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Neutral Citation Number: [2026] CIGC (FSD) 73

Cause No: FSD 2025-0213 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

BETWEEN:

(1) RCF VII SPONSOR LLC
(2) S&R CAPITAL LTD

Plaintiffs

-and-

BLUE GOLD LIMITED

Defendant

Appearances:	**Mr Andrew Ayres KC instructed by Mr Erik Bodden and Ms Nienke Lillington of Conyers Dill & Pearman LLP for the Plaintiffs** **Mr Christopher Levers and Ms Raedean Simpson of Ogier (Cayman) LLP for the Defendant**
Before:	**The Honourable Justice Jalil Asif**
Heard:	**3 July 2026**
Reasons circulated:	**6 July 2026**
Judgment:	**15 September 2026**

Civil procedure—effect of trial of preliminary issues—whether defendant should be permitted to raise new issues to qualify terms of order—Henderson v Henderson—

Civil procedure—interim injunction—whether plaintiffs should be required to fortify their cross-undertaking in damages—whether defendant had shown risk of identifiable loss likely to be caused by injunction

Costs—whether to order taxation of costs forthwith—whether to order payment on account of costs and, if so, in what sum

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JUDGMENT

- -

A. Background to judgment

1. This ongoing case concerns a corporate dispute between the parties. A more detailed explanation of the background to the dispute is set out in my previous judgment in this matter: *RCF VII Sponsor LLC and Another v Blue Gold Ltd [No.2)* [2026] CIGC (FSD) 35. In brief summary, the Plaintiffs were the original sponsor and some of the directors of a special purpose acquisition corporation, or SPAC. The role of sponsor was then assigned to an unrelated entity, which took over control of the SPAC. The Defendant is the company that remained following the business combination as part of the de-SPAC transaction. The Plaintiffs obtained shares in the Defendant as part of that de-SPAC transaction.

2. The Plaintiffs say they should be free to sell their shares in the Defendant as they wish. The Defendant is seeking to prevent them from doing so by imposing time-dependent limits on the number of shares that the Plaintiffs can sell. The Defendant asserts that the Plaintiffs' shares are "restricted" rather than "unrestricted", as defined in the Defendant's Articles of Association, and are therefore caught by certain trading limitations in the Articles. The Plaintiffs say that their shares should be unrestricted and that the Defendant is imposing an unjustified fetter on their ability to sell their shares. The Plaintiffs assert that this has caused them substantial damage due to the significant fall in the price of the Defendant's shares since July 2025, when the Plaintiffs wished to start selling their shares. The Plaintiffs have not pleaded an estimate of their loss, but it appears likely that the First Plaintiff's loss is between about US $100 million and US $200 million and the Second Plaintiff's loss may be around US $8.5 million.

3. On 14 May 2026, I handed down my judgment on the trial of three preliminary issues in this case: (1) are the Plaintiffs' shares in the Defendant restricted or unrestricted; (2) which of the Defendant's shareholders comprised the relevant affected class in respect of an attempt by the Defendant's directors to amend the Articles of Association specifically to designate the Plaintiffs' shares restricted

(if they are not already); and (3) whether the Defendant's directors had obtained the consent in writing of a majority of the members of the affected class to make that change to the Articles. I also addressed the continuation of an interim injunction restraining the Defendant from holding an extraordinary general meeting of the members in order to vote on a resolution to make the intended amendments to the Defendant's Articles of Association.

4. For the reasons set out in detail in that judgment, *RCF VII Sponsor LLC and Another v Blue Gold Ltd [No.2]* [2026] CIGC (FSD) 35, I concluded that the Plaintiffs' shares are unrestricted; I identified, as far as I could, those persons who would form the affected class for the purpose of the proposed variation to the Defendant's Articles of Association; and I concluded that the Defendant had not obtained the written consent of a majority of the affected class in August 2025 and therefore could not seek to vary the Defendant's Articles at the intended EGM of the members. In addition, I continued the interim injunction to prevent the Defendant from proceeding with any other attempt to vary the Defendant's Articles of Association to change the status of the Plaintiffs' shares.

5. Following delivery of that judgment, the parties were unable to agree the form of an Order reflecting the outcome of the preliminary issues. The Defendant sought to raise three issues: (1) whether the Order should reflect that the Defendant continued to argue by way of its counterclaim that 2 million of the First Plaintiff's shares should be treated as forfeited, affecting the number of shares treated as being owned by the First Plaintiff; (2) whether the Order should reflect that some of the Plaintiffs' shares were restricted for different reasons from that which was argued before me at the trial of the preliminary issues; and (3) whether the Plaintiffs should be required to fortify their undertaking as to damages in respect of the interim injunction. There were also issues between the parties regarding costs, and whether I should order a payment on account of costs.

6. These issues were not suitable for determination on the papers, and it was therefore necessary to hear further oral argument on behalf of the parties. That hearing took place on 3 July 2026, when the Plaintiffs were represented by Mr Andrew Ayres KC, instructed by Mr Erik Bodden and Ms Nienke Lillington of Conyers Dill & Pearman LLP, and the Defendant was represented by Mr Christopher Levers and Ms Raedean Simpson of Ogier (Cayman) LLP.

