IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NOs: FSD 262, 268, 269 and 270 of 2021 (DDJ)

IN THE MATTER OF PROCEEDINGS IN FSD 262 of 2021 (DDJ)
BETWEEN:

CHIA HSING WANG

Plaintiff

AND

CREDIT SUISSE AG
CREDIT SUISSE LONDON NOMINEES LTD

Defendants

AND IN THE MATTER OF PROCEEDINGS IN FSD 268, 269 and 270 of 2021 (DDJ)
BETWEEN:

CREDIT SUISSE LONDON NOMINEES LTD

Petitioner

AND

PRINCIPAL INVESTING FUND I LIMITED (FSD 268 of 2021)
LONG VIEW II LIMITED (FSD 269 of 2021)
GLOBAL FIXED INCOME FUND I LIMITED (FSD 270 of 2021)

First Respondents

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED (FSD 268 of 2021)

LVII INVESTMENT MANAGEMENT LIMITED (FSD 269 of 2021)

FLOREAT INVESTMENT MANAGEMENT LIMITED (FSD 270 of 2021)

Second Respondents/Applicants

Appearances:	Tom Weisselberg QC, Ben Hobden and Alistair Abbott of Forbes Hare on behalf of the Second Respondents/Applicants John Wardell QC, David Lee and David Lewis-Hall of Appleby (Cayman) Limited on behalf of the Plaintiff and the Petitioner Jonathan Adkin QC, Sam Dawson of Carey Olsen on behalf of the Joint Provisional Liquidators of the First Respondents
Before:	The Hon. Justice David Doyle
Heard:	23, 24, 25 and 28 March 2022
Draft Judgment circulated:	5 April 2022
Judgment delivered:	8 April 2022

HEADNOTE

Skeleton arguments should be concise and focused – those giving factual evidence should stick to the facts and not attempt to argue their respective cases in their affidavits or affirmations – the relevant law in respect of the duty to make full and frank disclosure of material facts in ex parte applications – proper approach to discharge applications – application to intervene in receivership proceedings dismissed – applications to discharge ex parte orders dismissed – receivership order and orders appointing provisional liquidators continued pending determination of the winding up petitions

JUDGMENT

Introduction

1. In these cases the documentation presented to the court for the interlocutory discharge hearing comprised some 34 volumes including 3 chunky volumes of a total of 109 authorities of which I was taken to less than 20 during the 3.5 day hearing. I remind myself that in *AHAB v SAAD* 2018 (3) CILR 1 (in a trial that took place over a year with many complicated points of law involved and a 1300 plus page judgment at first instance) there were, according to the law report, "only" 172 cases cited. In the cases before me, the "skeleton" argument of "Floreat Principal Investment Management Limited and Ors" from Tom Weisselberg QC, Ben Hobden and Alistair Abbott of Forbes Hare ran to some 104 pages. The "skeleton" argument of "(1) the Plaintiff in cause No. 262; and (2) the Petitioner in cause Nos 268, 269 and 270" from John Wardell QC, David Lee and David Lewis-Hall of Appleby (Cayman) Limited ran to some 109 pages. The skeleton arguments were too long.

2. Despite their length I record that I have considered all the legal arguments and submissions and benefited from reflection on the transcripts of the hearing. I would like to thank the transcribers for the excellent job they did in difficult circumstances.

3. Before I turn to the background and the applications that are before the court I wish to make the following additional comments for future reference:

   (1) I was concerned with the way in which deponents to the various lengthy affidavits wrongly and unhelpfully descended into matters of comment, opinion, argument and submissions. Such an inappropriate approach simply bumps up the costs and wastes a great deal of time. Affidavits and affirmations (other than those from expert witnesses giving opinion evidence) should be limited to facts. I made this obvious point in *Porton*

Capital Inc (unreported judgment, 3 February 2022 at paragraph 26). In future I expect attorneys to keep a much tighter rein over their clients and witnesses and ensure that the factual evidence is not "overlawyered". The place for legal argument is in concise and well focused skeleton arguments. The place for legal submission is in oral submissions which should also be concise and well focused and seek to deal with any issues raised by the judge. I appreciate that this is sometimes much easier said than done;

(2) As has been made plain in the past, a "scattergun" approach in discharge applications relying on alleged non-disclosure and lack of fair presentation is not appropriate;

(3) As Justice Williams rightly stressed, albeit in a very different context, in *F v M* (unreported judgment 20 August 2021) at paragraph 12 one of the problems in throwing an unnecessary mass of material at the court is the risk that "real gems … may be cloaked and not jump to the fore";

(4) Furthermore, some of the affidavits were filed outwith the times specified in the directions order. Evidence should not be filed outwith the timetable specified in directions orders without the permission of the court or, subject to anything to the contrary in the order, by agreement in writing between the parties in accordance with Grand Court Rules Order 3 rule 5(3); and

(5) Parties and their attorneys must exercise more discipline in respect of the length of skeleton arguments and the preparation, content and prompt filing of evidence otherwise they run the real risk that such will be excluded and adverse costs orders and other sanctions may be inflicted upon them.

Background

The appointment of receivers

4. On 8 September 2021 on the application of Chia Hsing Wang ("Mr Wang") I made an order on an *ex parte* short notice basis against Credit Suisse AG ("Credit Suisse") and Credit Suisse London Nominees Ltd ("CSLN") appointing receivers over the shares held by CSLN in the First Respondents for Mr Wang as the beneficial owner of such shares (the "Receivership Order"). This was to enable the receivers to commence winding up proceedings and applications for provisional liquidators to be made in the name of the registered holder.

5. The main reasons for making the Receivership Order are contained in my ex tempore judgment delivered on 8 September 2021. The judgment speaks for itself.

The appointment of provisional liquidators

6. On 17 September 2021 I made orders on an *ex parte* basis on the application of CSLN appointing provisional liquidators ("PLs") over Principal Investing Fund I Limited ("PIF"), Long View II Limited ("Long View") and Global Fixed Income Fund I Limited ("GFIF") (together the "Cayman Funds") (the "PL Orders").

