and Mr Potts on this issue during his oral submissions:

James Potts KC:

.... But just in terms of where this necessity point, we can see- as I said, I can see as a matter of logic that, a case might be more persuasive, if we were dealing in our case with the case of directors acting in breach of duty and that perhaps there was some narrower implied term being sought, which was to deal with that narrow circumstance. So I can see conceivably that one might, seek to imply a term that if the directors are unlawfully refusing to attend a meeting, that the shareholders might appoint a chair. Now, the difficulty for my learned friend is that's not the implied term that he's seeking from Your Lordship. He does not allege a breach of duty. He's not allowed to allege a breach of duty. So he has to pitch his case for a broader implied term, and he is stuck with the implied term that he's seeking. So it falls down at that stage on that sort of fact pattern. My learned friend also walks into a difficulty, that

ties its matters back to the question posed by My Lord, on day one, page 23, where you yourself indeed, you raised the question, relating to a director's fiduciary duties. Now on that, again, we say necessity is not made out, where the law already provides protection for shareholders, in the form of duties, and indeed there already is an implied term in the articles on Tianrui that any powers relating to the exercise of powers by directors, relating to a shareholders' meeting must be exercised in accordance with their fiduciary duties.

Justice Segal:

But do you say - just picking up the, implied, term that I put to Mr Ayres as a possibility, I mean, obviously the directors, have got, a power, query whether one construes it as a duty under the articles, to appoint a chairman, and that doesn't of itself say they have to be there to exercise, that power, but I put to Mr Ayres, it must be strongly arguable that it's implicit that if the directors are the only parties who are given the right and the power to appoint a chair, then it's an implied term that they will exercise that, power and they will attend the meeting to do so. But you need that ... otherwise, if one's talking about general duties and general powers, if they choose to exercise the power in the articles, then there's an implied term as to the manner in which and the purpose for which they should do so, but there's a prior question which is, are they under a duty to attend the meeting?

James Potts KC:

I would say it's not an on/off switch, that question. there may be - difficult to think of the circumstances, but, there may be circumstances. I certainly don't think that there's cause for an implied, an absolute implied term that directors must attend every meeting. There may be perfectly innocent, and good reasons consistent with their fiduciary duties in a particular fact pattern where, they choose not to attend a meeting. And so ... I wouldn't go as far as, conceding that it's a black-white, on-off switch, but I accept that in terms of the necessity point that it, firstly, it's not, it doesn't help my learned friend because he's going for a much wider implied term, but I accept, that there is an implied, term where Tianrui makes it clear that the articles show, show that it is implicit in the contract of membership that, any powers, of directors must be exercised, in accordance with fiduciary duties and so on....

Justice Segal:

Can I just say- I'm sorry to interrupt, but just to put down a marker. If that's right, query whether that really helps the shareholders, in the sense that, you say, that, there's no

necessity when the existing, terms of the articles and the relevant, background legal regime provides relevant protection for the shareholders. I mean, in this context, that means that they can ensure that the important business of the meeting can be conducted, but it doesn't- the protection at the least is rather full of holes, if there is no obligation on the directors, perhaps subject to some qualifications, to turn up and to exercise the power. Now, you've posited one implied term, which as you say, is not open to the, plaintiff, to assert in this case, which is the shareholders have got the power to appoint the chairman if the directors are acting in breach of duty or improperly in failing to attend the meeting or to exercise the power. That's, that's one possibility and it seems to me, that that is, strongly arguable. But if it's right that the correct construction of these articles is that the direct- directors have got no duty to turn up at all and no duty to exercise the power, to appoint a chair, even if that's subject to some qualifications or carve-outs, that then, how are the shareholders protected, and how is the critical machinery, of corporate governance, namely the ability of the shareholders to conduct business, how is that preserved and protected, under the regime as would exist on your approach to the construction of the articles?

James Potts KC:

Well, My Lord, I think I'd view it the other way. In terms of where the holes are, I'm not suggesting there's lots of- in fact, there's on, in most cases, of course, there'll be very limited circumstances in where, such effect of the power could be exercised in a way that they absent themselves from a meeting. And so, I think it's very limited circumstance. I think one has to be careful where one starts. But- and of course, the same point arises My Lord in terms of where the remedies are available, because, of course, the shareholder meeting, I think my learned friend accepted, that the court can order, there's a shareholder meeting. He referred to a just and equitable winding up petition at day one, page 23. I then added that the court can grant, relief through a personal claim, through the Tianrui decision and that could be pretty summary. I mean, these- this doesn't require- the whole point about proper purpose disputes is they can be dealt with extremely, summarily.

Justice Segal:

Well, perhaps, just to unpack that, I mean, how does that work? I mean, the personal claim, in Tianrui is obviously a claim against the company, for the enforcement of the articles.

James Potts KC:

Yes.

Justice Segal: *And that would require, wouldn't it, the articles to include a term that required the directors to attend and to, exercise the power.*

James Potts KC: *Well, well, My Lord, if it was said that ... the implied term, effectively that they'd exercised their power improperly ... the directors will be bound by an order against the company, and would be required to, comply with, a mandatory order.*

Justice Segal: *Right, but that presupposes and accepts, doesn't it, that there's the kind of implied term that I've put to you that whether it's an implied term or however one puts it, the directors are under the articles under an obligation to attend and to exercise the power subject, to limited carve-outs, and that's what under Tianrui shareholders would be enforcing, wouldn't it?*

James Potts KC: *My Lord, yes. Well, look, I mean, of course, one could, one could debate the question as to whether the term, the implied term or the obligation of the directors would be absolute, or not. that in a sense, for the purposes of today's argument, My Lord, maybe I can accept that this may be- Your Lordship may be right on that, and if Lordship is right on that, well, then there's no - then my learned friend's argument fails again. So I said, I don't need Your Lordship to determine that and I don't need to defend, respectfully, Your Lordship's implied term, but if Your Lordship is right, then of course that is a complete answer to my learned friend's case as well. So I've very happily adopted, for those purposes that I'm doing with the caveat that I'm not actually accepting it. I'm accepting, the premise of Your Lordship's question. And My Lord, just in terms of the remedies, perhaps one shouldn't get too excited about, procedural routes to relief, but Your Lordship also, posited the derivative claim as well, as a third alternative. But the fact is that at least we between us, we've identified the three of us, the three of us have identified one each, of a procedural route whereby the court could grant, relief in respect of a problem over a meeting. Now I expect- I accept, My Lord, that there isn't an express statutory provision as there is in many jurisdictions. I'm obviously familiar with Antigua and, in the UK and Hong Kong I think has one as well and so on. There isn't one in Cayman, but the fact is that's just a, it's a procedural mechanism, but the fact is you get there through whichever mechanism it is, but the fact is the court does have a power, to provide, remedies in an appropriate case, which again runs a coach and horses through argument- my learned friend's arguments about necessity*

Issue 4: the MILFAM Nomination Notice and the MILFAM Proxy Statement - did the MILFAM Nomination Notice comply with Article 20.3(a) and/or (b)?

Article 20.3

81. Article 20.3 states as follows (my underlining):

20.3 Form. To be in proper written form, a Nominating Shareholder's notice to the president of the Company must set forth:

- (a) as to each person who the Nominating Shareholder proposes to nominate for election as a Director: (i) the name, age, business address and residential address of the person; (ii) the principal occupation or employment of the person and the principal occupation or employment within the five years preceding the notice; (iii) the citizenship of such person; (iv) the class or series and number of Shares in the capital of the Company which are controlled, directly or indirectly, or which are owned, beneficially or of record, by the person as of the record date for the meeting of Members (if such date shall then have been made publicly available and shall have occurred) and as of the date of such notice; (v) a statement as to whether such person would be "independent" of the Company if elected as a Director at such meeting and the reasons and basis for such determination; and (vi) any other information relating to the person that would be required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law; and
- (b) as to the Nominating Shareholder giving the notice, (i) full particulars regarding any proxy, contract, agreement, arrangement or understanding pursuant to which such Nominating Shareholder has a right to vote or direct the voting of any Shares of the Company and (ii) any other information relating to such Nominating Shareholder that would be required to be made in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law.

The Company may require any proposed nominee to furnish such other information as may reasonably be required by the Company to comply with applicable law and determine the eligibility of such proposed nominee to serve as a Director of the Company or that could be material to a reasonable Member's understanding of the experience, independence, or qualifications (or lack thereof) of such proposed nominee.

The evidence

82. Mr Morrow said that MILFAM's proxy materials contained inaccuracies and omissions. In Morrow 1 he said as follows (my underlining):

31. *As is apparent from the correspondence, MILFAM's proxy materials and the Nomination Notice contained a number of inaccuracies and material omissions that obscured the relationships between MILFAM and the MILFAM Nominees. For example:*
- (1) *MILFAM did not tell shareholders that MILFAM Nominee Alan Howe was a member of the Manager Oversight Committee of MILFAM, was a director and officer of other MILFAM-owned and/or controlled entities including Alimco Financial Corporation, has worked for MILFAM sponsored entities since at least 1995, and received compensation from MILFAM in connection with his positions in those other entities, including Alimco Financial Corporation, the parent company of Alimco Re Ltd, a member of the MILFAM group, He serves on the board of directors of NextNav Inc with MILFAM's controlling person, Mr Neil Subin.*
 - (2) *MILFAM's proxy materials also did not tell investors that MILFAM Nominee Mark Holliday was not independent but rather has a history with MILFAM, including having worked for MILFAM sponsored entities since at least 2001, contrary to an assertion made in a 19 December 2025 letter from MILFAM to the Company stating that "We confirm that Mr. Holliday does not have any relationships with MILFAM or its affiliates or principals, other than a customary non-disclosure agreement and an indemnification agreement limited to actions in connection with the Company" (Pages 421-423). The full extent of his involvement with MILFAM and Neil Subin is unknown.*
32. *I believe that these omissions were material to the Company's shareholders because, by not disclosing these relationships, Scully shareholders could not assess the level of control MILFAM might be able to exercise over the MILFAM Nominees if they were elected. This was in circumstances where Mr Wichers, another of the MILFAM Nominees, was an employee of MILFAM. It was therefore not made clear to shareholders that at least three of the five MILFAM Nominees (the majority of the slate) had connections to MILFAM and therefore that, if the MILFAM slate were elected, MILFAM might be in a position to influence and control the conduct of the Board, despite being only a 13% shareholder.*

83. Mr Smith in Smith 1 said as follows (my underlining):

5. *At paragraph 79(4) of Morrow 1, Mr Morrow indicated that further grounds may be relied upon once the Plaintiff had given disclosure in the proceedings. In the light of the disclosure that has been given by the Plaintiff, grounds of complaint about the information provided in the "Nomination Notice" and the "Proxy Statement" (as defined) are as follows:*
 - a. *The extent of MILFAM's connections to the MILFAM Nominees. The MILFAM Nominees were not independent third parties with no prior connection to MILFAM. Instead (in addition to the second ground below):*

- (i) *Mr Wichers was an employee of MILFAM (a fact that had been disclosed).*
 - (ii) *Mr Howe sits on MILFAM's Management Oversight Committee, and has done so since 2018, and is a director of companies in which MILFAM has an interest as a (direct) shareholder;*
 - (iii) *Mr Holliday had longstanding connections to MILFAM and its President and Manager, Mr Subin; and*
 - (iv) *Javelin Global Commodities (US) LLP ("**Javelin**") had pitched for a lucrative contract in relation to the Company from MILFAM and, as a provider of outsourced management services, could seek to benefit from the appointment of its group founder, CEO and MD (Mr Freund) to the Company's board or future work for the Group.*
- b. *It follows that MILFAM could influence the conduct of the board by means beyond its shareholding in the Company - and out of proportion with it- so that rather than seeking to further the interests of the shareholders as a whole, the MILFAM Nominees could cause the Company to be managed in a way that served the interests of MILFAM.*
- c. *It also follows that some of the directors (especially Mr Freund and Mr Wichers) could find themselves in a position in which their duties to the company conflicted with their duties to a third-party, whether by virtue of related-party contracting or otherwise.*
6. *The purpose of this affidavit is not to comment on the documents that have been disclosed. Those documents speak for themselves. However, I draw attention to the following documents (among other material documents) that indicate the intentions of MILFAM and that MILFAM was seeking to appoint certainties or directors who would toe the party line on the board:*
- a. *MILFAM has disclosed a number of documents in connection with one of the MILFAM Nominees, Jerrod Freund, and Javelin, which Mr Wichers describes at paragraph 14 of his Seventh Affidavit sworn on 6 May 2026 ("**Wichers 7**") as a subsidiary of the company of which Mr Freund is stated to be the Founder, CEO and MD, Javelin Private Capital Group LLC. In particular:*
 - i. *A term sheet dated 16 September 2025 from Javelin.*
 - ii. *An email from Mr Freund to Mr Wichers on 17 September 2025, in which Mr Freund said (among other things):*

"Attached is the draft term sheet I've discussed with you - we're very focused on ensuring that interests are aligned and we're maximizing the javelin platform to reduce costs, streamline

assets and develop a bit of a growth strategy longer-term to create value "

- iii. *A number of other communications from Mr Freund to Mr Wichers in which he indicated his desire to ensure that he was aligned with MILFAM.*
- iv. *An email exchange between K&L Gates LLP and Mr Freund in which, among other things, K&L Gates reproduced an extract from a draft questionnaire in which Mr Freund referred to an "Informal discussion with Milfam LLC regarding joining the board to help accelerate better management and oversight" and "Informal discussions with Javelin Global Commodities regarding management experience of mineral royalties, operating businesses within mining sector, etc" and in which Mr Freund ticked "YES" in response to questions concerning arrangements or understandings.*
- v. *MILFAM has disclosed an exchange between Mr Wichers and Mr Anthony Lanza on 29 August 2025 in which they said the following:*

Wichers: Alan or Mark (probably Alan because he's been with us longer) would be chair

Lanza: Mark Holliday was Neil's old TTEE and former MOC member?

Lanza In terms of you going on the board, I have some reservations, but understand the IAT angle and get why it makes a lot of sense initially to really drive the MILFAM interests".

- 7. *Mr Wichers references the engagement between MILFAM and Javelin at paragraphs 13-15 of Wichers 7, going so far as to indicate his expectation that we would include documents concerning Javelin within the scope of our complaint. Mr Wichers observes at para 13 that:*

"I anticipate that the Defendants may seek to rely on, or mischaracterise, certain documents produced by MILFAM in discovery. I therefore address those documents briefly below."

- 8. *I am a shareholder of the Company and it is astonishing to me that the matters set out above about MILFAM Nominees were not disclosed to the shareholders. Mr Freund and, through him, Javelin were seeking to secure a lucrative contract with the Company. Mr Wichers states at para 15 that the discussions between MILFAM and Javelin ceased "by early November 2025", but that misses the point. Mr Wichers seems to accept that, if discussions had been ongoing, disclosure would need to have been given to the shareholders of the arrangement under discussion. The fact that*

MILFAM might have had no present intention to arrange a contract with Javelin (if that is the case), should not diminish the need for disclosure to be given that one of the MILFAM Nominees had attempted to secure a lucrative contract with the Company in the past and that MILFAM had engaged in discussions with him to that end.

84. In Wichers 7, Mr Wichers responded to the First and Second Defendant's evidence and said as follows (my underlining):

13. *The First and Second Defendants sought production of all communications between MILFAM and the MILFAM Nominees concerning the MILFAM Nominees' relationship with the Company. While none of the documents produced support the allegations advanced by the First and Second Defendants in respect of the MILFAM Nominees, I anticipate that the Defendants may seek to rely on, or mischaracterise, certain documents produced by MILFAM in discovery. I therefore address those documents briefly below.*
14. *In that context, MILFAM produced a draft, expressly non-binding term sheet circulated on 18 September 2025 by Javelin Global Commodities (US) LLP ("Javelin"), of which Mr Jerrod Freund is a managing director and the Chief Executive Officer of its subsidiary, Javelin Private Capital Group LLC. The term sheet contemplated, at a high level, the possibility of Javelin providing management services to the Company (pages 3 to 11). The circulation of that draft followed a limited number of text message exchanges between me and Mr Freund in August 2025, which involved preliminary and exploratory discussions regarding Javelin's management experience relevant to the Company given its background in the mineral royalty and mining sector.*
15. *The draft term sheet and the related preliminary discussions were never approved, adopted, or progressed by MILFAM. MILFAM has not instructed Javelin, and there was and is no agreement, arrangement, understanding or commitment of any kind between MILFAM and Javelin in relation to the management of the Company. It has never been MILFAM's intention that the Company's management be outsourced or transferred pursuant to any arrangement with Javelin or otherwise. As reflected in Mr Freund's director questionnaire circulated to MILFAM on 4 November 2025, there was no formal agreement between MILFAM and Javelin, and discussions were limited to informal conversations regarding Javelin's management experience..... Further, as confirmed in correspondence from K&L Gates LLP to Mr Freund dated 4 November 2025, by early November 2025 those discussions had ceased and there was no proposal on the table, nor any arrangement or understanding, between Javelin and/or Mr Freund and MILFAM ..."*

85. Mr Morrow and Mr Wichers were both cross examined. I found both witnesses to be honest and credible. The cross-examination of Mr Wichers was more extensive and

searching and Mr Wichers responded to the questions he was asked in a candid and open manner that was in my view designed to be of assistance to the Court. I consider aspects of the cross examination of both witnesses when discussing the parties' submissions on this issue.