7. On 6 July 2026, I arranged for my decision on the issues between the parties to be circulated, which was in the following terms:

> *"1. The judge considers that the terms of the Order should reflect the preliminary issues that were ordered to be tried. If the parties wished to qualify the terms of the preliminary issues to exclude the financing and extension shares or the other legends on the Plaintiffs' shares, they should have drafted or revised the terms of the preliminary issues appropriately.*
>
> *2. The judge does not accept that the Plaintiffs should fortify their undertakings as to damages. The judge considers that there is inadequate evidence adduced by the Defendant to form any intelligent estimate of the likely amount of any loss that might be suffered by the Defendant as a result of the grant and continuation of the injunction; the judge is not persuaded that there is a material risk of such loss eventuating; and in addition he does not consider that the Defendant has demonstrated any causal link to the injunction.*
>
> *3. The judge considers that the Defendant should pay the Plaintiffs' costs of the trial of the preliminary issues and that the Plaintiffs should be permitted to tax those costs now.*
>
> *4. The judge considers that an appropriate payment on account of the Plaintiffs' costs of the preliminary issues is US $100,000. This is based upon the figures for Conyers' phases 5 and 6. The judge has not made any allowance for the costs of Mr Ayres KC – the costs claimed are attributed in the evidence to the period from 8 July 2025 to 29 August 2025, which does not correlate to the dates provided by Conyers for their analysis of the different phases of work or with the period from September to November 2025 when the costs of the preliminary issues will have been incurred. The mismatch with Conyers' phases was raised by the Defendant in argument and not explained by the Plaintiffs. The judge is therefore left in a position where he cannot be confident that Mr Ayres' fees are properly to be attributed to the trial of the preliminary issues."*

8. There was some delay by the parties in providing their comments on the draft Order following that hearing and, as a result, the Order was only finalised on 20 July 2026. So far as relevant, the Order provides as follows:

> *"1. On a proper construction of the Defendant's Amended and Restated Memorandum and Articles of Association passed on 10 June 2025 and effective from 24 June 2025 ('the Articles'), the Class A Ordinary shares owned by the Plaintiffs in the Defendant are Unrestricted Shares, as defined in Article 2 of the Articles.*
>
> *2. For the purpose of Article 30 of the Articles, the shareholders within the relevant class for the purpose of effecting the variation of the Articles set out in the Notice of Extraordinary General Meeting dated 29 August 2025 to add a new Article 39 ('the Affected Class') comprises: (a) all Unrestricted Shares owned at the relevant record date by persons who received those shares because they owned shares in Perception Capital Corp. IV that were not redeemable in the business combination announced between Perception Capital Corp. IV and the Defendant in December 2023; and (b) all Unrestricted Class A Ordinary Shares issued upon exercise of any warrants issued or assumed by the Defendant in the Business Combination.*
>
> *3. The Defendant did not obtain consent in writing of the holders of a majority of the issued shares in the Affected Class, as required by Article 30 of the Articles, before calling the EGM to vote on the resolution to insert a new Article 39.*
>
> *4. Consequential on paragraph 1 of this Order, the Defendant shall take all steps within its power as issuer, including giving all necessary directions and instructions to Continental Stock Transfer & Trust Company, to remove any restrictions and/or restrictive legends affecting the*

> *Plaintiffs' Class A Ordinary shares in the Defendant imposed or directed by the Defendant, any issuer or any transfer agent preventing them from being treated as Unrestricted Shares in the Defendant.*
>
> *5. Consequential on paragraphs 2 and 3 of this Order, the Defendant cannot validly proceed to a vote on the resolution to insert a new Article 39 into the Articles unless and until it has obtained written consent from the Affected Class."*

9. On 29 July 2026, Ogier notified the Court that they had been instructed by the Defendant to pursue an appeal against the Order. Ogier asserted that I had not provided written reasons in relation to my decision on certain aspects of the Order, notwithstanding the decision circulated on 6 July 2026, and requested that I provide my reasons pursuant to section 19(4) of the Court of Appeal Act. Ogier asserted that they were unable to prepare the Defendant's grounds of appeal until those reasons were provided.

10. I therefore now return to this matter, as requested by the Defendant, to provide an elaboration of the short reasons that I have already expressed. I have focussed in this judgment on the matters consequential on my judgment on the preliminary issues that were in dispute between the parties and have not set out reasons in respect of those aspects that were not. This judgment should be read alongside the judgment that I have already delivered on the trial of the three preliminary issues.

