



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 218 OF 2021 (NSJ)

BETWEEN: JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND (IN PROVISIONAL LIQUIDATION)
PLAINTIFF

AND: OURGAME INTERNATIONAL HOLDINGS LIMITED
DEFENDANT

Before: The Hon. Justice Segal

Appearances: Matthew Goucke, Harriet Ter-Berg and Marc Hecht of Walkers appeared for the JPLs of the Plaintiff

Heard: 27 July 2021

Draft circulated: 5 August 2021

Judgment Delivered: 11 August 2021

Headnote

Application by joint provisional liquidators of a fund for injunctive relief – the fund is a shareholder in a Cayman company – the provisional liquidators claimed that a substantial number of the funds' shares had been sold at an undervalue and for an improper purpose to parties connected with the company's management – the company's management convened a shareholders' meeting to authorise its directors to issue further shares allegedly for the purpose of diluting the fund's shareholding – the shareholders' meeting was to be held imminently

JUDGMENT

1. On 27 July 2021 I heard an application (the *Application*) for injunctive relief made by the joint provisional liquidators (the *JPLs*) of Jian Ying Ourgame High Growth Investment Fund (the *Fund*) by way of an *ex parte* summons issued on Monday 26 July 2021. The Application, which came on at very short notice, was said by the JPLs to be urgent because the injunctive relief related to an extraordinary general meeting (the *EGM*) of the shareholders of Ourgame International Holdings Limited (*Ourgame*), which is a Cayman Islands company listed on the Hong Kong Stock Exchange, due to be held on 28 July 2021 in Hong Kong. Ourgame was joined as the defendant to the Application. The Fund is a shareholder in Ourgame. Notice of the Application had been given to Ourgame and Ourgame's Cayman attorneys (Maples and Calder) (*Maples*) who had written to the Cayman attorneys for the JPLs (Walkers) to set out Ourgame's position.
2. For the reasons explained below, I decided to grant injunctive relief but on different terms from the terms on which the JPLs had sought injunctive relief.

The background

3. The JPLs were appointed by me on 2 July 2021 following the presentation of a winding up petition by one of the Fund's shareholders, Kinetic Creation Global Investments Limited (the *Petitioner*). The Petitioner, as a contributory, presented a winding up petition against the Fund on 9 April 2021 seeking a winding up order pursuant to sections 92(c) and (e) of the Companies Act (2021 Revision) (the *Companies Act*).
4. The Fund was established for a limited term (the *Fund Term*) subject to extension of the term by agreement among the shareholders. The initial Fund Term was for one year from 21 December 2017 to 20 December 2018. The Fund Term was extended for a further year to 20 December 2019 (the period of the extension being referred to as Extension Term 1). Under the Fund's constitution, the Petitioner (as the holder of Class A shares) was entitled to a fixed return (the *Fixed Return*) of ten per cent simple interest per year on the sum subscribed by it (the *Subscription Amount*) in respect of the period up to the expiry of Extension Term 1. The Fixed

Return was payable out of the assets of the Fund on or before 20 December each year. If the liquid assets of the Fund available on the payment date were less than the amount owing to the Petitioner, then another shareholder in the Fund, Total Victory Global Limited (*Total Victory*), a company incorporated in the British Virgin Islands, as the Class B shareholder, was required to subscribe for a sufficient number of Class D shares to top up the Fund's liquid assets to enable the Fund to pay the Fixed Return. If Total Victory failed to do so, the Fund was required, on request from the Petitioner, to dispose of assets and use the proceeds to pay the Fixed Return. The Fixed Return that became owing to the Petitioner on 20 December 2019 had not been paid and Total Victory had not subscribed for Class D shares to put the Fund in funds to enable it to make the payment. Furthermore, according to the Petitioner, the Fund had failed to take steps to wind down the Fund following the expiry of the Fund Term so as to realise assets and pay the Fixed Return and the Subscription Amount (which was to be paid first out of the realisations of the Fund's assets before distributions could be made to other shareholders). In addition to the Class A and Class B shareholders, there are Class C shareholders, whose entitlement to any distributions on a winding up of the Fund also rank, like Total Victory as the Class B shareholder, after the Petitioner as the Class A shareholder.

5. In addition to complaints concerning the Fund's failure to comply with its obligations to wind down after the end of the Fund Term and to pay what was owed to the Petitioner (and to exercise its rights against Total Victory to facilitate such payment), the Petitioner complained about the Fund's decision making in its capacity as a shareholder in Ourgame. On 19 January 2021, the Fund held 221,653,555 ordinary shares in Ourgame, which represented a 20.57% shareholding. The Fund held such shares both directly in its own name on the Cayman register of members for Ourgame (132,464,366 shares – the *Paper Shares*) and indirectly via HKSCC Nominees Limited (89,189,189 shares – the *Paperless Shares*). The Paperless Shares were freely tradable on the Hong Kong Stock Exchange. On that date, Ourgame had announced that a company in which it has an interest, Allied Esports Media, Inc. (*AEM*) had entered into a stock purchase agreement to sell its interest in Club Services, Inc. to Element Partners, LLC for US\$78.25 million (the *Club Services Transaction* and the *Original Purchase Price*). The Original Purchase Price was subsequently increased to US\$105 million (the *Revised Purchase Price*).
6. In the period before 8 March 2021, the directors of the Fund were Mr Xiong Hui (*Mr Xiong*), a nominee of Total Victory and Mr Zhang Jun Justin (*Mr Zhang*), a nominee of Cithara

Investment International Limited, the investment manager of the Fund (the *IM*). On that date, Mr Zhang was removed pursuant to a written shareholder resolution signed by Total Victory and was subsequently replaced by Mr Zhang Jian, who was nominated by the Fund's Class C shareholders.

7. The Fund was to be managed by and had appointed an investment manager to manage the Fund's investments. Pursuant to an investment management agreement dated 12 January 2019 (the *IMA*), the Fund appointed the IM. However, steps were taken by Total Victory to remove the IM as investment manager. On 1 April 2021, Mr Xiong had received a copy of an undated written shareholders resolution (the *Written Resolution*) signed by Total Victory which was the sole holder of participating voting shares. The Written Resolution noted that the IM had "*previously disposed of the [Fund's] Investment Portfolio and assets without the knowledge or consent of the Board or [Total Victory] in violation of the [Articles] as well as the [IMA].*" It then recorded resolutions that the IMA and the IM's role as investment manager be terminated with immediate effect, that Mr Zhang be removed as a director with immediate effect and that all documents in the IM's custody be transferred to the Fund's (remaining) director. A copy of the Fund's register of directors recorded that Mr Zhang had been removed from his position on 8 March 2021.
8. The petition relied on two grounds. First, section 92(c) of the Companies Act and secondly section 92(e) of the Companies Act:
 - (a). section 92(c) states that a company may be wound up if "*the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up.*"
 - (b). the petition averred that the term of the Fund came to an end on 20 December 2019; that pursuant to the Fund's articles it was to be wound up at the end of the Fund Term and that despite requests from the Petitioner requesting that the Fund take steps to wind down the affairs of the Fund, the Fund had failed to respond or take the necessary action. (c). section 92(e) states that a company may be wound up if "*the Court is of the opinion that it is just and equitable*" to do so. The petition set out two bases on which a winding

up order was sought on this ground.