The First and Second Defendants' submissions

86. The First and Second Defendants submitted that the requirements of the English common law and, it followed, Cayman Islands common law were well established. The common law required, among other things, that a circular to shareholders must not be “tricky” and that it must be “full, fair and frank.” They cited and relied on the following main authorities: *Baillie v Oriental Telephone and Electric Company Limited* [1915] 1 Ch. 503 at 514-5 per Lord Cozens-Hardy M.R. (Kennedy LJ agreeing) and at 518 per Swinfen Eady LJ; *Kaye v Croydon Tramways Company* [1898] 1 Ch. 358 at 370 per Lord Lindley M.R and *Re RAC Motoring Services Ltd* [2000] 1 B.C.L.C. 307 at 325g-327c per Neuberger J (as he then was) applying, among other authorities, *Kaye*.
87. The First and Second Defendants also relied on the summary of the relevant principles in *Kosmin & Roberts' Company Meetings and Resolutions*, 3rd ed., (OUP 2020) at [3.23]
- “(2) any circular must contain a fair and reasonably full statement of the facts upon which the directors are asking the shareholders to vote;
- (3) a statement which is not frank, not open, not clear and not candid maybe challenged;
- (4) a circular must not be framed in a manner so as to mislead the shareholders;
- (5) a circular must not conceal from shareholders material facts and matters which are relevant to the matter that is to be considered at the forthcoming general meeting..”
88. The First and Second Defendants submitted that the same standards had been applied in the Cayman Islands in the context of shareholder meetings as part of a scheme of arrangement. Chief Justice Smellie (as he then was) had endorsed and applied the *RAC Motoring* case in *RE XL Capital Limited* [2010] (1) C.I.L.R. 52 at [12] in the context of a scheme and, to like effect, in *Re Sphinx Group* [2012] (2) C.I.L.R. 371, Chief Justice

Smellie had observed at [58] that “*It must, all the same, be emphasized that a proposal for a scheme of arrangement must be characterised by complete transparency and good faith ...*”.

89. The First and Second Defendants argued that full, fair and frank disclosure was required because a shareholder may act on the basis of the circular. A shareholder receiving the circular may choose to give his proxy without further inquiry or not to attend the meeting and to leave it to the majority: cf. *Tiessen v Henderson* [1899] 1 Ch. 861 at 870-1.
90. The First and Second Defendants submitted that these requirements applied as much to a circular issued by shareholders as they did to a circular issued by the directors. Both were concerned with the quality of the decision- making by the shareholders. They relied on *dicta* in the decision of the JCPC in *IGlobe Capital LLC v Sinovac Biotech Ltd* [2025] UKPC 3; [2025] B.C.C. 414 at [55] (my underlining):

... The identity of directors appointed to run a company's affairs is of obvious significance for shareholders and in ordinary circumstances, if their right to vote on that matter is not to be rendered nugatory, they should have sufficient information and a fair opportunity to be able to consider their options and decide how to cast their vote. Where the general law imposes specific requirements in that regard, as regulation 15 does, that opportunity has to allow for compliance with those requirements so that their vote is valid. Where a proposal to replace directors is made at an AGM, attended by many shareholders only by proxy, then the authority conferred by the proxy forms may be insufficient to enable the proxies to vote, one way or the other, on the newly tabled resolution, so that their principals are indeed deprived of the opportunity of voting, even though present (by proxy) and in principle entitled to vote. ...”

91. The First and Second Defendants noted that the JCPC had considered Canadian authorities cited by the parties, including *Kluwak v Pasternak* [2006] O.J. No. 4910, at [49]-[50], noting at [50] that this was “*a case which establishes that, if a circular be sent to shareholders, it must be fair and not misleading regardless of whether it comes from the company or from dissenting shareholders*” and that the test expressed by Mesbur J in *Kluwak* in the context of a circular issued by dissident shareholders to bring about a change in the composition of the board was that (at [16]) it “*... must contain full, fair and plain disclosure, that has sufficient information concerning the pertinent matters set out ‘in sufficient detail to permit shareholders to form a reasoned judgment concerning the*

matter.” Mr Potts accepted during his oral submissions that the facts and issues before the JCPC were different from those in this case, but he submitted that it was significant that the JCPC had not demurred from the point that the same standard applied to shareholder and director proxy statements.

92. Mr Potts said that it was important that the Court did not water down or diminish or undermine in any way the high standards of corporate governance that were required and expected in this jurisdiction of those distributing proxy statements (and notices) to shareholders ahead of general meetings. This was an issue that went to the standing and integrity of the Cayman Islands regime for regulating corporate governance and shareholder communications. Mr Potts submitted that if the directors or shareholders wished to propose a nominee director, it was necessary to fully and fairly disclose. He accepted however that what constituted full and fair disclosure in any particular case will depend on the circumstances – the test was fact specific - but subject to a review in each case as to what and how much needed to be disclosed it was necessary for those nominating a director fully and fairly to disclose their relevant relationships with their nominees so that shareholders can consider those relationships and then make a properly informed judgment as to whether the nominees in light of those relationships are the sort of people that they want to have as directors.
93. Mr Potts noted and adopted my summary of what I took to be the First and Second Defendant’s case in a comment I made to Mr Ayres during his closing oral submissions as follows (my underlining):

... it’s one thing to say, well, the shareholders, all shareholders of a company like this, anticipate and expect there to be a relationship between, the nominating shareholder and the nominated director, but it doesn’t follow surely from that, that shareholders are not also interested in and entitled to be told about, at least in broad terms, the nature of those relationships. So you can say, of course [that] shareholders expect that the person who is nominated by the nominating shareholder is trusted by the nominating shareholder. There must be a basis for that [expectation arising] out of [the nominating shareholder’s] previous experiences [of] or activities [with their nominee]. But the argument against you will be [that] it doesn’t follow from that expectation that shareholders in order to be properly informed when deciding whether to vote for the nominees, it doesn’t follow that they don’t also need to be told that in broad categorical terms, of the nature and, extent, certainly the financial impact, of the connections in the particular case.

94. Mr Potts said that the First and Second Defendant's case was based solely on Article 20.3(a)(vi) (accordingly, the fact that Article 20.3(a)(v) referred only to a statement as to whether the MILFAM Nominee was "*independent of the Company*" was wholly irrelevant). He submitted that in this case MILFAM was required (pursuant to Article 20.3(a)(vi)) to disclose at least "*in broad categorical terms ... the nature and extent [and] certainly the financial impact of [its] connections [and relationships with]*" the MILFAM Nominees. He argued that because it had completely failed to do so, the MILFAM Nomination Notice and the MILFAM Proxy Statement must be held to be inadequate and incomplete with the result that shareholders were not adequately informed to vote on the election of the MILFAM Nominees. The First and Second Defendants argued that the evidence showed that MILFAM had significant business and financial relationships with each of Mr Howe, Mr Holliday and Mr Freund which shareholders needed to be told about as those relationships might affect a (reasonable) shareholder's assessment of whether the nominee concerned would act independently of or might act to benefit and promote the interests of MILFAM and therefore whether they were suitable to be appointed a director (and preferable to the other individuals including the Original Directors) who were being nominated.
95. The First and Second Defendants argued that where the requirements were breached, resolutions flowing from them will be liable to be declared invalid if there was reason to believe that the shareholders' decision-making might have been affected by the misrepresentation or non-disclosure.
96. Mr Justice Slade had considered the consequences of non-disclosure in *Re Jessel Trust Ltd* [1985] B.C.L.C. 119, in deciding whether to sanction a scheme of arrangement and reduction of capital that had been approved by the shareholders. He had held (at 124e-g) that the test was whether "*if it was reasonable to suppose that such change [of circumstance] might have influenced the way in which the members voted at the meetings or abstained from voting*", and (at 125(a-b)) that the onus was on those who had failed to disclose a change of circumstances after despatch of the statement and was a very heavy one. They submitted that in most cases the Court must assume that this was a matter of concern to the shareholders and correspondingly one which might well influence them. They further submitted that the observations in *Re Jessel Trust Ltd* were not confined to a duty to disclose alterations in directors' interests. The offending party

would have to satisfy the Court that no reasonable shareholder would have changed their decision as to how to act if the changes had been disclosed (citing *Halsbury's Laws of England*, Vol 14 (2023), para 1132).

97. The First and Second Defendants submitted that the evidence (after and taking into account the cross examination of Mr Wichers) showed the following:
- (a). Mr Subin is the president and manager of and controls MILFAM and has also been since 2018 a trustee of all but one of the family trusts (of the family of Mr Miller who has died) that are the members of MILFAM. Mr Wichers had previously worked for Mr Subin since the age of fifteen. Under the operating agreement that governs how MILFAM is to be governed, management powers are given to the manager and Mr Subin is the sole manager and president (the president is responsible for general care and supervision of MILFAM's business).
 - (b). under the operating agreement a Manager Oversight Committee is appointed which (rather than the members) has the power to remove Mr Subin, has responsibility for determining Mr Subin's compensation and reviewing that compensation and evaluating Mr Subin's performance on an annual basis. It also approves any transactions where he may have a conflict of interest. It is a committee of three people of whom Mr Howe is one (since 2018). Mr Wichers accepted that the Manager Oversight Committee "*exercises an important supervisory role over the affairs of MILFAM.*". Mr Wichers also accepted that neither he nor MILFAM had disclosed or provided any information about Mr Howe's role on the Manager Oversight Committee.
 - (c). Mr Howe had represented Mr Miller as a nominee on a number of different boards of directors and was trusted by Mr Miller to look after Mr Miller's family interests.
 - (d). Mr Wichers had accepted that a shareholder of the Company would be interested in understanding whether a proposed director would be able to provide single minded loyalty to the Company and that the only connection between Mr Howe and MILFAM that had been identified and disclosed was that he was being put forward for election by MILFAM.

- (e). Mr Wichers had accepted that the MILFAM Nomination Notice and the MILFAM Proxy Statement did not disclose or provide any details of either Mr Howe's or Mr Holliday's roles over many years as directors of a large number of companies that MILFAM owned and controlled or details of the remuneration that they had both historically earned through a number of those directorships. They also did not disclose Mr Holliday's previous role on the Manager Oversight Committee.
- (f). Alimco Financial Corporation is the parent company of Alimco Re Limited, a Bermuda reinsurance company and is wholly owned by MILFAM. Mr Wichers was nominated by MILFAM to be a director of Alimco Financial Corporation. Mr Howe is also director of Alimco and remains a director because MILFAM is willing for him to be reappointed as a director. Mr Wichers accepted that while MILFAM disclosed that he was a director of Alimco Financial Corporation it did not disclose that Alimco Financial Corporation was wholly owned by it and that the details relating to Mr Howe did not mention Alimco at all. Mr Wichers said that Mr Howe's details were his standard biography that he used for every other public company of which he is a director and that no extraordinary considerations were made for the situation.
- (g). Mr Howe was accustomed to providing his invoices in relation to his Alimco activities for payment directly to MILFAM.
- (h). MILFAM also owns over 90% of another company called Anacomp of which Mr Howe has been a director since about 2007 and is now chairman of the board.
- (i). Mr Holliday has acted as a trustee for Mr Subin and was probably or had been a member of the Manager Oversight Committee.
- (j). MILFAM had failed to disclose that Mr Freund's relationship with the Javelin group and that the Javelin group had been in detailed and advanced discussions with MILFAM regarding a potentially lucrative contract that would earn the Javelin group millions of dollars, and that revealed Javelin (and Mr Freund's) commitment to support MILFAM and align with its commercial objectives.

98. The First and Second Defendants argued that the evidence made it clear that Mr Howe, Mr Holliday and Mr Freund benefitted financially to a material extent (or in Mr Freund's case were likely to benefit or had a serious prospect of benefitting) from appointments made or contracts granted by MILFAM which would or at least might be understood as affecting their ability to act independently of MILFAM. MILFAM, the First and Second Defendants submitted, had been required (both under Article 20.3(a)(vi) and the common law) to disclose this and these relationships to ensure that shareholders were able to make a properly informed decision as to whether to vote for the election of these individuals.
99. The First and Second Defendants submitted that what was required to be disclosed (pursuant to the common law or the requirements of the Articles) depended on the context. The more disclosure that was given by a shareholder in a circular, the more that may be required in order for the document to be lawful; and one statement on a particular subject-matter may require other statements in order for that statement to be placed in its proper context and not be misleading. Likewise, the more excessive a statement, the more that may be required by way of qualification if there was reason to do so. The MILFAM Proxy Statement had been detailed (in some respects) and lengthy and MILFAM had held the MILFAM Nominees out to shareholders as a tool to bring about enhanced "transparency" in the affairs of the Company.
100. The MILFAM Proxy Statement or the covering communication had stated as follows (my underlining):

... As explained in our proxy statement, we believe the MILFAM Nominees, if elected, would restore shareholder confidence by initiating a review of the Company's strategy, operations, and balance sheet with an emphasis on maximizing return of capital to shareholders, improving transparency and accountability to shareholders and minimizing related party transactions." (page 1)

...

We are soliciting your vote because we believe that the Existing Directors do not represent the best interests of the Company or the Company's Shareholders and have not been acting in the best interests of the Company during their tenure. Specifically, the Existing Directors have overseen significant and sustained shareholder value destruction over a long period of time and have done little to promote transparency. ... We also believe that the

MILFAM Nominees, if elected, would work expeditiously towards promoting transparency and increasing shareholder value.” (p. 2)

...

“... we anticipate that the MILFAM Nominees will conduct an evaluation of the Company’s management and strategy, with an emphasis on:

...

Improving alignment of incentives between the Board and shareholders, including but not limited to independent managerial oversight on strategic execution and increased transparency through regular earnings calls and shareholder-accessible annual meetings.”

(p. 4)

101. The First and Second Defendants said that MILFAM had also held out the MILFAM Nominees in fulsome terms — as “*independent*” and as nominees who “*would fairly represent the interests of all Shareholders ...*”:

“... we believe the MILFAM Nominees would create a well-balanced, highly qualified, independent, and diverse Board with extensive industry knowledge, experience, and insights beneficial to the Company, and that they would fairly represent the interests of all Shareholders of the Company.” (p. 2)

102. The First and Second Defendants noted that the principal question before the AGM was whether to appoint directors to a fiduciary office. If the MILFAM Nominees were elected they would be fiduciaries subject to the strict “*no conflict*” and “*no profit*” rules and owing a duty of loyalty to the Company. As such, the Company (and its shareholders) would be “*entitled to the single-minded loyalty of [their] fiduciary*”: *Bristol and West Building Society v Mothew* [1998] 1 Ch. 18.

103. The First and Second Defendants submitted that it had been incumbent on MILFAM to disclose the following four categories of information to the Company and the shareholders:

- (a). the extent of MILFAM’s connections to the MILFAM Nominees. The MILFAM Nominees were not simply independent third parties with no prior connection to MILFAM. Instead: (i) (as had been disclosed) Mr Wichers was an employee of

MILFAM; (ii) (as had not been disclosed) two of the nominees (i.e. Mr Howe and Mr Holliday) had longstanding connections to MILFAM; (iii) (as had not been disclosed) Mr Howe continued to have connections to MILFAM and to be remunerated by entities in which MILFAM is interested.

- (b). Javelin had recently pitched for a lucrative contract in relation to the Company from MILFAM and, as a provider of outsourced management services, could seek to benefit in the future from the appointment of the group's founder, CEO and MD (Mr Freund) to the Company's board. Mr Freund himself was not an independent person; he was a nominee who had "*aligned*" himself with MILFAM and made it known to Mr Wichers that he could be counted on to act with MILFAM.
- (c). it followed that MILFAM could influence the conduct of the board by means beyond its shareholding in the Company, and out of proportion with it, so that rather than seeking to further the interests of the shareholders as a whole, the MILFAM Nominees could cause the Company to be managed in a way that served the interests of MILFAM.
- (d). it also followed that some of the directors (especially Mr Freund, Mr Howe and Mr Wichers) could find themselves in a position in which their duties to the company conflicted with their duties to a third-party, whether by virtue of related-party contracting or otherwise.

