THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0019

BETWEEN:

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

Appellant

and

[1] RYAN PAUL JARVIS
[2] RACHELLE FRISBY
(as Joint Liquidators of Phoenix Commodities Pvt Ltd (in liquidation))

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mde. P. Nicola Byer	Justice of Appeal [Ag.]
The Hon. Mr. V. Dexter Theodore	Justice of Appeal [Ag.]

Appearances:

Mr. David Alexander, KC with him Mr. Brian Lacy, Mr. Alexander Bryant and Ms. Emily Rivett for the Appellant
Mr. Tony Beswetherick, KC with him Mr. Jeremy Child and Ms. Jhneil Stewart for the Respondents

2025: October 17;
2026: July 14.

Commercial Appeal – Statutory Interpretation – Section 49 of the Business Companies Act 2004 ("BCA") – List of members settled by liquidators – Whether issue of shares imposing liability void in absence of written agreement to become holder - Whether section 49 required formal bilateral written subscription agreement - Whether contemporaneous email exchange and attachment sufficient to constitute written assent – Whether section 49 of the BCA requires the shareholder's written assent to exist before or at the time of issue of the shares – Whether post-issue documents admissible only as corroborative evidence – Rule 28.18 of the Civil Procedure Rules 2023 ("CPR") - Whether failure to serve notice to prove material – Counter-notice - Whether, in the context of liquidation, relief analogous to rectification should in any event be refused

The appellant, ICM SPC, on behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio ("ASOR"), appealed against the decision of the learned judge dated 30th May 2024, as amended on 11th June 2024, dismissing its application under section 193(3) of the Insolvency Act 2003 for removal from the list of members settled by the joint liquidators of Phoenix Commodities Pvt Ltd ("Phoenix BVI" or "the Company").

On 10th May 2019, the board of Phoenix BVI resolved to issue 440,935 shares to ASOR; ASOR was entered in the register of members on the same day, and a share certificate was issued.

On 20th April 2020, Phoenix BVI was placed into voluntary liquidation, and the respondents were appointed as joint liquidators. On 16th December 2021, the respondents settled a list of members which included ASOR as holder of 440,935 shares. ASOR contended that the issue was void under section 49 of the Business Companies Act 2004 (the "BCA") because it had not agreed in writing to become holder of the shares.

The judge dismissed the application holding that ASOR, acting by Mr. Abdul-Massih, had agreed in writing to become a shareholder and had become a shareholder; that BVI law did not recognise the temporary, provisional, or partial membership advanced by ASOR, and that the Cancellation Notice did not operate to cancel or redeem the shares.

The present appeal concerned the construction and application of section 49 of the BCA, in particular whether the contemporaneous written materials were sufficient to evidence ASOR's assent to becoming holder of the shares, whether later documents could be used corroboratively, and whether any CPR 28.18 point affected the outcome.

The respondents, by counter-notice, contend that, even if the issue of shares were void, the Court should refuse to remove ASOR from the settled list, and that the judge was wrong to hold that the shareholder's written agreement had to exist before the issue of the shares.

Held: dismissing the appeal, dismissing the respondents' counter-notice on the timing issue; affirming the order below; and ordering the appellant to pay the respondents' costs of the appeal, to be assessed by a judge of the Commercial Court if not agreed within 21 days of this judgment, that:

1. The proper interpretation of section 49 of the Business Companies Act 2004 was a question of law for the appellate court. Whether the documents before the judge were capable, as a matter of law, of satisfying section 49 involved the application of that legal standard to the written record. To the extent that the judge's conclusion depended upon oral evidence, credibility, and the overall trial picture, the appellate Court would be slow to interfere; but where the issue turned upon the objective meaning and legal sufficiency of undisputed documents, the appellate court was entitled to form its own view, while giving due weight to the judge's overall evaluation of the evidence.

   Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 considered; **Deutsche Bank AG v Sebastian Holdings Inc and another** [2023] EWCA Civ 191 considered;

Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642 applied; **Simetra Global Assets Ltd and another v Ikon Finance Ltd and others** [2019] EWCA Civ 1413 considered.

2. Section 49 does not require a single formal bilateral subscription agreement executed by the company and the prospective shareholder. What it requires is a written record, whether in one document or in more than one contemporaneous document read together, from which the proposed holder's assent to becoming holder of the relevant share or shares could be established with sufficient clarity. The writing must identify or permit identification of: (i) the person who is to become the holder; (ii) the company whose share or shares are to be held; (iii) the shareholding to which the person is agreeing, at least with sufficient certainty to identify the relevant shares or class and number; and (iv) the fact that the person agreed to become the holder of that shareholding. Where liability depends on consideration or unpaid value, the written record must also be sufficiently clear to identify the liability being assumed or the basis upon which it can be ascertained.

   Telecommunications Regulatory Commission v Cable & Wireless (BVI) Ltd, BVIHCVAP2016/0013 (delivered 30th May 2018, unreported) considered; **Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd** [2012] EWCA Civ 265 considered; **Gluck v Secretary of State for Housing, Communities and Local Government and another** [2020] EWCA Civ 1756 considered.

3. The written assent required by section 49 had to exist before or at the time of issue of the shares. Post-issue documents cannot cure non-compliance with the statute if, at the moment of issue, there was no written assent of the kind required. They can be considered, however, in so far as they corroborate the existence of earlier assent. The respondents' counter-notice on timing therefore failed.

   Global Asset Capital Inc and another v Aabar Block S.A.R.L and others [2017] EWCA Civ 37 considered; **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co** [2010] UKSC 14 considered; **DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd** [2022] EWCA Civ 1555 considered.