- (d). first, that the Fund was in breach of its articles and other governing agreements since the Petitioner had not been paid the Fixed Return in respect of Extension Term 1, which should have been paid by the Fund on 20 December 2019 (or should have taken steps to require Total Victory to subscribe for Class D shares, or in default of such a subscription taken steps to sell its shares in Ourgame in order to pay the unpaid Fixed Return out of the proceeds of sale). The petition averred that the Petitioner had on 31 March 2021 been informed by the IM that in fact the Fund had sold 21,151,000 Paperless Shares between 20 January 2021 and 31 March 2021 but it appeared that the proceeds of sale had not been used to pay the outstanding Fixed Return. The IM did not provide further details of the sales although it appeared that the proceeds of sale were held by the Fund's broker Guotai Junan International (*Guotai*).
- (e). secondly, that the Fund had engaged in misconduct and mismanagement such that there was a need for an investigation into the Fund's affairs and the Petitioner had lost trust and confidence in the Fund's management. The misconduct alleged related to the Fund's failure to make proper inquiries concerning the Club Services Transaction and the removal of the IM.
- (f). as regards the alleged failure properly to consider the merits of and to investigate the Club Services Transaction, the Petitioner averred that it was concerned that the entire proceeds of the Club Services Transaction would be subsumed by AEM (and by extension, Ourgame), such that no proceeds would be available for distribution to shareholders (including the Fund). In fact, despite two increases to the Original Purchase Price, the amounts to be spent on the areas and for the purposes identified by Ourgame had been proportionally increased. There had been no explanation as to why this was the case and why AEM would not be distributing the difference between the Original Purchase Price and the Revised Purchase Price ultimately to Ourgame and from Ourgame to the Fund as a shareholder of Ourgame (the Petitioner claimed that Ourgame could expect to receive US\$7.974 million and that the Fund, as a 20.27% shareholder of Ourgame, could expect to receive US\$1.6163 million).

- (g). as regards the termination of the IMA, the Petitioner averred that by purporting to remove the IM and terminate the IMA with immediate effect, the Fund had acted in breach of the IMA. Furthermore, the Petitioner was not satisfied that there had been a proper basis for the termination of the IMA (in circumstances where the IM may have only been taking steps to sell Ourgame shares to enable the Fund to discharge its obligations to the Petitioner). The Petitioner was also concerned as to the justification and reasons for the removal of Mr Zhang as a director. While the Petitioner acknowledged that Total Victory had the right under the articles to resolve to remove Mr Zhang as a director, the Petitioner was once again not satisfied that there had been a proper basis for and was concerned as to the effect of his removal. Mr Zhang's removal had left Mr Xiong (a nominee of Total Victory, which the Petitioner claimed had little or no economic interest in the Fund based on the closing share price of Ourgame as at the date of the petition, and the Petitioner's rights of payment in priority to the other shareholders) in full control of the Fund.
- (h). the Petitioner summarised the basis on which it sought a winding up order on the just and equitable ground as follows in [37] – [39] of the petition:
- “37. *In the circumstances, the Fund has engaged in mismanagement and misconduct forming the basis for the Fund to be wound up on the just and equitable grounds by failing to:*
- (a). comply with its obligations under the Articles, the PPM and the Subscription Agreement with respect to the payment of the Accrued Fixed Return; and*
 - (b). make proper enquiries into the Club Services Transaction and attempting to remove the IM with immediate effect in circumstances where there is no basis to do so. It is necessary for a liquidator to conduct investigations into these issues.*
38. *The directors (including Mr Zhang up to at least 8 March 2021) have breached their duties to the Fund, including their duties to act in the best interests of the Fund, to exercise their powers for the purposes for which they are conferred and to act with skill, care and diligence. It is unlikely that these issues will be remedied while Total Victory and its beneficial owners are directors of other entities within the Ourgame group (Mr Yang is a director and CEO of Primo and Mr Ng is a director and also the Chief Executive Officer of AESE).*
39. *The Petitioner has justifiably lost all trust and confidence in the directors' ability and willingness to manage the Fund's affairs in the best interests of the Fund and its shareholders. It is just and equitable that the Fund be wound up and the*

Petitioner seeks a winding up order in respect of the Fund for the reasons set out herein.”

9. On 15 April 2021 the Petitioner had issued a summons seeking the appointment of joint provisional liquidators. The summons was heard on 27 April 2021. At the conclusion of that hearing, I adjourned the hearing of the summons until 14 May 2021. As a condition to the grant of the adjournment, I required that the Fund provide, and the Fund so offered to provide, an undertaking to preserve the *status quo* pending the further hearing of the summons (since at that point the Petitioner’s primary pressing concern related to the Fund’s decision making with respect to the Ourgame shareholder vote on the Club Services Transaction). The Fund undertook as follows (the **Club Services Transaction Undertaking**):

“that unless agreed otherwise with the written consent of the Petitioner, [the Fund] will not vote in respect of any shareholder resolution proposed by [Ourgame] in respect of a sale of the WPT Business [as defined] (i) before the hearings of the [summons to appoint the joint provisional liquidators] and/or the Summons for Directions (both of which will take place on 14 May 2021); or (ii) unless any such vote is exercised in accordance with the written directions of the Petitioner.”

10. Subsequently, the Petitioner and the Fund agreed the directions to be given for the further conduct of the petition and that the hearing of the summons seeking the appointment of joint provisional liquidators be further adjourned, and a consent order was prepared to record these directions and the adjournment. The Fund also agreed to give additional undertakings which were set out in the consent order dated 14 May 2021 (the **Consent Order**). The relevant parts of the Consent Order are as follows (underlining added):

*“AND UPON the Fund undertaking that (the "**Additional Undertakings**"):*

.....

- (ii). *it will not take any steps, either directly or indirectly, to deal in any way (including by sale, transfer, disposition, mortgage, charge and otherwise) with any asset of the Fund, including but not limited to, the shares held by the Fund in Ourgame (whether certificated or otherwise), including any steps to convert any such shares to or from certificated form, before the determination of the JPL Summons without the Petitioner's prior written consent (such consent not to be unreasonably withheld), save as strictly necessary to meet administrative costs charged by the Fund's securities broker and/or financial institution out*

of the Proceeds in accordance with the second part of paragraph 4 of the Order. For the avoidance of doubt, save as specifically set out in this subparagraph (ii) and/or subparagraph (iii) below, any actions in respect of the SPA and/or the Safe Custody Arrangement do not fall within the scope of this undertaking;

- (iii). *it will not agree the Closing Date under the SPA (as defined therein) before the determination of the JPL Summons without the Petitioner's prior written consent (such consent not to be unreasonably withheld); and*
- (iv). *it will inform the Petitioner in writing if it receives notice of any extraordinary general meeting of Ourgame within 2 calendar days of receiving such a notice and will provide written confirmation to the Petitioner as to how it intends to vote in respect of each resolution at least 7 calendar days prior to any such extraordinary general meeting of Ourgame.*

The terms of the Additional Undertakings are subject to the proviso that the Fund may agree otherwise in writing with the Petitioner or appear before the Court, including on an urgent basis, to apply for a variation or discharge of the aforesaid terms.”