104. The First and Second Defendants argued that given the absence of Mr Howe, Mr Holliday and Mr Freund as witnesses in these proceedings, the extent of the connections that existed and the consequences of the connections were not matters that the First and Second Defendants' counsel were able to ascertain in cross examination.

105. The First and Second Defendants submitted that the discovery given by MILFAM had revealed that the representation in the MILFAM Proxy Statement of "*independence*" and of directors who would bring independent decision-making to bear to be a misleading one. "*Independence*" connoted an independence of mind; not a slate of directors who there was some reason to believe might toe the MILFAM line espoused by Mr Wichers.

106. The First and Second Defendants argued that the need for disclosure arose because MILFAM had courted the Javelin pitch and Javelin had responded positively, seeking to obtain lucrative contractual rights against the Company and MILFAM would go on to nominate Mr Freund for election. MILFAM's failure to reveal its discussions with Javelin and the fact that Mr Freund had recently pitched to MILFAM for a contract with the Company was a serious omission. Mr Freund had been held out by MILFAM as being an "*independent*" nominee, but it was apparent from the contemporaneous communications that Mr Freund was very far from an independent nominee. Mr Freund was recorded to have used that language of alignment with MILFAM in multiple messages to Mr Wichers starting with his message on 25 August 2025:

"Hey Skyler, hope you had a good weekend. Spencer, Peter and I are all aligned. Let me know when you'd like to chat. We are a ton of value in doing this with you and want to make sure we're aligned with how you want this to work. Let me know when you'd like to catchup and also want to be helpful to you through this process."

107. The First and Second Defendants argued that because these matters were not disclosed, the members were potentially proceeding on an erroneous basis when they made their decision to give a proxy or not to attend the AGM and vote in person. Each of the non-disclosures alone was sufficient to impugn the votes in favour of the MILFAM Nominees.

108. The First and Second Defendants rejected MILFAM's claim that even if the MILFAM Nomination Notice and/or the MILFAM Proxy Statement were deficient, the deficiencies in disclosure had been cured by the December Press Release:

- (a). the December Press Release had been too late to cure any deficiencies in the MILFAM Nomination Notice and/or the MILFAM Proxy Statement. The cut-off date for the appointment of a proxy was 8am on 23 December (Hong Kong time) and it was plain that shareholders would have given their proxy prior to the publication of the December Press Release.
- (b). there was a world of difference between a circular put out by the Company alleging material misstatements in a circular issued by a shareholder and that shareholder admitting the facts that have been mis-stated and correcting their earlier circular.

- (c). the December Press Release had failed to cure all deficiencies, because the Company was not aware at the time of the extent of the non-disclosure. The Company, for example, knew nothing of the information concerning Javelin and Mr Freund that has been revealed via discovery.
- (d). in any event, the issue was whether the MILFAM Nomination Notice complied with the Articles on its own terms and its validity was not affected by disclosure that was subsequently given in a circular, by the Company or by MILFAM.

MILFAM's submissions

109. MILFAM noted that the First and Second Defendants had submitted that the Court should determine that the MILFAM Nomination Notice and the MILFAM Proxy Statement were unlawful on the basis that there was a failure to disclose that:

- (a). one of the MILFAM Nominees, Mr Alan Howe, held positions in certain entities in which MILFAM holds an interest ([31(a)] of Morrow 1) and sits on MILFAM's Management Oversight Committee.
- (b). another of the MILFAM Nominees, Mr Mark Holliday, "*has a history with MILFAM*" ([31(b)] of Morrow 1) and "*had longstanding connections to MILFAM and its President and Manager Mr Subin*" ([5(a)(iii)] of Smith 1]).
- (c). another of the MILFAM Nominees, Mr Jerrod Freund, had caused Javelin Global Commodities (US) LLP (*Javelin*) to send a proposal to MILFAM relating to the management of the Company.

110. The First and Second Defendant's case was based on an alleged failure by MILFAM to comply with Article 20.3(a) (v) and (vi) (which required a statement as to whether the MILFAM Nominees would be "*independent*" of the Company if elected as a director" and the reasons and basis for such determination and any other information relating to MILFAM Nominees that "*would be required to be disclosed in a dissident's proxy*

circular in connection with solicitations of proxies for election of Directors pursuant to applicable law”).

111. MILFAM argued that the reference to “*required to be disclosed in a dissident’s proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law*” was directed at and designed principally to apply to the statutory or regulatory provisions under applicable law which governed and applied to documents disclosed by or in relation to listed issuers, in accordance with applicable listing rules as supervised by relevant listing authorities. This wording was a catch-all provision to ensure that compliance with all such statutes, regulations and rules (from time to time and as amended) had to be complied with (there could be and usually were multiple regulators and regulatory regimes that would apply to disclosures relating to listed shares or debt). This was no doubt why the First and Second Defendants had initially relied on alleged breaches of US securities law before this aspect of the case had been abandoned without the filing of their expert evidence and without explanation. The First and Second Defendant had pivoted from reliance on US law to the common law of the Cayman Islands. But, MILFAM submitted, it was not clear that this wording covered the non-regulatory common law of the Cayman Islands. It was not clear that it could properly be said that there was a general requirement (“*required to be disclosed*”) under the common law to specify certain information in company notices although MILFAM accepted that the common law did regulate proxy statements and require that they not be misleading.
112. MILFAM made a second construction point. They argued that Article 20.3(a) (v) only required that the nominating shareholders notice contained a reasoned and supported statement as to the nominee's independence from the Company. It did not refer to anyone else and there was no express requirement for any statement as to the nominee's independence from the nominating shareholder. MILFAM submitted that if there had been a requirement to include a reasoned and supported statement as to the nominee's independence from the nominating shareholder, one would have expected that to have been included in the detailed drafting of the Article. Accordingly, MILFAM argued, Article 20.3(a) (v) and (vi) should be understood as not imposing any requirement for a statement as to the nominee's independence from the nominating shareholder (this construction for which MILFAM contended would be consistent with the *expressio unius est exclusio alterius* principle of construction).

113. MILFAM said that reading Article 20.3(a) (v) and (vi) in this way was both consistent with the expectations of experienced professionals working with listed securities (such as Mr Wichers) and commercial common sense, which required that identifying what had to be disclosed by nominating shareholders was consistent with the expectations of the other shareholders and that the disclosure obligations imposed on nominating shareholders were clear and not unduly onerous. Mr Ayres during his closing submissions noted the following exchange between Mr Potts and Mr Wichers during the latter's cross-examination:

Mr Potts *Wouldn't you accept that a shareholder also - might have been interested in Mr Howe's position on the MILFAM Oversight Committee when considering whether he was independent and would fairly represent the interests of all shareholders?"*

Mr Wichers *No, because once again, if I may, you're conflating two different issues there. Independent of the company is one significant issue and yes, his independence is a critical concern of shareholders. We made disclosures to that effect. All of our nominees are independent of the company. Mr Howe's ability to represent all shareholders, his role and connections with MILFAM beyond his role as MILFAM's nominee, which is clearly identified here, isn't relevant. Again, based on my past experience in these contexts would be atypical to provide."*

114. MILFAM submitted that there was no possibility of confusion in a shareholder's eyes that nominated directors were well known to and trusted by the nominating shareholder and thus were likely to have some sort of relationship to them. This was self-evident. A nominating shareholder would not nominate somebody unless they thought they were suitable and were going to do a good job. Accordingly, the fact that there is a connection with the nominating shareholder was not a concern of other shareholders because they would know that there was already going to be a relationship with the nominating shareholder. As Mr Ayres put it in his closing submissions "*... independence from the nominating shareholder is just simply not part of the landscape and not something which could possibly mislead a shareholder."*

115. MILFAM also cautioned against the Court imposing an impossible standard for nominating shareholder notices. Mr Ayres gave a number of examples which he said demonstrated that establishing too high a threshold would be counterproductive and

would produce unfairness. One example he gave was where it had been forgotten that one of the nominees proposed by a shareholder was the godfather of the chairman of the board of the nominating shareholder and this information was innocently omitted from the nominating shareholders' notice. Mr Ayres said that any disclosure standard should not result in the invalidity of a notice in this kind of case. He also argued that if there was an obligation to disclose relationships between the nominating shareholder and its nominees, serious difficulties would result in deciding what type and level of relationship was sufficient to trigger the obligation to make disclosure. As regards the present proceedings, he noted that there were various MILFAM Nominees with different relationships with MILFAM. Mr Wichers was a MILFAM employee with an obvious connection to and relationship with MILFAM. Mr Howe and Mr Holliday each had long and close working relationships of a different kind with MILFAM. Mr Patel (in respect of whom no complaint had been made) had only a tenuous and recent relationship with MILFAM. Where, Mr Ayres asked rhetorically, if the First and Second Defendants are right that disclosure of such relationships must be made, is the line to be drawn.

116. MILFAM argued that, if its construction of Article 20.3(a) (v) and (vi) was not accepted and therefore it had been necessary for MILFAM to disclose matters as required by the common law of the Cayman Islands, the First and Second Defendant's formulation of the applicable common law rule was incorrect and unduly onerous.
117. MILFAM said that while the law did require that notices from directors concerning members' meetings must contain a fair, candid and a reasonable explanation of the purposes of the business to be conducted and not be misleading, that was because the directors owed a duty in equity to the shareholders. However, a similar duty was not owed by shareholders *inter se*. But even if, contrary to that primary case, the shareholders did owe a duty akin to that owed by a director when requisitioning a meeting or issuing any other form of notice or circular, that duty was only to provide a "reasonable explanation." This was that an explanation containing sufficient information to enable the shareholders to make informed decisions about the proposals to be put to them at meetings.
118. MILFAM relied on the formulation of the requirement by Neuberger J in *Re RAC Monitoring Services* [2000] 1 B.C.L.C. 307 at 327 where he cited with approval the

statement of the position by White J in the Australian case of *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* [1998] 14 A.C.L.R. 375 at 377 as follows:

"Sufficiency of information is a matter of fact and degree. The directors have a duty in equity to give to shareholders sufficient information for them to make informed decisions about proposals to be put to them at meetings ... The essence of the duty is the requirement of reasonableness or fairness in the circumstances, having regard to the interests of the company as a whole. A surfeit of information may well obscure the purpose of the resolution. A lack of information may constitute misrepresentation by omission. It is a matter of sensible judgment by the directors in each case and ultimately by the court if complaint is made to it."

119. MILFAM argued that this formulation of the applicable requirement was very far from the much more onerous test contended for by the First and Second Defendants. MILFAM said that the First and Second Defendants were arguing for a test akin to that of the full and frank disclosure required of the applicant on an *ex parte* hearing of an injunction application. They appeared to contend that in this case a failure to discharge that onerous duty would result in the election of the MILFAM Nominees being vitiated. However, as could be seen from Mr Justice Neuberger's judgment in *RAC Monitoring Services* that was the wrong test. The correct test was based on ascertaining whether sufficient information had been provided to enable the shareholders to make informed decisions about the proposals to be put to them at the relevant meeting. MILFAM argued that the authorities relied upon by the First and Second Defendants to formulate their overly onerous test related to serious frauds sought to be perpetrated on unsuspecting shareholders.
120. MILFAM argued that the matters complained of by the First and Second Defendants came nowhere near the threshold that would be required for the Court to rule the MILFAM Notice and MILFAM Proxy Statement were so misleading that they were unlawful and therefore that the resolutions to elect the MILFAM Nominees were invalid.
121. In the context of the usual and entirely expected fact that shareholders will be expected to nominate individuals for directorship which they know and trust, the suggestion that any of the matters relied on by the First and Second Defendants were in any way misleading or tricky was absurd.

122. Mr Ayres in his oral closing submissions said that it was not in dispute that the MILFAM Nomination Notice and the MILFAM Proxy Statement did not include a full and exhaustive account of all of Mr Howe's and Mr Holliday's connections to MILFAM. But, he said, that was never the intention or focus of the information provided by MILFAM. Mr Wichers had been very clear in his evidence that the biographical information that he had caused to be included was public company facing. It was designed to deal with the case where a party was nominating directors to a listed public company. The issue in dispute, Mr Ayres said, was whether the omission of the material identified by the First and Second Defendants made the MILFAM Nomination Notice and the MILFAM Proxy Statement misleading or tricky or resulted in a failure by MILFAM to give other shareholders sufficient information to allow them to make an informed decision at the AGM. MILFAM submitted that it did not.
123. MILFAM said that even if (contrary to its primary case) the MILFAM Proxy Statement omitted information capable of being regarded as material, those matters cannot be said to have misled shareholders or to have been material at the time of the vote at the AGM. In particular, the very relationships now relied upon by the First and Second Defendants as having been “*undisclosed*” were set out in detail by the Company in the December Press Release. The Company thereby placed the alleged connections or associations squarely before shareholders before the vote, while urging them to vote for the Original Directors to be re-elected to the board. In that context, there was no possibility of their having been misled.
124. MILFAM submitted that as regards Mr Freund and Javelin, as explained by Mr Wichers at [13] – [15] of Wichers 7, the draft term sheet on which the First and the Second Defendants placed significant reliance for their argument that the MILFAM Notice and MILFAM Proxy Statement were defective, was never approved, adopted or progressed by MILFAM. MILFAM was not instructed by Javelin, and there was and is no agreement, arrangement or understanding of any kind between MILFAM and Javelin in respect of the Company.
125. In Wichers 7 Mr Wichers had dealt with the Freund- Javelin issue as follows:

14. *In that context, MILFAM produced a draft, expressly non-binding term sheet circulated on 18 September 2025 by Javelin Global Commodities (US) LLP (“Javelin”), of which Mr Jerrod Freund is a managing director and the Chief Executive Officer of its subsidiary, Javelin Private Capital Group LLC. The term sheet contemplated, at a high level, the possibility of Javelin providing management services to the Company (pages 3 to 11). The circulation of that draft followed a limited number of text message exchanges between me and Mr Freund in August 2025, which involved preliminary and exploratory discussions regarding Javelin’s management experience relevant to the Company given its background in the mineral royalty and mining sector.*
15. *The draft term sheet and the related preliminary discussions were never approved, adopted, or progressed by MILFAM. MILFAM has not instructed Javelin, and there was and is no agreement, arrangement, understanding or commitment of any kind between MILFAM and Javelin in relation to the management of the Company. It has never been MILFAM’s intention that the Company’s management be outsourced or transferred pursuant to any arrangement with Javelin or otherwise. As reflected in Mr Freund’s director questionnaire circulated to MILFAM on 4 November 2025, there was no formal agreement between MILFAM and Javelin, and discussions were limited to informal conversations regarding Javelin’s management experience (pages 12 to 21). Further, as confirmed in correspondence from K&L Gates LLP to Mr Freund dated 4 November 2025, by early November 2025 those discussions had ceased and there was no proposal on the table, nor any arrangement or understanding, between Javelin and/or Mr Freund and MILFAM ...*
126. In his oral closing submissions Mr Ayres said that Mr Wichers’ evidence showed that approximately on 10 September (there had obviously been some earlier discussions), Mr Freund had informed Mr Wichers that he had drafted a term sheet and, on 16 or 17 September, Mr Freund had emailed the draft term sheet, which proposed a management services agreement. Mr Wichers had at the time stated that this was “*well received*” and was cross examined by Mr Potts about what he meant by that. Mr Ayres submitted that Mr Wichers’ evidence, which should be accepted, was that when he received the draft term sheet his impression of the contents had been quite negative (as the economics and terms of the proposal were completely unworkable) and had regarded it as in substance dead on arrival, and that he had told Javelin that the only economics that the Company’s board would be likely to consider would follow a typical management incentive plan for a company the size of the Company. He had forwarded the term sheet to Mr Howe commenting “*It looks a bit different than I expected.*”. Mr Potts had sought to show that Mr Wichers had failed finally clearly and categorically to tell Javelin that the discussions regarding the management services agreement were at an end so that in fact there

remained the prospect of Javelin being given a lucrative contract, which might affect Mr Freund's position and give him an incentive to put the interests of MILFAM above those of the Company if appointed a director. But, Mr Ayres said, that was a wholly unjustifiable reading of what had happened. Mr Wichers had made it clear that the negotiations of a management services with Javelin were terminated and would not proceed although because Javelin, as a group, was an important and serious global player and there may be other things that Javelin could do for the Company in due course, Mr Wichers had not wished to cut off discussions abruptly or completely. The reality was, as he had explained, that he just let the whole proposal wither on the vine and that by 18 September, the idea of a management services contract with Javelin was dead. Mr Ayres submitted that in these circumstances there was absolutely no need for MILFAM to disclose anything (having regard both to the terms of Article 20.3(a) and (b) and the applicable general law) relating to Javelin or these negotiations in the MILFMAM Nomination Notice or the MILFAM Proxy Statement. Importantly, as Mr Wichers had also made clear, Mr Wichers' (and MILFAM's) position was that if there was eventually ever to be a Javelin management services agreement after the MILFAM Nominees had been appointed, the governance rules relating to related party transactions involving a director would have been observed. It was absurd to suggest that there needed to be disclosure of a speculative draft term sheet, which was irrelevant to the matters that shareholders needed to consider when deciding whether to vote for the MILFAM Nominees.