4. The judge had been entitled to conclude that the May 2019 email exchange, read with its attachment and the surrounding contemporaneous steps, satisfied section 49 and evidenced ASOR's written assent to becoming the holder of the 440,935 shares. The attachment formed part of the relevant written record. The conclusion was not displaced by the absence of a later call or by correspondence showing that formal subscription documents and other approvals would ordinarily be required for the wider private equity transaction, or by later communications and conduct said to be inconsistent with a completed share issue. The BNP Paribas certificate did not cure any defect at the moment of issue but was admissible as evidence corroborating the conclusion that ASOR had earlier agreed to be treated as a shareholder.

5. The learned judge's conclusion that BVI law did not recognise a temporary, provisional, or partial membership of the kind advanced by ASOR had not been displaced. Once the finding of sufficient written assent stood, ASOR could not both have agreed to be issued shares for the purposes of section 49 and escape the legal consequences of membership by invoking a private status unknown to the BVI company law framework. Additionally, the Cancellation Notice did not assist ASOR; it proceeded on the footing that there was a shareholding capable of cancellation or redemption and no effective redemption or cancellation occurred before liquidation.

6. It was unnecessary finally to determine the complaints founded upon CPR 28.18. Assuming in ASOR's favour that the respondents were not entitled to challenge the authenticity of the MOU, the Amendment Agreement or the Cancellation Notice in the manner alleged, and assuming that those documents were authentic in the sense of being genuine documents and not forgeries, those assumptions did not alter the result. Even if so treated, those documents did not undermine the sufficiency of the May 2019 written communications or establish that ASOR should be removed from the settled list.

7. Even if there had been doubt about the sufficiency of the May 2019 written assent, the court would have refused the relief sought. Although the application was brought under section 193(3) of the Insolvency Act and was not, strictly speaking, an ordinary rectification application the court could properly consider whether, immediately before liquidation, the applicant could have obtained removal or rectification of the register and whether it would be just to grant equivalent relief after the commencement of liquidation. Where the relief sought was, in substance, analogous to undoing a register position after the commencement of liquidation, the applicant's prior conduct, delay, third-party reliance, and the effect on creditors and the liquidation were relevant considerations. ASOR had been entered on the register, had permitted itself to be represented to BNP Paribas as shareholder, had not sought removal before liquidation, and sought relief only after the commencement of the insolvency process. Those circumstances justified refusal of removal from the settled list.

   Greenwich Millennium Exhibition Ltd v New Millennium Experience Company Ltd [2003] EWHC 1823 (Ch) quoting **Re Sussex Brick Co Ltd** [1904] 1 Ch 598 considered; **Smith v Charles Building Services Ltd and another** [2006] EWCA Civ 14 considered; **Re Transatlantic Life Assurance Co Ltd** [1980] 1 WLR 79 considered; **Nilon Ltd v Royal Westminster Investments SA** [2015] UKPC 2 considered.

JUDGMENT

Introduction

[1] **THEODORE JA [Ag.]**: This is an appeal by ICM SPC, on behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio ("ASOR"), against the

decision of Mangatal J [Ag.] (the "Judge") dated 30th May 2024, as amended on 11th June 2024. By that decision, the Judge dismissed ASOR's originating application under section 193(3) of the **Insolvency Act 2003**[1] for an order removing ASOR from the list of members settled by the joint liquidators of Phoenix Commodities Pvt Ltd ("Phoenix BVI" or "the Company").

[2] The appeal raises an important and novel question concerning the proper interpretation and application of section 49 of the **BVI Business Companies Act 2004**[2] (the "**BCA**"). That section provides that the issue by a company of a share which increases or imposes liability on a person is void if that person, or an authorised agent of that person, "does not agree in writing to becoming the holder of the share".

[3] The appeal also raises issues concerning the sufficiency of the documentary record relied upon by the Judge; the circumstances in which an appellate court may interfere with findings made after a lengthy commercial trial; the effect of an alleged failure to serve a notice to prove under rule 28.18 of the **Civil Procedure Rules (Revised Edition), 2023** ("CPR"); and the extent to which the Court may refuse removal from a settled list of members on discretionary or analogous equitable grounds.

[4] For the reasons which follow, I would dismiss the appeal. In summary, I would hold that section 49 does not require a single formal bilateral subscription agreement executed by the company and the prospective shareholder. However, section 49 does require a written record, whether in one document or more than one contemporaneous document read together, from which the proposed holder's assent to becoming holder of the relevant share or shares can be established with sufficient clarity. On the particular facts of this case, the Judge was entitled to

[1] Act No. 5 of 2003 of the Revised Laws of the Virgin Islands.
[2] Act No. 16 of 2004 of the Revised Laws of the Virgin Islands.

conclude that the May 2019 email exchange, read with its attachment and the surrounding contemporaneous document and steps, satisfied that requirement.

[5] I would also hold that, even if there were doubt about the primary section 49 analysis, the appeal would not succeed. The relief sought was removal from a settled list of members in the context of a liquidation. The Court is not required to ignore the appellant's prior conduct, the register, the BNP Paribas certificate, delay, and the practical consequences for the insolvency process. Those matters provide a further and independent basis for refusing the relief sought.

Background

[6] Phoenix BVI was incorporated in the British Virgin Islands on 25th September 2001. It formed part of the Phoenix Group, which specialised in commodities trading.

[7] From 2007, companies associated with ASOR and Inoks Capital SA provided funding to the Phoenix Group. By 2013, Mr. Nabil Abdul-Massih, a director of Inoks Capital SA and of the appellant, was aware that the Phoenix Group wished to source an equity investment.

[8] ASOR relied on a Memorandum of Understanding in the court below bearing the date 1st April 2018 (the "MOU"). It was said to have been made between ASOR, Inoks Capital SA, Phoenix BVI and certain Phoenix BVI shareholders. The MOU contemplated an equity injection of a minimum of US$40 million up to US$50 million, subject to conditions precedent. The MOU also stated on its face that it was not intended to be a binding contract in respect of obligations of the parties.