7. The reasons for making such orders are contained in my ex tempore judgment delivered on 17 September 2021. Again that judgment speaks for itself.

The applications presently before the court

8. Floreat Principal Investment Management Limited ("FPIM") is stated to be the sole management shareholder of PIF, LVII Investment Management Limited ("LV2IM") is

stated to be the sole management shareholder of Long View and Floreat Investment Management Limited ("FIM") is stated to be the sole management shareholder of GIF (the "Applicants"). FPIM, LV2IM and FIM by applications dated 6 October 2021 applied to discharge the PL Orders and by applications dated 10 February 2022 they sought permission to intervene in FSD 262 of 2021 (DDJ) and to discharge the Receivership Order.

9. For the sake of completeness I should add that Mr Wang also refers to his interest in Real Assets (RA) Global Opportunity Fund 1 Ltd ("RAGOF") in the British Virgin Islands ("BVI") and there are legal proceedings in the BVI in that respect.

10. Neither Credit Suisse nor CSLN (the Defendants in the receivership proceedings) seek an order discharging the Receivership Order.

11. The hearing of the various applications, which took place on 23, 24, 25 and 28 March 2022, was also treated as the *inter partes* return date hearing at which the court considered whether or not to continue the Receivership Order and the PL Orders.

12. In my previous judgments I have referred to the conflict between Mr Wang, the Cayman Funds and the principals involved with Floreat namely Mr Mutaz Otaibi, Mr Hussam Otaibi and Mr James Wilcox (the "Floreat Principals"). I have had full regard to the evidence presented by the Floreat Principals and all the other relevant evidence before the court.

The issues before the court for determination

13. In FSD 262 of 2021 (DDJ) the issues were concisely described as follows:

(1) whether the Applicants should be joined to the proceedings as intervenors to allow them to maintain their application to discharge the Receivership Order;

(2) if so joined, whether the Receivership Order should be discharged or continued;

(3) if the Receivership Order is to be discharged, whether it should in any event be re-granted.

14. In FSD 268, 269 and 270 of 2021 (DDJ) the issues were concisely described as follows:

(1) whether the PL Orders should be discharged or continued;

(2) if the PL Orders are to be discharged, whether they should in any event be re-granted.

Summary of determination of the issues

15. I have arrived at the following determinations in respect of the issues before the court:

(1) I do not grant leave to the Applicants to be joined to the proceedings in FSD 262 of 2021 (DDJ) as intervenors.

(2) I do however take into account the concerns they expressed. There is however no valid basis upon which the Receivership Order should be discharged. There are valid reasons as to why it should be continued. The Receivership Order is therefore continued.

(3) There is no valid basis upon which the PL Orders should be discharged. There are valid reasons as to why the PL Orders should be continued. The PL Orders are therefore continued.

The relevant law in respect of the duty to make full and fair disclosure of material facts

16. Before turning to my reasons for the determination of the issues, I refer to the relevant law in respect of the duty to make full and fair disclosure of material facts on *ex parte* applications.

17. Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 sitting in the Court of Appeal of England and Wales, relying heavily on *Rex v Kensington Income Tax Commissioners* [1917] 1 KB 488 and *Bank Mellat v Nikpour* [1985] FSR 87, set out (at pages 1356 to 1359) the relevant principles a court should have regard to in considering whether there has been a relevant non-disclosure and what consequences the court should attach to any failure to comply with the duty to make full and frank disclosure. I endeavour to summarise them as follows:

(1) the duty of the applicant is to make "a full and fair disclosure of all the material facts";

(2) the material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers;

(3) the applicant must make proper enquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries;

(4) the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant and

(c) the degree of legitimate urgency and the time available for the making of inquiries;

(5) if material non-disclosure is established the court will be astute to ensure that the applicant who obtains the *ex parte* order without full disclosure is deprived of any advantage he may have derived by the breach of duty;

(6) whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented;

(7) it is not for every omission that the *ex parte* order will be automatically discharged. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms.

18. Balcombe LJ at page 1358 added:

"The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see *Rex v Kensington Income Tax Commissioners, Ex Parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there

must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained: see in general *Bank Mellat v Nikpour* [1985] F.S.R. 87, 90 and *Lloyds Bowmaker Ltd*. v *Britannia Arrow Holdings Plc.,* ante, p. 1337, a recent decision of this court in which the authorities were fully reviewed. I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon L.J. in the *Lloyds Bowmaker* case, at p. 1349C-D, that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction."

19. Slade LJ at page 1359 added:

"The principle is, I think, a thoroughly healthy one. It serves the important purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duty, whether through deliberate lack of candour or innocent lack of due care.

Nevertheless the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against

whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v Kensington Income Tax Commissioners* [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

20. Sir Nicholas Browne-Wilkinson VC in *Dormeuil Freres S.A. v Nicolian International (Textiles) Ltd* [1988] 1 WLR 1362, dealing with an application to set aside an *ex parte Anton Piller* order made by Hoffmann J, at page 1367 referred to: "The total mass of evidence before me on these motions is something over 750 pages" and at page 1369 to the hearing lasting two days. The Vice-Chancellor at page 1368-1369 referred to some of the relevant law including the judgments in the *Brink's Mat* case and at page 1369 stated "The cost in time and money to the parties in a complex case can become vast and the waste of court time quite unacceptable." The Vice-Chancellor shared the concerns expressed by Slade LJ in the *Brink's Mat* case but agreed, as do I, that the principle of full and frank disclosure is an extremely important one. Nothing I say in this judgment should be treated as belittling the importance of the principle. In the case before the Vice-Chancellor it was accepted that an injunction should continue running until the trial and the main question was the exact terms of the injunction.