Discussion and reasons for my decisions

Issue 1 – the interpretation of the Articles

127. There is no dispute as to the applicable law regarding the proper approach to the interpretation of articles of association and that the applicable principles were well and accurately summarised by Mr Justice Snowden in *Euro Accessories*. It is worth quoting the relevant paragraphs from his judgment (my underlining):

28. *Although Henderson LJ referred to the application of the ordinary principles that apply to the interpretation of any written contract, there are, however, a number of obvious and important differences between a private contract and a company's articles of association which require some modification to these*

principles.

29. The first and most obvious is that the articles of association are generally not the product of a process of negotiation leading to a meeting of minds or consensus between all of the shareholders. There was certainly no such process or meeting of minds in the instant case because the terms of new art.6A were not agreed between Mr Gilsenan and Mr Monaghan, but were introduced by Mr Gilsenan using the procedure for amendment of the company's articles provided for under the Companies Act 2006 .
30. Secondly, the articles of association of a company are required to be registered as a public document at Companies House: see ss.18(2) and 26(1) of the 2006 Act. Thus, unlike a private contract, the articles of association are not addressed to a specific counterparty or counterparties, but have to be understood by anybody who inspects the register at Companies House, either with a view to becoming a party to the statutory contract by buying shares, or simply to deal with the company.
31. These features have an important impact by way of limitation on the admissible background against which the articles of association can be construed.....
32. So, in *Belize Telecom* itself, the Privy Council was able to imply a term into the articles of *Belize Telecom Ltd* that a director would vacate office when there was no longer any shareholder with a shareholding appropriate to authorise that director's appointment. Lord Hoffmann explained, at [37]:
- “The implication as to the composition of the board is not based upon extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation.”
33. In *Cosmetic Warriors Ltd v Gerrie* at first instance ([2015] EWHC 3718 (Ch)), applying the approach in *Belize Telecom*, the trial judge concluded that in addition to the articles themselves, third parties would have been able to ascertain, from the information in the annual returns at Companies House, (a) that the company in question was a small company; (b) that it only ever had one class of share; (c) the number and identity of the shareholders when the articles were created and at all times thereafter; and (d) that there had only ever been a small number of shareholders. That approach was endorsed by Henderson LJ in the Court of Appeal at [23].
34. The result is that the process of interpretation to arrive at the true meaning of a provision in a company's articles of association must concentrate on the natural and ordinary meaning of the words used, when viewed in light of the scheme and purpose of the articles in general, any extrinsic facts about the company or its membership that would reasonably be ascertainable by any

reader of the company's constitution and public filings at Companies House, and commercial common sense.

128. As Richard Spearman Q.C. (sitting as a Deputy Judge of the Chancery Division) said at first instance in *Cosmetic Warriors Limited, Lush Cosmetics Limited v Andrew Gerrie, Alison Hawksley* [2015] EWHC 3718 (Ch), as the articles are public documents which could affect third parties, the interpretative question is not what the parties intended but what the document meant (following *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305).
129. In the present case, the critical issue is whether the reference to the “*postponement of a meeting of Members*” in Article 20.2, which deals with the procedure for shareholders to give notice of individuals they wish to nominate for election as directors, indicates that the Articles must be understood as including a power for the directors to postpone a shareholders’ meeting which they have convened. Does it follow from the fact that the Article dealing with the time period within which such a notice must be given, which stipulates that the time period is to be calculated by reference to the date of the relevant meeting without adjustment and ignoring any delay resulting from “*any adjournment or postponement of a meeting of Members or the announcement thereof*”, that other provisions in the Articles must be interpreted and understood as giving the directors a power of postponement?
130. In my view it does not. This wording in Article 20.2 (“*any adjournment or postponement of a meeting of Members or the announcement thereof*”) deals with what happens *if* there is a postponement. It assumes that there could *or might be* a postponement. Postponement is coupled with adjournment and its inclusion can be understood as being for the purpose of covering, out of an abundance of caution, all delays and changes to the date of the relevant meeting that are in principle possible, without addressing how and on what basis a postponement might arise. The obvious purpose of the provision is to ensure that time periods for service of nomination notices always have to be calculated by reference to and based on the original date of the meeting and that no delays of any or whatever kind to the holding of the meeting can affect that. It seems to me that the reference to “*any adjournment or postponement of a meeting*” means in substance and is shorthand for “*any delay to the holding and conduct of the meeting of any kind.*”. This interpretation

does not involve ignoring or interpreting out of the Articles the reference to *postponement* in Article 20.2. Instead, it involves interpreting its meaning in context, having regard to the purpose of that Article and the purpose of the reference in the Article to the impact of delays to the holding of a shareholders' meeting.

131. Further, Article 20.2 is an administrative provision dealing with the mechanics of serving notices and its interpretation and significance need to take this into account. It is as a result a weak plank on which to build the case that the Articles include and give to the directors a substantive power to postpone. Article 20.2 does not *require* that there be a power to postpone. It does not establish a process which in order to operate requires there to be a (directors') power to postpone nor does it provide for certain steps to be taken which include or depend on there being a postponement by the directors.
132. In addition, Article 20.2 does not indicate that the postponement referred to is or must be a postponement by the directors. It can be read as contemplating the possibility of a postponement of any kind including by shareholders. I accept that the Articles, which were adopted by a special resolution passed on 12 July 2017, envisage that the Company's shares will be listed on the NYSE (the shares have been traded on the NYSE since July 2017 although the Company was incorporated in the previous month) and widely held (through custodians) so that the Articles should be taken to assume that a postponement resulting from a unanimous decision of all the shareholders would be highly unlikely (which is also the case as a matter of practical reality). However, in view of the purpose of and the reasons for including the reference to delays to the holding of a shareholders' meeting in Article 20.2 this does not matter. What was important and needed in that Article was to cover off and deal with the risk of any conceivable basis for such a delay however remote the risk or unlikely it might be that there would be a delay. It is also possible, as I mentioned during submissions, that it might be thought that there was a risk that requisitioning shareholders have a power to postpone a meeting that they had convened under Article 16.4 although this issue was not addressed in any detail, and I do not give it any substantial weight.
133. In my view, the various references to a postponement of a shareholders meeting in the notices and documents referred to by the First and Second Defendants do not change this analysis. They indicate that the parties may well have assumed (but there was no evidence

on this) that there was a power to postpone of some kind or that it was prudent to include a reference to a postponement in case there might be one, but an erroneous assumption (in so far as it related to the directors having a power to postpone) does not justify interpreting the Articles so as to include one. The First and Second Defendants did not assert that the parties had operated or proceeded on the basis of a common assumption giving rise to an estoppel by convention or that MILFAM was otherwise estopped from denying that the directors had a power of postponement. I note that there was no evidence or a claim that a shareholders meeting had in the past been postponed by the directors and that MILFAM and other shareholders had treated such a postponement as valid and acted on it.

134. Having carefully considered all the parties' submissions on this issue, which I have summarised above, I find for the reasons I have given, that the Original Directors did not have the power to postpone the AGM.

Issue 2 – Article 18.1 and implying a term into the Articles

135. As both parties accepted, the interpretation of a contract is a different process from the implication of a term into it. The position is neatly summarised by Mr Robin Hollington in *Hollington on Shareholders' Rights* (10th ed.) at [4-10] as follows (also see *Chitty on Contracts*, 36th ed. at [17-005] and Lord Leggatt in *Tesco Stores* at [98]-[101]):

As held by the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] A.C. 742, the interpretation of a contract is a different process from the implication of a term in it: the two are different processes governed by different rules; it is only after the process of interpretation of the words of the agreement has been completed that one turns the issue of implication: per Lord Kitchin in Wells v Devani [2019] UKSC 4 at [28]. The significance of this is that Lord Hoffmann had stated in Attorney General of Belize v Belize Telecom Ltd [2009] 1 W.L.R. 1988 that the issue of whether to imply a term into a contract was “one of construction of the agreement as a whole in its commercial setting”, which was disapproved by the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.

136. As is well known, the requirements which must be satisfied before a term will be implied into a contract as a matter of fact have been stated in various ways over the years and in a number of recent decisions in the UK Supreme Court and the Privy Council.

137. The traditional test was set out by Lord Simon of Glaisdale giving the majority judgment of the Privy Council in *BP Refinery (Westenport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26 when he stated:

“[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”

138. In *Belize Telecom*, Lord Hoffmann noted both that sometimes, depending on the facts, “do nothing” (that is do not imply a term) may be the proper approach and that, having cautioned that the implication of a term is not the common or most usual judicial response to a lack of contractual specification or alleged incompleteness, the Court has to consider how a reasonable addressee would understand the instrument in question (my underlining):

17. *The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*

18. *In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*

139. As *Chitty on Contracts*, 36th ed. at [17-015] notes, a helpful summary of the principles now applied (recognising the subsequent rejection of Lord Hoffmann’s approach in *Belize Telecom* that the implication of terms is another aspect of or adjunct to interpretation) by the courts when considering whether or not to imply a term into a contract as a matter of fact was given by Lord Hughes, giving the judgment of the Privy

Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 in the following terms (my underlining):

It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.

140. The current jurisprudence was also summarised by Lady Rose in the UK Supreme Court in *Barton v Morris* [2023] AC 684 as follows (my underlining):

21. *The leading authority on whether a term can be implied into a contract is Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 . Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hodge JJSC agreed) described at para 16 the "three classic statements, which have been frequently quoted in law books and judgments", namely per Bowen LJ in *The Moorcock* (1889) 14 PD 64, 68 , per Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605 , and the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227. It was in the last of those that MacKinnon LJ famously stated that a term would only be implied into a contract "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"*

22. *Lord Neuberger PSC described the notion that a term will only be implied if it satisfies the test of business necessity as supported in a number of observations in the House of Lords: see the authorities cited in para 17 of his judgment. He approved the principles set out in two earlier cases: the judgment of the majority in the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, as extended by Lord Bingham MR's approach in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 ("Philips"), at p 482. Lord Neuberger then set out his own comments on those principles. It is enough here to say that he concluded at para 24 by emphasising that there*

had been no dilution of the requirements which have to be satisfied before a term will be implied.

23. *The relationship between the "it goes without saying" test and the "business efficacy" test was discussed by Lord Hoffmann in Belize [2009] 1 WLR 1988 . He said at para 21 that these two formulations are not to be treated as different or additional tests but as different ways of expressing the "one question" which is what the contract, seen as a whole against the relevant background, would reasonably be understood to mean. Lord Hoffmann said further that the reference to business efficacy underlines two additional factors; that the notional reader will take into account the practical consequences of deciding that the contract means one thing or the other and whether a particular construction would frustrate the apparent business purpose of the parties. The fact that the term is only implied if it is "necessary" conveys that it is not enough for the court to consider that the implied term expresses what would have been reasonable for the parties to agree to. The court must be satisfied that it is what the contract actually means.*

141. The test is necessity and not reasonableness as *Chitty* notes at [17-14] (my underlining):

The Supreme Court in Marks & Spencer affirmed that it is not enough to show that the term is a reasonable one for it to be implied into the contract. Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient of itself to lead to the implication of a term into the contract. Thus a term will not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them. Nor will a term be implied simply because it would improve the contract or make the carrying out of it more convenient. As it has been observed, "[t]he touchstone is always necessity and not merely reasonableness". The test therefore remains one of necessity, albeit not "absolute necessity" but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term "in order to make the contract work". In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Given the strict or demanding nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in Marks & Spencer and, on that basis, have declined to imply a term into the contract between the parties. If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied

142. The reference to commercial or practical coherence is significant. In *Marks & Spencer* Lord Neuberger at [21] of his judgment had said this: (my underlining):

It is rightly common ground on this appeal that the test is not one of “absolute necessity”, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

143. I appreciate that there has been some debate as to the proper meaning of “coherence” in this context (see for example *McMeel on the Construction of Contracts*, 4th ed., 2025, at [11.46] – [11.48]) but the key point for current purposes is that the test focusses on, or at least permits to be taken into account, the practical workings and effect of the contract with and without the proposed implied term. But as Lord Leggatt pointed out in *Tesco Stores* at [105] the question is not whether the contract would work at all without the implied term but whether, without the implied term, the contract would work in the way the parties must reasonably have intended and expected it to work (my underlining):

*In Marks and Spencer, para 21, Lord Neuberger PSC aired a suggestion made by Lord Sumption JSC in argument in that case that another way of putting the business efficacy test might be to say that “a term can only be implied if, without the term, the contract would lack commercial or practical coherence”. While that would no doubt be a sufficient reason to imply a term, it seems to me to invite consideration of the wrong question. The question is not whether the contract would work at all without the implied term, but whether, without the implied term, the contract would work in the way the parties must reasonably have intended and expected it to work. I agree with Sir Kim Lewison that that is the idea that Lord Steyn was expressing in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, when he described the implication of a term as “essential to give effect to the reasonable expectations of the parties”: see Lewison, *The Interpretation of Contracts*, 8th ed (2024), para 6.85; *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2020] QB 418, para 150. It also accords with the original statement of the test in *The Moorcock*, as seeking to give to the transaction “such efficacy as both parties must have intended that at all events it should have”. I agree too with the Supreme Court of New Zealand that formulating the test in terms of commercial or practical coherence risks distracting from the purpose of implication, which is to give effect to the parties’ bargain as objectively assessed. It is the parties’ bargain, not some broader concept of business coherence, that is the focus of implication: see *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] 1 NZLR 696, para 110.*

144. As I have noted, articles of association are generally not the product of a process of negotiation leading to a meeting of minds or consensus between all of the shareholders so that focus of the interpretative inquiry is (as Mr Spearman Q.C. said in *Cosmetic*

Warriors Limited) “not what the parties intended but what the document meant.”. The question is therefore whether, objectively assessed, the Articles, in particular the procedure for holding and conducting shareholder meetings, will, without the MILFAM Implied Term, be effective to operate in the way (or manner) that they are supposed to work having regard to the structure and scheme (to use Lord Hoffmann’s term in *Belize Telecom*) of the governance arrangements which the Articles establish (and the Articles taken as a whole).

145. So the core question is whether an article which only allows the directors to elect the chairman of any shareholders’ meeting is inconsistent with the fundamentals of the corporate governance regime established by the Articles (and the relevant background company law) because in the absence of the directors at the meeting the shareholders will be prevented from conducting (potentially time critical) business and a key organ of the company will thereby be paralysed and unable to function.
146. In order to assess the impact of such an article it is necessary to consider what would happen if none of the directors attended and turned up at a shareholders’ meeting to conduct important business (and an AGM at which shareholders need to re-elect the existing or appoint new directors is a good example of such a meeting). There are two possible scenarios. First, the directors refuse (decide not) to or are unable to attend (this is a case of a decision by the Original Directors not to attend). Secondly, there are no directors in office (for example because all the directors have resigned).
147. As I put it to both Mr Ayres and Mr Potts during their oral submissions, it seems to me that an important part of this analysis is an understanding of the directors’ duties (where they remain in office). This is part of the legal framework created by the Articles and the Company’s constitution which regulates the conduct of shareholders meetings. To the extent that it can be said that the directors’ duties supplement Article 18.1 and require the directors to take steps to exercise the power granted to them thereby and to do so properly, it can be argued that the machinery for the appointment of a chairman and for the conduct of business at a shareholders meeting is not incomplete and is capable of operating effectively.
148. Article 18.1 gives the directors the power to appoint the chairman at shareholders meetings. That is (as Mr Potts accepted) a fiduciary power which the directors are under

a duty to exercise for a proper purpose. As Mr Potts pointed out, the decision of the JCPC in *Tianrui* makes it clear that the exercise by directors of powers given to them by the corporate constitution must be for a proper purpose (and that if the powers are exercised for an improper purpose in circumstances where a shareholder was adversely affected the shareholder would have personal cause of action against the company). So, it is clear that the Article 18.1 power must be exercised for a proper purpose.