11. Subsequently, the Fund made an application for an order pursuant to section 99 of the Companies Act that it be authorised to enter into an amendment to a share purchase agreement (**SPA**) dated 20 December 2019 (governed by Hong Kong law) between it and Choi Shun Investment Limited (**Choi Shun**) and that the undertakings previously given by it to the Court pursuant to the Consent Order be varied accordingly. Choi Shun is a company controlled by Mr. Li Yangyang (**Mr Li**) who is also the chairman of Ourgame. Under the SPA the Fund had agreed to sell all its shares in Ourgame to Choi Shun with completion to be on 31 March 2020 “*or such other date as agreed by the Parties.*” It appeared that Choi Shun had been unable to complete on 31 March 2020 and the Fund had agreed to defer closing of the sale but the Fund and Choi Shun had failed to agree a revised closing date. No steps appeared to have been taken for over a year to agree a new closing date or complete the SPA but following the presentation of the petition, the Fund had notified Choi Shun of that event (which it considered resulted in a breach of its continuing representations under the SPA) and further negotiations were said to have taken place, which resulted in an agreement, conditional on Court approval, to proceed with and complete the SPA subject to a number of amendments, including the elimination from the sale of the 21,151,000 Paperless Shares which had already been sold by the IM. The validation application was heard on Friday, 11 June 2021 and was vigorously opposed by the Petitioner. Questions arose as to whether the Fund could be required by Choi Shun, as a matter of Hong Kong law, to complete the SPA and whether the sale was at a proper price. Choi Shun had imposed a deadline of 12 noon (PRC time) on 15 June 2021 by which the Fund was to obtain a validation order permitting it to enter into

the documentation for amending and providing for the completion of the SPA (and a copy of an unsigned but agreed amendment to the SPA dated June 2021 (the *SPA Amendment*) was produced for the hearing). In view of the deadline and the consequential need for an urgent decision by the Court, I informed the parties at the end of the hearing that I would provide them with a note of my decision on Monday 14 June 2021, with reasons to follow. On Monday 14 June, I wrote to the parties' attorneys and informed them that I had decided that the validation application should be dismissed. Having carefully considered the Fund's application I had concluded that the Fund was unable to satisfy the Court that a validation order in the circumstances would be in accordance with the purposes of section 99 of the Companies Act or that the Court could properly conclude on the evidence that a validation order would not undermine or frustrate the maintenance of the *status quo* pending the resolution of the petition.

12. Following an inquiry by me as to whether the unsworn evidence relied on by the Fund to date in the proceedings, including at the hearing of the validation application, had subsequently been sworn and filed after the hearing in accordance with the indications given prior to the hearing, I was told that *none* of the Fund's evidence had been sworn. In these circumstances, when the Fund had in fact presented no sworn evidence that could be relied on, the validation application would need to be based only on the Petitioner's evidence so I decided that there was no justification for the preparation and delivery of a written judgment to elaborate on the brief explanation I had already given for my decision in my email to the parties' attorneys on 14 June 2021.

13. I would however mention the following brief points to outline the main reasons for that decision. The unsworn evidence filed with respect to the Fund's agreement to waive the right to require that closing of the SPA take place on 31 March 2020 gave rise to serious concerns. By agreeing to extend the closing date indefinitely and failing to put in place a mechanism by which the Fund could (easily) require and bring about closing, the IM and the Fund's board put the Fund (and the Fund's shareholders) at risk. There was no evidence to show that the IM and the board had considered the impact of the waiver of the completion date on the Fund's position. Furthermore, the unsworn evidence filed with respect to the steps taken by the Fund after agreeing to the waiver of the 31 March 2020 closing date also gave rise to serious concerns. It appeared that the Fund took no steps to fix a new closing date, or at least there was no evidence (sworn or unsworn) of attempts to agree a new closing date, for over a year. This only happened

after the filing of the petition. This created the clear impression that the IM and the Fund's board showed a complete lack of concern for and failure to respect the interests and rights of the Petitioner under the corporate constitution. These concerns in my view related and were relevant to the allegations in and basis of the petition. One of the Petitioner's core complaints concerns the Fund's unjustifiable and improper delay in implementing the wind down. Even though the petition does not refer to the SPA, the complaints made in it were wide enough to cover the allegations made on the validation application regarding the Fund's failure to close the SPA in accordance with the original timetable or shortly thereafter. I accepted that since the sale of the Ourgame shares was the critical step in the winding up process, it could be said (as the Fund had asserted) that by entering into the amendment to the SPA and thereby closing the SPA, the Fund was only acting as required by the corporate constitution and as required by the Petitioner. Doing so would facilitate and expedite the winding up process and the payment of the sums to which the Petitioner was entitled (and thereby avoid the Petitioner being locked into the Fund for any longer). However, in deciding whether to validate the transaction proposed by the Fund, the Court in my view needed to consider the circumstances surrounding and the Fund's conduct in relation to the SPA and its effect on a future winding up of the Fund and the rights and interests of the Fund's shareholders, in this case in particular the Petitioner and Total Victory. The Petitioner's complaint was that the sale was no longer at a proper price (or on arm's length terms) such that the Fund and the Petitioner would be damaged if it was allowed to proceed, at least before independent Joint Official Liquidators had been given the opportunity to form a view as to whether it really was in the interests of the Fund and its shareholders to proceed in all the circumstances. On the basis of the evidence filed by the Petitioner, I was satisfied that the Petitioner's grounds for opposing the order should be accepted and that the test for deciding whether to grant a validation order, as laid down by the authorities (in particular in the judgment of Moses JA in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* [2020 1 CILR 435]), was not satisfied. As I explained in my email of 14 June 2021, I had concluded that the Fund was unable to satisfy the Court that a validation order in the circumstances would be in accordance with the purposes of section 99 of the Companies Act or that the Court could properly conclude on the evidence that a validation order would not undermine or frustrate the maintenance of the *status quo* pending the resolution of the petition. While it would be usual for the Court to validate completion of a binding contract entered into before the presentation of the petition where specific performance would be the normal remedy available or likely to be available to

the purchaser, the Hong Kong law evidence of both parties showed (and the parties accepted) that the SPA did not impose an enforceable contractual obligation on the parties to agree a new closing date (so that the Fund could not be required to agree a new closing date). Furthermore, the valuation evidence indicated that there were sufficient grounds for concluding that it might be possible to sell the shares for a higher price.

14. On 30 June 2021, the Fund terminated the instructions of its Cayman attorneys, Kobre & Kim, who had previously appeared at the hearing of the validation application, and they then applied, and I granted them permission to come off the record, by order dated 2 July 2021.

15. Following the dismissal of the application for a validation order, the Petitioner became aware of certain developments that caused it to renew its application for the appointment of provisional liquidators. Its application was heard on 2 July 2021. An EGM of Ourgame had taken place on 30 June 2021 to consider and approve the Club Services Transaction. Prior to that meeting, the Petitioner had informed the Fund that it directed the Fund to vote against the resolution to approve the Club Services Transaction. As noted above, pursuant to the Club Services Undertaking, the Fund had undertaken not to “vote in respect of any shareholder resolution proposed by [Ourgame] in respect of a sale of the WPT Business [as defined] (i) before the hearings of the [summons to appoint the joint provisional liquidators] and/or the Summons for Directions (both of which will take place on 14 May 2021); or (ii) unless any such vote is exercised in accordance with the written directions of the Petitioner.” The Fund, through its then Cayman attorneys, had indicated in writing that the Fund would comply with the Club Services Undertaking by either voting in accordance with the Petitioner’s directions or by abstaining. However, from the public and certain other information available to the Petitioner, it appeared that the Fund must have voted in favour of the resolution in breach of the Club Services Undertaking. The information relied on and the explanation for this conclusion were set out in the Fourth Affidavit of Qian Zhiyi sworn on behalf of the Petitioner. The Fund did not respond to the application, instruct new attorneys, or seek to rebut the allegation that it was in breach of the Club Services Undertaking. Nor had it sought to explain why it had failed to file sworn copies of any evidence on which it had relied in the proceedings, including at the hearing of the validation application, or taken any steps to put right its failure to do so (I would note that Kobre & Kim attended as observers the hearing of the Petitioner’s application and Mr Ulrich Payne confirmed that his former clients had confirmed to his firm

that their unsworn affirmations would be sworn and filed and that he would not have relied on them in the absence of such a confirmation and an understanding that the affirmations would be properly sworn). It appeared that the Fund and its directors/management had participated in the validation application proceedings on an improper basis and, having failed to persuade the Court to grant the application, had decided to disengage and ignore any further proceedings and the obligations assumed in relation to the earlier proceedings. It also appeared that the Fund's board might be taking action in relation to the Fund's only assets, the Ourgame shares, which might be damaging or prejudicial to the Fund and acting without proper regard to their duties as directors. I was satisfied that in all the circumstances the Petitioner had demonstrated that the grounds set out in section 104(2) of the Companies Act were made out. I was satisfied that there was a prima facie case for the making of a winding up order (in particular on the basis of section 92(c)) and that the appointment of provisional liquidators was necessary in order to prevent mismanagement and misconduct on the part of the Fund's directors.