21. More recently and at first instance, Carr J, as she then was, sitting in the High Court in England and Wales in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at paragraph 7 summarised the general principles in modern terms as follows:

> "i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;

ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point

which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material aspect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without

renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

22. Mr Weisselberg also referred to Popplewell J's judgment in *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) a case in which BTR was "in serious breach in its duties to the court" (paragraph 32). On the facts and circumstances of that case Popplewell J was unimpressed by the absence of any explanation from BTR who had "put their hands

up" only in a couple of respects. Popplewell J stated that the lack of explanation "gives rise to a strong inference that there is no innocent explanation which can be put forward" (paragraph 34 (1)). Popplewell J at paragraph 45 added:

> "The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in *Re OJSC ANK Yugraneft v Sibir Energy PLC* [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

23. Mann J in *JSC Mezhdunarodniy Promyshlenniy v Pugachev* [2016] EWHC 248 (Ch) at paragraph 40 cautioned applicants for ex parte orders against "burying the point with a mass of material which the court reads" adding:

> "The obligation of disclosure involves both the disclosure of relevant material, and a manner of disclosure which, in the circumstances, is commensurate with its significance. Since it is plain that there was reference to the restrictions in the affidavit, it becomes relevant to consider whether, in the circumstances, that was sufficient or whether it was an insufficient "glancing" reference."

24. Bingham J, as he then was, in *Siporex SA v Comdel Commodities Ltd* [1986] 2 Lloyds Rep 428 (Comm) at page 437 referred to the scope of the duty of disclosure of a party applying *ex parte* for relief:

> "Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial parts for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the court may discharge the injunction even after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."

25. Lawrence Collins J, as he then was, in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 at paragraph 180 stated:

> "On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i e those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, 1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

26. Jacobs J in *The Public Institution for Social Security v Amouzegar* [2020] EWHC 1220 (Comm) at paragraph 139 referred to paragraph [180] of the judgment of Lawrence Collins J in *Konamareni* and at paragraph 140 stressed that:

> "Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it …"

27. Jacobs J continued:

> "141. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable. Thus, in *OJSC ANK Yugraneft v Sibir Energy* [2008] EWHC 2614 (Ch), Christopher Clarke J said at [106]:
>
> > "As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what

should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

142. When an allegation of material non-disclosure is made, an important principle is stated in *Gee on Commercial Injunctions* (6th edition) paragraph 9-032:

> "A party seeking to have without notice relief discharged for non-disclosure must give adequate notice that this ground is relied upon together with sufficient particulars enabling the other party to understand the case to be advanced. An allegation of non-disclosure is potentially serious both for the other party and his legal advisers and the party complaining of non-disclosure must give sufficient notice of his complaint so that there can be a fair hearing and it should be made without unnecessary delay."

143. Authority for this proposition is to be found in *Bracken Partners Ltd v Gutteridge* (unreported but available on Westlaw 2001 WL 1560833), where Stanley Burnton J said:

> "Claimants and their lawyers have a serious responsibility to the Court on any application made without notice to put all material facts and issues before the Court. That responsibility is the more onerous when the injunction sought and obtained is an asset freezing injunction.
>
> Correspondingly, an allegation that a Claimant or his lawyers have failed in that duty is a serious allegation involving misconduct or default on the part of the Claimant or his lawyers. If it is to be made,

adequate and clear notice of it must be given and full details provided of the non-disclosure or misrepresentation alleged."

28. Mr Weisselberg referred to paragraph 84 of the useful judgment of Males J in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) that "a failure may be regarded as "innocent" if the fact in question was not known to the applicant or its relevance was not perceived… This formulation [namely that an innocent non-disclosure is one where there was no intention to omit or withhold information which was thought to be material] would rightly include as culpable blind eye knowledge, that is to say a decision not to investigate for fear of discovering facts which would have to be disclosed, but that is not this case. I am satisfied that all three failures in this case were innocent in the sense described."

29. Neither counsel referred to the important additional observations of Males J earlier in his judgment. At paragraph 19 Males J stated:

> "It is important also not to allow a dispute about full and frank disclosure to turn into what is sometimes euphemistically described as a "mini" trial on the merits…unless both parties exercise restraint, there is a danger that applications for the grant or discharge of freezing orders may become unmanageable. Thus the claimant must disclose material facts, which will include making the court aware at the without notice stage of the issues which are likely to arise and the possible difficulties in its case, but need not extend to a detailed analysis of every possible point which may arise; and the defendant must identify with clarity (and if necessary restraint) the failures of which it complains, rather than adopting a scatter gun approach."

30. Males J at paragraph 20 referred to and applied the correct approach in cases of "any magnitude and complexity" as described by Toulson J in a case in 2011 and adopted by the Court of Appeal of England and Wales in a case in 2014 namely:

" "… issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself. ….

Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. …

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. …

In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion"."

31. Like Males J, I have also endeavoured to keep my eyes fixed on the wood and only on those trees which are of particular importance. Males J wisely cautions against any "major loss of perspective" (paragraph 87).

32. In the context of the cases presently before the court the following points are particularly noteworthy:

(1) the duty of the applicant is to make full and frank disclosure of all material facts. Full disclosure is linked with fair presentation;

(2) an applicant must make reasonable proper enquiries before making the application and address any likely defences but does not need to provide a detailed analysis of every possible point which may arise. An applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if they were present, especially when facts are disputed. Material points however should not be buried in a mass of material;

(3) this judge-made rule (which is essentially penal) cannot be allowed itself to become an instrument of injustice;

(4) in heavy commercial cases the borderline between material facts and non-material facts maybe a somewhat uncertain one and the application of the principle should not be carried to extreme lengths;

(5) a due sense of proportion must be kept and sensible limits have to be drawn especially in complex and heavy commercial cases where applicants may be attempted to abuse the principle and take an inappropriate scattergun approach;

(6) a dispute about disclosure should not be allowed to turn into a mini-trial of the merits; and

(7) it is normally inappropriate to base a discharge application on disputed facts which are properly reserved for the trial itself.

33. The general principles in respect of full and frank disclosure in *ex parte* applications are well established in common law jurisdictions throughout the world and have been applied locally in the Cayman Islands for many years. See for examples: Smellie CJ in *Cable &*

Wireless (Cayman Islands) Limited v Information and Communications Technology Authority 2007 CILR 273 at paragraph 53 – 64, Cresswell J in *Ebanks, ex parte Henderson* 2009 CILR 57 at paragraphs 90 – 92 and 99 – 100, Henderson J in *Rightway China Real Estate Limited* (unreported judgment 3 February 2014 at paragraphs 16 and 17), and Smellie CJ in *Sun Cheong Creative Development Holdings Limited* (unreported judgment 20 October 2020 at paragraph 60).