149. But it also seems to me that, as I discussed with Mr Potts and Mr Ayres, Article 18.1 must also be interpreted and understood as bringing with it an active duty on the directors to exercise the power given to them. The Articles give and entrust to the directors an important power which their duty to act in (what they consider to be) in the best interests of the company must require them to exercise in circumstances where the shareholders need or wish to conduct business in general meeting (save where there is a good reason why not exercising that power can be said to be in the best interests of the company and its shareholders).
150. Generally, of course directors are not under an unconditional obligation to exercise discretionary powers given to them by the articles but must do so when they consider that to do so is required in the best interests of the company. But where, as in the case of an article in the form of Article 18.1, the directors are given by the corporate constitution an exclusive power which must be exercised in order for the shareholders to be able to conduct any business at a general meeting, it must surely follow that the power is one which the directors must take steps to exercise save in cases where (they *bona fide* consider that) it is in the best interests of the company and the shareholders not to do so.
151. The directors are not parties to the articles so as to become directly bound so that such a requirement does not arise by implying a term into Article 18.1 which imposes a duty on the directors to exercise their power to appoint the chairman. Rather, as it seems to me, the requirement to exercise the power is a result, as I have explained, of the directors' general duty to act and to exercise the powers given to them in (what they consider to be) in the best interests of the company.
152. This approach is consistent with the directors' fiduciary duty to exercise the powers conferred on them by the constitution of the company in accordance with the corporate

constitution and for the purposes for which they were conferred. This duty is now set out in the UK in section 171 of the Companies Act 2006 but the position was the same at common law before the enactment of that section (see for example, *Re Oxford Benefit Building & Investment Society* (1886) 35 Ch. D. 502). This duty is usually expressed and operates negatively by prohibiting acting beyond the constitutional limitations on their powers contained in the articles (and of course the equitable constraints on the exercise of a fiduciary power are generally preconditions for the exercise to be legally effective).

153. Where the articles provide that *only* a director can appoint the chairman of a shareholders meeting (so that such a meeting can only conduct business if one or more directors attend and exercise their power to elect a chairman), it will generally be in the best interests of the company for the directors (or at least one or more of them) to take proper steps to exercise that power. In deciding whether, when and how to exercise the power given to them, and in properly discharging their duty to act in the best interests of the company, directors who have been given such a special and exclusive power must (in order to act in accordance with these duties) take all reasonable and proper steps to exercise the power. In exceptional circumstances, the directors may conclude that it is not in the best interests of the company (which when solvent connotes the best interests of the shareholders) for a shareholders meeting to be permitted to proceed to business but that will surely be rare as it will usually be appropriate to allow the meeting to decide whether it wishes to deal with the business which it has been convened to consider.
154. This approach to and understanding of the effect of the directors' general duty to act and exercise their powers in the best interests of the company is particularly important where, as in the Cayman Islands, the Court has no statutory jurisdiction to order that a shareholder meeting be convened on the application of shareholders. The role of the directors in facilitating the conduct of business at a shareholder meeting becomes essential and critical.
155. If this approach and analysis is correct, the result is that the corporate constitution in this case provides a mechanism, albeit one that relies on the performance and enforcement of the directors' duties, for ensuring that shareholder meetings can proceed to and conduct business.

156. I have mentioned the enforcement of the directors' duties and the question then arises as to the remedies available to shareholders if the directors refuse or otherwise fail to attend a shareholders meeting and to exercise their power to appoint the chairman. It seems to me that any shareholder (and certainly any shareholder who had given a proxy or notice that it planned to attend the meeting) would be able to bring a derivative claim against the directors (assuming that they all refused to attend and appoint a chairman) seeking a mandatory injunction that one of them attend and exercise the power to appoint a chairman. Such a shareholder might also have a personal action against the company although I can see that where the directors have been given the exclusive power to appoint a chairman it might be said that the company should not be and was not responsible for their failure to attend and appoint and that the relief needed should be directed against the directors, against whom only the company would have a cause of action for breach of the duty to the company.
157. I note that in *Alexander Ward* Lord Hailsham had referred not only to the inability of but also a refusal by the board to act (*if for some reason the board cannot or will not exercise the powers vested in them, the general meeting may do so*). He did not mention in the examples he gave a case such as the present but it seems to me at least arguable that the principle referred to and applied by the House of Lords in that case would apply at least where the directors flatly failed without giving reasons, or purporting to justify their decision not, to attend and exercise their power to appoint the chairman at a shareholders' meeting. As Mr Potts accepted, this reversionary power or re-vesting of the power in the shareholders principle would apply where there were no directors in office (for example because they had all resigned) so that there was no-one who could exercise the power under Article 18.1 to appoint a chairman.
158. For these reasons it seems to me that it can be said that the Articles in combination with the duties imposed on directors as a matter, and other general principles, of corporate law provide a legal mechanism for ensuring that meetings of shareholders can be conducted when required. It follows that it cannot be said that the inclusion of Article 18.1 creates a legally unworkable arrangement for the conduct of shareholders meetings which requires to be supplemented by a default mechanism which caters for the case where the directors refuse or fail to attend and exercise the power to appoint a chairman.

159. I have considered, as Mr Ayres urged me to do, whether, for the purpose of applying the test of necessity and business efficacy, the mere existence of such a legal mechanism and the duties on the directors to exercise the powers given to them by the Articles in the best interests of the company, provide a practicable and workable regime that adequately protects shareholders and allows shareholders to ensure that shareholders meetings can conduct important business in a timely and proper manner. I must admit that this has caused me some concerns. The legal analysis that I have set out above is not based on any authority directly in point or any direct textbook treatment (the discussion of the issue only arose and was based at the hearing on my questions and the parties did not deal with the point or cite any authorities in the written submissions) and the remedies available to shareholders based on this analysis would require proceedings which may take some time to result in effective relief. There is no doubt that shareholders would in principle be better off and have more protection if a default mechanism such as the MILFAM Implied Term were incorporated into Article 18.1.
160. But this is not the test for deciding whether to imply a term into the Articles. As I have noted above, while the test governing the implication of terms focusses on, or at least permits to be taken into account, the practical workings and effect of the relevant article and articles, the question is not whether the contract (the article or articles) would work at all without the implied term but whether, without the implied term, the contract (the articles or articles) would work in the way the parties must reasonably have intended and expected it to work (or in the case of articles, in the way that the document must be understood as meaning having regard to the way it was drafted and the scheme it created).
161. In this case, the shareholders chose to give and entrust to the directors the exclusive power to appoint the chairman and thereby to control the selection of the chairman to preside at shareholders meetings. This must be treated, by reason of the wording of Article 18.1 and the terms of the Articles taken as a whole, as a deliberate choice. It was also a choice which they were at liberty to make. As Mr Potts submitted, (a) the regime established by the Companies Act permits contracting out of the default rules and articles set out in Table A; (b) the threshold for contracting out is low (section 61 refers to “*any regulations as to who is to be the chairperson of... a meeting*”); (c) article 47 of Table A includes a default mechanism which gives the meeting the power to appoint the chairperson if the chair of the board is not in attendance shortly after the time fixed for

the start of the meeting or is unwilling to attend; (d) article 47 was not included in the Articles; (e) there is no evidence adduced or other basis for concluding that the omission of article 47 was a mistake or oversight (which would probably be inadmissible in any event).

162. So, the statutory regime clearly allows contracting out and for shareholders to decide to give directors the exclusive power to appoint the chairperson of general meetings. Such a choice may be in some respects be sub-optimal and have some disadvantages over the default mechanism in article 47 of Table A (and the MILFAM Implied Term) but it cannot be said to be impermissible or irrational. Like many provisions in a corporate constitution the shareholders are reliant on the directors acting properly and performing their duties and may be required to bring proceedings to protect their rights if the directors fail to do so.
163. I do not accept MILFAM's submission that Article 18.1 is to be or can be interpreted as not covering all the circumstances in which a chairman may be appointed and therefore as not dealing comprehensively with when a chairman may be appointed. There is no basis in the natural meaning of the words used, in the Articles as a whole, or the relevant context, which justifies the conclusion that Article 18.1 is only intended to deal with a sub-set of the circumstances in which a chairman may be appointed. Nor do I accept, as will be clear from the discussion above, the submission that Mr Ayres was driven to make that the statutory regime and the core features of the corporate governance regime established by the Companies Act and the supporting common law rules mean that shareholders can never adopt articles which omit a default mechanism akin to article 47 of Table A.
164. This is clearly not a *Belize Telecom* type of case where the scheme established by the articles necessitated and justified the incorporation of an implied term. In the circumstances of this case, despite these reservations I have mentioned, I have concluded that it is not justifiable and that there is no proper basis for the implication of the MILFAM Implied Term. Accordingly, I find that the shareholders whose proxy Mr Sun held were not entitled to appoint the chairperson and to appoint him to be the chairperson for the purposes of the AGM and that Mr Sun was not properly appointed to act as the chairperson at the AGM. It follows that no business could be conducted at the AGM and

the resolutions purportedly passed appointing the MILFAM Nominees as directors of the Company were not passed.

Issue 4: the MILFAM Nomination Notice and the MILFAM Proxy Statement - did the MILFAM Nomination Notice comply with Article 20.3(a) and/or (b)?

This issue strictly speaking does not need to be decided

165. In view of my decision on Issue 2, it is strictly speaking unnecessary for me to deal with Issue 4, but I will do so because the Issue has been fully argued and in case this matter goes further and I am wrong on Issue 2.

The core question arising

166. The issue is whether MILFAM's disclosure, in the MILFAM Nomination Notice and the Proxy Statement (and arguably as supplemented by MILFAM's letters to the Company on 17 and 19 December 2025) was sufficient to satisfy the requirement contained in Article 20.3(a)(vi) to disclose (and provide a statement of), as regards "*each [of the MILFAM Nominees] any other [in addition to that required by Article 20.3(a) (i)-(v)] information relating to the person that would be required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law.*"
167. This issue gives rise both to a question of the proper construction of Article 20.3(a)(vi) and, because Article 20.3(a)(vi) cross-refers to the general law governing what must be disclosed in circulars distributed for the purpose of soliciting votes at a shareholders meeting, a question concerning the nature and scope of that duty or obligation to disclose.

MILFAM's disclosure in the MILFAM Nomination Notice and the MILFAM Proxy Statement

168. In the MILFAM Nomination Notice MILFAM had stated in respect of each of the MILFAM Nominees that "*there is no further information relating to [Mr Howe, Mr Holliday and Mr Freund] required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law.*". In relation to Mr Freund, it was said that he had founded and currently served as

the CEO and Managing Director of Javelin Private Capital Group LLC, the merchant banking arm of Javelin Global Commodities, and his relationship with and roles in Boomerang Water and Jefferies were disclosed. In relation to Mr Howe, his relationship with and roles in Spartacus Acquisition Corporation, Broadband Initiatives Inc and Babcock and Wilcox were disclosed. In relation to Mr Holliday, his relationship with and roles in Goshawk Capital Corp., FiberTower Corporation and WM Mortgage Reinsurance Company were disclosed. Also included was a detailed statement of why each of them would be independent of the Company if appointed as a director. There were also expanded summaries of the careers and corporate connections of each of the MILFAM Nominees in the MILFAM Proxy Statement. There was however no mention at all of their connections with MILFAM (as officers or members of management committees or that MILFAM had appointed or procured their appointment as directors of other companies in which MILFAM was a shareholder from which they received fees and remuneration). Mr Wichers' role as an executive and portfolio manager of MILFAM was disclosed (which is stated in the MILFAM Proxy Statement to be a single-family office managing a range of investments for family interests).

MILFAM's responses to the Company's information requests

169. As I have noted (a) on 17 December 2025 MILFAM received a letter from the Company (the ***Company's 17 December Letter***) raising a number of requests for information in respect of certain of the MILFAM Nominees. MILFAM responded on the same day (the ***MILFAM 17 December Response***) and (b) on 18 December 2025, the Company made further requests for information in respect of certain of the MILFAM Nominees (the ***Company's 18 December Letter***) and MILFAM responded to each of the additional queries on 19 December 2025 (the ***MILFAM 19 December Response***).
170. In the Company's 17 December Letter, the Company raised the following matters and stated as follows:

As you will appreciate, the requested information is necessary to the Chair of the meeting in reviewing and making necessary determinations regarding the content of the Milfam Notice as contemplated in the Articles.

Given the timing of the Milfam Notice, our review is ongoing. However, in the interests of time, we ask that you urgently respond to the following:

1. *It has come to the Company's attention that Alan Howe, one of the proposed nominees of Milfam LLC ("Milmam"), is also a director and current or former executive officer of Alimco Financial Corporation, the parent company of Alimco Re Ltd. ("Alimco"). A review of recent filings by Milfam and Alimco on Schedule 13 D with the U.S. Securities and Exchange Commission and other public filings indicates that Alimco is part of the Milfam group and a related party to Milfam and Mr. Subin. In regard to the foregoing, we request that you please:*
 - a. *Provide detail of Mr. Howe's positions or relationships with entities within the Milfam, Alimco and other members of their group, including their respective principals.*
 - b. *Confirm the number of common shares of the Company indirectly beneficially owned or controlled by Mr. Howe by virtue of being a director and/or officer with Alimco or any other entities.*
 - c. *Provide detail of the positions or relationships of each other proposed nominee set forth in the Milfam Notice with entities within the Milfam, Alimco and other members of their group, including their respective principals.*
 - d. *Detail any compensatory, indemnification or other similar arrangements between entities Milfam, Alimco and other members of their group, including their respective principals, and the proposed nominees set forth in the Milfam Notice.*
 - e. *Confirm whether Milfam contends that Mr. Howe's relationship with Milfam and Alimco was not required to be disclosed in the Milfam Notice or Milfam's proxy materials, and if so, identify the factual and legal basis for that contention.*

We remind you that Article 20.3 provides that to be in proper written form, among other things, such notice must include, in respect of each nominee the principal occupation or employment of the person and the principal occupation or employment within the five years preceding the notice and "any other information relating to the person" required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to applicable law", which would include the general requirements that such information not be misleading or contain misrepresentations under applicable securities laws such as Rule 14a-9 under the United States Securities Exchange Act of 1934.

2. *We note that the Milfam Notice was executed by Skyler Wichers in a capacity listed as "Vice President" of Milfam. In regards to the foregoing, we request that you please provide:*

- a. *The reasoning as to why the Milfam Notice was not accompanied by "evidence of such authorization" to execute the Milfam Notice as an authorized representative as required by Article 20.1(c).*
- b. *Documentary evidence regarding Mr. Wichers position with Milfam, including, but not limited to the authorization to execute and deliver the Milfam Notice.*

171. In the MILFAM 17 December Response MILFAM stated as follows (my underlining):

.....

6. *First, the Nomination Notice is plainly not misleading, nor does it contain misrepresentations under the securities laws referred to or otherwise. Second, the role of the Chair of the AGM is limited only to determining whether the Nomination Notice is in compliance with Article 20. Finally, and in any event, for the purposes of the United States Securities Exchange Act of 1934 the Company is a Foreign Private Issuer and, pursuant to Rule 3a12-3(b), thus exempt from the proxy rules under that Act.*
7. *MILFAM's rights are fully reserved in respect of this most recent transparent attempt to dispute the validity of the Nomination Notice.*
8. *We now turn to your queries, below.*

Mr. Alan Howe directorships / managerial roles

9. *With respect to Alimco Financial Corporation ("AFC") (previously known as Alliance Semiconductor Corporation up until 2016), Mr. Howe has been a director of AFC since 2005 and his directorship of AFC pre-dates MILFAM LLC's ownership in AFC. In respect of Mr. Howe's directorship in AFC:*
 - a. *Mr. Howe is compensated for his role as a director of AFC (as is typical) on a standard basis, and is also party to a customary director's indemnification agreement with AFC; and*
 - b. *Mr. Howe did not include AFC on certain of his public-company biographies because AFC is not a public reporting company, having ceased public reporting in or around 2009. For biographies related to public company service, Mr. Howe lists only his roles in representative public companies for reasons that should be obvious to the Company.*
10. *Mr. Howe is not a director, officer or consultant of, and has never held any management role in, Alimco Re Ltd. ("ALR"). ALR is a shareholder of the Company, not AFC. Whilst AFC is a shareholder of ALR, holding 1.1% of*

the shares in issue, Mr. Howe (through his directorship of AFC) does not indirectly beneficially own or control any shares in the Company.