16. Following the JPLs' appointment, they gave notice of their appointment to Ourgame (on 3 July 2021) and commenced their investigation of the position of the Fund. On 7 July 2021 (only one week after Ourgame's most recent general meeting, which had taken place on 30 June 2021 and shortly after receiving notice of the JPLs' appointment), the Ourgame board gave notice of the requisitioning of a further EGM to be held on 28 July 2021, in Beijing, this time for the purpose of considering and passing an ordinary resolution to give the board of Ourgame authority to issue further shares in Ourgame. The notice stated that the ordinary resolution proposed was to the effect that the directors be given a general mandate during the Relevant Period (as defined) to allot, issue and deal with additional shares in Ourgame not exceeding twenty per cent of the number of issued shares at the date on which the resolution was passed (save that this limit was not to apply to shares issued pursuant to a rights issue, the exercise of options under a share option scheme, the exercise of share warrants or conversion rights and any scrip dividend scheme providing for the issue of shares in lieu of a dividend). The Relevant Period was the period from the passing of the resolution to the earlier of the next Annual General Meeting (*AGM*), the expiration of the period within which the next AGM was required to be held and the date of any revocation or variation by a subsequent ordinary shareholders' resolution of the authority given by the resolution.

17. As part of their inquiries concerning the Fund's assets and in order to be in a position to vote the Fund's Ourgame shares at the EGM, the JPLs contacted Ourgame and Ourgame's Hong Kong share registrar, Computershare HK Investor Services Ltd (*Computershare*). On 13 July 2021, the JPLs received a letter from Computershare in which it suggested that the Fund was registered as holding only 68,038,189 shares. On the following day (14 July 2021), the JPLs sent an email to Computershare enclosing the share certificates for 200,502,555 shares believed to be held by the Fund and requesting clarification. In addition, during a telephone call on 14 July 2021 between a member of the JPLs' staff and a representative of Computershare, Computershare informed the JPLs that the 68,038,189 shares had been voted at the 30 June 2021 EGM, and AGM, of Ourgame's shareholders.
18. Computershare's responses caused serious concerns to the JPLs who urgently made further inquiries. They discovered that an additional and previously unknown transfer of a substantial volume of the Fund's shares in Ourgame had apparently been made. One of the JPLs, Mr Kennedy, explained in his Third Affidavit (*Kennedy 3*) sworn on 26 July 2021, that it appeared that on 31 March 2021, the Fund had transferred (the *Alleged Transfer*) a further 132,464,366 shares in Ourgame (the *Subject Shares*) (being a 12.3% shareholding in Ourgame) to a transferee whose identity was initially unknown to the JPLs. The JPLs' initial review of the Fund's accounts did not indicate that the Fund had received payment for such a transfer. The JPLs had reviewed the custodian statements of the Fund then available to them for March, April, May and June, and found no indication that any consideration was received by the Fund for the Alleged Transfer. At the date of the Alleged Transfer the trading price of Ourgame's shares was HKD\$0.59 per share so that the market value of the Subject Shares was HKD\$78,153,975.90 (being USD\$10,050,601.30).
19. As I have noted, on 19 January 2021, the Fund held 221,653,555 ordinary shares in Ourgame, which represented a 20.57% shareholding. There are two other significant shareholders in Ourgame namely Glassy Mind Holdings Limited (*Glassy Mind*) which the JPLs understand holds 26.97% of Ourgame's shares and CMC Capital Partners (*CMC*), which the JPLs understand holds 10.91% of Ourgame's shares. As far as the JPLs are aware, whilst the interests of these two shareholders and the Fund may align from time to time, there was no material connection between them or commonality of control or influence. However, the JPLs considered that many of the other shareholders, save for the shares held by independent members of the public, were

held by parties connected with Ourgame's management. They considered that Mr Li, Ourgame's chairman and the controller of Choi Shun, was aligned with Total Victory and Mr Liu Jiang (**Mr Liu**). Mr Liu was also a director of Ourgame and acted on behalf of the Class C shareholders in the Fund. He also had an interest in a significant shareholder of Ourgame. The JPLs noted, for example, that on 20 May 2021, Mr Liu had filed a notice of interest in the shares with the Hong Kong Stock Exchange which stated that he had become interested in 63,679,864 (5.91%) shares in Ourgame through his 100% shareholding in a BVI entity called China Changjian Rivert Ltd (**China Changjian**). Alpha Lion Investment Limited sold its 100% shareholding in Wise Empire Holdings (which holds the 63,679,864 shares in Ourgame) to China Changjiang. It was for this reason that the JPLs were concerned (as was the Petitioner) that arrangements had been made between or coordinated action was being taken by the Ourgame shareholders connected with management to obtain voting control of Ourgame for their own benefit (and to the prejudice of the Fund and the Petitioner) by diluting the shareholding and voting power of the Fund, Glassy Mind and CMC (including by obtaining control or ownership of at least a sufficient part of the Fund's Ourgame shares so as to reduce the combined holding of the Fund, Glassy Mind and CMC to below 50%).

20. On 19 July 2021, the JPLs received a letter from Maples which stated as follows (underlining added by me):

*"According to the register of shareholders of the [Fund] maintained by [Ourgame]'s Hong Kong Share Register, Computershare HK Investor Services Ltd, (the "**HK Register of Members**") as of 15 July 2021, and the principal share register of the Company maintained in the Cayman Islands by [MFSJ] (the "**Principal Register of Members**") as of 16 July 2021, the Fund held 68,038,189 shares in [Ourgame].*

In relation to your queries regarding share certificates 040 to 043, [Ourgame] confirms that a Deed Poll dated 10 March 2021 was received by [Ourgame] from the Fund which claimed that those shares certificates had either been lost or accidentally destroyed and, as requested by the Fund, on 11 March 2021 new certificates 046 to 049 were issued to the Fund instead. [Ourgame] confirms that it is not in possession of the originals of the cancelled certificates.

[Ourgame] confirms that an instrument of transfer dated 31 March 2021 was received by [Ourgame] pursuant to which the Fund transferred the interest represented the interest represented by certificates 046 to 049 to another entity and the Principal Register of Members was updated accordingly. "

21. Mr Kennedy in Kennedy 3 noted that the Alleged Transfer was inconsistent with the statements made by the Fund (through its directors and/or attorneys) to the Court and the Petitioner in connection with the Petitioner's application for the appointment of the JPLs as to the Fund's legal and beneficial ownership in the Subject Shares after 31 March 2021. By way of example, in paragraph 13 of Mr Xiong's (unsworn) First Affirmation dated 26 April 2021, filed in opposition to the appointment of the JPLs, he stated that *"in an email dated Friday, 23 April 2021, the Fund's broker provided the Fund with a snapshot of the assets in the Fund's security account ... This shows 68,038,189 Ourgame shares held electronically ... (dated 23 April 2021)). This is consistent with the account statement dated 31 March 2021 provided to me by the former Investment Manager [a document dated 4 April 2021]). Approximately 132,464,366 additional Ourgame shares are held by the Fund in paper form ... (share certificates)." Furthermore, the recitals to the consent order entered into by the Petitioner and the Fund on 14 May 2021 recorded the Fund's confirmation given to the Court that it *"beneficially and legally held the [Subject Shares]"* and that the share certificates in respect of those shares were (insofar as the directors were aware) held in the possession of Guotai and Mr Xiong's Third Affidavit (also unsworn) dated 7 May 2021 had stated (at [24]) that *"Choi Shun has indicated that it is still waiting to close the SPA in respect of the Ourgame shares still held by the Fund (i.e. 200,502,555)." In addition, Ourgame had made a public disclosure to the market on 31 March 2021 stating that the Fund's shareholding in Ourgame had reduced from 221,653,555 (which represented a 20.27% shareholding in Ourgame) to 200,502,555 (a 18.6% shareholding in Ourgame) and the JPLs were aware that Ourgame had also issued a circular in relation to its annual general meeting (**AGM Circular**) on 31 May 2021 in which it stated that the Fund was interested in 200,502,555 shares of Ourgame as of 25 May 2021.**
22. The JPLs wrote to Ourgame and Maples on 22 July 2021 and sought an urgent response to their request for further information concerning the Alleged Transfer, noting that they considered that the EGM should be postponed to ensure that any vote at the EGM properly represented the legitimate interests of all of Ourgame's shareholders and did not become irregular. In addition, the JPLs set out their concerns in relation to the AGM Circular. On 23 July 2021 Walkers wrote to Maples stating as follows:

"The directors of your client will be aware of the fiduciary duties that they owe to Ourgame. They will also be aware of the duties owed by Ourgame to its shareholders

under the company's constitution and its articles of association. In the event that the EGM takes place on 28 July 2021 and/or the resolution is purportedly passed in the circumstances in which the irregularities relating to the Alleged Transfer have not been resolved, Ourgame and its directors will have acted in breach of their respective obligations to the detriment of the Fund in such a way as to cause the Fund (and ultimately its creditors) irreparable harm. By contrast, we note that there would be no prejudice to your client were it to agree to adjourn the EGM pending the resolution of this issue."

23. The Walkers letter went on to request that Ourgame provide the documents and information previously requested by the JPLs together with written undertakings that it (and its directors) would postpone the EGM for an initial period of 30 days to allow the JPLs sufficient time to investigate the Alleged Transfer; take no steps to proceed with any meeting or pass any resolution of its shareholders prior to the JPLs having concluded their investigation into the Alleged Transfer; and co-operate fully with the JPLs in their capacity as officers of the Court in respect of their investigation into the Alleged Transfer.
24. Shortly before Kennedy 3 was sworn, the JPLs received a letter from Eric Chow & Co., the Hong Kong legal advisers to Ourgame, which disclosed for the first time the identity of the apparent transferee of the Subject Shares. Mr Kennedy in Kennedy 3 noted that this letter stated, *inter alia*, the following:
- “(a). *that the Transferee of the Subject Shares was Powerful Warrior Limited. No further information was provided with regard to this entity;*
 - (b). *the instrument of transfer for the Alleged Transfer was received by Ourgame in early April 2021;*
 - (c). *the Alleged Transfer was subsequently approved by the Ourgame board on 6 April 2021;*
 - (d). *that if the JPLs require[d] further documentation from Ourgame, [they] should bring documents evidencing [their] authority to request such documents to Ourgame's offices in Beijing;*
 - (e). *an explanation regarding the misleading declaration of shareholdings in the AGM Circular;*
 - (a) *that contrary to the conversation that the JPLs had with Computershare on 14 July ... the Fund did not attend the EGM/AGM on 30 June 2021 and did not vote the 68,038,189 shares that it held in Ourgame;*
 - (b) *that Ourgame will not accept any voting instructions in relation to any of the*

shares registered under the name of the Fund;

- (c) *that the EGM scheduled for 28 July 2021 [would] not be postponed as it [was] not procedurally possible under the articles of association of Ourgame to do so; and*
- (d) *that a postponement [was] not consistent with the interests of Ourgame and its shareholders and that there [was] no proper reason to postpone the EGM.”*

25. Eric Chow & Co said that while Ourgame was of the view that the issues raised by the JPLs regarding the share transfer was an internal matter between the Fund, its prior management, the JPLs and potentially Powerful Warrior Limited (***Powerful Warrior***) in relation to which Ourgame had no information and took no position, it was prepared to allow the JPLs to inspect the documents they wished to examine at Ourgame’s offices in Beijing on the basis that Ourgame considered that it was in the best interests of itself and its shareholders to do so. They also said that while the 2020 Annual Report had stated that the Fund was interested in 221,653,555 shares, this was based on a disclosure of interest form (***DI Form***) filed by the Fund on 9 January 2018, which had been the last DI Form filed by the Fund before the end of the financial year on 31 December 2020. They said that the Annual report was only required to report matters that occurred within the relevant financial year (so that the 31 March 2021 transfer was not required to be referred to) and was accurate so far as the Ourgame directors were concerned. Similarly, the disclosure in the AGM circular, which referred to the Fund holding 200,502,255 shares, was based on the DI Form filed by the Fund on 1 April 2021 and was so far as the Ourgame directors were concerned accurate. It had been the Fund’s responsibility to ensure that the DI Forms were correct. Furthermore, the obligation under section 310(a) of the Hong Kong Securities and Futures Ordinance, which required a person acquiring an interest in or ceasing to be interested in voting shares in a listed company in the circumstances specified in section 313(1) of the ordinance, was on the relevant shareholder to make the required disclosures.

26. Also on 26 July 2021, the JPLs received a letter from Maples (which was carefully reviewed during the hearing). Maples stated that Ourgame had no dispute with the JPLs. It had not been a party to the transfer to Powerful Warrior and it was not the role of any company, let alone a widely held and listed company, to police transactions between its shareholders. The transfer appeared from the documents presented to Ourgame to be legitimate and if the JPLs wished to

challenge it they were at liberty to do so but must direct that challenge to Powerful Warrior and not Ourgame. Ourgame was obliged to act in accordance with its articles and register of members. Registered members such as Powerful Warrior were entitled to attend and vote at general meetings and Ourgame was unable to prevent Powerful Warrior from doing so simply on the basis of concerns expressed by the JPLs regarding the transfer. Furthermore, once a general meeting had been convened and notice had been duly given by the board, the board was unable as a matter of law to postpone the meeting as the JPLs had suggested and requested. While an adjournment would be possible, that required a resolution of the shareholders at the meeting. Maples also stated, in response to the JPLs' allegation that the passing of the proposed resolution would cause irreparable harm to the Fund, that there was no suggestion that if the board was given the power to issue further shares that it would be exercised otherwise than in a way which was *bona fide* in the best interests of Ourgame. They rejected the suggestion that the JPLs (on behalf of the Fund) might have any claims against Ourgame and confirmed that Ourgame's directors were aware of their fiduciary duties, which did not extend to investigating the merits of share transfers by shareholders. Maples requested that the JPLs draw their letter to the attention of the Court upon any application by the JPLs.

27. Following the issue and having been given notice of the Application, on 27 July 2021, Maples wrote to Walkers and stated as follows:

“We do not currently hold instructions to attend this morning's hearing. You will appreciate that no disrespect to the Court or to your clients is intended but it simply has not been possible for us to properly consider and take instructions in connection with the large amount of evidence which was served yesterday afternoon (let alone to prepare a response to it).

You should proceed (as we understand you had intended to proceed) on the basis that this hearing is ex parte and we trust that you and your clients will diligently discharge your respective duties of full and frank disclosure at the hearing. In particular, and without seeking to limit what that requires, we ask that you expressly deal with the points raised in our and our client's Hong Kong counsel's letters dated 26 July 2021, which letters sought to respond to all of the recent correspondence from your clients and to set out the position of the Company. In that regard, we would suggest that the selective treatment of that correspondence in Mr Kennedy's affidavit is not adequate.