[9] ASOR also relied on an Amendment Agreement bearing the date 25th April 2019 (the "Amendment Agreement"). ASOR's case was that the Amendment Agreement permitted ASOR to request the issuance of shares in Phoenix BVI on a temporary or provisional basis, with a mechanism for a partial conversion of debt to equity and a subsequent reversal if conditions precedent were not satisfied. The date, creation,

and effect of the Amendment Agreement were matters of dispute below. It is therefore preferable, at this stage, to describe the document as one relied upon by ASOR rather than as a document whose date and legal effect were accepted by the court below.

[10] Between 6th and 10th May 2019, there was an email exchange between Mr. Nitin Navandher of the Phoenix Group and Mr. Abdul-Massih. It is this exchange, together with an attachment and surrounding contemporaneous steps, which lies at the heart of the appeal.

[11] On 10th May 2019, the board of Phoenix BVI resolved to issue 440,935 shares to ASOR. ASOR was entered in Phoenix BVI's register of members on the same day. A share certificate was also issued. The register recorded ASOR as the holder of 440,935 shares. The value attributed to the shareholding was approximately US$40 million.

[12] A certificate was later signed by Mr. Abdul-Massih and provided in connection with a BNP Paribas facility. The certificate stated, in substance, that ASOR had been issued 440,935 shares against a capital contribution of US$40 million. The circumstances in which that certificate was signed, and whether it was originally undated, were disputed. The Judge nevertheless treated the BNP Paribas certificate as corroborative of ASOR's earlier written assent and as evidence of ASOR permitting itself to be represented to BNP Paribas as a shareholder of Phoenix BVI.

[13] ASOR further relied on a Cancellation Notice bearing the date 12th November 2019. By that notice, ASOR purported to require cancellation or redemption of the shares and alteration of the Company's register and accounts. The notice contemplated a 120-day period. The Judge held that the Cancellation Notice was ineffective to remove ASOR as a member and that, in any event, the concept of a provisional or temporary shareholding was unknown to BVI law.

[14] On 20th April 2020, Phoenix BVI was placed into voluntary liquidation by a qualifying resolution of its shareholders. The respondents were appointed as joint liquidators. On 16th December 2021, the respondents settled a list of members which included ASOR as holder of 440,935 shares.

[15] ASOR objected to its inclusion. Its objection was rejected. On 24th February 2022, ASOR issued the originating application under section 193(3) of the **Insolvency Act** seeking removal from the settled list.

[16] The application was heard over several days in September 2023. The Judge dismissed the application. She found that ASOR, acting by Mr. Abdul-Massih, agreed in writing to become a shareholder and became a shareholder. She further found that BVI law does not recognise a temporary, provisional, or partial membership of the kind advanced by ASOR, and that the Cancellation Notice did not operate to cancel or redeem the shares.

Statutory Framework

[17] Section 49 of the **BCA** provides:

> "The issue by a company of a share that-
>
> (a) increases a liability of a person to the company; or
>
> (b) imposes a new liability on a person to the company,
>
> is void if that person, or an authorised agent of that person, does not agree in writing to becoming the holder of the share."

[18] Section 50 of the **BCA** provides that a share is deemed to be issued when the name of the shareholder is entered in the register of members.

[19] Section 42(1) of the **BCA** provides that entry of the name of a person in the register of members as holder of a share is prima facie evidence that legal title in the share vests in that person.

[20] The relevant liquidation provisions are found in the **Insolvency Act**. Section 193 requires a liquidator to settle a list of members. Section 193(3) provides a

mechanism by which a person who objects to an entry in, or exclusion from, the list may apply to the Court for an order removing or modifying the entry. Sections 195 and 196 deal with the liability of present and past members to contribute to the assets of a company in liquidation.

[21] The practical importance of section 49 in this case lies in the alleged liability attached to the 440,935 shares. If ASOR validly became holder of those shares, substantial liability may follow in the liquidation. If the issue was void by reason of non-compliance with section 49, ASOR says it ought never to have appeared on the settled list.

Grounds of Appeal and Counter-Notice

[22] The appellant advanced a number of grounds of appeal. They may conveniently be grouped as follows:

(1) Firstly, grounds 1 to 4 challenge the Judge's interpretation of section 49. The appellant contends that section 49 requires a formal written agreement, or at least written evidence of an agreement containing all material terms, including the number of shares, the consideration, and the date of acquisition.

(2) Secondly, grounds 5 to 8 and 13 challenge the Judge's application of section 49 to the facts. The appellant submits that the May 2019 emails did not amount to sufficiently clear written assent; that post-issue documents were wrongly used to support a prior agreement; and that the Judge failed to take into account material inconsistent with any pre-issue agreement.

(3) Thirdly, grounds 9 to 11 concern alleged procedural errors. The appellant submits that the Judge wrongly permitted the respondents to challenge the authenticity or reliability of the MOU, the Amendment Agreement, and the Cancellation Notice

notwithstanding the absence of a notice to prove under CPR 28.18 and notwithstanding representations made at trial.

[23] The appellant does not pursue ground 12, which concerned common mistake.

[24] By their counter-notice, the respondents seek to uphold the Judge's order on additional grounds. They say, first, that even if the initial issue of shares were void, the Court should refuse to remove ASOR from the settled list because ASOR could not have obtained rectification of the register immediately before liquidation. Secondly, they contend that the Judge was wrong to hold that section 49 requires the shareholder's written agreement to pre-date the issue of shares.

Standard of Appellate Review

[25] The interpretation of section 49 is a question of law. This Court must therefore form its own view of the statutory language, context and purpose. No question of appellate deference arises in relation to the meaning of the statutory words themselves.

[26] A different approach applies to findings of primary fact. The principles are well settled. In **Fage UK Ltd v Chobani UK Ltd**,[3] the English Court of Appeal emphasised that an appellate court should not interfere with a trial judge's findings of fact merely because it might have reached a different conclusion. The trial judge has seen the whole evidential picture unfold, has heard the witnesses, and has had the advantage of assessing the evidence in its totality. Similarly, in **Deutsche Bank AG v Sebastian Holdings Inc and another**,[4] the English Court of Appeal restated the high threshold for disturbing findings of fact, particularly where credibility and the trial judge's assessment of oral evidence are engaged.