11. *With respect to MILFAM LLC, Mr. Howe has served on the Manager Oversight Committee since 2018. He receives no compensation for his role in that capacity, and has no other relationships with MILFAM or its principals outside of those set out in this letter. As a result, he has been deemed independent in various governance contexts.*
12. *Mr. Howe has been a director of Anacomp Inc. ("Anacomp"), in which MILFAM is a shareholder, since 2007 and receives standard compensation for this role. Mr. Howe is also the registered owner of 50,000 shares in Anacomp. Anacomp is not a public reporting company, having ceased public reporting prior to Mr. Howe's appointment in 2007. Anacomp was not included in Mr. Howes public company biographies for the same reason as explained above, namely that Mr. Howe's public company biographies are limited to representative public roles.*
13. *For the avoidance of doubt, Mr. Howe does not indirectly beneficially own or control any shares in the Company by virtue of his director or committee roles at AFC, ALR, MILFAM, or any other entity, as Mr. Howe does not have any power to vote, direct the voting of, dispose of, or direct the disposition of, any shares in the Company.*
14. *As regards disclosure, neither Mr. Howe's historical and independent service at non-reporting companies, nor his uncompensated oversight committee service at MILFAM, has triggered additional disclosure in the Nomination Notice or proxy materials beyond what was provided (as to which see paragraph 6 above).*

Positions or relationships of each nominee with MILFAM or its principals

15. *We set below the relationships of each nominee with MILFAM:*
 - a. *Alan Howe: As set out above.*
 - b. *Jerrod Freund: No positions or relationships with MILFAM or its principals, other than a customary non-disclosure agreement and an indemnification agreement limited to actions in connection with the Company.*
 - c. *Mark Holliday: No positions or relationships with MILFAM, or its principals, other than a customary non-disclosure agreement and an indemnification agreement limited to actions in connection with the Company.*
 - d. *Nimesh Patel: No positions or relationships with MILFAM, or its principals, other than a customary non-disclosure agreement and an indemnification agreement limited to actions in connection with the Company.*

- e. *Skyler Wichers: Mr Wichers has been employed since 2018 as a portfolio manager of MILFAM and since 2024 an executive, as clearly stated at paragraph 6(ii)(a)(A) of the Nomination Notice and in the biographical section of MILFAM's Proxy Statement.*

172. In the Company's 18 December Letter, the Company followed up with a series for further questions as follows (my underlining):

2. *There are a number of inconsistencies between your letter, the Milfam Notice and publicly available documents, which are concerning to the Company. The Company has the following requests for reasonable clarification as a result:*
 - a. *In the enclosed Schedule 13D/A dated May 30, 2019, filed by Alimco Financial Corporation ("AFC"), Mr. Howe's "principal occupation" is disclosed as "Chairman of the Board of Alimco". This fact is omitted from your letter and the Milfam Notice. For our information, please clarify why this information was deemed material for disclosure in that filing, but not the Milfam Notice or your letter.*
 - b. *The enclosed financial statements of Alimco Re Ltd. ("ALR" and, together with AFC, "Alimco") for the year ended December 31, 2024 (and dated May 20, 2025), filed with the Bermuda Monetary Authority, disclose that ALR is a "wholly owned subsidiary" of AFC. However, in your letter, you state that "AFC is a shareholder of ALR, holding 1.1% of the shares in issue". The above financial statements also disclose various other arrangements between Milfam and ALR, including common directorships. We ask that you clarify your response in light of the foregoing. Additionally, we ask that you also clarify why AFC and Mr. Howe are omitted from statements in recent Schedule 13D/A filings in respect of the Company by Milfam and Alimco regarding the identities of persons ultimately in control of ALR.*
 - c. *In your letter, you do not mention that Mr. Howe is the sole director of AFC. We refer you to the enclosed 2025 Foreign Profit Corporation Annual Report for AFC on file with the Secretary of State of Florida. Mr. Howe is the sole director of AFC in such filing. Further, the principal place of business listed for AFC in that filing is the same as the return address for Milfam in your letter. In light of the foregoing, please clarify how Mr. Howe, given his positions with AFC, does not have any control or direction over the shares of the Company held by AFC's wholly-owned subsidiary, ALR.*
 - d. *In the enclosed 2024 Foreign Profit Corporation Annual Report for AFC on file with the Secretary of State of Florida, the directors of AFC are disclosed as Mr. Subin, Mr. Wichers and Mr. Marcus. It omits Mr. Howe. This is inconsistent with the statement in your letter that Mr.*

Howe has been a director of AFC since 2005. The foregoing also appears inconsistent with the Milfam Notice, which discloses Mr. Wichers as a current director of AFC.

Please clarify the foregoing.

- e. Mr. Howe has executed various agreements filed with the United States Securities and Exchange Commission as "CEO" of AFC. These filings also list the address for AFC identically to the "principal business address" for Mr. Howe set out in the Milfam Notice. Please clarify whether, in addition to the new disclosure in your letter, Mr. Howe was also an executive officer of AFC.*
- 3. The Milfam Notice and proxy materials disclose Mr. Wichers' position as a director of AFC. For our information, please reconcile why this disclosure was deemed necessary and material for Mr. Wichers, but omitted for Mr. Howe.*
- 4. In your letter you state only that Mr. Howe receives "standard" compensation for his service to AFC. This is not responsive, and appears evasive. We ask that you provide reasonable detail, including the scope and quantum of compensation received by Mr. Howe from Milfam-owned AFC, Milfam or other entities related to Mr. Subin and/or Milfam.*
- 5. In your letter, you disclose for the first time, that Mr. Howe has served on the Manager Oversight Committee of Milfam since 2018. He apparently does so pro gratis despite Milfam's proposition that he is independent. For our information, please provide details of the Manager Oversight Committee's role in the Milfam structure.*
- 6. It has come to our attention that, in the matter of Caremark Rx Inc. and Crawford v. Holliday et al before the courts in Alabama, U.S.A. in or around 2000, individuals with the same names as Mr. Subin and Mr. Holliday were named joint defendants. In light of the foregoing, please confirm the statement in your letter that Mr. Holliday has no relationships with Milfam or its principals.*
- 7. With respect to Mr. Wichers' authority to execute and deliver the Milfam Notice, your contention that Mr. Wichers' corporate authority to execute documents on behalf of Milfam can simply be assumed by virtue of his past contact with the Company is unreasonable. Article 20 strictly requires that any nomination by a shareholder that is not an individual be executed by a "duly authorized" officer who provides evidence of such authorization. Your letter does not address whether he was, in fact, duly authorized at the relevant time the Milfam Notice was delivered. The Incumbency Certificate you have provided appears limited to provide authority for ordinary course matters with the approval of Milfam's Manager. Please clarify. The Chair of a meeting's role includes determining compliance with the informational requirements of Article 20. Notwithstanding that the Milfam Notice clearly*

did not meet the strict timing requirement in the Articles, in order to provide fulsome information for any such determination, we ask that you provide fulsome information for any such determination, we ask that you provide the information requested at your earliest opportunity. We urge you to be forthright in doing so.

173. In the MILFAM 19 December Response, MILFAM stated as follows (my underlining):

8. *We set out responses to each of your additional information requests below in the order in which they appear in your letter and adopt the definitions:*
 - (a) *Mr. Howe has served in various capacities with AFC over time, including as (i) director from 2006 to Present; (ii) Chairman, Chief Executive Officer, and Chief Credit Officer from 2016 up until 2019, and (iii) Chairman from 9 May 2019 to April 11, 2023. The description of Mr. Howe's role in respect of AFC as recorded in the Schedule 13D/A dated 30 May 2019 was therefore correct at that time. This information was not specified in the MILFAM Notice as it is immaterial to his independence as regards the Company and note required under Article 20.3.*
 - (b) *Our letter confirmed that AFC is a shareholder of ALR, and indeed it is the 100% shareholder. The reference to "1.1% of the shares in issue" was to ALR's shareholding in the Company. We repeat, for the avoidance of any doubt, that Mr Howe does not hold any shares in the Company by virtue of his directorship of ALR.*
 - (c) *Mr. Howe is not the sole director of AFC. A corporation is not required to list all of its directors in an Annual Report required to be filed in Florida and therefore the fact that Mr. Howe is only director listed does not mean he is the only director.*
 - (d) *As explained above, Mr. Howe served as Chairman, Chief Executive Officer and Chief Credit Officer of AFC between 2016 and 2019. During that tenure, he executed documents in the officer capacity he then held. At the time of the MILFAM Notice, Mr. Howe was not an officer of AFC.*
 - (e) *Mr. Howe's résumé is extensive and for the purposes of the MILFAM Notice, he reasonably limited his biographical disclosures to relevant public company roles. AFC is not a public company, and an exhaustive list of every private board role that Mr. Howe has held throughout his lifetime is not only unreasonable and unnecessary, but is not required by Article 20.3. We remind you that biographical summaries for the purposes of director nominations are high-level and audience-specific; they are not exhaustive resumes or background checks, nor do they create binding representations.*

- (f) We reiterate that Mr. Howe receives standard non-executive director compensation from AFC and Anacomp. Mr. Howe's current annual retainers are (i) AFC: US\$26,668; and (ii) Anacomp: US\$25,000.
- (g) The relevance of the information requested in respect of MILFAM's Management Oversight Committee to the MILFAM Notice is not understood. For the avoidance of doubt, Mr. Howe is not compensated by MILFAM for the performance of his role on the Management Oversight Committee.
- (h) We confirm that Mr. Holliday does not have any relationships with MILFAM or its affiliates or principals, other than a customary non-disclosure agreement and an indemnification agreement limited to actions in connection with the Company.
- (i) *Mr. Wichers' authority derives from MILFAM's Operating Agreement. At the relevant time, he was a duly appointed Vice President, as evidenced by the Incumbency Certificate. The Operating Agreement expressly authorises a Vice President to execute instruments on behalf of the Company for matters in the ordinary course, subject only to Manager approval where such approval is required. Executing and delivering a shareholder nomination notice is an ordinary course act and does not fall within any category reserved to the Manager.*

The interpretation of Article 20.3(a)(vi) and whether different duties apply to directors' and shareholders' circulars

174. Two of MILFAM's preliminary points can be disposed of rapidly. First, as Mr Potts pointed out, the First and Second Defendants' case is based solely on Article 20.3(a)(vi) so that the fact that the requirements in Article 20.3(a)(v) are confined to information relating to whether a nominee will be “*independent*” of the Company if elected as a Director” is irrelevant. This limitation on what needs to be disclosed under and is covered by Article 20.3(a)(v) does not qualify or affect the interpretation of the scope of Article 20.3(a)(vi) which is clearly a separate and independent requirement (and which refers to “*other information*”). Secondly, I do not accept that Article 20.3(a)(vi) is to be interpreted as being confined to information that is required to be disclosed by applicable listing rules or rules and regulations governing disclosures to be made by issuers with listed shares. The plain and natural meaning of the words used in, and the apparent purpose of, Article 20.3(a)(vi) make this clear. The sub-article refers to other information relating to the nominee that would be (or is) required to be disclosed in a dissident's proxy circular “*pursuant to applicable law.*” These words in italics are wide and, on their face, refer to disclosure obligations under the general law that governs circulars prepared and

distributed by shareholders (who are opposing the proposals or nominations of the Company and its current directors). Had it been intended to limit the scope of the disclosure obligation to only those matters covered by the applicable listing rules or regulations (whether made pursuant to statute or by a regulatory body), it would have been easy to say so explicitly. Furthermore, the purpose of Article 20.3(a)(vi) appears to be to catch all other information which is required to be disclosed under all other applicable law, of whatever kind.

175. I also reject MILFAM's submission that shareholders who distributed a circular regarding resolutions to be considered at a general meeting were not subject to the applicable duty (because the duty only applied to circulars distributed by directors by reason of a duty in equity or otherwise assumed by directors to the shareholders of the company). It seems to me to be clear that the duty arises for the purpose of ensuring that shareholders are fairly and properly informed of all relevant matters (and therefore can make an informed decision) when asked to vote on a resolution proposed, or otherwise to vote at a general meeting in a manner proposed, by a shareholder or shareholders. For shareholders to be properly enfranchised and able to take a decision on resolutions proposed at a general meeting, they must be properly and reliably informed on the matters relevant to that decision. That purpose is applicable both to circulars distributed by the directors and shareholders. Of course, directors are in a different position to shareholders since they owe duties to the company and may assume additional duties to shareholders in particular circumstances. But these differences are not relevant for current purposes.
176. While I accept that the facts and issues in *IGlobe* were different from the present case (relating to the question of whether under the articles and in light of the shareholder bargain evidenced thereby the dissenting shareholders were required to give advance notice of proposing and moving a resolution to remove incumbent directors) I regard Lord Briggs' statement of the position at [50] as being intended to reflect the position under the law of Antigua (from whom the JCPC was hearing the appeal and which was the governing law), of considerable persuasive force and also clearly in accordance with applicable principles. It will be recalled that Lord Briggs said as follows when discussing the ratio of *Kluwak* (my underlining):

It is a case which establishes that, if a circular be sent to shareholders, it must be fair and not misleading, regardless of whether it comes from the company or from dissenting shareholders.....

The content of the disclosure obligation under the general law applicable to circulars soliciting votes at shareholders' meetings – the relevant test

177. I also consider that MILFAM mischaracterised the First and Second Defendant's case as to the content of the applicable duty. I do not consider that they were seeking to equate the duty with the duty of fair presentation and full and frank disclosure which applies to parties making an *ex parte* interim application.
178. The core of their case, which I think MILFAM ultimately accepted, was that the shareholders' disclosure must provide other shareholders with information on relevant matters which is reasonably sufficient and provided sufficiently in advance of the shareholder meeting at which they need to cast their vote to enable shareholders to make an informed decision as to how to vote.
179. The First and Second Defendants relied, as I have noted, on the statement of the position at [55] in *IGlobe (shareholders in ordinary circumstances, if their right to vote on that matter is not to be rendered nugatory, should have sufficient information and a fair opportunity to be able to consider their options and decide how to cast their vote)*). The formulation of the duty at [3.23] of *Kosmin & Roberts' Company Meetings and Resolutions* is to similar effect albeit slightly unpacked.
180. The formulation of the disclosure as I have summarised it is in my view consistent with the authorities cited by the parties. I do not accept MILFAM's submission that the authorities relied on by the First and Second Defendants were all cases of (and which depended on there having been) fraud or deliberate misrepresentations or concealment designed to mislead other shareholders. Even though it was a case involving disclosure in by way of an explanatory statement prepared by directors in the context of voting on a scheme or arrangement, the scope and purpose of the disclosure obligation were well and clearly summarised by Mr Justice Neuberger, after a detailed review of the key authorities, in *Re RAC Motoring Services Ltd* when he said (as quoted above): "*It is sufficient if directors make a full and fair disclosure of all matters within the knowledge*

of the directors which would enable shareholders to make a properly informed judgment on the matters intended to be submitted to them.”. Mr Justice Neuberger also emphasised the need to apply the duty in context and pragmatically, having due regard to what is reasonable and genuinely needed to ensure that shareholders are sufficiently informed of relevant matters. He focussed on whether “anyone reading the circular and the notice could have been in any real doubt as to what was going on” and noted that it was unnecessary for “the information [to be] completely full” and that the disclosure might be sufficient if the information given allowed the shareholders to ask further questions and make further inquiry. He also noted that it was usually the case that, particularly with the wisdom of hindsight, “it can always be said that something more could or should be contained in it.”.

The consequences of MILFAM’s failure to make adequate disclosure

181. In *Re Jessel Trust* [1985] BCLC 119 at 124-125 Mr Justice Slade discussed the test to be applied to determine the effect of a non-disclosure of relevant information as follows (this was a case relating to an explanatory statement for a scheme of arrangement which had contained a statement of the material interests of the directors but prior to the relevant class meetings the material interests were altered in such a way as might affect the attitude of those receiving it):

*Counsel for the petitioner submitted that in dealing with circulars the principle which the court has applied is this: could a reasonable shareholder, knowing the true facts, have taken a different course from that which he took on the basis of a circular which did not disclose the true facts? She referred me in this context to *Clinch v Financial Corp* (1868) LR 5 Eq 450 and *Tiessen v Henderson* [1899] 1 Ch 861. These were cases which were dealing with circulars or notices which were themselves said to be misleading.*

Of course, it is not suggested in the present case that the explanatory statement was in itself misleading. So to that extent the problem is slightly different. But counsel for the petitioner has suggested that similar principles should be applied where there is a change of circumstances and a question arises whether that change in circumstances should be disclosed to the shareholders. She suggested that everything depended on whether a reasonable shareholder, if he had known of the change of circumstances, would have taken or would have been likely to take a different course in regard to voting or nonvoting than that which he did in fact take.

I do not really quarrel with this proposition of counsel for the petitioner, save to say that in my judgment the onus on a company or directors of a company, who are

placing a s 206 scheme before the court and have failed to disclose to the court a change of circumstances, consisting of a change in the material interests of the directors that has occurred between the date of the despatch of the explanatory circular and the date of the subsequent meetings, is a very heavy one.