Reasons for the determination of the issues

The application to intervene

34. I deal first with the application of the Applicants in FSD 262 of 2021 (DDJ) that "each be joined as an intervenor in these proceedings". In their skeleton argument the Applicants rely on Grand Court Rules Order 15 rule 6 (2) (b) (i) and/or (ii) which they say "amply justify their intervention in the Receivership proceedings". It is important to focus on the nature of the receivership proceedings. When considering rights and interests context, as generally in the law, is important. In the receivership proceedings Mr Wang seeks an order requiring Credit Suisse to take all steps required on its part to procure the transfer of shares in GFIF, Long View and PIF. No relief is claimed against the Applicants. Any orders made in the receivership proceedings would not determine any rights or obligations of the Applicants. The presence of the Applicants before the court is not necessary to ensure that all matters in dispute in the receivership proceedings may be effectively and completely determined and adjudicated upon. Moreover it is not in my opinion just and convenient in the receivership proceedings to determine any questions or issues arising out of or relating to or connected with any relief or remedy claimed in the receivership proceedings between the parties to those proceedings and the Applicants.

35. Both counsel referred me to the English Court of Appeal judgment in *Pablo Star Ltd* [2018] 1 WLR 738 (CA). *Pablo Star* is English authority for the proposition that in considering whether or not it was desirable to add a new party in corporate restoration proceedings, the

two lodestars are the policy objective of enabling parties to be heard if their rights might be affected by a decision in the case and the overriding objective under the relevant Rules of Court. In the circumstances of that case it was held that there were important practical reasons for strictly limiting the circumstances in which third parties were joined to applications to restore companies to the register. It was also held that in an appropriate case there was power under the appropriate rule (in that case CPR r19.2(2)) to join a third party in restoration proceedings to bring a complaint that the court had been misled when making the order for restoration. Sir Terence Etherton MR however at paragraph 78 stated: "… the jurisdiction to add third parties to company restoration proceedings is capable of providing an opportunity for all manner of opportunistic applications by persons who consider that they would be or might be adversely affected if the company was restored, including third parties against whom the company would have a cause of action". The Master of Rolls did not think it appropriate to exercise the power in the case before him.

36. I do not think it appropriate to permit the Applicants to intervene in this case. Their rights are not affected at the initial stage of the receivership proceedings. It would not be in accordance with the overriding objective to permit them to intervene. Their rights are not engaged until the next stage namely the subsequent applications for the appointment of PLs and for winding up orders. They are parties to those proceedings, and as has been evidenced by the presence of Mr Weisselberg, their rights in those proceedings are and will be well protected. I do not therefore exercise the jurisdiction the court has under Order 15 rule 6(2) (b) (i) or (ii) in favour of the Applicants.

37. During my exchanges with Mr Weisselberg I referred to paragraph 11 of the Receivership Order (not referenced in his lengthy skeleton) which in standard terms provided that "Anyone served or notified of this Order may apply to the Court at any time to vary or discharge the Order (or so much of it as affects that person)…". In his oral submissions Mr Weisselberg, somewhat opportunistically I have to say, placed great reliance on paragraph 11. On reflection, I think that reliance was misplaced. The persons properly served with or notified of the Receivership Order must still show that they have sufficient

interest to be able to obtain a variation or discharge of the order. The liberty to apply provision cannot be used by those whose rights are not engaged. The Applicants do not have a sufficient interest. The Receivership Order did not require them to do anything. The Receivership Order did not impact upon their rights and obligations. I appreciate that the Receivership Order enabled applications to be made for the appointment of the PLs and the presentation of winding up petitions but the Applicants do not need to be joined or permitted to intervene in the receivership proceedings to apply to discharge the PL Orders or to defend the winding up proceedings, which do directly affect them. In the context of these cases the receivership proceedings were one stage removed from those subsequent proceedings. I appreciate also that without the Receivership Order the subsequent proceedings would not have immediately followed but that is not to the point when determining rights and affected interests at the earlier receivership proceedings stage.

The alleged material non disclosures and lack of fair presentation in respect of the Receivership Order

38. If I am wrong in my decision not to permit the Applicants to be joined as intervenors in the receivership proceedings I should record that none of the much reduced allegations of material non-disclosure or lack of fair presentation would have led me to discharge the Receivership Order. For the sake of completeness, I should briefly deal with those allegations and my conclusions upon them.

39. Part way through the hearing Mr Weisselberg, belatedly but sensibly, abandoned reliance on paragraphs 214, 214.1, 214.2, 214.3, 214.4, 214.5, 215, 216, 219, 220, 221, 222, 223, 224, 224.1, 224.2, 224.3, 224.4, 225, 228, 228.1, 228.2 and 229 of his skeleton argument. What was left in respect of the challenge to the Receivership Order, after that significant and necessary cull to the inappropriate scattergun approach of the Applicants, were the following grounds:

(1) Risk of director misconduct

(2) Risk of dissipation of the Cayman Funds' assets

(3) Beneficial ownership of the shares

(4) Background to the CSLN investment in the Cayman Funds and RAGOF in the BVI

(5) "Orchestrated attack" allegations

(6) Alleged wrongdoing in respect of PIF/Shanti

(7) Alleged wrongdoing in respect of GFIF

(8) Alleged excessive fees related to the Aviation Notes

(9) Loan Termination Fee

(10) Capped return on investment

(11) Alleged wrongdoing in respect of Long View

(12) Alleged wrongdoing in respect of the BVI Fund RAGOF

40. I have to say that there was nothing in these remaining grounds of attack. There was no material non-disclosure and no lack of fair presentation. I deal with the grounds relevant to the application to discharge the Receivership Order briefly as follows:

Risk of director misconduct

41. There is nothing in the risk of director misconduct points. There was no material non-disclosure or lack of fair presentation. It was and is open to Mr Wang to allege that none of the Cayman Funds' respective directors appear to have exercised any real oversight

regarding the exercise of delegated powers. It was not a lack of fair presentation for it to be stated in the skeleton argument (at paragraph 42.2) that David Whitworth and Trinda Blackmore are "purportedly independent professional directors of both RAGOF and PIF". There was nothing wrong with the reference at paragraph 52 of the skeleton argument to "those directors which are purportedly independent professional directors appear to have longstanding relationships with Floreat (and … do not appear to exercise any meaningful oversight with respect to the Floreat Funds' activities)". The relevant individuals were identified as "professional directors" and there was no need to provide their professional qualifications or employment histories. There was nothing in the oral submissions at the *ex parte* hearing in respect of risk of director misconduct which amounted to a lack of fair presentation.