B. <u>The preliminary issues</u>

11. The order for a trial of preliminary issues was finalised on 25 September 2025, albeit dated 23 September 2025 when it was agreed in principle. The Order identifies the preliminary issues as follows:

> *"6. The following questions or issues shall be tried before the other issues in the case:*
>
> *a) Whether, on a proper construction of the Defendant's Amended and Restated Memorandum and Articles of Association passed on 10 June 2025 and effective from 24 June 2025 ('the Articles'), the Class A shares held by the Plaintiffs (and each of them) are Unrestricted (as contended for by the Plaintiffs) or are Restricted (as contended for by the Defendant).*
>
> *b) For the purpose of Article 30 of the Articles, which shareholders are within the relevant class (the 'Affected Class') for the purpose of effecting the variation of the Articles set out in the Notice of Extraordinary General Meeting dated 29 August 2025.*
>
> *c) Whether consent in writing of the holders of a majority of the issued shares of the Affected Class has been given."*

The terms of the preliminary issues were formulated by the parties in the period from 22 to 25 September 2025, with some minor revisions suggested by the Court and accepted by the parties.

12. The trial of the preliminary issues took place on 19-21 November 2025. I handed down my judgment on 14 May 2026: *RCF VII Sponsor LLC and Another v Blue Gold Ltd (No.2)* [2026] CIGC (FSD) 35.

C. Paragraph 1 of the Order

13. The Defendant contended that there was no ambiguity in my judgment dated 14 May 2026, but that the Plaintiffs were inappropriately and opportunistically attempting to extend the effect of the judgment beyond the matters pleaded, argued and adjudicated. The Plaintiffs sought an order as follows:

> *"The Class A Ordinary shares held by [the Plaintiffs] in [the Defendant] are Unrestricted Shares, as defined in Article 2 of the [Articles]."*

The Defendant's proposed wording, which was said to be based upon the Plaintiffs' case as pleaded in their Statement of Claim, was:

> *"(1) A declaration that [the First Plaintiff] is the holder of 1,870,219 Class A Ordinary Shares in [the Defendant], which are Unrestricted Shares as defined in the MAA;*
>
> *(2) A declaration that [the Second Plaintiff] is the holder of 138,125 Class A Ordinary Shares in [the Defendant], which are Unrestricted Shares as defined in the MAA".*

14. The issue underlying the difference in the two approaches concerned 2 million shares in the Defendant owned by the First Plaintiff and described by the parties as the *"extension and financing shares"*. The Defendant's case, as pleaded in its Counterclaim, is that the First Plaintiff had agreed to forfeit those shares but had failed to do so. By its Counterclaim, the Defendant seeks an order for rectification of its Register of Members to remove the First Plaintiff as the registered owner of those shares. The Plaintiffs' Statement of Claim appears to recognise that the First Plaintiff is liable to forfeit the extension and financing shares. However, in argument, the First Plaintiff's position was that its obligation to forfeit the shares was dependent upon the Defendant's sponsor fulfilling certain pre-conditions, which it has not, so that the First Plaintiff is not obliged to forfeit the shares.

15. The Defendant asserted in its skeleton argument for the hearing on 3 July 2026 that:

> *"9. The Plaintiffs' construction of the Judgment would have the effect of determining, in substance, the extant Counterclaim by conclusively treating those shares as existing, owned by RCF, and unrestricted. […]"*

It argued that any references by the parties or the Court to the First Plaintiff's shares should be construed as excluding the extension and financing shares. The Defendant noted in oral argument that the Plaintiffs' pleadings and evidence treated the extension and financing shares as being excluded from its claim. It argued that it was entitled to rely upon those factors and to assume that the preliminary issues did not cover the extension and financing shares. The Defendant argued that the Plaintiffs' form of draft order would permit the First Plaintiff to sell the extension and financing shares despite the Defendant's counterclaim.

16. The First Plaintiff responded that the Defendant's point is new, only raised following receipt of the judgment, and is wrong. The First Plaintiff submitted that:

16.1 there was a common understanding that for the purpose of the preliminary issues, the Court was considering the status of all the Plaintiffs' shares in the Defendant;

16.2 the court made a determination as to the nature or status of the Plaintiffs' shares, which must apply to all those shares; and

16.3 unless and until the Defendant's counterclaim succeeds, the First Plaintiff remains the registered owner of the extension and financing shares: cf section 38 of the Companies Act (2025 Revision);

16.4 however, the determination of the preliminary issue as to the status of the Plaintiffs' shares does not involve any decision regarding the First Plaintiff's ownership of the extension and financing shares, which will be determined following the trial of the Defendant's counterclaim; and

16.5 the Plaintiffs' proposed wording for the draft order was appropriate in light of the terms of the preliminary issue ordered to be tried and in light of the terms of the judgment on the preliminary issues.