182. It seems to me that the approach set out in *Re Jessel Trust* is, as the First and Second Defendants submitted, the proper approach to be applied in this case and for determining the consequences of inadequate disclosure to shareholders in connection with a circular prepared for a shareholders' meeting (and I did not understand MILFAM seriously to dispute that this was the proper approach/test to be applied as opposed to challenging whether the test was satisfied on the facts of this case).
183. The test is whether a reasonable shareholder, knowing the true facts, could have taken a different course from that which he/she took on the basis of a circular which did not disclose the true facts. Is it reasonable to suppose that proper disclosure (of the matters which should have been disclosed to shareholders) might have influenced the way in which the members voted at the meetings or abstained from voting.
184. While the present case does not involve a scheme under the statutory scheme jurisdiction it seems to me (absent any authority cited to the contrary) to adopt Mr Justice Slade's approach in the schemes context as to the burden of proof. The onus is on those who have failed to make proper disclosure to show that the decision making of a reasonable shareholder could not have been affected by receiving the proper disclosure. If this threshold test is not satisfied, it follows the votes cast by the shareholders cannot be relied on as representing their true and fully informed views and so are not safe and cannot stand. This test seems to me to be consistent with the purpose of the requirement that shareholders receive and be given sufficient information to enable them to make a fully informed decision on whether and how to vote on the resolutions to be proposed at the meeting (and whether to attend the meeting). If the information which has been withheld had been disclosed could have had an impact on the shareholders' decision making and thought process, their decision making and the votes they cast will be treated as having been flawed and any resolutions passed on the basis of such votes will be treated as invalid. Where the information which has not been disclosed is clearly relevant and material to the issue before the meeting, it is likely that the test will be satisfied.

What was MILFAM required to disclose to shareholders in the present case?

185. It seems to me that MILFAM misunderstood what was required of it when giving details of and making disclosures about the MILFAM Nominees in the MILFAM Nomination Notice (and the MILFAM Proxy Statement). As Mr Wichers' evidence made clear (and as Mr Ayres accepted), MILFAM's disclosure focussed on the standard type of CV which a prospective director would use when standing for election to be a director of a public company and almost exclusively on the issue of whether the MILFAM Nominees were "independent" of the Company. MILFAM took the view that there was no need to give any details of the nature and extent of its own relationship with the MILFAM Nominees because this was outside the scope of the required disclosure under Article 20.3 and, as Mr Ayres put it, because the Company's other shareholders (and the Original Directors) would and could be expected to appreciate that MILFAM would only nominate individuals which it knew well and trusted, and so could be assumed to understand that MILFAM had close connections and a close relationship with its nominees. No elaboration or further details were needed in order for the other shareholders to be able to make an informed decision as to whether the MILFAM Nominees were suitable candidates to take on the role and responsibilities of being a director.
186. But, in my view, this was clearly an error in relation to those MILFAM Nominees who (a) held an executive or governance role within or was an employee or officer of MILFAM (and so owed duties to MILFAM, were responsible for aspects of MILFAM's decision making or had a direct personal interest in the financial position of MILFAM), (b) had been appointed by MILFAM as directors or were directors on the board of a MILFAM subsidiary or company/entity in which MILFAM had a material financial interest and were paid fees or received remuneration in that capacity (and so were required to have regard in that capacity to the interests of MILFAM and received financial benefits as a result of an appointment by MILFAM or by MILFAM allowing them to continue in office and had the prospect of further such appointments), or (c) had a close and longstanding professional relationship with the family interests who owned or controlled MILFAM and for whose benefit MILFAM acted.
187. So, in my view it was clearly insufficient that shareholders could be expected to understand and assume that MILFAM had the type of, and a sufficiently close, working

relationship with each of the MILFAM Nominees which enabled MILFAM to conclude that they would be suitable to act as directors of the Company. As I said to Mr Ayres during his closing submissions on this point (as noted above) (my underlining):

... its one thing to say, well, the shareholders, all shareholders of a company like this, anticipate and expect there to be a relationship between, the nominating shareholder and the nominated director, but it doesn't follow surely from that, that shareholders are not also interested in and entitled to be told about, at least in broad terms, the nature of those relationships. So you can say, of course shareholders expect, that the person who is nominated by the nominating shareholder is trusted by the nominating shareholder. There must be a basis for that out of, previous, experiences or activities. But the argument against you will be it doesn't follow from that expectation that shareholders in order to be properly informed when deciding whether to vote for the nominees, it doesn't follow that they don't also need to be told that in broad categorical terms, of the nature and, extent, certainly the financial impact, of the connections in the particular case."

188. In my view, in order for shareholders to have been able to make an informed assessment as to whether the MILFAM Nominees would be able to act and make decisions independently of MILFAM, focus adequately on the interests of the Company and all its shareholders without allowing their relationship with and duties owed to MILFAM and dependence on MILFAM for material financial rewards to distract them or distort their judgment, MILFAM needed to disclose and shareholders needed to be aware of (based on Mr Wicher's written and oral evidence and the answers given by MILFAM in the MILFAM 17 December Response and the MILFAM 19 December Response):

- (a). Mr Howe's position as a member (since 2018) of the Manager Oversight Committee and the powers of the Management Oversight Committee (to show its significant role in MILFAM's corporate governance structure and its important supervisory role (to use Mr Wichers' words).
- (b). the fact that Mr Howe is a director of Alimco Financial Corporation, a company which is a subsidiary of MILFAM, and that he earns fees in that role (albeit of modest amounts, which should have been disclosed at least by reference to a range or statement that the fees were below a certain figure (and that those fees were paid at least from time to time by MILFAM).

- (c). the fact that Mr Howe is a director of Anacomp (presumably on the nomination of and voting by MILFAM) and was the chairman of the board (and that he received fees for so acting, with once again a disclosure of the scale of the fees earned) and that Anacomp was 90% owned by MILFAM.
- (d). the fact that Mr Holliday acted as a trustee for Mr Subin (the president and manager of MILFAM) and had since 2018 been a trustee of all but one of the family trusts which owned the financial interests in MILFAM (and the fact that he was or had been a member of the Manager Oversight Committee, if indeed as Mr Wichers thought might have been the case, he had so acted). Even if Mr Holliday no longer remained (or had never been) a member of the Manager Oversight Committee, it seems to me that his close and long standing professional and fiduciary relationship with Mr Subin and the trusts for whose benefit MILFAM was managed and run were sufficient to require disclosure. Such a relationship with the manager, controller and financial owners of MILFAM could reasonably be seen as raising a doubt as to his ability to act independently of MILFAM and against its wishes as shareholder of the Company (for example in the event of a dispute between MILFAM and the Company and its other shareholders).
189. These relationships and roles of Mr Howe and Mr Holliday could be seen by a reasonable shareholder acting reasonably as involving some significant loyalty to MILFAM or at least as generating financial rewards for them which were in the gift of MILFAM which might affect their willingness to act independently of MILFAM and against its wishes, and therefore their ability properly to fulfil their role as a director of the Company. Looking at the matter objectively, it seems to me that a shareholder would wish and need to be informed of these relationships and matters so that they could make an informed decision as to whether to vote for the appointment of one or more of the MILFAM Nominees. As I have already said, I can see that Mr Howe's roles were much more extensive, but it seems to me that the potential influence that Mr Holliday's relationship with Mr Subin and the family trusts might have on his thinking and decision making as a director of the Company (as well as the financial benefits he was likely to derive from his role as a trustee) were sufficiently material to be relevant matters which to be disclosed to shareholders to allow them to make an informed assessment of Mr Holliday's suitability to be a director of the Company.

190. I agree with the First and Second Defendants that the need to disclose these appointments and consequential financial rewards was enhanced by the statements made by MILFAM in the MILFAM Proxy Statement that one of the reasons for electing the MILFAM Nominees was to secure the “*fair representation of [the] interests of all shareholders*” and highlighting the governance credentials of each of the MILFAM Nominees (see internal page 4 of the MILFAM Proxy Statement). It was clearly relevant for shareholders to know, in order to be able to assess the credibility and weight to be given to this statement, that Mr Howe and Mr Holliday (particularly Mr Howe) had roles in the management of MILFAM and close ties to Mr Subin as well in Mr Howe’s case were in receipt of fees and remuneration derived from appointments made or procured by MILFAM.
191. However, I do not accept or consider that MILFAM was required to disclose that the Javelin group had been in discussions (involving Mr Freund) with MILFAM regarding a potentially lucrative contract. As MILFAM submitted, the evidence shows that the discussions with Javelin regarding a possible management services contract had been terminated and were not going to result, at least without fresh and further negotiations on different terms, in a contract between the relevant Javelin entity and the Company. It is clear that the terms of the management services contract proposed by Javelin would have resulted in Javelin receiving a substantial financial benefit (and equity in the Company) but Mr Wichers made it clear in his evidence that, if the need ever arose to appoint Javelin, it could never be on such terms which were far too expensive. Accordingly, at the time that Mr Freund was being nominated, there was no agreement to give a contract, and no immediate prospect of a contract being given, to Javelin. There was the possibility that there would be further negotiations and that a contract might be negotiated but if that happened after Mr Freund had been appointed as a director, Mr Wichers accepted that this would be a related-party transaction which would be a sensitive matter which would need to be disclosed to shareholders and proper approvals obtained. Shareholders would then be fully informed of the detailed terms at the time; disclosing at the time of Mr Freund’s nomination merely that there had been abortive negotiations about a contract which might never be needed would not have assisted shareholders in their assessment of Mr Freund’s suitability to be a director but rather would probably be confusing.

192. I do not accept the First and Second Defendant's suggestion (as I understand what was being argued) that that the evidence shows that Mr Freund had compromised or might be seen as having compromised his independence because he had confirmed that Javelin (and he) would always align themselves with MILFAM's wishes in relation to the Company.
193. The First and Second Defendants referred to Mr Freund's comments about his or Javelin being "aligned" with MILFAM and its objectives and suggested that this meant that he had committed to act in or to prioritise MILFAM's financial interests (even where those interests conflicted with those of the Company and its other shareholders) or would follow MILFAM's instructions or wishes if he were to be appointed a director. He was in my view only focussed on the role that Javelin could play if appointed under a management services agreement and was only saying that he and Javelin understood what the MILFAM Nominees and MILFAM would want to achieve by having such an agreement and in engaging Javelin to perform the functions envisaged thereby.
194. These conclusions were in my view clearly supported by Mr Wichers' evidence during his cross examination. The relationship and discussions between Mr Freund, Javelin and MILFAM were explored at length in Mr Wichers' cross examination by Mr Potts and in order to understand and assess the evidence that Mr Wichers gave it is necessary to set out at some length extracts from the transcript as follows (my underlining):

Skyler Wichers

..... but the idea that essentially we had discussed is that Javelin may be helpful in a contingency - from a contingency plan standpoint with, with aspects of management should Scully Management prove to be uncooperative in a transition. And that was the idea that at a high level, Mr Freund and I had explored. I think it probably was his, his suggestion as opposed to mine, but I, I had likely surfaced the idea that a contingency plan would be- may be needed or desired.

James Potts KC:

Okay. So you seem a bit hazy about that. The position is that you, you're - firstly, just to break that down so you accept that the idea - you'd had a discussion about the possibility of, um of Javelin assisting in relation to the management, a management role at Scully in the future, correct?

Skyler Wichers:

Yes.

James Potts KC: *And you had indicated to him that that was something that you were interested in exploring with him, correct?*

Skyler Wichers: *Correct. Again, I would caveat we had made no decisions around any of this at this time. All of this was exploratory.*

.....

Skyler Wichers: *I would have suggested to him the need for a contingency plan and I believe given his role within the broader Javelin organisation and connections with Javelin, he had, he had likely surfaced the possibility that Javelin could be helpful. But again, that's the best of my rec- recollection.*

James Potts KC: *Right. So he's expressing excitement about the potential of getting involved in the management of Scully, correct?*

Skyler Wichers: *Correct.*

.....

Mr Potts *.... on the 25th of August and you see it says, "Hi, hey, Skyler. Hope you had a good weekend. Spencer, Peter and I are all aligned. Let me know when you'd like to chat." So Spencer, Spencer Sloan?*

Skyler Wichers: *I don't recall Spencer's last name off the top of my head.*

James Potts KC: *Peter, Peter Bradley?¹*

Skyler Wichers: *Yes.*

James Potts KC: *But you understand that these are the two founders, most senior executives of Global Commodities, yes?*

Skyler Wichers: *Yes. Yes.*

James Potts KC: *... and so you're saying they're all, all aligned, so that means pointing in the right direction, same direction, correct?*

Skyler Wichers: *Yes.*

¹ When reference was first made to Mr Peter Bradley during the hearing I immediately explained that I had not noticed when reading the papers before the hearing (in the short period between receiving the papers and the hearing) the references to Mr Bradley but that in light of the references made to him at the hearing it appeared that the Mr Bradley in question was a neighbour and that he and his family were very close friends of mine (and of my wife) in London. I did and do not regard that relationship as impacting on my decision making in this case, but I did want immediately to disclose it and draw it to the parties' attention.

James Potts KC: “... we, we are a ton of value in doing this with you and we want to make sure we’re aligned with how you want this to work.” So the doing this with you and, and how you want this to work, that’s the potential collaboration between Milfam and Javelin in relation to future management of Scully, isn’t it?

Skyler Wichers: No, that’s, that’s a reference to a potential collaboration between Javelin and the Milfam Nominees, including myself. Obviously, as, as the organiser of that group of the Milfam Nominees, I believe that’s who Mr Freund was referring to here or in the co- and that’s the capacity Mr Freund was referring to me here.

.....

James Potts KC: Well, let’s just break that down. Firstly, it’s the future potential collaboration in relation to Javelin offering management services to Scully, correct? Through Scully, yes?

Skyler Wichers: Correct, correct.

James Potts KC: and I suggest to you that when it says doing this with you, that means you, Milfam, doesn’t it?

Skyler Wichers: No, that means the, the Milfam nominees, including me. No.... I mean the Javelin - there was no proposal, Mr Potts, as you could see that Javelin entered into contract of any kind with Milfam.

James Potts KC: I ... suggest to you ... that it’s, it’s clear from this document that he was discussing this with you at Milfam and, and he wanted to work with Milfam.

Skyler Wichers: I wouldn’t say that, no.

James Potts KC: And what he’s saying is that he wants to be - he then says - he talks about, “We want to make sure we’re aligned with, with how you want this to work.” The you is Milfam, isn’t it?

Skyler Wichers: No, I believe he was referring to myself in my individual capacity as one of the Milfam nominees and the individual responsible for organising a potential slate for the Scully board.

James Potts KC: There’s no references here to the Scully slate at this point, is there?

- Skyler Wichers: *No, but I'd submit that this is a fairly vague comment. It looks like it was a text message. Um.*
- James Potts KC: *I suggest to you that what he's doing is he's making clear that he, that he wants you to understand that he and Javelin and his founders wanted to be aligned with what Milfam wanted to do for the future of management of the company. That's right, isn't it?*
- Skyler Wichers: *I think he want - he wanted to be - as again, I, I would say that I'd refer back to - you back to what I said previously about the content of the conversations with Mr Freund and myself at this point, which were an exchange of views on the situation at Scully and what likely should be done with it and what we could do if, if elected and what that should look like. and obviously as the person organising that and as the nominating shareholder, I think Mr Freund here is expressing significant deference to my views on that.*
- James Potts KC: *He's pitching for business to you, isn't he? Put simply.*
- Skyler Wichers: *I think that's fair. Yes.*
- James Potts KC: *And he's seeking to emphasise that he wants to make sure that he's going to be doing what you want him to do.*
- Skyler Wichers: *.... I would say he wants to be aligned with the vision that - he wants the, whatever Javelin was putting forward to be aligned with the vision that he and I had discussed and, and the path forward that we had discussed or potential path forward we had discussed for the company.*
- James Potts KC: *And that's Milfam's vision, isn't it?*
- Skyler Wichers: *That's the vision that I, that I articulated to him and yes, Milfam as the nominating shareholders for the Milfam nominees put forward in our proxy statement.*
-
- Mr Potts: *what you're talking about positively is a potential partnership between Javelin and Milfam in relation to the future management of Scully, correct?*
- Skyler Wichers: *Again, I'd refer you back to what I said about the context of the conversation between Jerrod and myself. You know, Milfam is a nominating shareholder here. We talked- Mr Freund and I were discussing a path forward for the company in the context of each of us being nominees and Milfam being the nominating shareholder.*

.....

James Potts KC: On the 10th [September Mr Freund] says, “Wanted to give you a quick update. I’ve drafted the term sheet, gone through with Spencer we’re going through with internal, external counsel as well tomorrow. Just want to make sure we’re staying in lane considering potential contention.” So just to break that down, he’s seeking to ensure here that, firstly, that he’s going to send you a term sheet. That’s the pitch that we’ve been, we discussed a, a few moments ago, correct?