Risk of dissipation of the Cayman Funds' assets

42. There is nothing in the risk of dissipation of the Cayman Funds' assets points. Nothing in the skeleton argument or oral submissions on this topic amounted to material non-disclosure or lack of fair presentation. It was, on the evidence, open to Mr Wang to make the submissions he made of risk of dissipation and such submissions were fairly and properly made.

Beneficial ownership of shares

43. There is nothing in the material factual background points. Mr Wang fully and fairly put the material factual background to the court. Plainly, on any view and as accepted by Mr Weisselberg in exchanges with me, Mr Wang had and has a significant financial interest in the Cayman Funds. The nominees holding such shares appear to accept that the shares are held ultimately for Mr Wang as beneficial owner. Even if the precise holdings are disputed this is not something that can be determined at this interlocutory stage of the proceedings. Taking a proportionate and sensible approach, the lack of disclosure of the historical

account overview document dated 27 November 2018 and other associated documents and the document dated 16 December 2015 were not material non-disclosures.

Background to the investment

44. There was no failure to disclose material facts in respect of the background to the investment in the Cayman Funds (and RAGOF in the BVI). There was no unfair presentation in this respect. Moreover any factual dispute as to the background to the investment cannot be determined at this interlocutory stage of the proceedings.

"Orchestrated attack" allegations

45. There is absolutely nothing in the criticism of the "orchestrated attack" allegations. It was entirely proper for Mr Wang and his legal team to disclose to the court their case that the Floreat Principals were seeking to carry out an "orchestrated attack" on Mr Wang's interests. Contrary to the Applicants' submission that there was no evidence to justify this allegation, there was ample *prima facie* evidence to support such a case. There was no failure to disclose material facts in that respect. There was no lack of fair presentation. The Applicants dispute that there was any such "orchestrated attack" on Mr Wang's interests. I note the contents of Mr Hussam Otaibi's letter to Mr Wang dated 22 April 2021 and the apparently unpleasant phone calls but cannot determine any factual disputes in respect of these calls and the alleged orchestrated attack at this interlocutory stage without the benefit of cross-examination. Suffice to say nothing in this area leads me to conclude that the Receivership Order should be discharged for material non-disclosure or lack of fair presentation.

Alleged wrongdoing in respect of PIF/Shanti

46. Mr Wang did not fail to disclose material facts or make an unfair presentation in relation to the submission that the Floreat Principals engaged in wrongdoing in respect of Shanti

and the artworks. The significant factual dispute between the parties in this respect cannot, as the authorities make crystal clear, be determined at this interlocutory stage of these proceedings. Suffice to say I do not consider that there is anything in the Applicants' submission that Mr Wang failed to disclose material facts or made an unfair presentation. It was highlighted that it was probable that the substantive allegations would be disputed. The way in which Mr Wang put the case on Shanti and the artworks cannot, for present purposes, be validly criticised.

Alleged wrongdoing in respect of GFIF including Holbox, Aviation Notes, Loan Termination Fee and capped return on investment

47. I am not persuaded that there is any substance in the Applicants' criticisms under the heading alleged wrongdoing in respect of GFIF. There was no failure to disclose material facts or any unfair presentation in respect of Holbox, the alleged excessive fees related to the Aviation Notes, the Loan Termination Fee or the capped return on investment. At the risk of sounding like a broken record, insofar as the facts in respect of these issues are in dispute they cannot be resolved at this interlocutory stage of the proceedings.

Alleged wrongdoing in respect of Long View

48. Again, I am not persuaded that there was any material non-disclosure, misrepresentation or failure of fair presentation on the alleged wrongdoing in respect of Long View. The factual disputes in respect of Long View must await trial.

Alleged wrongdoing in respect of the BVI Fund RAGOF

49. The Applicants' submissions on alleged wrongdoing in respect of the BVI Fund RAGOF do not lead me to conclude that there was any lack of material disclosure or lack of fair presentation. Mr Wang properly put this before the court as an appropriate part of the jigsaw he was attempting to piece together as part of his overall case against the Applicants.

Disclosure duties

50. Mr Wang and his legal team plainly took their disclosure duties seriously. Mr Wang filed an affidavit in support of his application which included 7 paragraphs under the heading "Full and Frank Disclosure". In the 39 page skeleton argument, paragraphs 121 to 126 specifically dealt with full and frank disclosure issues and Mr Wardell during his oral submissions on 8 September 2022 specifically directed the court to what they said "about full and frank obligations."

Re-grant if there had been material non-disclosure or lack of fair presentation

51. Even if I had been persuaded that some of the alleged non-disclosures were of sufficient materiality to require a discharge of the Receivership Order and some additional penalty such as an adverse costs order being imposed against Mr Wang, I would have re-granted the Receivership Order on the basis that any non-disclosures were innocent and non-culpable and that the interests of justice required the re-granting of the Receivership Order to enable the winding up petitions to proceed expeditiously to a hearing.

The continuation of the Receivership Order

52. Mr Weisselberg politely, fairly and properly warned me against confirmation bias, but taking that warning carefully on board and trying, so far as is humanly possible, to objectively stand back, I conclude that there were good reasons for granting the Receivership Order as briefly set out in my judgment delivered on 8 September 2021 and there are good reasons to continue it. The winding up petitions should proceed and be determined on their merits.