[3] [2014] EWCA Civ 5.
[4] [2023] EWCA Civ 191.

[27] The position is more nuanced where the issue is one of inference, evaluation, or the legal effect of documents. In **Assicurazioni Generali SpA v Arab Insurance Group (BSC)**,[5] the English Court of Appeal distinguished between primary findings of fact, to which substantial deference is owed, and evaluative conclusions or inferences from established facts, where the appellate court may be in a better position to review the conclusion, particularly where the material is documentary. In **Simetra Global Assets Ltd and another v Ikon Finance Ltd and others**,[6] the Court of Appeal also made clear that appellate restraint does not prevent intervention where a finding is unsupported by the evidence, inadequately reasoned, or cannot be reasonably explained or justified.

[28] Moreover, case law[7] is clear that where issues of law or questions of mixed law and fact arise, this permits more intensive scrutiny of legal conclusions because questions of law concern the interpretation and application of legal rules and so appellate courts can review a question of law de novo (afresh) and substitute their own legal judgment for that of the lower court.

[29] That distinction is important in this appeal. Whether section 49 requires a single formal written agreement is a question of law. Whether the documents before the Judge were capable, as a matter of law, of satisfying section 49 involves applying that legal standard to the written record. To the extent that the Judge's assessment depended on oral evidence, credibility, and the overall trial picture, this Court should be slow to interfere. To the extent that the issue turns on the objective meaning and legal sufficiency of undisputed documents, this Court is entitled to assess those materials for itself, while giving appropriate weight to the Judge's overall evaluation of the evidence.

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[5] [2002] EWCA Civ 1642.
[6] [2019] EWCA Civ 1413.
[7] See: JSC BTA Bank v Ablyazov and another [2018] EWCA Civ 1176; Michael Joseph v Indra Hariprashad Charles et al SLUHCVAP2023/0028 (delivered 4th May 2026, unreported).

Section 49: Interpretation

[30] The appellant submits that section 49 requires a written contract between the company and the prospective shareholder. It says that the writing must identify the company, the shareholder, the number of shares, the consideration, and the date from which the proposed shareholder is to become a shareholder. It submits that any lesser requirement would fail to protect the person upon whom liability is said to be imposed.

[31] The respondents submit that this is an impermissible gloss on the statute. They say that section 49 requires only that the proposed holder, or that person's authorised agent, agree in writing to become the holder of the share. They emphasise that the section does not use the words 'contract', 'subscription agreement', 'executed agreement', or 'signed agreement'. They say that the statutory purpose is to ensure a sufficient written record of assent, not to require a formal instrument.

[32] In order to resolve this dispute, it is useful to recall the proper approach to statutory interpretation. The Court must begin with the words used, read in their statutory context. In **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Ltd**,[8] Carrington JA [Ag.], applying **R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme**[9] and **Douglas v The Police**,[10] emphasised that statutory interpretation requires the court to identify the meaning borne by the words in question in their particular context. Legislative intention is an objective concept inferred from the language used, and the primary meanings of the words may be modified so far as necessary to make them consistent with the statutory context. The court must start with the grammatical meaning of the words but must also consider the enactment as a whole and arrive at an informed interpretation rather than a merely literal one. The court must

[8] BVIHCVAP2016/0013 (delivered 30th May 2018, unreported).
[9] [2001] 2 AC 349.
[10] (1992) 43 WIR 175.

therefore consider both the grammatical meaning of section 49 and the wider scheme and purpose of the BCA.

[33] In my judgment, on that approach, the proper construction of section 49 lies between the parties' competing positions. The appellant is right that the writing must do more than merely record some loose or ambiguous connection with a proposed share issue; but the respondents are right that the section does not require a single formal bilateral subscription agreement.

The Language of the Section

[34] The starting point is the statutory text. Section 49 is directed to the 'issue' by a company of a share which increases or imposes liability on a person. By section 50, issue occurs when the person's name is entered in the register of members. The section therefore operates at the point at which company status and the liabilities attendant upon that status are imposed.

[35] The operative words are that the issue is void if the person, or an authorised agent, 'does not agree in writing to becoming the holder of the share'. The section does not expressly require a document labelled as a subscription agreement. It does not require execution by both company and shareholder. It does not require a signature. Nor does it say that all material terms must appear in a single document.

[36] I would therefore reject the appellant's submission that section 49 can be satisfied only by a single formal bilateral contract. To read the provision in that way would add words that the legislature did not use.

[37] However, it does not follow that the written requirement is minimal or purely evidential in a loose sense. Section 49 is a protective provision. It is concerned with preventing a person from being fixed with shareholder status, and the liabilities which may flow from that status, without written assent. The writing must therefore

do real work. It must show, with adequate clarity, that the person agreed to become holder of the share or shares in question.

[38] I would express the requirement in this way. The writing, whether in one document or in more than one contemporaneous document read together, must identify or permit identification of: (i) the person who is to become the holder; (ii) the company whose share or shares are to be held; (iii) the shareholding to which the person is agreeing, at least with sufficient certainty to identify the relevant shares or class and number; and (iv) the fact that the person agreed to become holder of that shareholding. Where the liability depends on consideration or unpaid value, the written record should also be sufficiently clear to identify the liability being assumed or the basis on which it can be ascertained.

[39] That formulation gives effect to the protective purpose of the section without converting it into a requirement for a formal subscription agreement. It also avoids rendering section 49 a trap for ordinary commercial communications where the written record, fairly read, makes the proposed holder's assent clear.

Contract and Issue of Shares

[40] The appellant relied on the contractual nature of the relationship between a company and its members, and on the proposition that a contract for the issue of shares may arise before registration. There is force in the proposition that a share issue will commonly be preceded by a contract of allotment or subscription. There is also no doubt that, in many commercial contexts, prudent practice will be to record the agreement in a formal subscription or share purchase agreement.