Further, it should be noted that an authorised representative of your clients attended the offices of our client in Beijing this afternoon to inspect and receive copies of the following documents:

- (a). *a complete and unredacted copy of the deed poll dated 10 March 2021;*
- (b). *a complete and unredacted copy of the meeting of the board of directors of Ourgame held on 11 March 2021 concerning the reissue of new share certificates of the Fund;*
- (c). *a complete and unredacted scanned copy of the share certificates numbered 046 to 049;*
- (d). *a complete and unredacted copy of the instrument of transfer dated 31 March 2021;*
- (e). *a complete and unredacted copy of the meeting of the board of directors of Ourgame held on 6 April 2021 concerning the instrument of transfer referred to at (d) above and the registration of the interest in the name of Powerful Warrior; and*
- (f). *a complete and unredacted scanned copy of the share certificate numbered 050.*

All our client's rights are fully reserved, including the right to seek to set aside any ex parte order which might be granted.”

28. During the hearing of the Application, the JPLs explained that they were still in the process of reading and considering the documents to which they had only very recently been given access by Ourgame. They said that their initial observations were (and this was confirmed immediately after the hearing in Mr Kennedy’s Fourth Affidavit) that the letter sent to Ourgame by the Fund stating that the share certificates had been lost had been signed by Mr. Xiong; the instrument of transfer was executed by Mr. Zhang Jian, the director appointed on 29 March 2021; the stated sale consideration set out in the Alleged Transfer was HK\$39,739,309.8, or HK\$0.30/share, representing a 51% discount to the closing price of HK\$0.59/share as at 31 March 2021 and that Mr Li had been aware of the Alleged Transfer as he had signed the Ourgame board resolution dated 6 April 2021. Furthermore, according to the instrument of transfer, Powerful Warrior was a BVI entity.
29. The JPLs considered that, on the evidence available to them, the Alleged Transfer was subject to challenge and confirmed that their intention was to proceed with proceedings to challenge the Alleged Transfer. While the precise reasons for and circumstances surrounding the Alleged Transfer remained to be fully established, it appeared that it had been entered into surreptitiously, in highly suspicious circumstances, without proper consideration and without being for the

benefit of the Fund. The JPLs suspected that it was likely that it had been entered into to assist those shareholders of Ourgame who were aligned with Ourgame's management by removing the majority shareholding and ability to vote down an ordinary resolution of the group of shareholders comprising Glassy Mind, CMC, and the Fund. They considered that the proposed resolution was probably part of the arrangements between the shareholders aligned with Ourgame's management and consequential upon the Alleged Transfer and designed to give Ourgame's directors the power to further dilute the shareholdings of Glassy Mind, CMC, and the Fund. In these circumstances, the JPLs considered that they must apply to Court for injunctive relief. They considered that absent an order from the Court, the proposed resolution would be passed and the position of the Fund seriously prejudiced and irremediably harmed.

The relief sought by the JPLs

30. The Application sought the following orders:

- (a). an order that the EGM be adjourned until such time as the dispute concerning the Alleged Transfer (the *Share Dispute*) is resolved, or until further order of the Court.
- (b). an order (in the form of a mandatory injunction) requiring Ourgame (acting through the chairperson of the EGM) to adjourn the EGM until such time as the Share Dispute is resolved.
- (c). an order (in the form of a prohibitory injunction) preventing Ourgame from taking certain steps at the EGM to bring about the passage of the proposed resolution.
- (d). an order (in the form of a prohibitory injunction) preventing Ourgame from exercising powers granted by the resolution (if passed) to issue and allot shares pending the resolution of the Share Dispute.
- (e). an order (in the form of a prohibitory injunction) preventing Ourgame from taking steps to assist with or procure the registration of the Subject Shares pending the resolution of the Share Dispute.

31. The JPLs filed in draft and undertook to issue as soon as is practicable a writ to which Ourgame and its current directors were joined as defendants (the directors are the Second to Eight Defendants) and which sought the following relief:

(a) as against Ourgame, a declaration that:

“the following acts/failures to act are, will or would be an abuse and improper exercise of the powers of the First Defendant's directors (Defendant's 2-8) giving rise to an unlawful and improper breach by the First Defendant of duties owed to the Plaintiff under the company's constitution and/or its articles of association:

- (a) *the convening of the Extraordinary General Meeting of the First Defendant to be held at 5pm (Hong Kong time) on 28 July 2021 (the "EGM") by notice dated 7 July 2021 (the "Notice") for the purpose of tabling ordinary resolutions set out in the Notice (the "Resolutions"); and/or*
- (b) *the failure to adjourn or take steps to adjourn the EGM at the request of the Plaintiff pending the determination of the dispute as to (i) the identity of the owner of the legal and beneficial title of 132,464,366 shares in the First Defendant with share certificates numbered 046 - 049 (the "Subject Shares") (ii) the propriety of the alleged transfer that took place on 31 March 2021 and/or (iii) the party lawfully entitled to exercise voting rights or direct the exercise of the voting rights in the same at any general meeting of the First Defendant (the "Share Dispute"); and/or*
- (c) *any steps taken to allow a poll to be taken at the EGM (if not postponed) regarding the Resolutions or any other matter which may bring about the dilution of or otherwise interfere with the rights of the Plaintiff in respect of its shareholding in the First Defendant pending the resolution of the Share Dispute; and/or*
- (d) *any steps taken to admit or otherwise accept any proxies or votes for the purpose of voting on the Resolutions or any other matter which may bring about the dilution of or otherwise interfere with the rights of the Plaintiff in respect of its shareholding in the First Defendant pending the resolution of the Share Dispute; and/or*
- (e) *any steps taken to allot, issue or deal with additional shares of the First Defendant pending the resolution of the Share Dispute or at all; and/or to make or grant offers, agreements and options which would or might require the exercise of such powers; and/or*
- (f) *any steps taken or the procurement of the taking of any steps to register or to assist with the register of the transfer of the Subject Shares to any party other than the Plaintiff, or to otherwise deal with the Subject Shares.*

- (b). a declaration that any allotment, issue or dealing with additional shares in the First Defendant, and/or any steps taken by the First Defendant to make or grant offers, agreements and options which would or might require the exercise of such powers, pending the determination of the Share Dispute, would be unlawful and improper and therefore invalid
- (c). the relief claimed in (a) and (b) was sought by the Fund on the basis that it claimed to have a personal right *qua* shareholder of Ourgame to enforce Ourgame’s obligations to it under Ourgame’s articles and corporate constitution (in reliance on my judgments in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* (unreported) FSD 161 of 2018 (NSJ) and FSD 93 of 2019 (NSJ) dated 6 April 2020 (*Tianrui*)).
- (d). as against the Second to Eighth Defendants, a declaration that the actions listed in (a) – (f) in sub-paragraph (a) above will or would constitute or give rise to a breach by the Second to Eighth Defendants of their fiduciary duties to Ourgame. This relief was claimed on the basis that the Fund could bring a derivative action against Ourgame’s directors.
32. The draft order filed by the JPLs included a cross-undertaking in damages to be given by the Fund in the following terms:
- “AND UPON the Plaintiff giving an undertaking that, if the Court later finds that this Order has caused loss to the Defendant, and decides that the Defendant should be compensated for that loss, the Plaintiff will comply with any order the Court may make, provided that any order requiring the Plaintiff to compensate the Defendant shall be limited to the assets available in the Plaintiff’s estate”*
33. The JPLs submitted that the requirements for interim relief were well-known and set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and restated in the context of mandatory injunctions in *National Commercial Bank Jamaica v Olint* [2009] 1 WLR 1405, [17] – [20]. It was necessary first to demonstrate that, as regards the Fund’s underlying claims, there was a serious issue to be tried. Secondly, the Court must consider whether if the Fund was successful at trial, an award of damages would be an adequate remedy. Thirdly, the Court must consider whether if Ourgame was successful at trial damages under the cross-undertaking would be an

adequate remedy. Fourthly, the Court must consider the balance of convenience and seek to take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