The alleged material non-disclosures and lack of fair presentation in respect of the PL Orders

53. I turn now to the applications to discharge the PL Orders. On 25 October 2021 I had made an order that the Applicants file "a concise document stating the grounds of the Discharge Application". The Applicants provided an 8 page document entitled "Summary of Material Non-Disclosures and Areas of Unfair Presentations" (with a further 10 pages annexed). During the hearing Mr Weisselberg handed up a colour copy of what he described as a "composite version". The Applicants put their case for the discharge of the PL Orders under the following headings:

A. Alleged Imminent Risks/Urgency

A1. Risk of compelled redemption

A2. Risk of document destruction

A3. Risk of director misconduct

A4. Risk of dissipation of the Cayman Funds' assets

B. Material Factual Background

B1. Beneficial ownership of the Cayman Shares (and RAGOF shares)

B2. True background to CSLN investment in the Cayman Funds (and RAGOF in the BVI)

B3. Mr Wang's collateral purposes

B4. "Orchestrated attack" allegations

C. Alternative Remedies

D. Alleged wrongdoing in respect of PIF/Shanti

E. Alleged wrongdoing in respect of GFIF

E1. Allegations concerning Holbox

E2. Alleged excessive fees related to the Aviation Notes

E3. Loan Termination Fee – alleged diversion/mismanagement

E4. Allegations regarding capped return on investment

E5. Allegations regarding a dilution of shareholding

F. Alleged wrongdoing in respect of Long View

G. Other alleged wrongdoing in respect of the BVI Fund RAGOF

Alleged Imminent Risks/Urgency

54. I do not find that there were any material non-disclosures or lack of fair presentation under the heading Alleged Imminent Risks/Urgency:

Risk of compelled redemption

(1) I have concluded that Mr Wang's concerns in respect of the risk of a compelled redemption were properly put at the *ex parte* hearing. In view of his concerns over the alleged serious wrongdoing it is easy to see why Mr Wang was also concerned over the risk of attempts at compelled redemption. The omission in respect of PIF

to refer to the words "regulatory or tax" was not material when one puts it in the context of the wider picture of serious concerns. Mr Wang was rightly highlighting his concerns that there could also be attempts at compelled redemption in light of his material concerns in respect of the serious wrongdoing he had referenced;

Risk of document destruction

(2) The concerns in respect of the risk of document destruction were properly put before the court at the *ex parte* stage in light of the serious misconduct that was being alleged. I accept that the focus of the concerns was in respect of documents that "may not be held by external service providers who (particularly if regulated) may be trusted to preserve them" (paragraph 14.3 of CSLN's application for the appointment of PLs). This point was specifically noted at paragraph 28.3 of my judgment delivered on 17 September 2021. I note the continuing concerns and the allegations in respect of the authenticity of the pre-acquisition proposals which cannot be determined at this interlocutory stage. Moreover, the pre-action disclosure proceedings in England and the Cayman *Norwich Pharmacal* proceedings were duly disclosed (see for example paragraphs 129 and 180.1 of the skeleton argument dated 15 September 2021). There was ample evidence of *prima facie* serious wrongdoing from which a risk of document destruction could be inferred. It is rare to get direct evidence from an alleged wrongdoer such as an email confirming that he was in the course of destroying and/or fabricating documents. Mr Wardell referred to *Dunlop Holdings Limited v Staravia Limited* 1982 WL 221020 (1982) where Oliver LJ dealt with an appeal in respect of classic *ex parte Anton Piller* orders and in that context stated:

> "… it has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is

seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the court."

There was no material non-disclosure or lack of fair presentation in respect of the risk of document destruction;

Risk of director misconduct

(3) I am not persuaded that there was any material non-disclosure or lack of fair presentation in respect of the risk of director misconduct. There were references to the professional directors and concerns in respect of their alleged lack of meaningful oversight. I referred to this point at paragraph 8 of my judgment delivered on 17 September 2021. In any event, experience sadly shows that the presence of "professional" directors does not automatically eliminate a risk of wrongdoing. There was no need to refer to the exact professional qualifications of the directors or their detailed career histories. I also note the references by Mr Wardell to the discretion to remove the directors;

Risk of dissipation of the Cayman Funds' assets

(4) The risk of dissipation of assets was properly put before the court and there was ample evidence (including the evidence of alleged past dissipation and serious misconduct) from which the risk could reasonably and properly be inferred. At paragraph 177 of CSLN's skeleton argument it was stated that the other side may seek to argue that a risk of dissipation and/or misuse of assets was not satisfied for various possible reasons some of which were specified in the sub-paragraphs of paragraph 177. Mr Wardell at the *ex parte* hearing on 17 September 2021 stated: "They may say there's no real risk of dissipation, and it may be said that the risk of dissipation relies heavily on their conduct with RAGOF, but they're the same

people." The case on risk of dissipation was fairly put before the court and there were no material non-disclosures;

Material Factual Background

Beneficial ownership of shares

(5) There was no material non-disclosure or lack of fair presentation in respect of the beneficial ownership of the shares. The failure to disclose the historical account overview was not a material non-disclosure. The failure to disclose the security letter dated 16 December 2015 was not a material failure. This really is a non-point. It is not disputed that Mr Wang has a significant financial interest. At paragraph 5 of my judgment delivered on 17 September 2021 I indicated that "Mr Wang is stated to be the ultimate beneficial owner." I was recording the case as presented. The nominees have confirmed the beneficial holding and any serious dispute in this respect must await trial. There is absolutely nothing in the allegation that there was a failure to disclose anything material in relation to Mr Wang's beneficial interest;

Background to the CSLN investment

(6) Moreover, there is nothing in the allegation that there was a material non-disclosure or lack of fair presentation in respect of the background to the CSLN investment. The determination (if necessary) of the factual dispute between the parties as to the true background to their relationship and the investments is a matter that will have to await trial. This was another very bad point taken by the Applicants and should not have found its way into the composite summary or the skeleton argument. I have to say that Mr Weisselberg's treatment of this point, like so many of the Applicants' other points, falls foul of the plain direction in the authorities not to

attempt to turn such issues at the interlocutory stage into a "mini-trial". At this interlocutory stage it is simply not appropriate to descend into a detailed analysis of every disputed factual or legal issue that may be of some conceivable relevance. It is quite inappropriate for the Applicants to attempt to rely on disputed facts which may themselves be issues in the winding up proceedings and the resolution of which must properly await the trial itself. It is not appropriate to convert the discharge hearing into a "mini-trial" or a form of preliminary trial of issues which must be left for the hearing of the winding up petitions. As a general point I stress that it is not for this court, at this interlocutory stage, to determine all the substantive factual and legal issues in dispute insofar as they relate to or could impact upon the winding up petitions;