17. My conclusion was that the Plaintiffs' approach was to be preferred. My reasons for reaching that conclusion were:

    17.1 the parties agreed and the court ordered a formulation of the first preliminary issue that was unrelated to the number of shares owned by the Plaintiffs and was focussed purely on the status of the Plaintiffs' shares, namely whether they were restricted or unrestricted;

    17.2 neither of the parties put forward arguments at the trial of the preliminary issues that the broad terms of those issues should be refined or varied to exclude the extension and financing shares;

    17.3 the Court's task was to decide the preliminary issues ordered to be tried, not to decide some different question that had not been properly formulated and argued by the parties;

    17.4 the decision on the first preliminary issue did not address or purport to decide the question of the First Plaintiff's ownership of the extension and financing shares;

    17.5 however, the First Plaintiff is entitled to be treated as the owner of those shares for so long as they are recorded in the Defendant's Register of Members as being owned by the First Plaintiff, and so the ownership issue did not provide a reason to qualify the scope of the decision on the first preliminary issue;

    17.6 noting the Defendant's submission that the Court should not determine the issues on the Defendant's counterclaim at this stage of the proceedings, the Defendant's proposed wording for the draft order would have the effect of deciding the ownership question, or risked being construed as having done so, by treating the extension and financing shares as not being owned by the First Plaintiff despite the contents of the Defendant's Register of Members and s.38 of the Companies Act, and hence of inappropriately determining the Defendant's counterclaim before that matter had come on for trial; and

    17.7 the Plaintiffs' proposed wording accurately tracked the terms of the preliminary issue ordered to be tried and the conclusion that I reached in my judgment.

18. In addition, if the Defendant had a real and legitimate concern that the First Plaintiff might attempt to sell the extension and financing shares despite the Defendant's counterclaim, then the Defendant

could seek undertakings from the First Plaintiff not to do so or apply for an injunction to restrain the First Plaintiff from doing so.

D. Paragraph 4 of the Order

19. The Plaintiffs sought an order consequent on the determination of the preliminary issues that:

> *"[The Defendant] shall direct Continental Stock Transfer & Trust Company ('CST') to treat the Plaintiffs' Class A Ordinary shares in [the Defendant] as Unrestricted Shares, and shall procure that CST deposit those Unrestricted Shares into the Plaintiffs' respective stock brokerage accounts."*

20. The Defendant asserted that, following delivery of the judgment on the preliminary issues, it took prompt steps to remove the restriction on the Plaintiffs' shares based on the terms of the Defendant's Articles of Association, namely restriction R088B. However, the Defendant raised that there were two other restrictions affecting certain of the First Plaintiff's shares, R088A and R088C, which the Defendant asserted arose independently of the Articles and required investigation by the Defendant. The Defendant sought to qualify the terms of the Order to reflect these additional restrictions on the First Plaintiff's shares.

21. The terms of these restrictions are as follows:

21.1 R088A:

> *"The securities represented hereby have not been registered under the Securities Act of 1933, as amended, or qualified under any state laws and may not be offered for sale, sold, pledged, hypothecated or otherwise transferred or assigned unless (i) a registration statement covering such securities is effective under such act and the transaction is qualified under applicable state law or (ii) the transaction is exempt from the registration requirements under the act and the qualification requirements of applicable state law and, if the company requests, an opinion satisfactory to the company to such effect has been rendered by counsel…. The securities represented by this certificate are subject to additional restrictions on transfer set forth in a letter agreement with RCF Acquisition Corp. (the Company) (a copy of which may be obtained from the company at the Company's principal place of business without charge) and may not be offered, sold, transferred, pledged, hypothecated or otherwise disposed of in violation of such restrictions."*

21.2 R088C

> *"Neither the securities nor any interest therein may be offered, sold, transferred, pledged or otherwise disposed of except pursuant to an effective resale registration statement under the Securities Act of 1933, as amended or such laws or an exemption from registration under such*

> *act and such laws which, in the opinion of counsel, is available, and in the case of a transaction exempt from registration, such securities may only be transferred if the transfer agent for such securities has received documentation satisfactory to it that such transaction does not require registration under the Securities Act."*

22. The Defendant argued that the existence of these additional restrictions was pleaded in its Defence and Counterclaim but was not addressed by the Plaintiffs in their pleadings or evidence other than to deny that the Plaintiffs' cooperation was needed to remove the restrictions, and accordingly the Defendant was entitled to raise them now. The Defendant said that the genesis of the restrictions was unclear and pre-dated the business combination giving rise to the claims. It said that it could not lift the restrictions without a clear understanding of the position. The Defendant added that once it had a proper understanding of the genesis and legal underpinning for the restrictions, and assuming there was no legal basis to maintain them, it would take steps to remove them.

23. In any event, the Defendant argued, the preliminary issues were focussed on the restrictions arising from the Defendant's Articles of Association and not these other restrictions, and so the Court should not order the Defendant to remove <u>all</u> restrictions on the First Plaintiff's shares.