[41] There is an important distinction between what careful lawyers would ordinarily advise parties to do in documenting a substantial equity investment and what the statute requires as a condition of validity. A formal subscription agreement may be prudent, and in many commercial transactions expected. But section 49 does not ask whether the parties followed best practice, or whether the transaction was

documented as fully as it might have been. It asks whether the person on whom liability is imposed agreed in writing to becoming the holder of the share. That statutory question cannot be answered by substituting commercial prudence for statutory language.

[42] I therefore accept that the distinction between allotment and issue should not be overemphasised in a way that strips section 49 of practical protection. At the same time, I do not accept the appellant's submission that the existence of contractual relationships in company law compels the conclusion that section 49 requires a formal written contract. The statute could have said so, but it did not.

Authorities on Written Requirements

[43] Both sides relied on English authorities on statutory writing requirements. Those authorities are not binding as decisions on section 49, but they are helpful by analogy.

[44] In **Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd**,[11] the English Court of Appeal held that a writing requirement under the Statute of Frauds could be satisfied by a sequence of emails or documents. The decision arose in a shipping context and must be read with attention to its facts, but its significance is not limited to charterparties. It illustrates the wider proposition that modern commercial communications may satisfy statutory writing requirements where the statute does not demand a single formal instrument.

[45] In **Gluck v Secretary of State for Housing, Communities and Local Government and another**,[12] the Court of Appeal considered statutory wording requiring agreement in writing. The context was planning, and the wording was not the same as section 49. Nevertheless, the case supports a practical rather than excessively legalistic approach to whether an agreement is evidenced in writing. It does not

[11] [2012] EWCA Civ 265.
[12] [2020] EWCA Civ 1756.

establish that every statutory reference to agreement in writing requires a formal contract. Nor does it establish that such a requirement can be satisfied by ambiguous correspondence.

[46] Those authorities support the conclusion that the question is one of substance rather than form: whether the materials relied upon, construed fairly and in context, objectively record a concluded agreement in writing.

[47] The appellant relied on observations of Newey LJ in **Gluck**[13] suggesting that, in a different context, the words 'agree in writing' might require an agreement made in writing. I accept that those observations show that context matters. They do not, however, dictate the result here. Section 49 has its own text and purpose. That text does not support the appellant's proposed requirement of a formal written contract.

[48] New Zealand authorities were also relied upon, because section 50 of the New Zealand Companies Act 1993 is similar but not identical. The BVI provision omits the New Zealand words 'before it is issued' and uses 'agree' rather than 'consent'. I do not consider that much can safely be inferred from the difference between 'agree' and 'consent'. In ordinary usage they overlap substantially. Nor was there legislative material before the Judge demonstrating that the BVI legislature intended a materially higher threshold by using 'agree'.

[49] The more important point is that section 49 must be construed on its own terms. I would hold that the statutory requirement is one of sufficiently clear written assent to becoming holder of the relevant shares. It is not a requirement of formal written contract; nor is it satisfied by vague, equivocal, or merely administrative writing which does not show the proposed holder's assent to the relevant shareholding.

[13] Ibid, at paragraph 36.

Timing

[50] I turn to the respondents' counter-notice on timing. The Judge held that the written agreement required by section 49 should pre-date the issue of the shares. The respondents say that this was wrong because the statutory words are ‘does not agree’, not ‘did not agree’, and because the section should be tested at the time when the court considers whether the issue is void.

[51] I would not accept that submission. Section 49 speaks of agreeing in writing to ‘becoming’ the holder of the share. The natural reading is that the person agrees before or at the time of becoming the holder, not after the person has already become holder. The omission of the words ‘before it is issued’ in the New Zealand legislation is relevant, but not decisive. The words in the BVI legislation themselves point to pre-issue or contemporaneous assent.

[52] That conclusion also accords with the protective purpose of the section. If the purpose is to prevent liability being imposed without written assent, the assent should exist before the liability is imposed by entry on the register. Otherwise, the company could first enter a person on the register and only later seek confirmation. That would weaken the protection afforded by section 49.

[53] I would therefore dismiss the respondents’ counter-notice on the timing issue. I would, however, add an important evidential qualification. Documents created after issue cannot cure a failure to comply with section 49 if, at the moment of issue, there was no written assent of the kind required by the statute. But that does not mean that later documents are necessarily irrelevant. They may be admissible as evidence from which the court may infer whether the requisite assent existed before or at the time of issue. English law draws a distinction between using later material to create or vary a legal obligation retrospectively and using later material as evidence of whether an earlier agreement or assent existed. In **Global Asset Capital Inc and another v Aabar Block S.A.R.L and others**,[14] the Court of Appeal

[14] [2017] EWCA Civ 37.

held that, when deciding whether a contract had been made at an earlier point, the court may look at the whole course of communications, including communications immediately following the alleged contract date. The issue is whether those later communications shed light on whether agreement had already been reached. That approach is consistent with **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co**,[15] where the Supreme Court emphasised that contract formation is assessed objectively from the parties' communications and conduct as a whole. It is also consistent with **DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd**,[16] which distinguishes questions of formation — whether agreement was reached at all — from questions of interpretation or subsequent legal effect. The Judge's reliance on post-issue material must therefore be understood in that evidential sense: not as curing a void issue, but as corroborating the conclusion that ASOR's written assent had already been given.

[54] Accordingly, section 49 required written assent before or at the time of issue. But post-issue documents, including the BNP Paribas certificate, could be considered insofar as they corroborated the existence of earlier assent.

Application of Section 49 to the Facts

[55] The central factual question is whether, before or at the time ASOR was entered on Phoenix BVI's register on 10th May 2019, there was a sufficient written record of ASOR's assent to becoming the holder of the 440,935 shares.