.....

James Potts KC there is an email of ... 17th of September from Mr Freund [which states] “We’re very focused on ensuring that interests are aligned and that we’re maximizing the Javelin platform to reduce costs, streamline assets, and develop a bit of growth longer term to create value.” So again, this is another clear statement, isn’t it, from Javelin that Mr Freund and Javelin wants to be aligned with what Milfam wants, correct?

Skyler Wichers: Milfam’s interest as a shareholder in Scully. Milfam’s only interest in Scully is as a shareholder and our role as nominees is, you know, obviously representing the company as directors and I think that’s what Mr, Mr Freund’s referring to here. It, it was important and I had- and, and allow me to expand for one more second. It was important, and I had articulated this to Mr Freund at an early stage, particularly given the context in which we were nominating the slate. It was extremely important that we differentiate ourselves from what management had been doing. A significant part of the reason we were putting up a slate was because of concerns of related party transactions and those types of things. And so we wanted to - to the extent there was anything to be done, it was very, very important and we were extremely mindful of our roles as Scully directors first and foremost. we understood that there would be a heavy emphasis on that given we wanted to make a sharp departure from what the former directors had - how they had conducted the company.

James Potts KC: But you’re here discussing a potential future related party transaction between the company and someone that you’re proposing as a director, isn’t that right?

Skyler Wichers: Correct. And as you can imagine, there would be high degree of sensitivity around something like that.

James Potts KC: Yes, quite right. But that's not a discussion that you disclosed in any way, in any communications to the shareholders of the company, is that right?

Skyler Wichers: Correct. Because when it - by the time, with the - for two reasons. Because the terms that ultimately were sent across were completely unworkable. And upon further discussion, I'm not sure the concept of Mr Freund being on the board at all or nominees affiliated or recommended by Javelin being on the board in the context of agreement like this would be something that's at all workable given the board's role in overseeing management and Mr Freund's role at Javelin. And then on top of that, the terms that they proposed I think were completely unworkable from the company's perspective or would've been unworkable from the company's perspective and it was completely dead on arrival, as I think is reflected in the communications around this.

James Potts KC: but you accept that you were discussing here a potential related party transaction, correct?

Skyler Wichers: Yes. Something that would've been disclosed as a related party transaction, no question had Mr Freund gone on the board.

.....

James Potts KC: You appreciated with the carrot of future work for Javelin, you would be able to rely on Mr Freund to carry out Milfam's wishes, correct?

Skyler Wichers: I wouldn't say that necessarily, no. And again, I don't know, I would emphasise that this was September. We didn't put in our nomination notice until November. We explored a number of concepts that - and I think at this point we're - we understood and had an interest in developing a contingency plan for management, but we weren't exactly sure what that would look like. And frankly, I'm not sure if it would've been workable to have Mr Freund and somebody Javelin recommended in on the board while something like this was entered into, for all the reasons we're talking about now. I mean, clearly we explored it. But this is - these are exploratory contracts or conversations and as you can see, went no further than a term sheet being sent over.

James Potts KC: You appreciate at this point, you are dangling the carrot of future work for Javelin on the basis of which you are proposing him to go onto the board, correct?

Skyler Wichers: I would reject that characterisation. I would say that I surfaced with Mr Freund the need for a contingency plan in the event that management was uncooperative, and we were elected as directors and Mr Freund had suggested this as a potential solution. I don't - I reject that I was offering the possibility of a contract to Javelin in exchange for Mr Freund's role on the board. The one had nothing to do with the other.

James Potts KC: *Mr Freund had been repeatedly telling you that he wanted to be aligned with what Milfam wanted to do, correct? We've seen that in the earlier documents, that's right, isn't it?*

Skyler Wichers: *We [have] covered that point. Again, Mr Freund wanted to be aligned with myself in my individual capacity as a Milfam nominee, the other Milfam nominees to the board and Milfam as the shareholder, yes. It was important across the board on, on all of those points. And in the subsequent conversation with Mr Sloan and Mr Freund on this point, that was one of the key sticking points that the terms that they proposed couldn't go forward was because it was completely unworkable that the Scully- us as Scully nominees could ever approve something like this.*

.....

James Potts KC: *And, and he was pitching for a valuable future contract for the company, his company, correct?*

Skyler Wichers: *Yes.*

James Potts KC: I suggest to you that you knew and appreciated that he would want to deliver on Milfam's objectives as shareholder in the company in, in order to secure that contract. That's right, isn't it?

Skyler Wichers: He wanted to deliver on the objectives of the Milfam nominees as directors of Scully Royalty for the benefit of Milfam's interest in the company as a shareholder.

James Potts KC: *He was only discussing it with you, wasn't he, at this time?*

Skyler Wichers: *Which would make logical sense given I was organising Milfam's slate as a nominating shareholder for the Scully Board. And one of the points that I raised with Mr Freund*

and Mr Sloan in conversation about this term sheet was the importance of this being approved by a broader board, of which there would be differing views.

James Potts KC: Where is that in any of these documents?

Skyler Wichers: That was a phone call between Mr Sloan, Mr Freund and myself sometime shortly after this email was sent.

James Potts KC: There's not- you give no evidence about that in your affidavit, do you?

Skyler Wichers: I don't believe so, no.

.....

James Potts KC: So the proposal is to enter into an MSA, that's what, master services agreement or master supply agreement, something like that. Is that how you'd understand MSA?

Skyler Wichers: I think management services agreement if I'm not mistaken.

James Potts KC: Quite right. I see. Management services agreement with the company's managed day-to-day operations.

.....

James Potts KC: And they'd be responsible for appointing senior executives including CEO and CFO?

Skyler Wichers: Yes.

James Potts KC: And management over all the corporate services, corporate functions. You see that?

Skyler Wichers: Yes.

James Potts KC: And then reporting to the board and then you can see the term is a 10-year term unless early termination. You see that?

Skyler Wichers: Yes, I do.

James Potts KC: And then just in terms of the termination at the bottom it could be terminated after three years. You see that?

Skyler Wichers: yes.

James Potts KC: *And, but on terms that there'd be a termination fee of a- with a- of the present value assuming 10% discount, but, but rolled forward for the balance of the 10, 10-year term, correct?*

Skyler Wichers: *Yes.*

James Potts KC: *And, and then the management fee in the middle, 2.5 million dollars index CPI linked, correct?*

Skyler Wichers: *Yes.*

James Potts KC: *And then also there's also an optimisation fee and an annual bonus. So the optimisation fee is based effectively a percentage of cost savings, correct?*

Skyler Wichers: *It is and I would note that that's- that and the elements throughout in terms of- including in terms of the services, you'll find to Mr Freund's comments about being aligned or aligned with the vision that we laid out in the proxy statement that all Milfam nominees supported. One of our objectives was cost reduction.*

James Potts KC: *Sure. but this is to pay somebody 20% of the cost savings. That's what this bonus is, this optimisation fee is, isn't it?*

Skyler Wichers: *It does and, or, or it is and it aligns Javelin or, or, or purports to align Javelin with the interests of the company as we laid out in our proxy statement.*

James Potts KC: *Yes. And an annual bonus of 10% of, of new business effectively, correct?*

Skyler Wichers: *Yes.*

James Potts KC: *Then Warrants*

.....

James Potts KC: *So that, that would deliver them with 11% of the issued share capital of the, of the company based on if they were able to deliver increases to the, the stock price of the shares, correct?*

Skyler Wichers: *Correct. Again, this, this is, I believe what Mr Freund was referring to in his repeated emphasis on alignment and you'll note that that would align Javelin with all shareholders not just Milfam.*

.....

Skyler Wichers:

Yes. This looks like this was September 23rd. This may have been after- yes, I see my, my subsequent message with- sorry to cut short. This was after Mr Freund, Mr Sloan and I had spoken, um discussing the term sheet and I had expressed the problems with it, namely that I felt their, the economics and the terms of it were completely unworkable. I appreciated them pulling it together and I appreciated the capabilities that Javelin might bring to the problem like this, but it was- Javelin's a very large organisation and the economics required to, have to move the dial for them on engagement like this were just simply unworkable for the scale of the company and that was, that was essentially what I was communicating. And I, and I expressed to Mr Freund and Mr Sloan on that call very plainly that I didn't expect anything that looked like this would be possibly workable for Scully directors in the event that we were elected.

.....

Adverse inferences?

195. I would note that I do not accept the submission made by the First and Second Defendants that adverse inferences should be drawn against MILFAM on the issue of whether the MILFAM Nominees had close and relevant interests requiring disclosure to shareholders. I accept MILFAM's submissions on this point and do not see that MILFAM could be criticised for only adducing evidence from Mr Wichers (who appeared to have a detailed and personal knowledge of nearly all of the facts and matters in issue).

The impact of the disclosures by MILFAM in the MILFAM 17 December Response and the MILFAM 19 December Response and of the December Press Release

196. The further disclosures made to the Company by MILFAM in the MILFAM 17 December Response and the MILFAM 19 December Response allowed the Company to prepare and distribute a further press release and form 6-K posted with the SEC on 22 December 2015. This was the December Press Release. In it the Company stated as follows:

The MILFAM Circular Omits Critical Information for Shareholders and is Materially Misleading

..... the Company has repeatedly notified MILFAM of certain omissions in the MILFAM Circular which are, individually and taken together, significant and material in order for the Company's shareholders to make an informed vote.

The MILFAM Circular among other deficiencies, discloses that the MILFAM Nominees are "independent" and that they would "fairly represent the interests of all shareholders of the Company". However, MILFAM has purposefully withheld and obfuscated important relationships and positions between certain of its nominees and the MILFAM group. **These omissions obscure the fact that a majority of the MILFAM nominees have significant past ties and relationships with the MILFAM group including:**

[Mr Howe currently continues to serve as a member of the Manager Oversight Committee]

[Mr Howe is currently a director of Alimco, a member of the MILFAM group and has served in that role for approximately two decades and was the CEO and Chairman]

[MILFAM has not disclosed the compensation received by Mr Howe in these roles]

[MILFAM has not disclosed that Mr Holliday served concurrently as directors of various companies]

We urge shareholders to use caution in reviewing MILFAM's proxy materials

197. MILFAM argued, as I have noted, that as a result the First and Second Defendants cannot show that shareholders would have been misled when deciding how to vote, whether to attend the AGM or whether to amend or withdraw the proxies they had given before receiving the December Press Release. The relationships relied upon by the First and Second Defendants had in fact been disclosed together with clear warnings as to the reliability and completeness of MILFAM's disclosure.
198. The First and Second Defendants however argued that the adequacy of MILFAM's disclosure was to be judged by reference to what it had disclosed in the MILFAM Nomination Notice and the MILFAM Proxy Statement. The December Press Release could not count as adequate disclosure of the relevant information which needed to be made and confirmed directly by MILFAM (and in any event it was incomplete because for example it failed to deal with the discussions with Javelin and Mr Freund regarding the proposed management services agreement). In the alternative, the December Press Release was published too late to make any difference and to give shareholders an opportunity to take account of the new information when deciding whether to attend the

AGM and how to vote. The cut-off date for the appointment of a proxy was very shortly after the filing of the December Press Release and shareholders would have given their proxy prior to its publication.

199. I note that the December Press Release was distributed five days before the date of the AGM (on 22 December with the AGM on 27 December) and accept that it might be said that this was sufficient time for a reasonable shareholder to withdraw his/her proxy or decide to attend the AGM in person and personally exercise their right to vote at the AGM. The Company's Proxy Statement discussed the revocability of proxies and made it clear that any shareholder was able to revoke a proxy given by it at any time before it had been exercised by a subsequent and new proxy or other written instrument deposited up to and including the last business day preceding the AGM or with the chairperson of the AGM on the date of but prior to the commencement of the AGM. A shareholder was also permitted to revoke a proxy by attending the AGM in person and registering with the scrutineer.
200. No evidence was adduced as to the practicalities of shareholders being able, and having time, to react to the December Press Release but it seems to me that since the December Press Release was issued almost immediately before the start of the Holiday Season and, as I have already noted and Mr Potts pointed out, the shares were held through chains of custodians and sub-custodians so that a withdrawal of a proxy already given would have required the giving and despatch of various sets of instructions, and since I cannot assume that most shareholders were located sufficiently near Hong Kong to be able to travel there and to the AGM at short notice, I do not consider that it would be safe or justified to conclude that the receipt of the December Press Release gave shareholders a reasonable opportunity to vote by reference to the new material included in it.
201. Accordingly, in my view MILFAM cannot rely on the disclosures contained in the December Press Release and it cannot be said that shareholders had access to and were able to consider and take into account the further information contained therein when making the decision as to how to vote on the resolutions to be proposed at the AGM (which decision was taken in this case at the time that they issued their proxies). Therefore, on the assumption and basis that the AGM went ahead and the resolutions were proposed and moved at the AGM on 27 December 2025, the adequacy of

MILFAM's disclosure is to be judged by reference to the MILFAM Nomination Notice and the MILFAM Proxy Statement.

202. In the circumstances, this was clearly an unsatisfactory situation. On 27 December 2025 it could not be assumed and it was not established that shareholders had been given an adequate opportunity to take into account when deciding how to vote the latest information that had been included in the December Press Release or that further supplemental disclosure with further details (including a statement from MILFAM to explain its position and the relationships that had been identified) was not required (or would be needed by and helpful to shareholders in coming to an informed view on how to vote). The difficulties for shareholders and the likelihood of confusion were compounded by the Company's announcement on 24 December 2025 of the purported postponement of the AGM and MILFAM's announcement on 26 December 2025 challenging the validity of the purported postponement and its intention to proceed with the AGM as scheduled. It seems to me that in these circumstances the only responsible and proper course to be taken was for the Original Directors (or at least one of them) to have attended and opened the AGM and to have proposed an adjournment to allow for further supplemental statements to be prepared and circulated by MILFAM and the Original Directors and for the AGM to be rescheduled to a later date so that shareholders would be given a proper opportunity to make a fully informed decision and to reconsider their vote and to recast or amend their vote based on the new statements and a complete and fairly presented picture of the position.
203. This of course was not done, and I can see that MILFAM was put in a difficult position as a result. It was right to challenge the legal validity of the postponement of the AGM but then in practice was unable to ensure that the AGM was able to take place. I also accept that the Original Directors were in a difficult position and that no challenge has been made as to *bona fides* of or motives behind the decisions they made and action they took. I can see, without of course deciding the point which does not arise on this application in view of the way in which the parties have chosen to conduct this litigation and the issues which are in dispute and put before the Court, that the Original Directors were also in a difficult position because they wished, as they were clearly entitled to do, to challenge the decision I had made in the Nomination Notice Judgment and considered that the uncertainties resulting from a pending appeal - and no doubt the flurry of last

minutes press releases - meant that it was very difficult if not impossible for shareholders to be able to take a fully informed and considered decision at an AGM to be held on 27 December. But as I have said, even accepting that to be right, particularly where MILFAM had publicly challenged the validity of the purported postponement, it is hard in my view to justify the Original Directors' decision to not turn up to and to lock and thereby prevent access to the venue where the AGM was due to be held.

204. But based on the events as they played out and on what actually took place, even assuming that the process conducted by Mr Sun constituted a shareholders meeting and AGM held in accordance with the AGM Notices, that he was properly appointed as the chairperson of the AGM and that the resolutions were properly moved and voted on at such a meeting, the resolutions purportedly passed to elect Mr Howe and Mr Holliday must be treated as invalid because of the inadequate disclosure regarding their relationships with MILFAM, and the positions they hold in MILFAM or companies/entities owned by MILFAM. I have considered whether the inadequate disclosure in relation to Mr Howe and Mr Holliday taints the whole of the MILFAM Nomination Notice and the MILFAM Proxy Statement and therefore also the disclosure made in relation the other MILFAM Nominees but have concluded that, on balance, it does not. I do not consider that a reasonable shareholder who had been told and knew the full facts relating to the other MILFAM Nominees could or would be likely to change their decision to support them and vote for their election merely because the disclosure regarding Mr Howe and Mr Holliday was shown to be incomplete. I accept that a reasonable shareholder might have a concern as to whether MILFAM's disclosure failures in relation to Mr Howe and Mr Holliday might raise a question as to whether MILFAM was seeking deliberately to mislead shareholders but despite the allegation to this effect made by the First and Second Defendants I do not consider that I can make a finding to that effect, or assess the effect of the failures to make full disclosure in respect of Mr Howe and Mr Holliday on that basis, having regard to the evidence adduced (and the absence of the cross examination of relevant witnesses) on this application.



The Hon. Justice Segal

Judge of the Grand Court, Cayman Islands

2 July 2026