34. The JPLs noted that *Olint* (a decision of the Privy Council) made it clear that the test to be applied where mandatory or prohibitory injunctions were sought was the same and the fact that a mandatory injunction was sought will be taken into account when considering the balance of convenience and the potential for an additional burden on a respondent when complying with the injunction. The JPLs said that there were two key planks to the claims underlying the Fund's application for declaratory relief namely, first that Ourgame ought to have postponed, or agreed to adjourn the EGM in order to allow time for the Share Dispute to be resolved and secondly to the extent that Ourgame had refused to postpone, or agree to adjourn the EGM pending determination of the Share Dispute there was a serious issue to be tried as to whether that refusal had been given by the directors of Ourgame for an improper purpose and in such a manner as to cause the Company to breach its obligations to the Fund under the company's constitution and the articles of association. There was also a serious issue to be tried as to whether that refusal had been given by the directors in breach of their fiduciary duties to the Company and whether any further steps that might be taken by Ourgame which may have the effect of improperly diluting the Fund's shareholding or otherwise interfering with the Fund's rights as a shareholder would be the result of breaches by the directors of their fiduciary duties.
35. The JPLs submitted that there was a serious issue to be tried as to its personal claims against Ourgame in the present circumstances. The actions of the directors identified in the writ would involve the issue of shares for an improper purpose directed at and in order to dilute the shareholding of the Fund and thereby a breach of Ourgame's articles. The JPLs argued that there was a serious issue to be tried, based on the facts currently known and evidence presented, as to whether these acts or omissions were part of a course of conduct effected by various parties connected with and including Ourgame's directors for the purpose of bringing about a dilution of the Fund's shares and to reduce the negative control rights of the Fund (when voting in line with the two other significant independent shareholders, Glassy Mind and CMC).
36. The JPLs argued that a member was entitled to commence proceedings in its personal capacity where the right being enforced was a personal right conferred on the member *qua* shareholder of the company and the matter that the shareholder was complaining about was not merely a

procedural irregularity (see *Edwards v Halliwell* [1950] 2 AER 1064 at 1066-1069 and *Gower Principles of Company Law (8th Ed)* at [16-22]). The JPLs recognised that this was a developing area of the law with conflicting first instance decisions but submitted the latest and most authoritative decision, which they considered should be preferred, was my judgment in *Tianrui* (and noted that this judgment was subject to an appeal that would be heard by the Court of Appeal in November) and that it was clear that there was clearly a serious issue to be tried as to the existence of a personal claim.

37. The JPLs also submitted that it was trite law that directors owed fiduciary and other duties to their company including the duties to avoid conflicts of interest and to act for proper purposes. To the extent that the directors act in breach of those duties, a claim will lie against them by the company and that claim may be brought by an affected shareholder by way of a derivative action (see GCR O15, r12A). The JPLs acknowledged that permission would be required to continue such a claim upon the director defendants filing a notice of intention to defend (GCR O15, r 12A(2)) but permission was not required at the interlocutory stage (GCR O15, r 12(6)).

38. The JPLs also argued that the Court had jurisdiction to order that a meeting of shareholders be adjourned by directing the chairman of the meeting to exercise his or her residual power to adjourn the meeting in reliance in particular on the judgment of Mr Justice Zacaroli in *Findmyclaims.com Limited v Graham Andrew Howe, Susan Playle, Aaron Playle* [2018] EWHC 1833 (Ch). This case involved an application for an interim injunction to restrain the first and second respondents from acting as or being held out as directors of the company. The first respondent alleged that he was a 2/3 shareholder in the company. A board meeting was convened at which the board resolved that the first respondent had never been a shareholder and an EGM was requisitioned for the purpose of considering resolutions for the appointment of the first and second respondents as directors. The respondents attended the EGM and the issue of their entitlement to vote was raised. The first respondent was told by the chairman that he was not a shareholder of the company and consequently that he was not entitled to attend and vote at the meeting. He refused to leave the meeting and the chairman declared in the circumstances he would not allow the business to proceed. At this point the proxy for the second respondent intervened and declared the meeting open. He proposed the appointment of a new chairperson and, together with the first respondent installed the third respondent as chairperson (with the first respondent voting as a shareholder, despite the question regarding his entitlement to vote). The

other shareholders protested that the votes were invalid. The first and third respondents and the second respondent's proxy purported to pass resolutions for the appointment of the first and second respondents as directors. The company argued that where the sense of the meeting could not be obtained, the chairman has a common law discretion not to continue with the meeting and in this case the sense of the meeting could not have been obtained, given that the first respondent was claiming to be a shareholder, unless and until his entitlement to vote as a shareholder had been ascertained. Zacaroli J granted the injunctions and said as follows (emphasis added by the JPLs):

"In my judgment, although this case is clearly not on all fours with Byng and it is at least arguable it does not fall within the exceptional residual power as described in that case, I consider that it is sufficiently arguable that, on a proper reading of the Vice-Chancellor's judgment, the power extends to circumstances where there is no practical utility in continuing with the meeting because the views of the meeting could not be obtained without the prior question as to who was entitled to exercise votes, whose voice was determinative, being resolved. That is principally on the basis that the purpose behind the power expressed in the Byng case is to enable the intentions of the persons entitled to vote at the meeting to be ascertained in respect of the resolutions proposed. In circumstances where, first, there is a clear dispute as to whether someone has a swing vote and, second, in the absence of that vote there would be a deadlock, it seems to me that there would have been no point in going on to put the resolutions to the meeting."

39. As regards the balance of convenience, the JPLs noted that the Privy Council in *Olint* had summarised some of the potentially relevant considerations as follows at [18]:

"Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

40. The JPLs submitted that it was plain that damages would not be an adequate remedy in the present case in the event that (a) the Alleged Transfer was void, or voidable and/or (b) the EGM had been wrongly convened, and the shares are wrongly voted by Powerful Warrior at the EGM. Further, given the extensive list of claims against additional parties that the JPLs may have to investigate, the balance of convenience weighed in favour of granting the injunction to protect the Fund's wider rights. In addition, unusually in this case, the consequences on third parties will be

significant since the two significant, independent shareholders, CMC and Glassy Mind will be prejudiced and there will be prejudice to Ourgame itself (*qua* company) if it transpires that Powerful Warrior is not a valid shareholder (or for whatever reason does not have the power to vote the shares in question). The JPLs noted that both CMC and Glassy Mind had written letters confirming that they supported the Application.

Discussion

41. As I explained during the hearing, it seemed to me that there were three distinct aspects to the JPLs' complaints and claims. First and foremost, there was the challenge to the Alleged Transfer. This involved a claim against Powerful Warrior. Secondly, there was the challenge to reliance being placed on the Alleged Transfer and in particular any attempt by Powerful Warrior to exercise rights as a shareholder in reliance on the Alleged Transfer, including exercising the right to attend and vote at the EGM (or any other general meeting of Ourgame's shareholders). Thirdly, there was the challenge to the actions of the Ourgame board.
42. The Application was not directed at and did not seek to restrain the actions to be taken by Powerful Warrior in reliance on the Alleged Transfer or Ourgame's acceptance and treatment of Powerful Warrior as a member of Ourgame for the purpose of the EGM (although it did seek an order preventing Ourgame from taking steps to assist with or procure the registration of Powerful Warrior as a member in respect of the Subject Shares, but this relief was now moot since Powerful Warrior had already been so registered) but instead was directed at the holding, conduct of and decision making at the EGM and the exercise of the powers granted to the Ourgame board by the proposed resolution, if passed. The Application, as I have noted, sought an order directing that the EGM be adjourned, and preventing Ourgame from taking steps at the EGM to bring about the passage of the proposed resolution and an order preventing Ourgame from exercising powers granted by the resolution (if passed) to issue and allot shares pending the resolution of the Share Dispute.
43. The difficulty with this approach, in my view, was that the evidence of wrongdoing by the Ourgame board was, at this stage limited and, in some respects, circumstantial. Furthermore, the relief sought, in seeking to prevent and interfere with the holding and conduct of a meeting of shareholders of a listed company was wider and more extensive than was necessary to achieve