[56] The Judge relied principally on the email exchange between 6th and 10th May 2019. The appellant submits that the emails, taken alone, did not identify the number of shares, the consideration, or ASOR's agreement to those matters. The respondents answer that the emails must be read with their attachment, which set out the proposed shareholding, and with the surrounding contemporaneous steps.

[15] [2010] UKSC 14.
[16] [2022] EWCA Civ 1555.

[57] In my view, the respondents are correct that the attachment formed part of the relevant written record. It was not a free-standing later reconstruction. It was part of the same email exchange. Although the Judge's paragraph [181] set out the text of the emails rather than reproducing the attachment in full, the attachment was before the Court and was referred to in the evidence. The appellate question is whether the Judge's conclusion was open on the written materials before her. It is not necessary that every supporting document be quoted in full in the paragraph in which the Judge set out the email text.

[58] The relevant written sequence may be summarised as follows.

[59] Firstly, on 6th May 2019, Mr. Navandher indicated that Phoenix BVI would work on issuance of shares at the BVI level to Inoks or the Inoks-nominated entity. That email formed part of the immediate commercial context in which the share issue was being discussed.

[60] Secondly, on 7th May 2019, Mr. Abdul-Massih responded by providing the full style of the shareholder entity, namely ASOR. This was not merely an internal Phoenix document. It was a communication from ASOR's side identifying the entity to be recorded as shareholder.

[61] Thirdly, on 8th May 2019, Mr. Navandher informed Mr. Abdul-Massih that the shares would be issued that Friday and that the named entity would be included in the register of members by the following Monday.

[62] Fourthly, on 10th May 2019, Mr. Navandher sent Mr. Abdul-Massih the current and revised shareholding of Phoenix BVI following the issuance of shares to the Inoks-nominated entity. The evidence before the Judge included Mr. Abdul-Massih's own statement that the document listed ASOR as holding 440,935 shares at US$90.72 per share, for a total value of approximately US$40 million.

[63] Fifthly, Mr. Abdul-Massih replied confirming ‘good receipt of the revised Shareholder structure and adequacy of the same’ and proposed that the announcement be changed so that the relevant references were to ASOR rather than Inoks.

[64] I accept that the phrase ‘good receipt of the revised Shareholder structure and adequacy of the same’ is not a model of legal drafting. Standing alone, it might have been open to more than one interpretation. It does not use the words ‘subscribe’, ‘allot’, ‘issue’, or ‘agree to be bound"’. If that phrase alone were the whole case, the appellant's argument would have greater force.

[65] But the phrase was not the whole case. It was part of a sequence in which the proposed shareholder had been identified, imminent issue and registration had been communicated, the shareholding structure had been sent, and Mr. Abdul-Massih confirmed the adequacy of that revised structure while correcting the proposed announcement to identify ASOR as the shareholder. On the same day, the board resolved to issue the shares, ASOR was entered on the register, and a share certificate was issued.

[66] In those circumstances, I would not interfere with the Judge's conclusion. The written record, read as a whole, permitted the Judge to find that ASOR had agreed in writing to becoming the holder of the 440,935 shares. The finding was not dependent on subjective intention or after-the-event oral explanation. It arose from the objective meaning of the contemporaneous written communications.

[67] The appellant submitted that the May 2019 emails were concerned only with administrative mechanics, or with preparing for a possible future completion once conditions precedent were satisfied. I do not accept that this submission makes the Judge's conclusion plainly wrong. The 8th May email said the shares would be issued and the entity included in the register. The 10th May email referred to the revised shareholding after issuance. The response did not object to issuance or registration, did not say that ASOR had not agreed, and did not say that no step

should be taken until a subscription agreement or shareholders' agreement was executed. It instead confirmed the adequacy of the revised shareholder structure and corrected the announcement to refer to ASOR.

[68] The appellant also relied on the absence of a later call on ASOR. That point does not materially undermine the Judge's conclusion. The absence of a call is capable of more than one explanation. In particular, Phoenix BVI's records treated the shares as having been issued against a capital contribution. The failure to make a call does not establish that ASOR had never agreed to become holder of the shares.

[69] The appellant further relied on Maples & Calder correspondence and advice suggesting that formal subscription documents, shareholder agreements, business plan approvals and corporate authorisations would be required before completion of the wider private equity transaction. That material was relevant background, but it was not determinative of section 49. Advice as to how a contemplated private equity transaction should be completed, or as to prudent documentation for a full investment transaction, does not answer the statutory question of whether ASOR agreed in writing to become the holder of the shares that were in fact issued on 10th May 2019. Nor does evidence of best practice impose a statutory requirement for a formal subscription agreement where section 49 does not do so.

[70] The appellant also relied on later communications and conduct said to be inconsistent with a completed share issue, including continued discussion of conditions precedent and draft transaction documents. That material was capable of supporting ASOR's narrative, but it was not decisive. The Judge was entitled to find that the share issue occurred notwithstanding the wider private equity transaction not having been fully completed. Section 49 is concerned with written assent to becoming the holder of the shares, not with completion of every contemplated document in the broader transaction.

[71] The BNP Paribas certificate was created after ASOR's entry on the register. I would not treat it as curing any defect that existed at the moment of issue. However, it was admissible as evidence corroborating the Judge's conclusion that ASOR had earlier agreed to be treated as shareholder. It was also relevant to the discretionary and reliance issues considered below. On the Judge's findings, the certificate stated that ASOR had been issued 440,935 shares against a capital contribution of approximately US$40 million and was used in connection with Phoenix BVI obtaining or maintaining the BNP Paribas facility.

[72] In short, the appellant's section 49 challenge depends upon isolating individual phrases in the email exchange and separating them from the attachment and surrounding steps. The Judge was entitled to take a broader, objective, documentary view. When that is done, there was sufficient written assent to satisfy section 49.

[73] I would therefore dismiss grounds 1 to 8 and 13.

Temporary or Provisional Shareholding

[74] The Judge held that BVI law does not recognise a status of temporary, provisional, or partial membership of the kind advanced by ASOR. The appellant did not directly appeal that holding.