24. The Plaintiffs responded that the Defendant's position directly contradicted the terms of the judgment on the preliminary issues and the Defendant was attempting to frustrate the Court's judgment for the following reasons:

    24.1 restrictions R088A and R088C were clearly erroneously placed on the First Plaintiff's shares:

    (a) the Plaintiffs' shares have been registered on Form F-4, so R088A is inapplicable; and

    (b) the First Plaintiff is not an affiliate of the Defendant, so R088C is also inapplicable;

    24.2 the erroneous application of these restrictions is plain and obvious as a matter of fact, it does not turn on any question of US securities law, and it is plainly within the Defendant's power to direct Continental Stock Transfer & Trust Company to remove the restrictions; and

    24.3 the issue whether any of the Plaintiffs' shares were restricted was plainly raised by the terms of the first preliminary issue: if the Defendant wished to contend that the First Plaintiff's shares were subject to restrictions R088A and R088C, then the Defendant should have raised the point in its Defence and during the trial – the passing references to restrictions R088A and R088C in the Defendant's Defence did not do so;

24.4 it was abusive, in the sense of the principle derived from ***Henderson v Henderson*** (1843) 3 Hare 100, for the Defendant to raise these other restrictions on the Plaintiffs' shares at this stage and the Defendant is estopped from doing so.

25. To elaborate on the Plaintiffs' fourth point set out above, the Plaintiffs argued that:

25.1 the Defendant did not rely on restrictions R088A or R088C in its Defence to the Plaintiffs' Statement of Claim as giving rise to a reason why the Plaintiffs' shares should be restricted or going to causation, which it should have done if it wished to rely upon them;

25.2 the question of the restrictions applicable to the Plaintiffs' shares was fundamental to the determination of the first preliminary issue, the whole purpose of the first preliminary issue was to determine whether the Plaintiffs' shares were freely alienable: the Defendant should have raised at the trial the other restrictions that it now sought to rely upon;

25.3 the judgment on the preliminary issues conclusively determined that the Plaintiffs' shares are unrestricted and freely alienable in unqualified terms, giving rise to an issue estoppel barring the Defendant from asserting that those shares are not unrestricted nor freely alienable;

25.4 the judgment also made factual findings that it had been agreed that the Plaintiffs' shares in the Defendant would not be subject to any restrictions *"of any kind"*;

25.5 it was too late for the Defendant to try to raise the additional restrictions after judgment on the preliminary issues.

26. My conclusion was, again, to prefer the Plaintiffs' arguments. The Defendant did not positively plead in its Defence that restrictions R088A or R088C provided an alternative reason why the Plaintiffs' shares in the Defendant should be restricted and should not be freely alienable. The Defendant agreed to the terms of the preliminary issues, which did not make any distinction between the different restrictions that might apply to the Plaintiffs' shares. The Defendant did not raise restrictions R088A or R088C as an issue during the trial of the preliminary issues. The Defendant

referred to restriction R088A in its evidence and during the trial of the preliminary issues only for the purpose of supporting an argument as to whether the Plaintiffs had obtained their shares in the Defendant before or at the time of the business combination, which was relevant to the argument whether they were restricted or unrestricted, as defined in the Defendant's Articles of Assocation.

27. In addition, I considered that if the Defendant's contention were correct that it was able now to raise additional restrictions on the alienability of the Plaintiffs' shares then there would have been little or no point in trying the preliminary issues, as formulated, since they would not have been likely to be determinative of an important question in the action and would have been unlikely to save time and costs overall.

28. I therefore concluded that it was too late for the Defendant to seek to put restrictions R088A or R088C into play, following the determination of the preliminary issues, and that the Defendant's conduct was abusive in the ***Henderson v Henderson*** sense: namely, the Defendant could and should have raised the point regarding these additional restrictions during the trial of the preliminary issues if it wished to rely upon them, rather than holding back and only raising the issue at this stage. I also bore in mind that there did not appear to be any justification for retaining those restrictions and that the Defendant's own position was that it was willing to remove them as soon as it had carried out some type of unidentified investigation concerning them.

E. Fortification of the Plaintiffs' undertakings as to damages

29. The parties disputed whether the Plaintiffs should be required to fortify their cross-undertaking in damages, given in respect of the interim injunction and which I had decided should be continued. The Defendant relied on paragraph 136 of my judgment on the preliminary issues, where I said:

> *"136. […] I accept Mr Collingwood's complaint that the Plaintiffs must give cross-undertakings as to damages. Further, given that the effect of this judgment is that the shares of the Plaintiffs and their affiliates are unrestricted and should [be] freely alienable, I consider that the Plaintiffs should in principle provide fortification of their undertakings because Blue Gold is unlikely to continue to have the option of enforcing against the shares owned by the Plaintiffs. I will hear counsel in due course to determine the amount of such fortification."*

30. The Defendant contended that it was therefore entitled to fortification and the only question was as to the amount. The Defendant's case as to its potential loss was founded upon the alleged impact of unrestrained selling of shares by the Plaintiffs on the Defendant's share price. The Defendant argued at paragraph 73 of its skeleton argument that:

> *"(a) There is a tangible and evidenced risk that the Injunction will cause loss to the Defendant. As set out in Cavaghan 2, the amendments to the Articles (now restrained by the Injunction) were intended to ensure the orderly sale of shares and prevent market destabilisation. Without these protections, there is a real risk of concentrated selling by the Plaintiffs, triggering a collapse in share price and broader market disruption;*
>
> *(b) The Defendant also faces consequential risks, including potential delisting from NASDAQ if price thresholds are not maintained, with significant implications for financing and the viability of its business […]; and*
>
> *(c) Evidence from Cavaghan 2 confirms that [the Defendant]'s share price experienced a marked decline following the public announcement of the Judgment via NASDAQ on 15 May 2026 […]. While it is acknowledged that [the Defendant]'s shares have declined over the relevant period, [the Defendant]'s case is that they have not experienced any price recovery (unlike previous trading patterns). By way of example, the share price fell below US$1 on one occasion prior to the Judgment but recovered immediately afterwards (see 10 and 13 April 2026) […], maintaining a price above US$1 until the Judgment was delivered."*

31. Mr Cavaghan, the Defendant's CEO, who signed an affirmation in support of the Defendant's arguments, quantified the Defendant's likely loss at US $2,615,046, based on the change in the Defendant's share price between 17 February 2026 and 14 May 2026. Mr Cavaghan indicated that this was an interim valuation and that the injunction risked causing wider loss to the Defendant, particularly if it was forced to de-list from NASDAQ due to its share price falling below US $0.10. He said that the Defendant would wish to adduce expert evidence on the amount of the Defendant's likely loss. Mr Cavaghan indicated that the proposed expert evidence would need to address:

31.1 the value of the Defendant's gold mine in Ghana;

31.2 the likely amount to be recovered by the Defendant in ongoing arbitration proceedings against the Republic of Ghana;

31.3 the anticipated loss of the Defendant's market value due to the collapse in its share price; and

31.4 an assessment of all the Defendant's existing and future liabilities.

32. The Plaintiffs argued that, notwithstanding the terms of paragraph 136 of my judgment, there had not been any substantive argument on the question of fortification at the trial of the preliminary

issues, and that what was said in paragraph 136 of the judgment remained open to argument. Accordingly, the Plaintiffs argued that it was still open to them to contend that the Defendant was not entitled to fortification as a matter of principle.

33. However, in my view, the arguments put forward by the Plaintiffs did not actually attack the entitlement of the Defendant to fortification in principle but, instead, were directed at whether the Defendant could establish that fortification was required in all the circumstances. The Plaintiffs relied on the judgment of Parker J in ***Fabran Holdings Ltd v Daventree Trustees Ltd*** (unreported, 17/01/24). In paragraph 162 of his judgment in that case, Parker J identified the relevant principles as follows:

> *"162. In relation to an assessment of cross undertakings in damages the approach is (i) for the Court to make an intelligent estimate, being informed and realistic although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant for fortification by reason of making the interim order; (ii) find whether the applicant has shown a sufficient level of risk of loss to require fortification, by showing a good arguable case to that effect; and (iii) find whether the making of the interim order is or was a cause without which the relevant loss would not be or would not have been suffered: see* Energy Venture Partners v Malabu Oil and Gas *[2015] 1 WLR 2309."*

Energy Venture Partners v Malabu Oil and Gas Ltd [2015] 1 WLR 2309 is an English case, where the Court of Appeal adopted the requirements for fortification identified by Mr Michael Briggs QC (as he then was) sitting as a Deputy High Court judge in *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch): see Tomlinson LJ at paragraphs 13 and 52 of his judgment.

34. The Plaintiffs submitted that the Defendant could not satisfy these requirements, and therefore was not entitled to fortification of the Plaintiffs' undertakings:

34.1 the Defendant had not adduced sufficient evidence to show what loss it was likely to suffer;

34.2 the Defendant had failed to make out a good arguable case that there was a risk it would suffer the identified loss; and

34.3 the Defendant had failed to evidence a causal link between the Injunction, which merely prevented it from holding an EGM to amend the rights attached to any class of shares, and the risk of loss.

35. The Plaintiffs argued that a reduction in the Defendant's share price might affect shareholders, but was not a loss to the Defendant, so that the Defendant's selected measure of loss was simply wrong. Secondly, the Plaintiffs argued that the Defendant sought to identify the loss by reference to the date when judgment on the preliminary issues was made public in May 2026, rather than when the injunction was granted in September 2025. The Plaintiffs argued that this highlighted the Defendant's failure to tie its alleged loss to the grant of the injunction, rather than to the fact of the litigation or other extraneous factors. Thirdly, the Plaintiffs submitted that the evidence as to the Defendant's share price showed that the price had been consistently and steadily declining since July 2025, before the injunction was granted, and had continued in the same vein thereafter. The Plaintiffs said that this was inconsistent with the suggestion that the injunction was responsible for any decline in the Defendant's share price.

36. In respect of the Defendant's indication that it wished to adduce expert evidence, the Plaintiffs responded that the topics on which expert evidence was intended to be sought did not appear to have any link to the injunction and therefore did not appear to inform the question of fortification. They argued that there was no proper justification for expert evidence, that it would add to the costs and delay resolution of the case, and the court should refuse to permit it.