the legitimate purpose which was justified by the JPLs' claims. Requiring the EGM to be adjourned would impact on all Ourgame's shareholders, some of whom were not implicated in the wrongful conduct asserted by the JPLs. I accept that there are grounds for concluding that there has been a concerted course of conduct and a scheme involving various parties including some of the directors of Ourgame and those aligned with them to exercise and maintain control of Ourgame and remove the Fund's, Glassy Mind's, and CMC's combined ability to vote down ordinary resolutions. I also accept that there are grounds for concluding that the proposed resolution is the latest step in the process of implementing that scheme, being responsive to the appointment of the JPLs and the risk that the Alleged Transfer would be challenged. But at this stage these conclusions are based on circumstantial evidence, inference, and limited detail. The allegations of a concerted course of conduct are not particularised. It is unclear who exactly is a party to the course of conduct and in what capacity and what exactly the individuals concerned are said to have done or agreed. Nor is there evidence of acts which clearly demonstrate a breach of duty (such as the transfer of the Subject Shares at an undervalue and without a proper benefit to the Fund). In the absence of such evidence, it seemed to me that it would be wrong to grant injunctive relief which prevented the EGM from proceeding. The claims based on alleged breaches of duty by the Ourgame board were insufficiently particularised to establish a serious issue to be tried with respect to the claims in the draft writ based on the improper convening of the EGM, the failure to adjourn the EGM or the improper future conduct of the EGM. While I accept that it is at least arguable that the Court can, in the circumstances explained by Mr Justice Zacaroli in *Findmyclaims.com*, review the decision of a chairman of a shareholders meeting to adjourn the meeting, and give directions to the chairman as to the exercise of his or her power to adjourn the meeting, the point of law does not arise in this case because I was not satisfied that the evidence supports a finding that the chairman would be acting improperly *in refusing to adjourn the meeting* merely because there was a dispute between a former shareholder and the registered member as to whether the transfer to the registered member was voidable and capable of being set aside.

44. However, the position is different, as it seems to me, with respect to steps taken by Powerful Warrior to vote the Subject Shares at the EGM, particularly where the evidence showed that a vote by Powerful Warrior would be determinative of the outcome of a vote on the proposed resolution. In circumstances where there is sufficient evidence to show a serious issue to be tried in relation to a claim to set aside the Alleged Transfer and to require that the Subject Shares be

retransferred, subject to repayment of the consideration actually paid and where the exercise of voting rights in reliance on the impugned Alleged Transfer was likely to result in the passing of a resolution which could lead to the potentially improper issue of further shares, which might be difficult, time consuming and expensive to unwind, it was appropriate to grant injunctive relief. There was then a serious risk that damages would not be an adequate remedy. Furthermore, while Powerful Warrior would be unable to vote at the EGM and procure the passing of the proposed resolution, assuming that this is what it intended and wished to do, it would have the opportunity to seek to set aside the injunction and vote the Subject Shares if it established that it had valid title to them at a subsequent meeting if the resolution was not passed at the EGM. It was also difficult to see that Ourgame would suffer any serious prejudice. The EGM could proceed, and the proposed resolution put to a vote by those attending and able to vote. There was no evidence that Ourgame needed to have the proposed resolution passed rapidly. To the extent that Ourgame or Powerful Warrior did suffer any damage or loss, the Fund's cross-undertaking in damages would be available. This was to be, as can be seen from the form of undertaking set out above, limited to the assets available in the Plaintiff's estate but the JPLs confirmed that they had cash in excess of HK\$12 million currently under their control and noted that, if the Alleged Transfer was upheld as valid, the Fund should have access to the purchase consideration (or at least be able to make claims to recover the purchase consideration if it had been wrongly paid away).

45. In my view, the evidence that the JPLs had been able to collect to date, albeit incomplete and in the process of being supplemented and verified, demonstrated that there was a serious issue to be tried as to whether the Alleged Transfer was entered into at a substantial undervalue and for an improper purpose, and involved a breach of duty by the Fund's director who executed it (and arguably by all the directors). The evidence also established reasonable grounds for inferring that Powerful Warrior knew that the transfer of the Subject Shares was for a consideration substantially less than their fair and market value and was aware of and probably a party to the arrangements designed to deprive the Fund, Glassy Mind and CMC of negative control and the ability to veto ordinary resolutions of the shareholders of Ourgame. The JPLs confirmed at the hearing that based on the evidence they had now obtained they were satisfied that there were reasonable grounds for seeking, and that they intended shortly to commence proceedings, to set aside the Alleged Transfer (and that they could rely on a common law cause of action based on a breach of duty by the Fund's directors of which Powerful Warrior was on notice even before a winding up order was made and an official liquidator with the power to bring claims under

sections 146 of the Companies Act was appointed). They noted that they had to date been unable to access the records of some of the Fund's bank accounts and wished to do so in order to double check whether the consideration for the Subject Shares referred to in the instrument of transfer had in fact been paid to and received by the Fund, and if it had been, what had happened to any payment. They also wished to contact Powerful Warrior and ask it to provide further details of the Alleged Transfer and respond to the JPLs' claims. Because the JPLs had not known of the identity of the transferee under the Alleged Transfer until immediately prior to the hearing, they had obviously been unable to contact Powerful Warrior before the hearing or give it notice of the Application.

46. In these unusual circumstances, it seemed to me to be right and appropriate to grant injunctive relief but limited to an injunction that had the effect of preventing Powerful Warrior from being permitted to vote at the EGM. This could most effectively be done by making an order directed to Ourgame (and the chairman at the EGM) which prevented them from accepting and counting any votes cast by Powerful Warrior (or, in case there had been a sub-sale by Powerful Warrior to evade the effect of any order of the Court, votes cast by anyone else in respect of the Subject Shares). Of course, Powerful Warrior was not a party to the Application and the draft writ filed by the JPLs did not include a claim against Powerful Warrior. Nonetheless, during the hearing, as I have explained, the JPLs confirmed that they considered that they and the Fund could make and that they would be making a claim to set aside the Alleged Transfer. I told the JPLs at the hearing that they would need to amend the undertaking in the draft order to issue proceedings to include a claim against Powerful Warrior to set aside the Alleged Transfer. The revised form of undertaking included in the order is as follows (underlining added):

“AND UPON the Plaintiff undertaking to issue a Writ of Summons in substantially the form of the draft Writ of Summons filed with the Court on 26 July 2021 amended to add a claim against Powerful Warrior as a further Defendant, seeking to challenge and set aside the Alleged Transfer on grounds including, inter alia, that the Alleged Transfer was a transaction for no consideration or at an undervalue or otherwise on terms prejudicial to and not for the benefit of the Fund and that Powerful Warrior was on notice of such grounds and not a bona fide purchaser without notice.”

47. I appreciate and took into account the fact that Powerful Warrior was not given notice of the Application and had not before the Application had been issued been given an opportunity to respond to the allegations made regarding the validity of and circumstances surrounding the



Alleged Transfer. This made the Application a purely *ex parte* application with respect to Powerful Warrior. Nonetheless, in my view the granting of immediate injunctive relief was justified and necessary in view of the fact that the EGM was to be held imminently, within a matter of a few hours after the conclusion of the hearing, and Powerful Warrior would have the protection of the cross-undertaking provided it was amended and extended to include and cover them, which I directed should be done.

Mr Justice Segal
Judge of the Grand Court, Cayman Islands