[75] The appellant submits that this omission is not fatal because its primary case is that there was no valid agreement for any shareholding at all. That is correct as far as it goes. If there were no section 49 assent, the question whether provisional shareholding exists would not arise. But for the reasons already given, I would hold that the Judge was entitled to find sufficient written assent.

[76] Once that conclusion is reached, the absence of any recognised provisional or temporary shareholding becomes important. ASOR cannot both have agreed to be issued shares for the purposes of section 49 and yet escape the consequences of

membership by invoking a private status unknown to the BVI company law framework.

[77] It may be that parties can contract for other rights or assets relating to a company. Sections 29 and 31 of the **BCA** were relied upon by the appellant in this regard. However, the documents and events in issue here were not merely concerned with some abstract right or asset. ASOR was recorded on the register as holder of 440,935 shares. The share certificate and BNP Paribas materials proceeded on the basis of shareholding. The Cancellation Notice sought cancellation or redemption of the shares. The case is therefore not answered by recharacterising the arrangement as some other non-share asset or right.

Cancellation Notice

[78] The Cancellation Notice does not assist the appellant. On its face, it sought cancellation or redemption of the shares. That presupposed that there was a shareholding capable of cancellation or redemption. It did not operate retrospectively to undo ASOR's written assent in May 2019.

[79] Further, as the Judge held, the Company's articles and the **BCA** did not permit the unilateral redemption of the shares at ASOR's option in the manner asserted. A redemption or acquisition by the Company of its own shares required compliance with the statutory and constitutional requirements, including solvency requirements where applicable. No such effective redemption occurred before liquidation.

[80] I would therefore uphold the Judge's conclusion that the Cancellation Notice did not remove ASOR as a member before Phoenix BVI entered liquidation.

Procedural Grounds: CPR 28.18 and Notice to Prove

[81] The appellant's procedural grounds concern the MOU, the Amendment Agreement, and the Cancellation Notice. The appellant says the respondents did not serve a notice to prove under CPR 28.18 and represented at trial that they were not

challenging authenticity, yet were permitted to cast doubt on the authenticity, dating, and reliability of those documents. The appellant says the Judge therefore erred in making findings adverse to ASOR concerning those documents.

[82] The respondents answer that the issue had been raised well before trial, that the appellant bore the burden of establishing the documents on which it relied, and that the Judge's concerns arose from ASOR's own evidence.

[83] It is unnecessary for the disposition of this appeal to decide every question concerning the scope and effect of CPR 28.18. I am prepared to assume in the appellant's favour, without deciding, that the respondents were not entitled to challenge the authenticity of the MOU, the Amendment Agreement, or the Cancellation Notice in the manner alleged by the appellant. I am also prepared to assume, again without deciding, that those documents should have been treated as authentic in the sense that they were genuine documents and not forgeries.

[84] Those assumptions do not alter the result. Authenticity is not the same as legal effect. Nor is it the same as establishing that the documents produced the consequences for which ASOR contends.

[85] Firstly, the MOU, even if authentic, stated on its face that it was not intended to be a binding contract in respect of obligations of the parties. It therefore did not create a binding legal condition which prevented any subsequent written assent to the issue of shares.

[86] Secondly, the Amendment Agreement, even if authentic, does not defeat the May 2019 written assent. On ASOR's own case, the Amendment Agreement contemplated the possibility of the issuance of 440,935 shares and referred to an arrangement involving a US$40 million capital contribution or conversion mechanism. Once BVI law is taken not to recognise a temporary or provisional shareholding of the kind advanced, the Amendment Agreement cannot convert an

actual entry on the register into a non-shareholding status. At most, it forms part of the background against which the May 2019 communications occurred. It does not render those communications insufficient for section 49.

[87] Thirdly, the Cancellation Notice, even if authentic and delivered, presupposed that shares had been issued and sought their cancellation or redemption. It did not show that ASOR never agreed to become holder. It also did not achieve a valid redemption or cancellation under the **BCA** and the Company's articles.

[88] Fourthly, the primary basis on which I would uphold the Judge is the sufficiency of the May 2019 written communications, read with the attachment and contemporaneous issuance steps. The authenticity of those materials is not the subject of the CPR 28.18 complaint. Even if the MOU, Amendment Agreement, and Cancellation Notice are treated as authentic, they do not displace the conclusion that ASOR agreed in writing to becoming the holder of the shares.

[89] For those reasons, any error by the Judge in permitting or entertaining challenges to the MOU, the Amendment Agreement, or the Cancellation Notice was not material to the result. Grounds 9 to 11 therefore fail.

Discretionary Refusal of Relief and the Settled List of Members

[90] The respondents submit by Counter-Notice that, even if ASOR could establish that the share issue was void under section 49, the Court should refuse to remove ASOR from the settled list of members. The appellant says that this argument wrongly treats its application as if it were a rectification claim and that section 193 of the **Insolvency Act** does not confer a broad discretion.

[91] It is necessary to approach this issue with care. The application before the Judge was not, strictly speaking, an ordinary rectification application under the companies legislation. It was an application under section 193(3) of the **Insolvency Act**

challenging inclusion on a list of members settled by liquidators. The language and purpose of that provision must therefore be respected.

[92] However, the section 193 jurisdiction cannot be exercised in isolation from the register and from the liquidation context. The settled list is prepared because the company is in liquidation. It reflects, and is derived from, the membership position of the company. Where the applicant seeks removal from that list on the basis that the register should not have treated it as a member, the court may properly consider whether, immediately before liquidation, the applicant could have obtained removal or rectification of the register and whether it would be just to grant equivalent relief after liquidation has commenced.

[93] I would therefore not state the matter as an unlimited discretion to disregard statutory status. If a person was never a member and was wrongly included, the court must give effect to the statute. But where the court is asked to grant relief which is, in substance, analogous to undoing a register position after the commencement of liquidation, the applicant's prior conduct, delay, third-party reliance, and the effect on creditors and the liquidation are relevant considerations.

[94] On the facts found, those considerations are powerful. ASOR was entered on the register on 10th May 2019. It did not apply to the court to have its name removed before liquidation. It permitted itself to be represented to BNP Paribas as a shareholder. It signed or caused to be provided the BNP Paribas certificate in connection with a facility for Phoenix BVI. The Company subsequently entered liquidation. The liquidators then settled the list of members by reference to the register.

[95] The appellant submits that section 193 gives it a specific statutory right to object to inclusion on the list and that delay before liquidation should not defeat that right. I accept that the statutory right to object is real, but the existence of the right to apply does not mean the court must ignore the circumstances in which the applicant

comes before it or the consequences of the relief sought. Section 193(3) empowers the court to make an order removing or modifying an entry. It does not require the court to do so automatically whenever an arguable defect is shown, irrespective of conduct and reliance.

[96] Although this is an application under section 193(3) of the **Insolvency Act** and not a rectification claim in the strict sense, the rectification authorities are nevertheless instructive. They show that relief affecting the register of members is discretionary and sensitive to prejudice, third-party rights and the practical consequences of altering the register. **Re Sussex Brick Co Ltd**, as quoted in **Greenwich Millennium Exhibition Ltd v New Millennium Experience Company Ltd**,[17] establishes that rectification is not available *ex debito justitiae* and may be refused where it would work injustice to others. **Smith v Charles Building Services Ltd and another**[18] confirms that the discretion remains even where a prima facie right to rectification is shown. **Re Transatlantic Life Assurance Co Ltd**[19] shows that creditor interests may be relevant where rectification affects the apparent capital or membership position. **Nilon Ltd v Royal Westminster Investments SA**[20] underlines the centrality of the register to membership and shareholder liability. Those principles apply with particular force after liquidation, when creditor interests have intervened and the statutory process of settling the list of members has begun.

[97] I would therefore accept the respondents' alternative submission in a qualified form. If, contrary to my primary conclusion, there had been doubt about the sufficiency of the May 2019 written assent, I would nevertheless have refused the relief sought on the basis that ASOR's own conduct materially contributed to the position now challenged and that removal after liquidation would be inconsistent with the equities and practical realities of the insolvency process.

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17 [2003] EWHC 1823 (Ch) at paragraph 76, quoting Williams L.J. in Re Sussex Brick Co Ltd [1904] 1 Ch 598 at 606–607.
18 [2006] EWCA Civ 14 at paragraphs 10(5), 11 and 12.
19 [1980] 1 WLR 79 at pages 85A–B and 85E–G.
20 [2015] UKPC 2 at paragraph 39.

Estoppel and Representation to BNP Paribas

[98] The respondents also relied on estoppel. I do not consider it necessary to decide whether all elements of a freestanding estoppel are made out in favour of the respondents, the Company, the liquidators, or creditors. The representation to BNP Paribas is, however, highly material to the discretionary analysis just described.

[99] The BNP Paribas certificate was plainly capable of representing that ASOR had been issued the 440,935 shares and was recorded as a shareholder. The Judge found that the certificate was provided for the purpose of satisfying BNP Paribas or inducing BNP Paribas to proceed with a facility for Phoenix BVI. Whether analysed as estoppel, acquiescence, reliance, or simply as conduct relevant to discretionary relief, this is a serious obstacle to ASOR's attempt to deny shareholder status after liquidation.

[100] I would not finally decide the broader estoppel point because it is unnecessary. The same facts are sufficient to reinforce the conclusion that removal from the settled list should not be ordered.

Conclusion and Disposition

[101] I would summarise my conclusions as follows.

[102] Firstly, section 49 of the **BCA** does not require a single formal bilateral contract executed by both the company and the proposed shareholder. The statutory words do not impose that level of formalism.

[103] Secondly, section 49 is nevertheless protective. It requires a written record, whether in one document or in more than one contemporaneous document read together, from which the proposed holder's assent to becoming holder of the relevant share or shares can be established with sufficient clarity.

[104] Thirdly, the written assent required by section 49 should exist before or at the time of issue. I would therefore dismiss the respondents' counter-notice on the timing issue. Post-issue documents may, however, be used evidentially to corroborate the existence of prior written assent.

[105] Fourthly, on the particular facts of this case, the Judge was entitled to find that the May 2019 email exchange, read with its attachment and the surrounding contemporaneous steps, evidenced ASOR's written assent to becoming holder of the 440,935 shares.

[106] Fifthly, the Judge's conclusion that BVI law does not recognise a temporary or provisional shareholding of the kind advanced by ASOR has not been displaced. The Cancellation Notice did not effect a valid cancellation or redemption of the shares before liquidation.

[107] Sixthly, the procedural complaints concerning CPR 28.18 do not affect the outcome. Even assuming in ASOR's favour that the MOU, the Amendment Agreement and the Cancellation Notice should have been treated as authentic, those documents do not undermine the sufficiency of the May 2019 written assent or establish that ASOR should be removed from the settled list.

[108] Seventhly, even if there were doubt on the primary section 49 issue, I would refuse the relief sought. ASOR was on the register, permitted itself to be represented to BNP Paribas as shareholder, did not seek removal before liquidation, and now seeks relief after the commencement of the insolvency process. Those circumstances would justify refusal of removal from the settled list.

[109] I would therefore dismiss the appeal and affirm the order of Mangatal J [Ag.] dated 30th May 2024, as amended on 11th June 2024, save that I would dismiss the respondents' counter-notice on the timing issue while holding that the order below should nevertheless stand.

[110] Costs should follow the event. The appellant shall pay the respondents' costs of the appeal, to be assessed by a judge of the Commercial Court if not agreed within 21 days of this judgment. The costs order made below shall remain undisturbed.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
P. Nicola Byer
Justice of Appeal

By the Court

Chief Registrar