Mr Wang's alleged collateral purposes

(7) Mr Wang says he had no collateral purposes. The Applicants say he did. Again the dispute in relation to collateral purposes must await trial. I say no more in that respect as I do not want to prejudge the issue;

"Orchestrated attack" allegations

(8) Again whether or not there was an "orchestrated attack" must (if necessary) await determination at trial. I agree that there was ample evidence before the court at the *ex parte* hearing to justify the submission that there was an "orchestrated attack" upon Mr Wang. Amongst many other references, Mr Wang refers to two abusive phone calls and the 22 April 2021 letter. On any reasonable objective analysis it was clear that Mr Wang's case was that there had been an "orchestrated attack" and it was clear that the other side may well dispute that, as indeed they now do. The factual dispute as to whether there was an "orchestrated attack" upon Mr Wang or not is not one which it is appropriate to determine at this stage. This really is getting close to chucking the kitchen sink in as well. This point should not have

appeared in the composite summary and the skeleton argument. It should be clear from this judgment that many of the points relied upon by the Applicants should not have been made;

Alternative Remedies

(9) Again there is nothing in the alternative remedies point. There was a whole separate section headed in bold "Alternative Remedies" in CSLN's skeleton argument for the *ex parte* hearing. At paragraph 181 of the skeleton argument it was stated that:

> "It is trite law that the Court will ordinarily refuse to appoint a liquidator where an alternative remedy exists, and it is possible (although improbable) that Floreat and/or the Cayman Funds will assert that there is some available alternative to winding up. However, it is submitted that there would be no utility in any of the alternative orders which the Court could make in the circumstances which obtain in respect of each of the Cayman Funds. In particular, Mr Wang needs the affairs of each Cayman Fund to be independently scrutinised by officers of the Court and followed up by proceedings against those responsible for any losses sustained by the Fund in question."

It is unrealistic for the Applicants now to suggest that Mr Wang's interests could have been properly protected by a Stop Order or an injunction or by undertakings or some other alternative remedy. There was no material non-disclosure or lack of fair presentation on the alternative remedies. I say no more on this issue as I do not wish to prejudge any issues that may also arise in respect of it at the winding up hearing;

Alleged wrongdoing in respect of PIF/Shanti

(10) There were no material non-disclosures or lack of fair presentation in respect of PIF/Shanti. Insofar as there is a factual dispute in respect of this issue such factual dispute cannot be resolved in these interlocutory proceedings and must await trial. Suffice to say for present purposes I am not satisfied that there was any failure to disclose material documents. To the extent that it is disputed whether or not Mr Wang had possession of or means to obtain certain documents or whether such documents were concealed from Mr Wang, again, those factual disputes cannot be determined at this interlocutory stage;

Alleged wrongdoing in respect of GFIF

Holbox

(11) On any objective consideration of the position it is plain that this aspect of the matter did not form a major part of the alleged wrongdoing and was gently put forward on the basis of a potential conflict of interest (see paragraph 78 of the skeleton argument dated 15 September 2021). Mr Wang at paragraph 200 of his second affidavit sworn on 13 September 2021 stated: "FFP's view is that this appears to give rise to a potential conflict of interest." Holbox was a very small piece of a much larger jigsaw and when considering issues of materiality that must be borne very much in mind. A due sense of proportion must be kept. Moreover, there is plainly a factual dispute in respect of Holbox. The fact that Holbox was allocated to Series 8 in which Mr Wang was not an investor was disclosed. It is accepted that this Series 8 point (although highlighted at paragraph 201 of Mr Wang's second affidavit sworn on 13 September 2021 and at paragraph 79 of the skeleton argument dated 15 September 2021) was not referred to in oral submissions at the *ex parte* hearing. In my judgment there was no need for it to be highlighted in oral submissions and the Applicants' continued reliance on it is

simply further evidence of their inappropriate scattergun/kitchen sink approach. Moreover, I cannot determine the factual disputes in respect of Holbox at this interlocutory stage. I do however take into account all that is written and said in respect of Holbox and have concluded that there was no material non-disclosure and no lack of fair presentation;

Aviation Notes

(12) The concerns in respect of the Aviation Notes were fairly and properly put before the court. There was evidence in respect of the position concerning the Aviation Notes. It was plain to the court that there would be a dispute in respect of the allegations being made. Counsel specifically made it plain that issues would no doubt be raised by the other side in respect of the Aviation Notes. Any dispute in respect of the Aviation Notes cannot be determined at this interlocutory stage. Based on the evidence and arguments to date there was no material non-disclosure or lack of fair presentation in that respect;

Loan Termination Fee

(13) Mr Wang put his case on the Loan Termination Fee plainly and clearly at the *ex parte* hearing. Mr Wang in his second affidavit at paragraph 196 referred to allegations that former employees had diverted approximately US$1 million away from GFIF in respect of "a loan termination fee that should have been paid to the fund." There is reference to an allegation from the former employees that "Mr Mutaz Otaibi agreed on behalf of the fund that the loan termination fee would be paid 50% to their corporate vehicle and 50% to his own corporate vehicle." Mr Wang adds at paragraph 197 that if the allegations made by the former employees are true then Mr Mutaz Otaibi would have been involved in an improper diversion. The issue is also covered at paragraph 73 of the *ex parte* hearing skeleton argument where the following point is properly and fairly made: "… if those allegations are

true, such conduct on the part of Mutaz Otaibi would be a matter of very serious concern, and yet further evidence of a serious lack of probity …" Mr Wardell refers to the evidence from the other side and the judgment of the English Court in respect of this issue but I do not need to go to that judgment as I am satisfied that there has been no material non-disclosure or any lack of fair presentation in respect of the Loan Termination Fee;