37. In addition, the Plaintiffs proposed that there was no need for fortification of their undertakings because the private equity fund behind the First Plaintiff had offered to guarantee payment of any liability of the Plaintiffs pursuant to their undertakings as to damages.

38. I concluded that the Defendant had failed to identify likely loss caused by the injunction. I accepted the Plaintiffs' argument that diminution in the Defendant's share price was not a measure of the loss suffered by the Defendant, if any. The Defendant had not put forward any other measure of likely loss that it could plausibly say was caused by the grant of the injunction, so it was simply not possible to identify any loss in respect of which fortification might be appropriate. In addition, the Defendant had not identified how the injunction would cause loss to the Defendant, and the Defendant had not persuaded me that there was a material risk of such loss eventuating. I therefore concluded that it was not necessary for the Plaintiffs to provide fortification of their cross-undertaking in damages.

39. However, notwithstanding this view, I considered that the Defendant was adequately protected, insofar as there was any risk that it might suffer loss from the continuation of the injunction for which the Plaintiffs ought to be held liable, by the guarantee offered by the First Plaintiff's parent.

F. Costs

40. The Defendant conceded that it should pay the Plaintiffs' costs of the preliminary issues, and the parties agreed that those costs should be taxed on the standard basis, if not agreed. The parties also agreed that the costs of the Plaintiffs' application for an interim injunction should be reserved. The outstanding costs issues between the parties were:

    40.1 should the Plaintiffs obtain an order for payment of their costs of the originating summons more widely?

    40.2 should the Plaintiffs' costs of the preliminary issues be subject to taxation forthwith?

    40.3 should the Court order a payment on account of the Plaintiffs' costs and, if so, in what sum?

F.1 Scope of costs order

41. The Plaintiffs argued that the trial of the preliminary issues had determined all the issues raised by the originating summons as originally formulated. The Plaintiffs said that their addition of a damages claim was a consequence of the Defendant's application to convert the proceedings into a writ action. They accepted that the costs of the outstanding issues, i.e. the damages claim and the Defendant's counterclaim would need to be determined at the conclusion of the proceedings.

42. The Defendant disputed that it was possible, let alone appropriate, to try to hive off the costs of the originating summons proceedings for the period before the proceedings were ordered to be treated as if commenced by writ. It pointed to the conceptual difficulty in identifying what was intended to be encompassed within the Plaintiffs' label of the "costs of the originating summons". The Defendant pointed out that there is only one proceeding, albeit it has now been ordered to proceed as if begun by writ instead of originating summons, which the Defendant said highlighted the difficulty in isolating the costs of the originating summons.

43. I agreed with the Defendant that it was very difficult to see how the costs of the originating summons could be separately identified. I was also sceptical that it was appropriate to conclude that the relief sought by the originating summons had been wholly obtained so that the originating summons could be considered to be "spent" and that what was left to go forward could be said to be costs of the writ action – which, incidentally, does not separately exist.

44. I therefore rejected the Plaintiffs' attempt to obtain an order for their costs of the originating summons at this stage of the proceedings.

F.2 Taxation forthwith?

45. The Plaintiffs relied on the English case of *Greencore (UK) Holdings plc v Elementis plc* [2005] EWHC 2139 (Comm) where Aitkens J said at paragraph 5:

> *"5. […] in my view it is clear that the claimants have won on the points that were argued at the preliminary issues trial and in my view, the general approach in this court when preliminary issues have been ordered and fought out, is that the successful party should have its costs and should be entitled to have those costs assessed. That makes commercial sense and if there is to be an adjustment in the future because the other side wins the trial eventually, that can be accommodated."*

46. The Plaintiffs noted that *Greencore* was followed in *Barclay v Barclay* [2020] EWHC 1179 (QB), where the court was concerned with the costs associated with a claim by the defendants to legal professional privilege, which the defendants subsequently abandoned, in respect of covert recordings and transcripts of the claimants' private conversations, which the defendants had been required to deliver up pursuant to an *Anton Piller* Order. Warby J concluded that he should make an immediate order for costs, rather than costs in the cause or costs reserved. As to the timing of the assessment of those costs, Warby J said:

> *"51. The general rule is that the time for detailed assessment is at the end of the proceedings, but the court can make a different order: see CPR 47.1. In this case, I accept Mr. Rees' submission that there is no good reason why the claimants should have to wait many months before being able to have their costs assessed, and there is a good reason why they should have their costs assessed now. I accept that an earlier detailed assessment would have no material impact on the timetabling of the underlying proceedings, and would not cause the defendants any unfair prejudice.*
>
> *52. There is little authority on this point, but I have been referred to the decision of Aikens J (as he then was) in* Greencore (UK) Holdings plc v Elementis plc *[2005] EWHC 2139 (Comm). That decision lends some support to the submissions I have identified. Granted, this decision was made*

> *after the trial of preliminary issues in the case, but I do not regard that as a distinction of principle, given the analysis that I have set out. In this case, as in* Greencore*, there is no risk that if a costs order was made the other way in future the claimants would be unable to meet it."*

47. The Plaintiffs also relied on the decision of Kawaley J in ***Fortunate Drift Ltd v Canterbury Securities Ltd*** (unreported, 10/06/20), as quoted with approval by Segal J in ***Jafar v Abraaj Holdings*** (unreported, 17/01/22). At paragraph 24, Kawaley J set out the principles to be applied when considering making a "forthwith" costs order as follows:

> *"(1) whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole;*
>
> *(2) whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates;*
>
> *(3) whether the proceedings as a whole have a long time to run; and*
>
> *(4) whether being required to pay the interlocutory costs forthwith before the end of the litigation would be for any reason unfair, having regard to the overriding objective of GCR Order 62."*

The Plaintiffs submitted that the relevant criteria were satisfied, and that the court should make a "forthwith" order.

48. The Defendant also referred to Segal J's judgment in ***Jafar***, quoting Kawaley J's recitation of the applicable principles in ***Fortunate Drift***. The Defendant contended that the preliminary issues were not discrete but were part of and were inextricably bound up with the broader continuing dispute, encompassing complex factual and legal issues. The Defendant suggested that the ultimate costs position was uncertain and might materially shift such that the Defendant might become the net recipient of costs at the conclusion of proceedings. The Defendant complained that the Plaintiffs were special purpose vehicles, and their only assets were their shares in the Defendant, so that there was a serious risk that they would be unable to repay the Defendant if the Defendant became a net recipient of costs. The Defendant was not comforted by the guarantee from the First Plaintiff's parent because that guarantee was limited to the cross-undertaking in damages and did not cover any net liability of the Plaintiffs to repay costs owed to the Defendant. The Defendant submitted that it was therefore inappropriate to make a "forthwith" costs order.

49. I did not accept the Defendant's argument. I considered that the preliminary issues were finally dispositive of the matters ordered to be tried. There was therefore a presumption that the Plaintiffs should be entitled to proceed to taxation of their costs of the trial of those issues. The preliminary

issues were discrete issues, which was why they had been ordered to be tried as preliminary issues. I did not consider it unfair to the Defendant to permit the Plaintiffs to proceed with a taxation of the relevant costs now. However, to provide the Defendant with some comfort, if it were to end up being the net recipient of costs, I invited the Plaintiffs to obtain confirmation that the guarantee offered by the First Plaintiff's parent would be extended to cover any net costs liability to the Defendant, which they confirmed immediately following the hearing.

F.3 Payment on account and the quantum thereof

50. The Plaintiffs submitted that there was a starting assumption that the court should make an order for a payment on account of costs in their favour: see *Juniper Life Sciences Ltd v RBH Holdings* (CICA, unreported 27/11/24). The Plaintiffs argued that they were in an even stronger position than the case of seeking a payment on account in respect of an interlocutory costs order because the preliminary issues had been finally determined. The Plaintiffs said that they would be prejudiced if an order were not made both because they would be kept out of the money to which they are entitled and because there was a real risk regarding the Defendant's financial standing and ability to pay costs and damages.

51. The Plaintiffs assessed their costs of the preliminary issues and of the wider originating summons, but excluding the costs of the interim injunction, at just over US $430,000. They therefore sought a payment on account of just over US $215,000.

52. The Defendant accepted that there was a presumption in favour of an order for a payment on account of costs. However, the Defendant contended that this presumption was displaced in this case for four reasons: first because the Defendant intended to pursue an appeal but had not commenced it because the Order was not yet finalised; secondly because there was a risk that the Plaintiffs could not make a repayment, if required in the future; thirdly because the material provided by the Plaintiffs regarding their costs was insufficiently detailed and was internally inconsistent so that the court could not form a view as to the appropriate level of costs and, hence, an appropriate payment on account of costs; and fourthly because the Plaintiffs' claimed costs were excessive.

53. The Plaintiffs responded that the Defendant's alleged intention to pursue an appeal was irrelevant in circumstances where the Defendant had not pursued such relief, and that whether or not there might be some future netting off of costs orders against each other was entirely speculative and was not a reason to refuse to order a payment on account.

54. I concluded that the presumption in favour of ordering a payment on account of costs should apply and was not displaced by the matters raised by the Defendant. However, I accepted the Defendant's argument that there were internal inconsistencies regarding the Plaintiffs' claim for costs: in particular, the date range over which the fees attributed to Mr Ayres was sought did not correspond with the time period when the parties would have been preparing for and conducting the trial of the preliminary issues. This was not addressed and clarified by the Plaintiffs despite having been raised by the Defendant in argument. I therefore did not consider it appropriate to include any sum in respect of Mr Ayres' claimed fees. In my judgment, I determined that the appropriate payment on account of the Plaintiffs' costs of the preliminary issues should be US $100,000, based upon the figures set out in Conyers' schedule of costs for the periods they had identified as phases 5 and 6, and which covered the preparation for and trial of the preliminary issues.

Dated 15 September 2026

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THE HONOURABLE JUSTICE JALIL ASIF
JUDGE OF THE GRAND COURT