Capped return concern

(14) Any arguments on the merits and disputed facts on the capped return issue will have to await trial. Despite the detail devoted to this by the Applicants I have not been persuaded that there was any material non-disclosure or lack of fair presentation;

Dilution concern

(15) Mr Wang in his second affidavit at paragraph 115 simply stated: "I am concerned as to whether proper value was paid for the subscription and/or whether the issue has been used to wrongly dilute me." Paragraph 80 of the *ex parte* skeleton refers to this concern as to whether specified shares "were acquired for proper value, or whether those shares were issued improperly to dilute his participating shareholding". Again there is nothing in the allegation that there was material non-disclosure or lack of fair presentation. Suffice to say there is nothing in this ground which would justify discharging the orders;

Alleged wrongdoing in respect of Long View

(16) Mr Wardell in his oral submissions on 17 September 2021 in respect of Long View stated "they may well argue ….that Mr Wang was expected to have been aware of the terms of his bargain and he knowingly entered into it… he quite clearly didn't understand that the Floreat Principals were able to generate a very substantial

second layer of fees out of him, over and above the fees they already …. [had] under the current advisory agreement" (page 9 of the transcript). I agree that this Long View ground raises disputed issues that will have to await trial. I think it is wrong, however, to say that there is no evidence of properly presented concerns in this respect and it is a gross understatement to say, as the Applicants in effect do, that this is merely a contractual dispute and "there is nothing to see here". I am not in a position to determine facts or to arrive at any conclusions on the arguments presented by Mr Weisselberg which frankly had the distasteful flavour of an inappropriate attempt at a mini-trial or seeking premature determinations of preliminary issues. Suffice to say I have not been persuaded that I should discharge the PL Order on this ground; and finally

Other alleged wrongdoing in respect of the BVI Fund RAGOF

(17) In my judgment in order that the court had the full picture it was fair and proper for reference to be made to RAGOF and the BVI proceedings. The court was fully aware that the applications and allegations in that respect were principally for the BVI court. I was not misled in that respect. I note all that is written and said on this ground but there was no material non-disclosure or lack of fair presentation in respect of RAGOF and this ground does not justify the discharge of the PL Orders.

55. Having considered all the lengthy evidence and submissions put before the court I have concluded that there is no substance to the Applicants' wide ranging allegations of lack of proper disclosure and lack of fair presentation. I do not find that there has been material non-disclosure in this case or that there was a lack of fair presentation.

Disclosure duties

56. Those responsible for discharging the obligation of full, frank and fair disclosure plainly took their obligations seriously. For example, Mr Wang's affidavit sworn on 13 September

2021 in support of the applications for the appointment of PLs ran to some 103 pages and paragraphs 240 – 287 (some 24 pages) were under the heading "Full and Frank Disclosure." The skeleton argument ran to some 61 pages and paragraphs 150 -186 on pages 49 to 61 dealt specifically with full and frank disclosure issues. Moreover, again a large part of Mr Wardell's oral submissions on 17 September 2021 were directed to full, frank and fair disclosure issues. I, of course, accept Mr Weisselberg's point in effect that even where applicants provide great detail pursuant to their full and fair disclosure obligations something material may still be missed or not brought specifically to the judge's attention.

57. In this case, however, I find no material omissions. I spent much time digging through the detail in search for what the Applicants may have thought were gems of non-disclosure in the mass of material provided by the Applicants but after many days of doing so found none.

Re-grant if there had been material non-disclosure or lack of fair presentation

58. I note the great lengths that those supporting the applications for the appointment of PLs went to in discharging their onerous full, frank and fair disclosure obligations and if I had come to the conclusion that something material had nevertheless been missed and the PL Orders had to be discharged, I would have re-granted them on the basis that any omissions were innocent non-culpable omissions and that the interests of justice required the re-granting of the PL Orders. The PLs must remain in place to hold the ring and as necessary and appropriate to continue their work pursuant to the PL Orders, pending the determination of the winding up petitions.

The continuation of the PL Orders

59. I have concluded that the PL Orders should be continued. The PL Orders were justified for the reasons stated in the *ex tempore* judgment delivered on 17 September 2021 and should continue. I have considered the relevant statutory provisions and the local case law.

I have given the position "the most anxious consideration" in the words of Lewison LJ in the Court of Appeal of England and Wales in *Commissioners for HM Revenue & Customs v Rochdale Drinks Distributors Ltd* [2013] B.C.C. 419. I have considered afresh the threshold conditions and the balance of convenience. The four hurdles remain well cleared in respect of the Cayman Funds. The balance of convenience remains firmly in favour of the orders continuing in respect of the Cayman Funds, the positions of which I have considered separately. The continuation of the PL Orders is the course of action which to this court seems likely to cause the least irremediable prejudice.

Conclusions

60. In conclusion, despite the considerable advocacy skills of Mr Weisselberg, I have not been persuaded to discharge the Receivership Order or the PL Orders.

61. Having heard the matter on an *inter partes* basis I have concluded that the orders I made in September of last year should be continued.

62. Standing back, trying to keep my eyes fixed on the wood rather than losing focus in the trees and looking at the matter as objectively as humanly possible (conscious of the dangers of confirmation bias) I find that the worrying picture properly and fairly painted for me at the *ex parte* hearings last September is similar to the picture that appeared at the inter partes hearing in March of this year. If anything I have to say, based on the evidence now presented to the court, that the weight of the prima facie concerns appears to have increased. I keep my mind open to persuasion in respect of the hearing of the winding up petitions, but for present purposes it is plainly in the interests of justice that the Receivership Order and the PL Orders remain in force pending the determination of the winding up petitions.

Costs

63. I am minded to order that the Applicants pay the costs of their failed applications (such costs to be taxed on the standard basis in default of agreement) subject to consideration of any concise (no more than 5 pages) written submissions to the contrary within 21 days and any concise (no more than 5 pages) written submissions in reply within 14 days thereafter and I am content to determine costs on the papers without the necessity for a further hearing.

Draft Orders

64. The attorneys should file within the next 7 days agreed draft orders reflecting the decisions made in this judgment for my approval.

David Doyle

_____

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT