THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2025/0024

BETWEEN:

XENO ORIGIN LIMITED

Appellant

and

MA KWOK LEUNG

Respondent

BVIHCMAP2025/0026

BETWEEN:

MA KWOK LEUNG

Appellant

and

XENO ORIGIN LIMITED

Respondent

Before:

Hon. Mde. Margaret Price Findlay	Chief Justice [Ag.]
Hon. Mde. Esco L. Henry	Justice of Appeal
Hon. Mr. Gerard St. C Farara	Justice of Appeal

Appearances:

Mr. David Lord, KC for the Appellant/Respondent, Xeno Origin Limited
Mr. Alexander Cook, KC with him Mr. Guy Olliff-Cooper, Mr. Aaron Mayers and Ms. Grainne Hussey for the Respondent/Appellant Ma Kwok Leung

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2026: February 24;
July 3.

Company law - Derivative actions - Section 184c of the BVI Business Companies Act, 2004 - Leave to bring proceedings - Retrospective leave - Whether proceedings commenced without prior leave of court are a nullity or merely defective - Distinction between "no appeal shall lie" in section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 89 and "not entitled to bring or intervene" in section 184c(6) - Whether section 184c(6) speaks to existence of proceedings or to capacity and standing of member - Whether BVI court has jurisdiction to declare foreign derivative proceedings a nullity - Absence of express power to "continue" extant proceedings under section 184c unlike English equivalent under section 261(1) of the Companies Act 2006 - No retrospective power conferred by necessary implication or inherent jurisdiction – Whether absence retrospective power the member must apply anew for prospective leave - Mandatory considerations under section 184c(2) - Whether a failure to satisfy any one of the five considerations must result in dismissal of leave application - Whether certain of the five mandatory considerations can carry more weight than others -Whether court has the power to consider relevant considerations or factors in addition to the five mandatory considerations under section 184c(2) - Court's overriding discretion to consider matters in the round - Full and proper as opposed to cursory examination of evidence required - Whether blanket prospective leave permissible without claim-by-claim analysis - Valuation evidence - Whether independent professional valuation essential where claim premised on sale at gross undervalue - Third-party offers to purchase as cogent evidence indicative of market value - Litigation costs under section 184c(2)(d) - Adequate alternative remedies under section 184c(2)(e) - Whether personal claims of member and derivative claims of company in respect of different losses overlap

These were two interrelated interlocutory appeals from the same judgment and order of Wallbank J of the Commercial Division of the High Court of Justice of the British Virgin Islands on an application for retrospective leave and, alternatively, prospective leave under section 184C of the BVI International Business Companies Act, 2004 of the Virgin Islands ("BCA")., Xeno Origin Limited ("Xeno") is a BVI company whose sole registered shareholder is Ma Kwok Leung ("Mr. Ma"), who held the shares therein as nominee for Mr. Lim Yew Cheng ("Mr. Lim"). Xeno held 48.999997% ("the 49% Shares") of the issued share capital in a Hong Kong company, Aether Limited ("HK Aether"), which in turn held 100% of the shares in Beijing Aether Property Development Ltd ("BJ Aether"), a company incorporated in the People's Republic of China which owned substantial real estate properties in Beijing known as the Development Properties.

Xeno had been financed through two loan facilities Xeno 1 and Xeno 2 with Guanghua SS Holdings Limited ("Guanghua SS"), part of MBK Partners. Both facilities were secured by a Composite Share Charge over Mr. Ma's shares in Xeno and over the 49% Shares held by Xeno in HK Aether. Following default on both facilities, Mr. Cosimo Borrelli and Mr. Meade Malone ("the receivers") were in November 2021 appointed by the security trustees as joint receivers over the Secured Assets. Mr. Ma's case was that the receivers had conducted an inadequate marketing process for the Secured Assets and had ultimately, in breach of duty, negligently and as part of a conspiracy to defraud Xeno, transferred the 49% shares held by Xeno in HK Aether to Chang An Limited, a joint venture company incorporated by China Cinda (HK) Asset Management Co. Limited ("Cinda HK"), for the sum of US$1 million, notwithstanding that the said shares had attracted third-party offers in the hundreds of millions of US dollars. Mr. Ma contended that the receivers had conspired with Guanghua SS and Cinda HK to sell the secured assets at a gross undervalue.

Mr. Ma was joined personally and in a derivative capacity, as a plaintiff in proceedings before the High Court in Hong Kong ("the First HK Proceedings") in a derivative capacity on behalf of Xeno, without first having applied for and obtained the leave of the BVI Court under section 184C of the BVI Business Companies Act, 2004 ("the BCA") to bring such derivative proceedings. The receivers, in their defence in the First HK Proceedings, pleaded that Mr. Ma's derivative claims were defective for want of such leave. This prompted Mr. Ma to file a Fixed Date Claim Form in the BVI Commercial Court seeking, as a first limb, retrospective leave to commence and continue the First HK Proceedings derivatively in the name and on behalf of Xeno and, alternatively, prospective leave to bring new derivative proceedings before the Hong Kong courts in the name and on behalf of Xeno.

The learned judge refused the application for retrospective leave, holding that the provisions of section 184C(6) of the BCA which provides that a member 'is not entitled to bring or intervene in any proceedings in the name or on behalf of a company' except as provided in the section, did not permit the court to grant leave retrospectively. He reasoned that proceedings commenced without leave were a nullity, and that one cannot grant leave to commence something that has already been commenced. He equated the phrase 'not entitled to bring' in section 184C(6) with the expression 'no appeal shall lie' in section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 89. However, the learned judge granted the alternative limb of the application for prospective leave. Having considered the mandatory factors under section 184C(2) of the BCA, he concluded that the derivative claims were more probable than not to succeed, that their pursuit was in the interests of Xeno, that there was no adequate alternative remedy, and that the likely recoveries would far exceed any reasonable estimate of the likely litigation costs. He accordingly granted Mr. Ma prospective leave to commence new derivative proceedings in Hong Kong against the receivers and the other defendants in the name and on behalf of Xeno. At a consequential hearing, the judge ordered Mr. Ma to pay Xeno's costs on the retrospective leave issue and awarded Mr. Ma his costs on the prospective leave issue.

Mr. Ma appealed the refusal of retrospective leave, contending that the learned judge erred in construing section 184C(6) as not permitting the court to grant such leave. He argued that unlike the expression 'no appeal shall lie' which speaks to the very existence of an appeal, section 184C(6) speaks only to a member's capacity and standing to bring proceedings in the name of the company and says nothing as to the legal status of proceedings brought without leave, which such proceedings are defective but not a nullity. Mr. Ma also challenged the consequential costs order. Xeno appealed the grant of prospective leave on six grounds, contending that the learned judge applied an incorrect and lower "possibility" standard rather than the 'more probable than not' standard when assessing whether the derivative claims were likely to succeed; granted blanket prospective leave across all pleaded causes of action without a claim-by-claim analysis; was not entitled in the absence of a professional valuation of the 49% Shares at the date of their sale to find that a sale at a gross undervalue was more probable than not; erred in treating non-binding third-party offers to purchase as cogent valuation evidence; wrongly treated the five mandatory considerations under section 184C(2) as non-cumulative rather than as threshold requirements each of which must be satisfied; and erred in his treatment of litigation costs and the availability of adequate alternative remedies.

Held: dismissing both appeals and ordering that the costs of Appeal No. 26/2025 be awarded to Xeno and the costs of Appeal No. 24/2025 be awarded to Mr. Ma, both such costs to be assessed by a judge of the Commercial Division of the High Court of the Virgin Islands if not agreed by the parties within 30 days of the date of delivery of the judgment, that:

1. The expression "is not entitled to bring or intervene" in section 184C(6) of the BCA and the expression "no appeal shall lie" in section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 89 are not synonymous and do not convey the same meaning or direct the same legal consequence. The words "no appeal shall lie" speak to the non-existence of an appeal filed without leave, rendering any such "appeal" a nullity incapable of being revived by a subsequent grant of leave. The words "is not entitled to bring or intervene" in section 184C(6) speak to the capacity and standing of a member to bring or intervene in proceedings in the name and on behalf of the company; but say nothing as to the legal status of purported derivative proceedings brought without the leave or permission of the court under section 184C of the BCA, and do not declare or make clear that such proceedings are a nullity. Furthermore, the BVI Court has no extra-territorial jurisdiction to declare foreign derivative proceedings a nullity, and derivative proceedings brought by a member without leave whether in the BVI or in a foreign jurisdiction are defective but not a nullity. Proceedings brought by a member without leave are either a nullity or they are not, regardless of the jurisdiction in which they have been commenced, and the same conclusion must apply to derivative proceedings brought without leave of the BVI Court whether in the BVI or elsewhere.

   Patrick v Walker JM 1966 CA 217 considered; **MacDonna v Richardson** AXAHCVAP2005/0003 (delivered 29th June 2007, unreported) considered**; Nigel Gray v Allan Leddra and others BVIHC** (COM) 2011/0079 (delivered 4th April 2012, unreported) considered; **Wong Ming Bun v Wang Ming Fan and others HCA** [2014] 1 HKLRD 1108 considered; **Novatrust Limited v Kea Investments Limited and Ors** [2014] EWHC 4061 (Ch) considered.

2. There is no express power in section 184C of the BCA conferring on the court the power to grant retrospective leave to a member to continue derivative proceedings already commenced without prior leave. The language of the section is entirely prospective, employing only the expressions "to bring", "to intervene", "to defend" and "to discontinue". Section 184C is devoid of the words "to continue" found in the corresponding English provision, section 261(1) of the Companies Act 2006, which expressly empowers an English court to grant permission to continue derivative proceedings brought without the leave of the court. Further, no retrospective power is conferred by necessary implication, nor is it permissible to imply one. Any contention that such a power may be derived from the court's inherent jurisdiction is misconceived, as the jurisdiction to permit a member to bring derivative proceedings is a creature of statute and does not exist at common law. The remedy

available to a member who has commenced derivative proceedings without leave, is to apply anew for prospective leave placing before the court the material necessary to satisfy the mandatory considerations under subsection (2) and the requirements of subsection (3) of section 184C.

Re Saunders (A Bankrupt) [1997] Ch 60 considered; **Re Testro Bros Consolidated Ltd** [1965] VR 16 (Scholl J) considered; **Wilton UK Ltd v Shuttleworth** [2017] EWHC 2195 (Ch) considered; **Iu Chung v Greater Achieve Limited** BVIHC (COM) 2015/0140 (delivered 6th June 2017, unreported) considered; **Seal v Chief Constable of South Wales Police** [2007] UKHL 31 applied.

3. The five mandatory considerations set out in section 184C(2) of the BCA do not constitute a cumulative checklist of threshold requirements each of which must be independently satisfied before the court may grant leave to bring derivative proceedings. Properly construed, section 184C requires that each of these five factors or considerations must be considered by the judge in assessing the merits of and determining an application for leave to bring derivative proceedings. The opening words of section 184C(2) “without limiting subsection (1)” also make plain that the court’s discretion under subsection (1) is not confined to the five specified mandatory factors and that additional relev
4. ant considerations may also be taken into account having regard to the circumstances of each case. However, a failure to satisfy any one of the five mandatory considerations under subsection (2) points, prima facie, towards refusal of leave, but does not automatically result in refusal. The court retains an overriding discretion to assess all relevant factors or considerations in the round. Moreover, the weight to be accorded to each of the five mandatory considerations in subsection (2) and to any additional relevant factor or factors, is a matter for the presiding judge having regard to the particular circumstances of each application. These five considerations under section 184C (2) are to be contrasted with the absolute preconditions under section 184C (3), which must be satisfied before leave can, in any circumstances, be granted. However, consideration (c) - whether the proceedings are likely to succeed - is of paramount importance and is likely to be decisive.

Basab Inc v Accufit Investment Inc and Anor BVIHCMAP2014/0020 (delivered 9th November 2015, unreported) followed; **Nigel Gray v Allan Leddra and others** BVIHC (COM) 2011/0079 (delivered 4th April 2012, unreported) considered; **Glory Advance International Limited v Merit Fortune Holdings Ltd** BVIHC (COM) 2015/0090 (delivered 8th July 2016, unreported) considered; **ZVI Dekel v Clerkenwell Lifestyle Limited** BVIHC (COM) 2024/0466 (delivered 4th March 2025) considered; **Cream Holdings Ltd v Banerjee** [2005] 1 AC 253 considered.

5. The correct threshold test for whether derivative proceedings are ‘likely to succeed’ under section 184C(2)(c) of the BCA, is whether it is more probable than not that the proceedings will succeed. In this regard, the court is required to carry out a full and proper as opposed to a cursory examination of the evidence before it,

evaluating that evidence alongside the arguments and counterarguments advanced by both parties in relation to the merits of each cause of action. The court must consider the elements of each pleaded cause of action; the nature, cogency and probative value of the evidence adduced by the applicant; any counter-evidence advanced by the respondent; the ingredients of and principles of law applicable to each cause of action, including expert evidence of foreign law where relevant; and any unassailable defence (such as a limitation plea) which might render a claim hopeless notwithstanding its apparent merits on paper. However, in carrying out this exercise, the court must not conduct a mini trial.

6. Where a judge has used words like "possible" and "possibly" in describing the likely success of individual derivative claims, an appellate court must carefully read the lower court's judgment as a whole to determine whether the correct threshold test of 'more probably than not' was in fact applied. An isolated use of such words do not necessarily lead to the inescapable conclusion that the judge applied a lower standard than that prescribed in *Basab Inc v Accufit Investments Inc and Anor*. In the instant matter, on a proper reading of the judgment, the learned judge clearly identified and had in mind the correct threshold test of "likely to succeed" set out in **Basab** and his use of the terms "possible" and "possibly" when read in the particular context do not demonstrate that he applied a lower test or lower standard in determining whether those causes of action were likely to succeed.

   Basab Inc v Accufit Investment Inc and Anor BVIHCMAP2014/0020 (delivered 9th November 2015, unreported) followed.

7. Where the underlying basis of a derivative claim is an allegation of a sale at a gross undervalue, it is not an absolute requirement that an applicant for leave under section 184C must, at this stage, adduce evidence of an independent professional valuation of the relevant asset or property as at the date of the impugned sale. While such evidence is to be preferred and would best assist the court in carrying out the gatekeeper exercise under section 184C to ensure that weak or frivolous claims are not permitted to be brought in the name and on behalf of a company by a member or members, an applicant/member may adduce and rely on other cogent and reliable documentary evidence indicative of the market value of the relevant assets at or sufficiently proximate in time to the date of the impugned sale. This may include bona fide third-party offers to purchase the same assets, provided those offers are from reputable and substantial entities or persons and are not shown to be fabricated or otherwise unreliable. The court on a section 184C leave application is not required to determine the market value of the assets to the standard applicable at trial and need only be satisfied that there is sufficient cogent evidence indicative of value to support a finding that a claim based on a sale at a gross undervalue is more probable than not to succeed. In carrying out its sifting and gatekeeper function under section 184C of the BCA, the court is required to assess the merits of each pleaded or intended cause of action in determining under section 184C(2)(c) whether the derivative proceedings meet the threshold test of 'likely to succeed.' Furthermore, it is not correct as a matter of principle to simply grant blanket leave across a suite of claims on the strength of findings made only in relation to some of

them. However, where the various causes of action are closely interrelated and substantially turn on the same underlying questions of fact and law, a judge may be satisfied that each has been sufficiently addressed without conducting a wholly separate analysis of every element of every cause of action, provided the judgment as a whole demonstrates that the judge's mind was directed to the distinct claims. An allegation of unlawful means conspiracy is sufficiently pleaded where the statement of claim identifies the parties alleged to have combined, the unlawful means said to have been employed, and the intent to injure; and it is possible for the conspiracy claim to be regarded as less probable of success than a claim in negligence and yet still satisfy the "more probable than not" standard.

Basab Inc v Accufit Investment Inc and Anor BVIHCMAP2014/0020 (delivered 9th November 2015, unreported) followed; **Royal Brunei Airlines Sdn Bhd v Tan** [1995] 2 AC 378 considered; **Kuwait Oil Tanker Co SAK v Al Bader** (No 3) [2000] 2 All ER (Comm) 271 (CA) considered.

8. In considering consideration (d) of section 184C (2) - the costs of the proposed derivative proceedings in relation to the relief likely to be obtained, the court is not in every case required to have before it a formal litigation budget or costs schedule. Where it is self-evident from the material before the court that the likely recoveries, should the derivative claims succeed, would far exceed any reasonable estimate of the likely litigation costs, it is open to the judge to conclude that consideration (d) has been satisfied to the requisite standard, without the production of a formal costs budget. The court may also take into account a personal indemnity as to costs offered by the applicant/member where there is a proper basis to regard it as genuine and where the member has demonstrated the capacity to fund the litigation.

Glory Advance International Limited v Merit Fortune Holdings Ltd BVIHC (COM) 2015/0090 (delivered 8th July 2016, unreported) considered.

9. Where the derivative claim brought by a member on behalf of the company and the personal claims brought by that member in his own capacity are in respect of different losses suffered in different capacities, the former in respect of loss to the company and the latter in respect of loss suffered personally as guarantor and chargor, the availability of the personal claim does not constitute an adequate alternative remedy to the derivative claim for the purposes of consideration (e) of section 184C (2) of the BCA.

JUDGMENT

[1] **FARARA JA [AG.]:** These are two interrelated interlocutory appeals from the same judgment and order which, conveniently, were heard together and will be decided in this judgment. The first, No. 24/2025, brought by Xeno Origin Limited (Xeno' or

'the Company'), a company incorporated under the laws of the Territory of the Virgin Islands ('BVI'), against Ma Kwok Leung ('Mr. Ma'). Mr. Ma is the sole registered shareholder of Xeno and the legal owner of all issued shares in Xeno. It is not disputed that Mr. Ma holds those shares as nominee for Mr. Lim Yew Cheng ('Mr. Lim'). The second appeal, No. 26/2025, was brought by Mr. Ma against Xeno. While both appeals arise from the same judgment and order, Xeno and Mr. Ma (qua appellants) have appealed different primary findings, conclusions and orders made by a learned judge (Wallbank J), a judge of the Commercial Division of the High Court of Justice in the Territory of the Virgin Islands ('BVI'), as pronounced in an *ex tempore* judgment and order both dated 26th June 2025 whereby the learned judge determined an application, by Fixed Date Claim Form, brought by Mr. Ma for, in the alternative, retrospective and prospective derivative orders pursuant to section 184C of the BVI Business Companies Act, 2004 ('the BCA' or 'the Act').

Background

[2] The salient background facts existing prior to the events leading to Mr. Ma's application to the Commercial Court for leave to bring a derivative claim before the High Court in Hong Kong, are of some importance in placing matters in their proper perspective. Below is a short summary of this background information, much of which is taken from the summaries in the skeleton arguments for both Xeno and Mr. Ma.

[3] Xeno held 48.999997% of the issued share capital in a Hong Kong company, Aether Limited ("HK Aether"). The remaining 0.000003% was owned by Kenora Corporation Limited ("Kenora") a Liberian company owned by Mr. Lim. The combined shareholding of Xeno and Kenora is referred to as "the 49% Shares". The remaining 51% shareholding in HK Aether was held by an entity 'Keppel Land', a global asset manager and its subsidiaries. HK Aether has, at all material times, held 100% of the issued shares in Beijing Aether Property Development Ltd ('BJ Aether'), a company incorporated in the People's Republic of China ('PRC' or 'China'). BJ Aether in turn owned substantial real estate properties located at No. 7 Guanghua

Road in Beijing in the PRC, which have been under development for some time ('the Development Properties'). BJ Aether is part of a joint venture between HK Aether and Beijing Guanghua Textile ('BGT').

[4] Pursuant to the joint venture agreement, BGT was entitled initially to 20% and HK Aether to 80% of the economic interests in Development Project. However, on 31st December 2012 BGT's 20% interest was transferred to an entity called "Guangzhou Hun Yuan", the shares of which were held on trust for Mr. Lim.

The Xeno 1 and 2 Loan Facilities and Appointment of Receivers

[5] As matters unfolded, prior to 2017 Xeno was financed by Deutsche Bank. Mr. Le was then an employee of Deutsche Bank and is said to have had a close friendship over the years with Mr. Lim. In 2017, Mr. Le moved from Deutsche Bank to MBK Partners, a private equity firm based in Asia. It is Mr. Ma's case that Mr. Le persuaded Mr. Lim, through various misrepresentations and undue influence, to refinance Xeno's debts with MBK Partners. This led to Xeno entering into two loan facilities called 'Xeno 1' and 'Xeno 2' with Guanghua SS Holdings Limited ('Guanghua SS'), part of MBK Partners.

[6] On 21st December 2017, through SCH1, a BVI company, Xeno, was provided with first a loan facility of US$80 million ('Xeno 1 Facility'). The Xeno 1 Facility was secured in favour of Guanghua SS by certain "Security Assets". These were comprised of a Composite Share Charge over (i) Mr. Ma's shares in Xeno; (ii) the 49% Shares owned by Xeno in HK Aether. The Xeno 1 Facility was also secured by the personal guarantees of Mr. Lim and his son Lin Minghan ('Mr. Lin').

[7] On 21st May 2018, Xeno entered into a second loan facility ('Xeno 2 Facility') with Guanghua SS (part of MBK Partners). As security for this second loan, the Composite Share Charge entered into in relation to the Xeno 1 Facility was extended to cover the monies loaned under the Xeno 2 Facility, and the Xeno 1 Facility was assigned to Guanghua SS. However, the Xeno 2 Facility was assigned

to HK Aether which was then secured by a charge over its 80% equity interest in BJ Aether. It is Mr. Ma's case that the result is that Xeno was no longer the borrower under the Xeno 2 Facility, but the security provided by Xeno and the personal guarantees provided by Mr. Lim and Mr. Lin were never released.

[8] In December 2019, the Xeno 1 Facility became due for repayment. It is Mr. Ma's case that Mr. Lim was willing and able to do so. However, he was informed by Wei Ming, an employee of Mr. Le, that the Xeno 1 Facility had to be discharged at the same time as the Xeno 2 Facility. Further, as Mr. Lim had no control over whether the Xeno 2 Facility was repaid as this loan was owed by HK Aether, which was under the control of a Cayman Islands company called CDB Aether Center Limited ('CDB Aether'), the result was that both the Xeno 1 and 2 Facilities fell into default.

[9] On 23rd November 2021, SCH 1, as security trustee under the Security Agreements, appointed Mr. Cosimo Borrelli and Mr. Meade Malone as joint receivers ('Receivers') over the assets which Guanghua SS held as security. These included the 49% Shares held by Xeno in HK Aether and the 80% interest of HK Aether in the Development Project.

[10] On the same date Mr. Borrelli was appointed sole director of Xeno; and Guanghua SS presented a winding up petition before the courts in Hong Kong in relation to HK Aether (which petition was granted and a winding up order made on 7th June 2021); and Guanghua SS commenced legal proceedings before the courts in Hong Kong against Mr. Lim and Mr. Lin on their personal guarantees. Judgment was granted to Guanghua SS on 20th April 2022. In June 2024 (approximately 2 years later) Guanghua SS commenced proceedings in the BVI to enforce the judgment against the shares held by Mr. Ma in Xeno.

[11] Mr. Ma's position is that these enforcement proceedings are a transparent attempt to stifle the Derivative Claims before the court in Hong Kong. In this respect, Mr. Ma points to an admission by Guanghua SS and Cinda HK in the First HK Proceedings

that '*since around 2021, MBK Partners and Guanghua [SS] on the one hand and Cinda HK on the other hand engaged in discussions about collaborating in the enforcement of their respective securities*', as evidence of a conspiracy and agreement 'that MBK Partners/Guanghua SS would procure the Receivers only to sell the 49% Shares to Cinda HK, thereby enabling Cinda HK to take complete control over HK Aether, and through it, the [Development] Project. This explains why, in the years following their appointment, the Receivers took such lacklustre steps to market the Security Assets and even at times took steps that appear calculated to put off prospective purchasers.' (Mr. Ma's Derivative Appeal written submissions para. 20). Needless to say, these are most serious allegations levelled against or implicating these Receivers in a conspiracy, both of whom are well-known to the court as persons of integrity and professionalism.

Sale by Receivers of Security Assets for US$1M

[12] Following their appointment the Receivers took certain steps to market the security assets. In this respect, the parties are not in total agreement as to the extent of these steps and the reasons for and justification or rationale why the Receivers sold the Security Assets on 1st August 2023 to Chang An Limited ('Chang An') a joint venture company incorporated on 13th July 2023 by Cinda HK for purchase price of US$1 million. I set out below my understanding of certain of the steps taken by the Receivers to market the Security Assets and to invite offers from interested third party investors.

[13] Between 2nd December 2020 and 23rd July 2021, the Receivers placed advertisements in various newspapers marketing the sale by them of the Security Assets under their powers as appointed Receivers. These advertisements have been criticized by Mr. Ma as being 'poorly prepared.' Between 4th December 2020 and 23rd April 2024, the Receivers contacted 375 'potentially interested parties.' Mr. Lim's evidence is that only a small number of these contracted were interested in the Security Assets and that the actions by the Receivers 'smacks more of a party trying to look like they are doing their job, rather than actually thinking about how

best a sale could be achieved' (Lim's 2nd affirmation at para. 37). These steps were categorized by Mr. Ma as 'meagre efforts' by the Receivers to properly market and sell the Security Assets. (Ma's skeleton para. 22)

[14] However, as matters unfolded the Receivers received expressions of interest from 15 parties. Of those, 14 received an information memorandum ('Information Memorandum') and/or access to the data room. The Receivers engaged in further correspondence with some of the prospective investors. These included (i) Blackstone Group (HK) Limited; (ii) Olayan Capital Pte Ltd; and (iii) Keppel China Ptd Limited. Efforts were also made by Mr. Lim to raise interest from potential purchasers. In May 2021, three further investors made 'offers' ("the May Offers"). These were:

(1) China Resources Capital Management Limited ('CR Capital'), a Chinese state-owned conglomerate who offered to purchase the 49% shares in HK Aether for RMB 3.412 billion (approximately US$531 million);

(2) Wealth CBD Aman Ltd ('Wealth CBD') a shareholder of CBD Aether who offered to purchase the 49% shares for US$114 million; and

(3) JIC Holding Co Ltd ('JIC Holding') a reputable Chinese state-owned asset management company with issued and paid-up capital of RMB 2 billion, who offered to purchase 44% of HK Aether for RMB 1.33 billion (approximately US$206 million)

[15] It is Mr. Ma's case that these were legitimate offers which had valued the 49% shareholding in HK Aether "in the hundreds of millions of dollars" (US). This is stoutly disputed by Xeno. Mr. Ma also contends that the Receivers had, by their conduct and responses, frustrated these offers by demanding that the interested parties provide a binding term sheet and non-refundable 10% deposit within a matter of days of the making of the offer; and commit to completion within a number of weeks. He categorized these conditions as being entirely outside of market practice and

being so onerous or unrealistic that the investors making these May Offers could not possibly comply.

[16] Furthermore, it is Mr. Ma's case that on 24th January 2022, Hopu Capital ("Hopu") expressed an interest in acquiring an interest in Xeno and Kenora (an indirect ownership of the 49% Shares) for RMB 1.813 billion (approximately US$ 286 million). This expression of interest was brought to the attention of the Receivers on 22nd March 2022, but they failed to engage with Hopu about it.

[17] It is also Mr. Ma's case, that Cinda HK submitted an offer to purchase the 49% shares and Guanghua SS' rights under the Facility Agreements for US$ 220 million, however by May 2023 this offer had been withdrawn, allegedly for the reason that "Cinda HK and MBK Partners had worked out a way for Cinda HK to purchase the 49% Shares with only a de minimis amount of the purchase price being used to discharge Xeno's obligations under the Xeno 1 and 2 Facilities, thereby allowing MBK Partners to realize the value of those shares and to continue pursuing Mr. Lim and Mr. Lin on their guarantees", and to thereby achieve a double recovery. (Mr. Ma's written submissions derivative appeal at para. 26)

[18] On 23 May 2023, Guanghua SSF made a formal offer to purchase the Security Assets. On 25th May 2023 (a mere 2 days later), the Receivers entered into a sale and purchase agreement ("SPA") with Guanghua SSF for the sale and transfer of the Sale Assets for US$1 million. No independent valuation of the Sale Assets had been undertaken or obtained by the Receivers prior or subsequent to entering into the SPA.

[19] On 13th July 2023 Cinda HK incorporated Chang An to take the actual transfer of the Security Assets. On 26th July 2023, MBK Partners, Guanghua SSF, Guanghua SS, Cinda HK and Chang An entered into a master agreement ("Master Agreement") which provided (at clause 2.2) that MBK Partners will grant to Chang An the following: (i) the entire issued share capital of Guanghua SS; (ii) a

HK$977,675 receivable from HK Aether; (iii) rights to participate in the Xeno 1 and 2 Facilities; and (iv) the Sale Assets.

[20] The Master Agreement also provided at clause 2.2 that in return Cinda HK will (1) pay on behalf of Chang An US$ 185 million to Guanghua SSF of which US$1 million will be paid to the receivers in satisfaction of Guanghua SSF's obligations under the SPA (on the basis that this money will be applied towards the Xeno 1 Facility and then distributed back to Guanghua SSF) clause 6.2(a); (2) issue and allot shares representing 10.8% of the issued share capital of Chang An to Guanghua SSF; (3) grant Chang An rights to participate in the CBD Aether Loan; and (4) transfer the 51% Shares to Chang An using best endeavours to ensure this is done within 6 months – clause 5.2(a).

[21] On 12th July 2023 ARA Capital ("ARA") offered to acquire the entire issued share capital of HK Aether for US$250 million. On 8th August 2023 ARA provided proof that it had funding to complete the purchase. However, they were informed that because of "recent developments" MBK Partners would no longer consider their proposal. By then the Receivers had already decided to sell the 49% Shares to Guanghua SSF.

[22] On 1st August 2023, pursuant to the Master Agreement the Receivers transferred the Sale Assets to Chang An and Cinda HK transferred US$185 million to Guanghua SSF.

[23] Mr. Ma's position is that the 49% shares were sold by the Receivers at a gross undervalue. He posits that the reason why they did so was because they had been suborned by and conspired with, Guanghua SS and Cinda HK.

First HK Proceedings

[24] The first HK Proceedings were commenced by Mr. Lim and Mr. Lin on 6th December 2023 after receiving a demand from Guanghua SS to discharge Xeno's remaining

liabilities, and having received an unsatisfactory response to their requests made of the Receivers and Guanghua SS for an explanation as to their conduct ("the First HK Proceedings").

[25] On 28th February 2024, Mr. Ma was added as a plaintiff to those proceedings to bring claims in his personal capacity and derivatively for and on behalf of Xeno. Apart from the receivers, the other defendants were, initially, Guanghua SS, Cinda HK, Kenora and Xeno Origin. The defences of the receivers and Guanghua SS/Cinda HK were filed on 13th June 2024, and the plaintiffs' replies on 11th and 17th September 2024. On 20th January 2025, amendments were made to add Chang An and Guanghua SSF as defendants. The Receivers filed their amended defence on 27th March 2025. This was followed by a filing on of an amended defence by Guanghua SS, Cinda HK and Chang An. No defence was filed by Guanghua SSF.

[26] However, the addition of Mr. Ma as a plaintiff in the First HK Proceedings derivatively on behalf of Xeno Origin, had been 'commenced' by Mr. Ma without first applying for and obtaining the leave of the BVI Court under section184C of the BCA. In the June 2024, defence filed therein by the Receivers they pleaded, inter alia, that Mr. Ma's claims were defective because he had not obtained the leave of the BVI Court under section 184C of the BCA to do so for and on behalf of Xeno.

Ma's FDCF

[27] This prompted Mr. Ma to seek legal advice from lawyers in BVI and to the filing by Mr. Ma of a fixed date claim form dated 28th January 2025 ('the FDCF') in Claim No. BVIHC (COM) 2025/0038). The FDCF was filed over 12 months after Mr. Ma had joined, in a derivative capacity, as a plaintiff purportedly on behalf of Xeno, in the First HK Proceedings, and while said proceedings were still on foot before the court in Hong Kong.

[28] This application was supported by the First Affirmation of Mr. Ma ('Ma 1'), the First Affirmation of Mr. Lim ("Lim 1"), and an expert report of Mr. James Man, an attorney-

at-law admitted and licensed to practice law in the jurisdiction and before the courts of Hong Kong, on Hong Kong Law ('Man 1'), in which Mr. Man concluded that assuming the fact as pleaded by the plaintiffs in the said proceedings, the actions governed by Hong Kong law would likely succeed. In response, Xeno filed the First Affirmation of Mr. Borrelli ('Borreli 1') and the expert report on Hong Kong law of Mr. Abraham Chan SC ('Chan 1'). In reply to Borreli 1, Mr. Ma filed the Second Affirmation of Mr. Lim ('Lim 2') and the Second Affirmation of Mr. Ma himself ('Ma 2'). Mr. Ma also applied and was on 12th June 2025 granted permission by Wallbank J to adduce an expert report of Mr. Ho Kwok Leung Glen ('Mr. Ho') on the question of whether the Receivers' actions were reasonable taking into account market practice. On 17th June 2025, Mr. Ma filed a short supplemental report from Mr. Man dealing with certain alleged "inaccuracies" in Chan 1; and that same day Xeno filed the Second Affirmation of Cosimo Borrelli ('Borreli 2')

[29] By the FDCF before the BVI Commercial Court, Mr. Ma sought, pursuant to section 184C of the BCA Act, the following reliefs:

(1) retrospective leave of the court to commence and to continue the extant First HK Proceedings; and, alternatively

(2) prospective leave to bring a new derivation action before the courts in Hong Kong on behalf and in the name of Xeno, substantially in the form of a draft Re-Amended Writ of Summons and draft amended statement of claim filed in the First HK Proceedings on behalf of Xeno.

The Judgment of the Court Below

[30] In brief, by his *ex tempore* judgment, the learned judge refused the first limb of Mr. Ma's application seeking leave, retrospectively, to commence and to continue the First HK Proceedings. However, the learned judge granted the second or alternative limb of Mr. Ma's application. He considered the factors or considerations in section 184C(2) of the Act and made an order granting prospective leave to Mr. Ma to commence, derivatively, new proceedings before the High Court in Hong Kong on

behalf of Xeno, essentially on the same legal and factual basis as the causes of action and reliefs sought by Mr. Ma in the First HK Proceedings.

[31] By the judgment, the learned judge refused retrospective leave on the basis that the provisions of section 184C(1)(a), in particular, the expression to 'bring proceedings', when properly construed in conjunction with the express prohibition or disentitlement in subsection (6) of a member to '*bring … any proceedings in the name of the company*' except otherwise than provided for in section 184C, did not permit or empower the court to make an order granting retrospective leave to commence or to continue extant derivative proceedings in the name of the company. Also, by order made 25th September 2025 (paragraph 3), the learned judge directed that Mr. Ma pay Xeno's costs relating to the issue of retrospective leave which he had dismissed.

[32] By the judgment, the learned judge, having considered the provisions of section 184C(2) of the Act and the considerations therein which must be taken into account by a court when exercising its discretion whether to permit a shareholder to commence, derivatively, a claim or action on behalf of a company, the learned judge made an order in favour of Mr. Ma granting, prospectively, leave to commence a new derivative action before the High Court in Hong Kong in the name and on behalf of Xeno.

Events Post Judgment

[33] At a consequential hearing on 25th September 2025, the judge –

(1) awarded Mr. Ma costs in relation to the prospective leave issue;

(2) awarded Xeno its costs relating to the retrospective leave issue; and

(3) granted Xeno permission to appeal against the granting of prospective leave (paragraph 1 of the Order dated 26th June 2025).

Later, on 8th October 2025, the learned judge also granted leave to Mr. Ma to appeal his refusal of retrospective leave. The Xeno notice of appeal was filed on 16th October 2025 and Mr. Ma's notice of appeal on 29th October 2025.

[34] Following delivery of the judgment in the court below, on 22nd August 2025, Mr. Ma suing derivatively on behalf of Xeno Origin commenced new proceedings against the Receivers, Guanghua SS, Cinda HK, Chang An and Xeno Origin before the High Court in Hong Kong in Claim No. 1570/2025 ("the New HK Proceedings"), substantially for the same causes of action and reliefs as in the first HK Proceedings ("the Derivative Claims").

The Appeals

[35] By notice of appeal filed 16th October 2025, Xeno appealed against those parts of the judgment and paragraph 1 of the Order granting prospective leave. Mr. Ma appeals by way of notice of appeal filed 29th October 2025 against those parts of the judgment and paragraph 2 of the Order refusing retrospective leave and, if successful, against paragraph 3 of the learned judge's order dated 25th September 2025 for the payment of legal costs.

Appeal 24/2025

[36] By Appeal 24/2025, Xeno challenges certain findings of fact made by the learned judge in his judgment. These include the findings that:

(1) Xeno's HK Derivative Claims were "likely to succeed";

(2) any alternative claims available to Xeno were bad; and

(3) pursuing the Derivative Claims were in the best interests of Xeno.

[37] In its appeal, Xeno also challenges certain findings of law made by the learned judge. These are that he wrongly:

(1) treated certain "offers" as admissible, relevant and indicative of market value for the 49% shares sold;

(2) held "*we don't need a valuation … in the formal sense*" and proceeded without probative valuation evidence as at the date of sale of the Shares;

(3) diluted the "*likely to succeed*" threshold in section 184C(2) to a "possibility" standard while granting leave across all pleaded causes of action;

(4) treated costs [of the HK derivative litigation] as a non-essential factor and accepted that there was "*zero downside*" based on an indemnity [offered by Mr. Ma] without any evidence of his ability to fund the likely costs and relief; and

(5) concluded that the section 184C(2) factors were not a cumulative list of hurdles to be overcome and that an applicant did not have to satisfy the court on all of them in order to obtain leave to commence derivative proceedings.

[38] In its notice of appeal, Xeno relies on 6 grounds of appeal. They are:

(1) The judge erred in law and/or in fact in concluding that the derivative claims being pursued in the First HK Proceedings were likely to succeed,

(2) The judge erred in law by granting blanket prospective leave to commence all of the derivative claims "substantially in the form" as pleaded in the First HK Proceedings without a claim-by-claim analysis.

(3) The judge erred in law and/or in fact in concluding that there was no adequate alternative remedy available to Mr. Ma as required by section 184C(2)(e) of the BCA.

(4) The judge erred in law and/or in fact in failing to conclude that the absence of (i) any valuation evidence of the Shares at the Sale date; and (ii) any evidence of likely litigation costs and recoveries prevented compliance with section 184C(2)(d).

(5) The judge erred in law and/or in fact in concluding that the Derivative Claims were in the interests of Xeno where the proceedings are not shown to be likely to succeed and there is no cogent funding/costs evidence.

(6) The judge was wrong in law to treat the five mandatory considerations which the court "must take into account" set out in section 184C(2) of the BCA as a non-cumulative checklist. Properly considered, failure on any of the section 184C(2)(b), (c) or (e) points prima facie to refusal, subject only to a constrained residual discretion.

Appeal No. 26/2025

[39] In his notice of appeal filed in appeal 26/2025 Mr. Ma, in relation to the judge's dismissal of the application for retrospective leave, challenges the learned judge's finding and conclusion of law that he did not have the power under section 184C(6) to grant retrospective leave. The sole ground of appeal in relation to this aspect, is (essentially) as follows: -

> "The judge was wrong to decline to grant the appellant [Mr. Ma] retrospective leave to bring claims on behalf of Xeno in the First HK Proceedings on the basis that he had no power to do so as a result of section 184C(6) of the BCA when, in fact, section 184C(6) does not provide that the judge has no power to grant retrospective leave. The judge did have such a power. If the judge had not made this error of law, he would (and should) have granted retrospective leave."

[40] In relation to his appeal against the cost order (para. 3), Mr. Ma's sole ground of appeal is that consequent upon the success of his main ground of appeal (above) concerning the judge's refusal to grant leave retrospectively, it follows that the learned judge was also wrong to award Xeno its costs relating to that issue.

Issues on Appeal

[41] From the above, I distil the following issues arising for determination on the appeals:

Appeal 26/2025

(1) Was the learned judge wrong to construe the provisions of section 184C(6) of the BCA as not permitting the court to grant a member/shareholder retrospective leave to commence a derivative claim in the name and on behalf of the company?

(2) Consequent on the determination of the question at (1) above, did the learned judge err in making the costs order against Mr. Ma personally?

Appeal 24/2025

(3) Did the learned judge err in his approach to and treatment of the five mandatory considerations in section 184C(2) of the BCA when determining whether to grant leave to Mr. Ma under sub-section (1) to bring derivative proceedings and in not treating these five factors as cumulative such that a failure to satisfy any one of them would *prima facie* result in a dismissal of the application?

(4) Was the learned judge wrong in concluding that the Derivative Claims being pursued (or to be pursued) by Mr. Ma in the Hong Kong Proceedings were "likely to succeed" and whether, in seeking to answer this question, diluted the threshold test in Basab Inc v Accufit Investment Inc. and Anor BVIHCMAP2014/0020 from "more probable than not" to a "possibility" standard?

(5) In considering whether the Derivative Claims met the threshold test in section 184C(2) of likely to succeed, ought the learned judge to have assessed each Derivative Claim individually and did he therefore err in granting Mr. Ma blanket perspective leave to pursue all the derivative Claims on behalf of Xeno?

(6) Ought the learned judge to have held on the evidence adduced by Mr. Ma that there was no "valuation evidence" or any cogent and reliable evidence adduced indicative of the value of the 49% Shares held by Xeno in HK Aether as of the date of their Sale and to therefore dismiss the leave application in its entirety?

(7) Did the learned judge err in treating the "offers" and/or other evidence adduced as cogent evidence of the value of the 49% Shares for the purposes of determining whether Mr. ma had satisfied the "likely to succeed" threshold in section 184C(2)(c)?

(8) Did the learned judge err in the exercise of his discretion by failing to consider or to properly consider, as required by section 184C(2)(d), the likely litigation costs to Xeno of Mr. Ma being permitted to pursue the Derivative Claims in Hong Kong and the likely recoveries?

(9) Did the learned judge err in concluding that Mr. Ma has satisfied the consideration at section 184C(2)(d) that pursuing the Derivative Claims were in the interest of Xeno?

(10) Did the learned judge err in his treatment of and conclusion that Mr. Ma had no adequate alternative remedies available to him as required by section 184C(2)(e)?

Appeal 26/2025 – Issues 1 and 2

[42] With regard to Appeal 26/2025, the determination of issue 2 is consequent upon this Court's determination of issue 1. Accordingly, both issues will be taken together first.

Appeal 26/2025: Issues 1 and 2 - Retrospective Leave and Ma's Costs Order

[43] Issue 1 (retrospective leave) was dealt with by the learned judge first. The judge expressed a measure of regret, if not reluctance, in reaching the conclusion that he was compelled by the wording of section 184C(6) to rule that he did not have the power to grant leave retrospectively. He went so far as to not only declare his understanding that to so rule "might be cataclysmic" or "might be severe". He described the outcome as "unfortunate", and but considered that, in the circumstances, he could do nothing else.

[44] When considering this first limb of Mr. Ma's application, the learned judge considered the provisions of subsection (1)(a) of section 184C which provision enables a member of a company to apply (subject to subsection (3)) for leave of the court to "bring proceedings" in the name and on behalf of that company. This is the classic derivative claim provision with the leave of the court. He recognized that what was being sought by the first limb of Mr. Ma's application was leave to "continue" the extant First HK Proceedings, which had been brought by Mr. Ma purportedly as a derivative suit on behalf of Xeno, without permission having been sought and obtained by him prior to having Xeno joined as the third plaintiff in those proceedings before the High Court in Hong Kong.

[45] The learned judge considered the position under the law of England, which expressly permits a member to apply for leave or permission of the court after having commenced the derivative action; expressly being empowered to grant leave to "continue" existing proceedings in the name and on behalf of the company. He observed that no such language is used in section 184C(1) or (6) of the BCA. The judge was of the considered opinion that subsection (6) makes clear that "a member

who does not have permission, is not entitled to bring derivative proceedings." He reasoned as follows:

> "Now, to my mind, if somebody is not entitled to do something that means, in law, that he cannot do it. He does not have the ability, the legal power to do it. So if he tries to do it nonetheless, then what he does is **empty**, it has no effect. And I take that to be the same as saying that it is **null**."

[46] The judge considered, comparatively, the provision at section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap.89 which states:

> "(4) **No appeal shall lie** without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases…"

[47] While accepting that the wording of subsection (6) of section 184C is not in such definitive prohibitor terms as section 30(4) above, the learned judge reasoned that the wording of subsection (6) is that a person with standing "is not entitled to bring" an application for leave to continue a derivative action brought without leave, retrospectively. In short, the judge reasoned that if one is not entitled to bring such proceedings without first having obtained the leave of the court, then that person "**doesn't get into the Court door**. There is **nothing** that he has brought. That's the way I read it." (emphasis added)

[48] The short point is that the learned judge considered that any step taken by a member by way of commencing legal proceedings for and on behalf of a company (incorporated in the BVI), a derivative action, is a nullity, and must be treated as if no such step or proceedings have been commenced. In support of this line of reasoning, he relied on the dicta of Barrow JA (as he then was) in **MacDonna v Richardson:**[1]

> "A nullity cannot be cured or retrospectively validated."

[49] The kernel of the learned judge's reasoning on this issue is the meaning and gravity of the word "*entitled*" in subsection (6), which he considered to be a "strong word".

[1] AXAHCVAP2005/0003 (delivered 29th June 2007, unreported).

He went on to state: ‘It is either you are entitled or you are not in the same way that the Court has jurisdiction or it doesn’t. It doesn’t have a sort of half thing that can be [sic] into life. You have either got it or you don’t.’ Having accepted that in relation to insolvency proceedings, the English courts have treated the situation where leave to commence such proceedings are a requirement that any commencement without the leave of the court is not a nullity but is a defect which can be cured retrospectively by making an application *ante* for leave. This position notwithstanding, it is the judge’s opinion and ruling that on the basis of the ordinary meaning and use of the word “entitled” in subsection (6) “and the idea of prospective permission to bring derivative proceedings in this jurisdiction, that tells me that you can’t get retrospective permission.” However, absent any direct authority on the issue of interpretation, the learned judge accepted that he could be wrong in his conclusion, and there is an argument to the contrary. It is this contrary argument which Mr. Ma makes in support of his appeal No. 26/2025.

Mr. Ma’s Submissions on Retrospective Leave

[50] In proffering a different interpretation to that taken by the learned judge of section 184C(6) of the BCA, Mr. Ma prays in aid by way of contrast section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) (“the Supreme Court Act”) where it is stated (in part) “No appeal shall **lie** without the leave of the Judge or of the Court…’. He argues that in the context of section 30(4) the word “lie” means “to exist”. Accordingly, this provision is concerned with setting out or making plain when or how an appeal will come into existence. Where an appeal does not exist, it is a nullity. By contrast, section 184C(6) does not deal with when or how proceedings will come into existence.

[51] In support of this proposition or construction, Mr. Ma cites the decision of the Court of Appeal of Jamaica in **Patrick v Walker,**[2] where Duffus P, dealing with the

[2] [1996] CA 216 , Jamaica Court of Appeal.

comparable provision to section 30(4) in Jamaica, that is section 10(1) of the Judicature (Appellate Jurisdiction) Law of 1962, observed (in material part): -

> "…Section 10(1) provides that: 10(1) "No appeal shall lie –(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge …The section of the law which is now under review in this court – Section 10(1)(f) – is clear and positive. It states that "No appeal shall lie" without leave, and it is our view that this means exactly what the words state and that no appeal proceedings can be commenced until leave has been granted and therefore, any notice which may have been filed without leave being first obtained is of no effect. It is completely valueless and void, and the submission of learned counsel that notice has been revived by the subsequent leave is a submission that we are unable to accede to".

[52] Mr. Ma contrasts the language of section 30(4) of the Supreme Court Act (BVI) and the learning from **Patrick v Walker** above, with the language used at section 184C(6) of the BCA. It is submitted that, unlike section 30(4) of the Supreme Court Act, subsection (6) of section 184C of the BCA is not concerned with when proceedings commenced or intervened in by a member, on behalf of a company, exist or can exist, nor can this be so where those proceedings were brought or already existed in another jurisdiction. Moreover, the question of whether proceedings commenced in another jurisdiction exist or are a nullity is obviously not a question of BVI company law or one for the BVI Court, but a question governed by the law of the foreign forum in which they were brought or were ongoing, in this case Hong Kong.

[53] Mr. Ma argues that section 184C(6) is concerned with a different question; that is, whether a member is entitled to bring proceedings in the name or on behalf of the company. This provision is silent as to what are or might be the consequences of a member bringing proceedings (whether in BVI or in a foreign jurisdiction) when he/she was not "entitled" to do so having not applied for and obtained the prior leave of the BVI court to do so. It is submitted this "silence" is not uncommon in certain types of legislation. Lord Steyn observed in **R v Soneji (Kamlesh Kumar)**[3] that a

[3] [2006] 1 AC 340 at para. 14

legislature often 'casts its comments in imperative form without expressly spelling out the consequences of a failure to comply.'

[54] Mr. Ma cautions that the appropriate approach to construing subsection (6) is to focus on what are the consequences of non-compliance, that is, a failure to first obtain permission or the leave of the court to commence an action on behalf of and in the name of the company or to intervene and be added as a party in a derivative capacity to extant proceedings; and, specifically, whether the clear consequences of such non-compliance is "the total invalidity or, as the judge held, nullity of the proceedings themselves."

[55] Mr. Ma also relies on the *dicta* of Justice Davis-White KC in **Wilton UK Ltd v Shuttleworth**[4] to the effect that the purpose of a requirement for leave is to give the court the opportunity to check that the proposed proceedings are in the interests of the company and are not vexatious as regards the proposed defendants.

[56] However, I would observe at this juncture that in the BVI this 'check' by the court is to be applied before the derivative proceedings have commenced. This is unlike the position in England where it is applied by the judge shortly after commencement of such proceedings, the court there having by statute the express power to grant leave *ante* to "continue" such derivative proceedings. In this respect, the dicta of Justice Davis-White, while constituting a correct formulation of the rationale for the requirement to obtain leave, are, with respect, not entirely helpful in the BVI context where section 184C mandates that a member must first apply for the leave of the court before he/she can "bring" a derivative claim in the name and on behalf of the company. Importantly also, the "check" which a judge must apply using the factors and considerations at subsections (2) must be carried out "in determining whether to grant leave", and "only if the Court is satisfied" of the matters at subsection (3).

[4] [2017] EWHC 2195 (Ch) at para 62.

[57] Mr. Ma also submits that the consequence of non-compliance with the pre-commencement requirement for leave of the court in section 184C(1)(a) is that the judge is deprived at that stage of the opportunity to apply the 'checklist' of factors and considerations at subsections (2) and (3). It is submitted that this 'consequence' is not so onerous or egregious so as to rise to the level of rendering the derivative proceedings a nullity, as the judge held, such that it cannot be cured retrospectively by an application for, and the granting of, leave. Furthermore, argues Mr. Ma, in some cases the failure to apply for leave pre-commencement of the derivative action, may be entirely innocent and had leave been applied for it ought or would have been granted. In such circumstances, the consequence of declaring the derivative proceedings or claim a nullity, would be unnecessarily and disproportionately to require the member to restart the derivative claim and to refile or to file substantially the same documents again, leading to delay and unnecessary costs being incurred by the company and by the defendant or defendants to such proceedings.

[58] In this regard, Mr. Ma prays in aid this passage from the judgment of Scholl J in **Re Testro Bros Consolidated Ltd:**[5]

> "But with all respect, I do not feel able to adopt the view that this court is prevented by the statute from recognizing and sanctioning, even retrospectively, **its own proceedings**, more especially when the principal, and it may be the sole, effect of its order will be to save costs, and the re-issue, re-service, and re-delivery of the documents identical with the existing documents. **If the court is of opinion that leave, had it been applied for, would have been given, why should it not decide, if it wishes, to treat as regular and effective, proceedings over which *ex concessis* it has jurisdiction**, and dispense with the need merely to repeat them." (emphasis added)

[59] Mr. Ma argues that applying this approach to construing section 184C and subsection (6) in particular, and reaching the conclusion being argued for by him, is entirely consistent with established principles in other analogous situations. One

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[5] 1965] VR 16 (Vic SC), cited in Wilton UK Ltd v Shuttleworth & Ors [2017] EWHC 2195 (Ch) para 49(4). [1965] VR 16 (cited at para. 49(4) in Wilton).

such example is that since the 19th century the practice of the court of England & Wales has been that insolvency proceedings begun without first obtaining the requisite leave of the court, should not be regarded as irretrievably null but, rather, as existing and capable of redemption (or saving) by a post commencement application for leave: **Re Saunders (A Bankrupt)**.[6] It is submitted, that there is no good reason why a different approach should be adopted when it comes to making section 184C retrospective applications for leave to bring derivative proceedings on behalf of a company.

[60] This approach, it is argued, is also consistent with the decision of Leon J (as he then was) in the BVI case of **Iu Chung v Greater Achieve Limited**.[7] There the judge opined that the failure to first obtain leave to commence a derivative claim was 'a matter that could have been sought to be fixed by a subsequent application for permission.' Further, Leon J had also observed that Elder J also considered that retrospective leave could, in principle, be granted.

[61] Mr. Ma submits, therefore, that as a matter of principle and of authority, the learned judge in the instant matter was wrong to conclude that he had no power under section 184C to grant retrospective leave to Mr. Ma to bring derivative proceedings in Hong Kong against the named defendants. In any event, had the learned judge not so wrongly concluded, it is clear he would have granted retrospective leave to Mr. Ma, as he did go on to grant prospective leave on the same facts. Further, Mr. Ma's omission to first obtain leave was clearly an inadvertent mistake, and retrospective leave would have caused no prejudice to Xeno (or the named defendants), as the First HK Proceedings would have simply continued as the only such HK proceedings thereby obviating the burden of delay and incurring additional and unnecessary legal costs to the parties thereto.

[6] [1997] Ch 60 at page 82B-C.
[7] BVIHC (COM) 2015/140 (delivered 6th June 2017).

Xeno's Submissions on Retrospective Leave

[62] Xeno argues that section 184C is and must be viewed as an exclusive statutory regime governing derivative proceedings. As such the jurisdiction to grant leave to bring derivative proceedings is a "creature of statute", as Duffus J observed in **Patrick v Walker** in relation to obtaining leave to appeal to the Court of Appeal. Accordingly, one needs look no further than the relevant statutory provision (section 184C) to see its terms and effect or the way in which the jurisdiction can be exercised. Xeno submits that section 184C, properly construed, creates a jurisdiction "to bring" or to intervene in proceedings in the name and on behalf of the company; it does not create a jurisdiction to "continue" derivative proceedings brought by a member without the prior leave of the court, nor does it create a jurisdiction or grant to the court the power to retrospectively validate that which had been done without leave and in derogation of the provisions of subsection (1) of section 184C.

[63] Xeno submits that subsection (1)(a) of section 184C confers jurisdiction on the court to grant leave to a member on making an application to "bring" a derivative action in the name of the company or to intervene in existing proceedings for the purpose of continuing or defending or discontinuing them, on behalf of the company. It is submitted that the clear language of the section is "prospective and capacity creating"; and the grant of leave is a condition precedent to the act which it permits. Furthermore, there is nothing in the language of section 184C which suggests that retrospective leave can be granted, or that proceedings already commenced without leave can be retrospectively validated or permitted in the face of the prohibition in subsection (6), which remains operative unless and until leave is granted. This is to be compared and contrasted with the corresponding derivative action provision in England, section 26(1) of the Companies Act 2006, which expressly provides for leave to be given "to continue" a derivative claim.

[64] It is contended that, properly read, the language of section 184C is actually to the opposite effect. In particular, the use in subsection (6) of the words "except as provided herein" clearly demonstrates that the "entitlement" to bring a derivative action in the name of the company exists only as provided by the section. Second, the use of the words "is not entitled to bring or intervene" makes the negative entitlement a prohibition which remains operative unless and until leave is granted. It is also submitted that the requirement for leave is not a mere procedural nicety capable of being dispensed with after the fact or that there is some jurisdictional basis or power in the statutory language for validating proceedings already commenced in breach of the prohibition.

[65] Xeno contends that the wording in subsection (6) (albeit different) is to the same effect in law as the words "No appeal shall lie" in section 30(4) of the Supreme Court Act (set out above). The short point here is if someone is by statute "not entitled" to do something then, if they purport to do that thing, "it does not lie". This submission accords with the view taken by the learned judge when construing section 184C(6).

[66] Regarding Mr. Ma's submission that the section is silent as to the consequences of non-compliance, Xeno contends that this is incorrect. It argues that the consequence is that the member has brought proceedings which he/she is not entitled to bring (on behalf of the company) or which he has no entitlement to continue or to defend.

[67] Xeno also submits that, in any event and as a matter of principle, it is not possible to grant retrospective leave to bring proceedings which have already commenced. In support of this proposition, Xeno relies on the dicta of Lindsay J in **In Re Saunders (A Bankrupt)**:[8]

> "Gillard J said in In re Excelsior Textile Supply Ltd [1964] VR "one cannot appropriately give leave to commence something unless leave were given before the commencement of it." He further held that there was no power

[8] [1997] Ch 60.

> to give leave further to proceed with litigation where its commencement had not been authorized""

[68] Xeno also submits that the concept of granting leave retrospectively does not accord with the court's supervisory powers under section 184E of the BCA and under section 184D with regard to the costs of "bringing or intervening in the proceedings". Section 184E provides:

> 184E. The Court may, at any time **after granting a member leave** under section 184C, make any order it considers **appropriate in relation to proceedings brought by the member or in which the member intervenes**, including:
>
> (1) An order authorizing the member or any other person to control the proceedings;
>
> (2) An order giving directions for the conduct of the proceedings;
>
> (3) An order that the company or its directors provide information or assistance in relation to the proceedings; and
>
> (4) An order directing that any amount ordered to be paid by a defendant in the proceedings must be paid in whole or in part to former and present shareholders of the company instead of to the company. (emphasis added)

[69] It is submitted that all these provisions of the BCA (sections 184C, 184D and 184E) make clear that it was not envisioned by the Legislature that a member may commence proceedings in the name and on behalf of the company and, after commencement and the proceedings have progressed and various steps have been taken and decisions made by the court in relation to those proceedings and costs incurred by the parties, the member who has purported to act in the name and on behalf of the company without the permission of the court and by so doing has deprived the court of its jurisdiction to apply the statutory checklist and of its

supervisory and other antecedent powers under sections 184E and 184D, can then seek to validate his actions done without the requisite permission or authority, by seeking leave retrospectively.

[70] As an adjunct to this point, Xeno also submits that it is an abuse of process for a member of a company to purport to bring a derivative claim in the name and on behalf of the company, without the authorization or permission of the court under section 184C. This is the position taken by Bannister J in **Nigel Gray v Allan Leddra et al**[9] when he opined:

> "In my judgment, the position here in the BVI is clear. A derivative action requires permission under section 184C. In considering whether to grant permission, the Court here is mandated to take account of a number of important considerations. The Court may not give permission unless satisfied that the company does not intend to make the claim and that it is in the interest of the company that conduct of the proceedings should not be left to the company or to a majority of its board or of its members. **These conditions are of so stringent a nature that in my judgment it is an abuse of process to attempt to mount a derivative claim without the consent of the court under section 184C**. If that permission is granted, then it seems to me that it is a matter of case management whether the derivative claim is prosecuted as part of unfair prejudice proceedings or is tried together with them or separately, **but to attempt to bring such a claim without permission is, in my judgment, an abuse**," (emphasis added)

[71] Bannister J's decision in **Nigel Gray v Allan Leddra** was cited approvingly in the decision of the High Court of Hong Kong in **Wong Ming Bun v Wang Ming Fan and others,**[10] where a derivative claim had been brought by a shareholder of a BVI company without having obtained the leave of the BVI Court under section 184C. At paragraph 36 of his judgment, Peter Ng J stated:

> "The legal position is clear – whether a shareholder can commence a derivative action in the name and on behalf of the company is a matter of substantive law under BVI law, a shareholder can only commence a derivative action in the name and on behalf of the company with leave of the BVI Court. No leave has been obtained. The action as presently constituted is **defective**." (emphasis added)

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[9] BVIHC (COM) 79 of 2011 (delivered 4th April 2012, unreported)

[10] HCA 1985/2012 (Hong Kong).

[72] Xeno also relies on similar statements of principle by Pelling QC sitting as a High Court judge in **Novatrust Limited v Kea Investments Limited and Ors:**[11] 'such a shareholder can only commence such an action if he has that permission. It is the permission that gives him locus standing or right to bring the claim.' And by Ng J in **Wong Ming Bun** (at paras 44 and 45) –

> "First, it was not in dispute that no leave from the BVI Court had been obtained by the Plaintiff. **Second, there was no suggestion from the Plaintiff, or any authority in support, that leave from the BVI Court could be obtained retrospectively after a derivative action had long been commenced**. Third, no authority has been shown to this court in support [of] the proposition that such retrospective leave, even if permissible under BVI law, could be obtained, not from the BVI Court, but from a Hong Kong court, if and when the plaintiff saw fit to apply for it in order to rectify any defects in the present action
>
> In these circumstances and given this court's conclusion as to the legal position under BVI law, the Company's and the 1st & 3rd defendants' applications to strike out the statement of claim on the ground of locus standi must succeed." (emphasis added)

[73] In further support of the proposition that the requirement for obtaining leave in section 184C is a precondition to the member being permitted to bring proceedings in the name and on behalf of the company, Xeno cites this passage from the judgment of Pelling J in **Novatrust:**[12]

> " … the effect of s. 184C(6) is that before a member of a BVI company can have the **right** to bring derivative proceedings in respect of that company, permission has to be obtained by that member from the BVI Court … Obtaining that permission is a **condition precedent** to the ability of the member to bring such proceedings." (emphasis added)

[74] On this issue, Xeno also submits that any suggestion that any perceived gap in the wording (which Xeno does not accept) of section 184C can be filled by the court's inherent jurisdiction, is misconceived. The court's inherent jurisdiction cannot be used to add to or to expand a jurisdiction which by the statute does not exist. It

[11] [2014] EWHC 4061 [Ch].
[12] Novatrust Ltd v Kea Investments Ltd & Ors [2014] EWHC 4061 (Ch) (Chancery Division).

cannot be used to create an "entitlement" to continue extant derivative proceedings, where no such entitlement exists under the existing provision in the statute. To do so would serve to undermine the statutory scheme created by section 184C in conjunction with sections 184D and 184E of the BCA.

[75] Xeno also submits that the statutory provisions and statutory scheme concerning derivative actions, serve three clear purposes: (i) preserving the company's control over its causes of action; (ii) protecting defendants and the company from vexatious and speculative claims; and (iii) ensuring that the Court performs a rigorous gatekeeping role- including a "likely to succeed" merits assessment, before the proceedings can be commenced in the company's name. It is submitted, that retrospective leave would have the effect of hollowing out each of these protections and would encourage members of companies (without the requisite authority or permission) to "litigate first, ask later"; ignore the gate keeping function, and incentivize the tactical use of foreign disclosure to meet the BVI threshold after the event.

Discussion and Conclusion on Issues 1 and 2 – Retrospective Leave

[76] Much has been made by the parties in their respective arguments and submissions in the appeals and in the court below, of the differences or similarities of wording, force, and effect of the words "no appeal shall lie" in section 30(4) of the Supreme Court Act and the words "not entitled to bring or intervene" in section 184C(6) of the BCA, the provision of central importance to the determination of the issue of retrospective leave in the appeals. For my part, and in my respectful opinion, these two expressions or words of prohibition are not synonymous, nor can they be equated as a matter of proper construction. They do not convey the same meaning and are not directed to the same consequence or effect of the proceedings to which each are applicable.

[77] The words "no appeal shall lie" in section 30(4) of the Supreme Court Act is speaking to or declaratory of the non-existence of an appeal against an interlocutory order

which has been filed without prior leave of the court. It is clear from these words that such an "appeal" cannot and does not exist. It is a nullity or a nothingness as a matter of law, incapable of being revived by an application *ante* for leave. These words go to the very existence or lack thereof of any appeal filed without obtaining prior leave, as required. Whereas, section 184C(6) by using the words "is not entitled to bring or intervene", is pronouncing not on the existence or not of derivative proceedings brought by a member without the prior leave of the court, but to the capacity and standing of a member to bring such proceedings in the name and on behalf of the company of which they are a member/shareholder. The section is silent as to the status in law of such proceedings and does not by those words pronounce or declare them a nullity, a nothingness, as does section 30(4).

[78] I have reached this conclusion fully mindful that other jurists may reasonably differ, as did the learned judge in the court below. Likewise, I am mindful of the thoughtful opinions expressed by other judges and jurists on this issue in the cases cited and in the *dicta* from the authorities relied on by the parties in these appeals, all of which I accord great respect.

[79] As I see it, the appropriate starting-point in any proper consideration of the issue of whether retrospective leave is permissible is the statutory provision being construed, and objectively the legislative intent or purpose of it when considered in the context of other aligned provisions dealing with derivative actions and the object and purpose of the statute as a whole.

[80] In the instant matter, the Court is required to construe the provisions of section 184C and, in particular, subparagraph (a) of subsections (1) and subsection (6) thereof. These provisions state as follows: -

> "184C(1) Subject to subsection (3), the Court **may, on the application of a member of a company**, grant leave to that member to:
>
> (a) **bring proceedings** in the name and on behalf of that company

> (6) Except as provided in this section, a member is **not entitled to bring or intervene** in any proceedings in the name or on behalf of a company." (emphasis added)

[81] Also of importance to any consideration of this issue and a proper interpretation of the words and language of these two subsections of section 184C, is an examination of other relevant provisions of the statute which concern the court's power to grant leave to bring a derivative action or to intervene in an extant action or proceedings in the name and on behalf of a company. In this respect, Xeno relies on two provisions. The first is section 184E (set out in full at para. [68] above) and the second, section 184D dealing with costs of the derivative proceedings.

[82] In my opinion, section 184E is of little, if any, assistance to a determination of the issue of retrospective leave under consideration in appeal 26/2025. By section 184E, the Legislature gave to the court wide supervisory powers to be exercised "after" granting leave to a member under section 184C to bring a derivative action in the name of the company. Furthermore, as provided therein, the powers of the court under section 184E are to be exercised, expressly, "at any time **after** granting a member leave under section 184C", and "in relation to proceedings **brought** by the member or in which the member intervenes". (emphasis added)

[83] It follows that the court's powers under section 184E can only be invoked *ex post facto* the court having granted the member leave to bring a derivative action or to intervene in an extant action in the name and on behalf of the company, and only in relation to the proceedings actually brought derivatively by that member having been granted leave. This is pellucid from any proper reading of section 184E. For these reasons, section 184E is of no real assistance to a determination of whether the court may grant leave retrospectively, save to say, as does Xeno, by commencing a derivative proceedings without the leave of the court, the recalcitrant member has deprived the court of exercising its proper role and function under section 184C as a gatekeeper and to carry out its check list exercise in relation to, at minimum, the five factors set out in subsection (2) thereof.

[84] By contrast, the powers of the court under section 184D may be exercised either at the point of the court granting leave under section 184C(1) to a member to bring derivative proceedings in the name and on behalf of the company or to intervene in extant proceedings, or thereafter in circumstances where, for example, the issue of meeting and financing the costs of the derivative proceedings or the intervening proceedings had not been dealt with by the court at the time of granting leave. This is clear from these words in section 184D(1):

> "If the Court **grants leave** to a member to **bring or intervene** in proceedings under section 184C, it shall, **on the application of the member**, order that the whole of the reasonable costs of **bringing or intervening** in the proceedings must be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs. (emphasis added)

[85] In my considered opinion, section 184D, important though it is, is not of any real assistance in resolving the issue whether, properly construed, section 184C(1) and (6) empowers the court to retrospectively grant leave to a member who has commenced derivative proceedings or to intervene, derivatively, in extant proceedings, without first having applied for and been granted leave by the court, and who has, by so doing, ran afoul of the mandatory requirement of section 184C of the BCA to obtain leave, and had, at the time, therefore, no "entitlement" to bring such proceedings. The reason for reaching this conclusion is simply that the court's powers with regard to making or not making provision for the cost of derivative action or intervention by a member in the name of the company in extant proceedings, rests, first and singularly, upon a decision by the court to grant leave to such member. The exercise of that power and discretion in relation to the costs of the proceedings or intervening proceedings is in no way concerned with the principal question or issue of whether properly construed section 184C permits or empowers a court to grant leave retrospectively.

[86] This brings me to a consideration of an aspect of this issue which, in my opinion, is germane and pertinent to the proper determination of the issue of retrospective

leave. It is the fundamental and foundational principle of company law of the separate legal personality of a company from its members; and, as an adjunct to this principle, the ways by which a company may properly resolve to make decisions, including decisions to bring legal proceedings or to intervene in extant legal proceedings.

[87] In accordance with well-settled principles of company law, a company is a juridical person separate and distinct from its shareholders, entitled to sue and be sued in its own name. Derivative actions are quintessentially concerned with causes of actions and claims of the company not of its members. This is pellucid from section 184C(3) of the BCA which expressly provides that a court considering an application for leave under section 184C(1) and (2), can only grant such leave if satisfied that "the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be". In short, it is the company which has the cause of action or claim, not any of its members, and it is for the directors to decide whether and what courses of action the company ought or should take or adopt in relation to its claims, including whether to commence litigation by the company or to intervene as a claimant in extant litigation brought by a third party or whether to defend against a claim brought by a third party against the company. It is the directors who are charged with the duty to take steps in the interest of the company.

[88] No member of a company has the right or entitlement to unilaterally bring, commence, defend or discontinue proceedings in the name or on behalf of the company, save as is permitted by and under section 184C of the BCA. Decisions as to whether the company is to act on its own potential claim or claims or to defend actions brought against it by third parties or to discontinue its own proceedings or claims, rest not with an individual member, even one holding a majority of the issued share capital of the company. These matters fall to be determined by its directors or board of directors duly appointed acting in accordance with the decision-making powers and authority granted or accorded to them under the BCA and/or the

memorandum and articles of association of the company or, in certain instances, by the members/shareholders in general meeting.

[89] Viewed in this way, the rights and privileges concordant with the ownership of shares in a company incorporated under the laws of the BVI, does not grant to a member/shareholder any right or entitlement to unilaterally decide to bring litigation in its name and on its behalf. Accordingly, any such step taken by a member which is not authorized by the directors or by resolution of members in general meeting, would be unauthorized and an outlier to the statutory rights of a member as a shareholder of the company.

[90] It is precisely because of the separate legal personality of a company from its members and the position of a member as the owner of shares in the company, that section 184C of the BCA and the concept of a derivative action being brought by a member of their own initiative in the name and on behalf of the company, arises. It arises as an exemption to the principle of separate legal personality and decision-making by a company. Accordingly, derivative actions are a creature of statute and section 184C is the statutory regime by which derivative actions are permitted.

[91] Section 184C contains the jurisdiction and bases upon which a member, exceptionally, may cause the company to bring or to intervene in legal proceedings. The section sets out both the procedural and substantive bases upon which the derivative action jurisdiction of the court may be invoked, and by whom. It stipulates that a member of a company may apply for and seek the permission of the court to bring an action or intervene in an action in the name and on behalf of the company. Without such an order, a member does not have the requisite standing to act on behalf of the company without such company having resolved to bring such action. When exercising such authority with permission granted by the court, the member is causing the company to act as a party to litigation. The causes of action relied on and reliefs sought or defences deployed are those of the company, not of the member himself. Any benefit derived from such derivative action are those of the

company and not of the member who caused the proceedings to be brought or intervention to be made in the name and on behalf of the company.

[92] Examples in company law of where a member may be permitted to bring an action in the name and on behalf of the company are where (i) the wrongdoers (potential defendants) are in control of the company and the claim is sought to be brought by a minority shareholder on behalf of the company; (ii) there is a deadlock on the board of directors of the company and the company is unable to make a decision or pass the requisite resolution to bring or to intervene in proceedings in the name of the company; and (iii) the company does not intend to bring the claim or action or to intervene or to defend the claim brought by a third party against the company and, in the court's assessment, bringing such claim or intervening in or defending extant proceedings is in the interests of the company. This is why under section 184(3) it is provided that the court may not make an order granting leave to a member to bring derivative proceedings on behalf of the company unless the court is satisfied that (a) the company does not intend to bring or intervene in proceedings and (b) it is in the interest of the company that the conduct of such proceedings should not be left to the directors or to the determination of the shareholders/members as a whole. Therefore, it is by and through the statutory avenue and permissive jurisdiction and power granted and conferred on the courts by section 184C, that a member/shareholder, regardless of the amount of shares which they hold in the company or how comparatively small that shareholder is, can apply to the court under section 184C for permission to, derivatively, bring or to intervene in proceedings in the name and on behalf of the company.

[93] It follows, therefore, that in approaching any determination of the powers of the court under and pursuant to section 184C, and specifically the question of whether such power extends to granting retrospective leave, a court or judge must construe the language of section 184C as a whole and, in particular, subsections (1)(a) and (6) and accord to the words used therein their natural and ordinary meaning. The court must also do so mindful of the context and purpose of section 184C, which is to

provide an exception to the accepted legal position that a company acts through decisions made by its board of directors and/or the shareholders in general meeting, and in accordance with the powers conferred by statute and/or its memorandum and articles of association.

[94] In my opinion the word “bring” in subsections (1)(a), (3) and (6) of section 184C, given its natural and ordinary meaning, is clear and uncontroversial. To “bring” means to commence or to initiate. This meaning, however, does not necessarily rule out or exclude the concept of retroactive permission or leave being granted *ante* where derivative proceedings have been “brought” by a member, purportedly in the name and on behalf of the company, without the prior permission of the court under section 184C.

[95] In my opinion and judgment, the meaning of the word “entitled” used in subsection (6) is also clear and uncontroversial. To be “entitled” to do something means simply that the person doing it had the right or standing to do so. Thus, the expression “not entitled” means that no such right or standing normally exists to do such a thing in the name of the company, save and except, in this instance, by the leave or permission of the court upon an application by a member. It is the grant of leave which confers upon the applicant-member the right or entitlement to bring an action or to intervene in an action or to defend an action in the name and on behalf of the company. This arises in this way in circumstances where, as discussed above, no such right or entitlement is conferred upon a member by virtue of their ownership of shares in the company. Such a right or power is not an incidence of the member’s status as a member or shareholder of the company. The only “incidence” of the status as shareholder in this context is the standing to bring an application under section 184C for leave to commence derivative proceedings.

[96] The next question is whether the bringing of an action or intervening in or defending extant proceedings in the name and on behalf of a company, is a nullity as the learned judge held. To be even more exact, the learned judge reasoned if one is not

entitled to do something "it does not get into the court door", thereby equating the phrase "not entitled" in subsection (6) with "no appeal shall lie" in section 30(4) of the Supreme Court Act. It is on this basis and line of reasoning that the learned judge held that section 184C(6), properly construed, does not permit a court or judge to grant leave retroactively. The basis of the judge's conclusion is that such proceedings are "null" or a nullity and cannot be revived by the court by an application *ante* and the grant of leave or permission. This latter principle is certainly sound, but, as concluded above, the phrases or expressions used in these two statutes are not to be equated, and, in the context of section 184C(6) derivative proceedings brought in the absence of leave having been granted under section 184C, not a nullity as a matter of law.

[97] Respectfully, I cannot agree with the judge's line of reasoning on this issue. The fact that at the time the derivative proceedings were brought by the member he or she was not "entitled" *qua* member to bring them in the name and on behalf of the company, does not, in my judgment, render those proceedings a nullity. I have reached this conclusion for several reasons. First, as a matter of jurisprudence and jurisdiction, proceedings brought by a member in the name and on behalf of a company in a foreign jurisdiction cannot be a "nullity" in the true sense of that word, and the BVI Court has no extra-territorial jurisdiction or other jurisdiction over such foreign proceedings and cannot declare them to be a nullity or to strike them out as an abuse of its process.

[98] The BVI court would, of course, have jurisdiction over the BVI company in whose name and on whose behalf the foreign proceedings were brought by the member without leave, and the member himself or herself in relation to such company. This jurisdiction goes to the various ways in which or by which the BVI Court can exercise its jurisdiction to control and to direct both that company and the member/shareholder in relation to any such foreign proceedings. Such powers can be exercised in an appropriate case on an application by the company or another member or someone else with standing. Where the BVI court's jurisdiction over the

company is being exercised in such circumstances, the judge may make certain orders binding on both the company and on the member, including orders to discontinue or to withdraw the derivative proceedings commenced without the leave of the BVI Court. Second, where the steps taken by the member without leave is to defend the company in relation to or to intervene in extant proceedings, this "defect" does not go to nullity of or validate those proceedings. None of these situations or examples of situations lead inexorably to the conclusion that the actions by the member, done in the name of the company without the permission of the BVI Court having first been obtained under section 184C, are a nullity. Third, this being the case, it would be erroneous to conclude that while foreign derivative proceedings brought by the member are not a nullity, derivative proceedings brought by the member in the BVI jurisdiction, would be. Proceedings brought by a member without leave are either a nullity or they are not regardless of where or in what jurisdiction such proceedings have been commenced.

[99] As indicated above, this scenario and its concordant legal effect and implications, is different from and not synonymous with the provisions of section 30(4) of the Supreme Court Act. The expression used in that provision "no appeal shall lie", which has been held to mean that an appeal filed without the leave of the court is a nullity, a nothingness, as if it had never been done, clearly has just that meaning. No such words or expression is used in section 184(C)(6) of the BCA. The use therein of the phrase "no entitlement" does not have the same meaning and effect as "no appeal shall lie". The language of subsection (6), properly construed, does not confer a meaning of "nullity" or nothingness, as does the language of section 30(4) of the Supreme Court Act. In my opinion, the expression "not entitled" in section 184C(6) speaks to the right or standing of the member to cause the company to bring proceedings or to intervene in or defend extant proceedings brought by a third party. It is confirmatory of the ordinary position that a company has a separate and distinct legal personality from its members and a company acts through its board of directors or members in general meeting; and the ownership of shares does not confer or carry with it the right or entitlement for a member, of its own

volition, to act in the name and on behalf of the company, including by bringing or commencing legal proceedings in its name, subject only to leave of the court to do so being pursuant to section 184C of the BCA.

[100] If such derivative proceedings brought by a member without the leave of the court granted under section 184C is not a nullity, then what is the legal status of such proceedings? In my view, such proceedings are defective and the member responsible has by bring them abused the process of the BVI court. Such proceedings when brought in a foreign jurisdiction, are therefore liable, on appropriate application being made, to be struck out by the court having jurisdiction over the proceedings. Alternatively, they may be regularized by being taken over by the company at the resolution of its directors or the shareholders in general meeting.

[101] Xeno argues that such proceedings are an abuse of court. They do so on the basis of the dicta of Bannister J in **Nigel Gray v Allan Leddra** (supra) in the passage set out above. I do not differ with this line of reasoning of the judge in this case or with his conclusion as to an abuse of process. However, it is notable that Bannister J does not go so far as to declare such proceedings a nullity. Furthermore, in the decision of Ng J in the Hong Kong case of **Wong Ming Bun v Wang Ming Fan** and others (supra) relied on by Xeno in their argument on this issue, the said judge, having citing the dicta of Bannister J in **Nigel Gray**, held that because the member had not first obtained the leave of the BVI court, the "*action as presently constituted is **defective***." This conclusion (albeit non-binding on this court), does not support the finding of nullity by the learned judge in the instant matter in relation to the steps taken by Mr. Ma to cause Xeno to be joined as a plaintiff in the First HK Proceedings. Further, the fact that there is no suggestion in the judgment of Bannister J that retrospective leave could be obtained in those circumstances (a question which he did not address at all) does not, in my view, support, a finding that section 184C, properly construed, does not empower a judge to grant leave retrospectively upon the appropriate application being made under that section.

[102] Xeno also argued that the language of section 184C is prospective and capacity creating, and the granting of leave is a condition precedent to the very act which it permits, that is, the capacity or authority to bring proceedings in the name or on behalf of the company. Taken at face value, this argument seems quite attractive. However, it does not, in my respectful view, hold up to proper scrutiny. The fallacy of this argument is that the proceedings are brought in the name of the company and not that of the member. It cannot be said that because the initiator of the proceedings in the name of the company is a member who had no entitlement to do so, means that such proceedings in the name of the company are a nullity. Furthermore, as held above, such proceedings are "defective", and not incapable of being taken over by the company itself upon a proper and legitimate exercise of its decision-making powers. Also, argumento, if it is that the company has no standing to bring or to continue or to defend such a claim brought in its name, or the court of choice for such proceedings does not have jurisdiction, the claim or proceedings may be struck out by that court either of its own initiative or upon application. This is very different from such proceedings being characterized as a nullity.

[103] However, none of these points and conclusions lead inextricably to the conclusion that the court has the power under section 184C to grant leave retrospectively, even if the derivative proceedings brought by the member are defective for that reason. As stated above, the starting point is the words of the statute itself. **Seal v Chief Constable of South Wales Police.**[13] Either the power exists to grant retroactive leave as a matter of the clear language of the section or it does not. In this regard, Xeno argues that unless there is a specific statutory power to "continue" extant derivative proceedings brought in the name and on behalf of the company without the leave of the court under section 184C (such as exists in the English statute section 26(1) of the Companies Act 2006), the court has no power to grant leave retroactively to, in essence, validate such proceedings. In support of this proposition, Xeno relies on the passage cited approvingly by Lindsay J in **In Re**

[13] [2007] UKHL 31 at para 5.

Saunders (A Bankrupt) from the judgment of Gillard J in **Re Excelsior Textile Supply Lt***d*:

> "one cannot appropriately give leave to commence something unless leave were given before the commencement of it," He further held that there was no power to give leave further to proceed with litigation where its commencement had not been authorized.
>
> To that statement of principle, I would merely add the words: 'unless the statute expressly or by necessary implication, so confers or permits'."

[104] There is no express power in section 184C conferring on the court the power to retroactively grant leave to a member to 'continue" derivative proceeding already commenced by that member without the prior leave of the court. Section 184C is notably devoid of the use of the expression "to continue", as it is devoid of any express power to grant retrospective leave or permission. Instead, the language of the section is entirely prospective, as Xeno correctly submits. It uses expressions "to bring", "to intervene", "to defend" and "to discontinue". Furthermore, such retrospective power is not conferred by necessary implication, nor is it permissible in my view to imply such a power into section 184C. Additionally, any question of inferring such a power as part of the inherent jurisdiction of the court would be erroneous as a matter of principle, as the jurisdiction to permit a member to bring proceedings or to intervene or defend existing proceedings in the name and on behalf of the company, is one created by statute. No such power existed at common law. In this regard, it is instructive to see that such a power to grant leave to continue derivative proceedings is expressly provided for and conferred on the court by the equivalent English statutory provision.

[105] This does not lead to the conclusion that a member, having brought the derivative proceedings in the name and on behalf of the company without the leave of the court, has no remedy. The simple remedy is to apply anew for prospective leave, explaining why no leave had been applied for before commencing the proceedings, and in doing so put before the court sufficient material upon which to satisfy the mandatory considerations of subsections (2) and the requirements of subsection (3), such as to enable the court to exercise its discretion and undoubted power to

grant prospective leave to bring new proceedings in the name and on behalf of the company. This is what Mr. Ma wisely did in the instant matter, and the judge's grant of prospective leave is the subject of review in Appeal No. 24/2025.

[106] For the reasons set out above, Issue 1 (retrospective leave) fails and, consequentially, so does issue 2 concerning the costs order against Mr. Ma upon the judge's dismissal of his application for retrospective leave. Xeno shall be awarded its costs in Appeal No. 26/2025.

Appeal 24/2025: Issue 3 (Ground 6) – Did the Judge err in His Approach to and Treatment of the Five Mandatory Considerations in Section 184C(2) as Non-Cumulative?

Xeno's Submissions on Issue 3

[107] In ground 6 of its appeal Xeno contends that the learned judge was wrong to treat the five considerations set out in section 184C(2) as a "non-cumulative" checklist, such that any failure of the considerations at subparagraphs (b), (c) or (e) "points to refusal, subject only to a constrained residual discretion." Xeno's argument is that all five considerations at subparagraph (2) are mandatory considerations and are threshold requirements for the court to exercise its discretions under section 184C(1) to grant prospective leave to an applicant to bring a derivative claim.

[108] In support of this proposition, Xeno relies on this passage from the judgment of Bannister J (at para. 13) in **Basab Inc. v Accufit Investments Inc. and Anor**–[14]

> "a fair hearing of sub-section 184C(2) as a whole and in its context discloses that its purpose, always subject to the court's overriding discretion, is to point the Court toward refusing permission if the applicant "fails" on one or more of the matters referred to"; and further, "the very nature of the considerations listed in sub-section 184C(2) is such that "failure" on **any one of them** will point, prima facie, towards refusal of permission."

[14] BVIHC (COM) 2014/0013 (delivered 9th November 2015, unreported).

[109] Xeno also relies on dicta of Bannister J in **Nigel Gray v Allan Leddra** (supra) (at para. 9) that the considerations numerated at section 184C(2) are "important considerations" which the court is "mandated to take into account". With this latter statement of principle, I am entirely in agreement. Xeno also prays in aid under this ground of their appeal these judicial opinions and utterances of Leon J in **Glory Advance** (supra): "subsection (2) of Section 184C of the Act requires that the Court take the following five matters into account"; and that it would be illogical "for the Court to determine the weight to attach to each of the five matters". With the latter of these two statements, I am, respectfully, not in agreement.

[110] I would observe, at this juncture, that in relation to the aspect of Leon J's opinion that it would be "illogical" for a judge to determine what weight to attach to any of the five mandatory considerations in subsection (2), thereby suggesting that each of these considerations must be given equal or the same weight when determining how to rule or how to exercise the court's discretion whether to grant leave to commence derivative proceedings, Justice Leon went further than Bannister J was prepared to go in **Nigel Gray**. In the latter case, Bannister J did not disapprove of a judge attaching differential weight to any of the five considerations at subsection (2) of section 184C, but merely opined that the failure to satisfy any one of them points, *prima facie*, to a refusal of leave to bring a derivative action. In my respectful view, to attempt to discourage or to implicitly disentitle a judge, when exercising the undoubted discretion reposed in the court under section 184C(1)(a) of the BCA, from exercising the customary judicial assessment and judgment when considering the stipulated factors or considerations to be taken into account in determining which way that discretion ought properly to be exercised, would be wrong as a matter of principle and serve to erode the very discretion granted by subsection (1). In this regard, it must be appreciated that these five factors or considerations are not cast in the same absolute terms and effect as considerations (a) and (b) of subsection (3) of section 184C. More will be said of this distinction and its significance later in relation to this issue of retrospective leave.

[111] It is of importance to note that in relation to ground 6 of its appeal, Xeno has adopted a peculiar and counter-productive position on the issue of the importance to be accorded to each of the five considerations in subsection (2). Xeno seems to be taking the position that it is only in relation to considerations (b), (c) and (e) where, if the member-applicant "fails" to satisfy the judge, would "point, prima facie, to refusal" of the application for permission to bring derivative proceedings. They do not accord the same treatment or significance to a failure to satisfy the court with respect to considerations (a) dealing with whether the member/applicant "is acting in good faith", or (d) dealing with "the costs of the proceedings (to be brought or intervened) in relation to the relief likely to be obtained". In fact, this is Xeno's argument on ground 6 and is confirmed at paragraph 86 of its written submissions, as it was in their oral submissions before this Court, a position or argument which does not accord with the opinion of Bannister J in **Basab**. At paragraph 86, Xeno accepted -

> "that the Court retains a **residual discretion** if **one** of those requirements is not satisfied, that discretion is constrained by section185C. Furthermore, it is submitted that the mandatory requirements **set out in sub-section 184C(2)(b), (c) and (e) are each a requirement that must be met so that if the Derivative Claims are unlikely to succeed, or if they are not in the best interest of Xeno, leave will ordinarily be refused**; and if there is an adequate alternative remedy, that will **weigh heavily against** leave." (emphasis added)

[112] These conflicting submissions by Xeno are not confirmatory of an overarching requirement that all five considerations at subsection (2) must be established (each to the requisite civil standard) to enable the court to grant leave. Second, to the contrary, Xeno's submissions are to the effect that certain of these factors or considerations ((b), (c) and (e)) in subsection (2) should be accorded greater importance or significance when deciding whether to grant leave such that a failure to establish any one of them ought to result in a refusal of leave, whereas a failure to satisfy the judge in relation to considerations (a) and (d) should be accorded lesser importance or significance in the court's exercise of discretion. Third, certainly 2 of the 3 most significant considerations would "ordinarily" result in refusal of leave, and the other one would weigh "heavily against granting leave. Fourth, Xeno's

submissions on this issue do not exclude the judge having a "residual discretion", if one of the five requirements is not met to his satisfaction.

[113] Xeno's primary or principal submission under this ground of appeal is that the learned judge incorrectly treated each of the five considerations in subsection (2) a "merely prima facie points", and erred in "defaulting to an overall discretion" (looking at matters in the round) which led him into error by failing to consider each of the five requirements "with sufficient vigour". (para. 87 Xeno's written submissions)

[114] In addressing ground 6 of Xeno's appeal, Mr. Ma considered what is the correct approach to and treatment of the five mandatory requirements under subsection (2) of section 184C of the BCA. It is submitted that Xeno's primary submissions under this ground is, in any event, wrong as a matter of law. Mr. Ma points out that the wording of subsection (2) does not, on any proper reading, state that the failure to satisfy any one of the five considerations must result in the court refusing leave nor is there any presumption that in such circumstances leave will be refused. In short, the only mandatory requirements are the five set out at section 184C(3) of the BCA which states: "Leave to bring or intervene in proceedings may be granted under subsection (1) **only if the Court is satisfied** that: (a)…; or (b)…."

Mr. Ma's Submissions on Issue 3

[115] It is also submitted by Mr. Ma that the language of sections 184C(2) & (3) is amply supported by the authorities. Reference is made to **Glory Advance**[15] where (at para. 23) Leon J opined: "… there is no reason why any particular consideration should 'trump' another …. The appropriate **discretionary weighing** will depend on all the circumstances of each matter." And, in **ZVI Dekel v Clerkwenwell Lifestyle Limited**[16] per Mithani J at paras. [23] and [27]: -

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[15] BVIHC(COM) 2015/0090 (delivered 8th July 2016).

[16] BVIHCM 2024/0466 (delivered 4th March 2025).

> "s. 184C gives a **wide and unfettered power to grant leave** to bring a derivative claim, subject, of course, to the limitation that it must be exercised judicially and, therefore, on a case-by-case basis".
>
> The factors specified in s. 184C, which the Court must take into account, are **not exhaustive**", and "**do not carry more weight** than those that are not so set out." (emphasis added)

[116] The opinion of Mithani J in **ZVI Dekel** adopts the approach that the court's discretion under section 184C(2) is "wide and unfettered" and is not limited by the five factors or considerations specified therein, which are to be treated as "non-exhaustive". Second, Mithani J in that extract, also underscores that a judge, in exercising the discretion under section 184C whether to grant leave, may take into account other relevant considerations or factors, on a case-by-case basis. Third, Mithani J is of the further opinion that none of the five specified factors under subsection (2) necessarily carry more weight than other relevant factors to be taken into account which are not specified at subsection (2).

[117] Mr. Ma also referred to the very passage from the judgment of Bannister J in **Basab** relied on by Xeno in observing that the said judge stated that a failure on any of the five mandatory considerations merely "point[s], prima facie, towards refusal", and not that the failure on any one of them is fatal to the application for leave. It is also pointed out by Mr. Ma that the Court of Appeal in its decision in **Basab** did not suggest that the House of Lords in **Cream Holdings Ltd v Banerjee**[17] was authority for the proposition that whether the proceedings were likely to succeed was a threshold test; and the House of Lords made clear at para. [22] that "there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite."

[17] [2005] 1 AC 253.

Analysis and Conclusion on Issue 3

[118] Section 184C(2) provides**:**

> "**Without limiting subsection (1)**, in determining whether to grant leave under that subsection, the Court **must take the following matters into account**:
>
> (a) whether the member is acting in good faith;
>
> (b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;
>
> (c) whether the proceedings are likely to succeed;
>
> (d) the costs of the proceedings in relation to the relief likely to be obtained; and
>
> (e) whether an alternative remedy to the derivative claim is available." (emphasis added above)

[119] In my considered view, the provisions of section 184C(2) are clear and unambiguous. The opening words, "Without limiting subsection (1)", is a clear statement that there is no intention to or limitation on the judge or the court to a consideration only of the five factors specified in subsection (2) when exercising its undoubted discretion or subsection (1), to grant leave to an applicant-member to bring or intervene derivatively in proceedings. Second, it follows that a judge considering an application for leave under section 184C(1) is permitted to consider factors or considerations, supported by the evidence adduced, which are not one of, but additional to, the five mandatory factors set out in subsection (2). Third, the five mandatory factors set out in subsection (2) must be considered and taken into account by the judge in determining the application under subsection (1) of section 184C. A failure to do so is presumptively fatal to any decision on the application. This is pellucid from the words "must take into account" in subsection (2). Fourth, neither subsection (1) or (2) of section 184C speaks to the weight to be attached by the judge to any one or more of the five mandatory factors or considerations in subsection (2). The amount or degree of weight to be attached by a judge to any one of these mandatory factors, is a matter to be assessed and determined by the

judge having regard to the facts and circumstances of the particular application for leave. This assessment of each of the mandatory factors or considerations is a matter uniquely for the judgment of the presiding judge. Fifth, likewise the weight to be attached to any additional relevant factors or considerations, is a matter solely for the judge to be determined based on the mandatory factors to be considered, the evidence adduced in support of the application, and any other additional relevant factor or factors borne out by such evidence. The amount of weight to be attached to any one of the "additional" considerations is again purely a matter for the judge.

[120] Can the judge when dealing with an application for leave under section 184C attach more weight to an "additional" factor than the weight which he attaches to any of the five mandatory factors specified in subsection (2), as suggested by Mithani J in the passage above from **ZVI Dekel**? In my considered opinion, strictly speaking the answer may be "yes", as a matter of principle, judicial discretion and logic. However, it is difficult, but not impossible, to conceive of circumstances where an additional consideration attracts more weight or significance to the determination of an application for leave under section 184C, than the five mandatory considerations under subsection (2). As a matter of legislative purpose and context, the five mandatory factors specified in subsection (2), by their very nature and significance to the determination of an application by a member for leave to bring derivative proceedings, must be accorded prominence and great importance, in my view. In most if not all cases, the court's assessment of each of these factors is very likely to point, prima facie, to granting or refusing leave, as the case may be, if not decisive.

[121] This is to be compared and contrasted with subsection (3) which uses the word "only" in limiting or curtailing court's ability to grant an application for leave. Satisfying the two requirements of subsection (3) is absolutely critical to the court's determination of an application for leave under subsection (1), even if an applicant has satisfied the judge on each of the five mandatory considerations under subsection (2) and any additional relevant factors founded on the evidence adduced

and circumstances of each case. This is clear from the use of the wording of the subsection, which states:

> "(3) Leave to bring or to intervene in proceedings may be granted under subsection (1) **only** if the Court is satisfied that:
>
> (1) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings. As the case may be; or
>
> (2) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the of the shareholders or members as a whole."

[122] In considering the issue of prospective leave, the learned judge clearly accepted that the court "must take" the five factors or considerations at subsection (2) into account. He mused: "So I have to take those matters into account". He dealt with Mr. Ma's standing to bring the application under section 184C and disposed of this issue by concluding that "it is undoubtedly clear that he is a member", who has admittedly 'retained some rights of membership", and hence possesses the requisite standing.

[123] The learned judge considered the various arguments and counterarguments as to whether the five mandatory factors are exhaustive and, if not, whether they carry more weight than those which are not set out in the subsection. In setting out his position on these issues, the learned judge opined (at transcript page 15 L 15-25, p,16 L 1-13):

> "Well, clearly, those matters which the statute tells the court that it must consider, they are **non-negotiable**, you have (sic) take them into consideration. **I disagree with Justice Mithani that the Court's jurisdiction is unfettered**. I agree with him that it is wide, but I do not agree that it is unfettered. Precisely the conditions in 184C, they are the **fetters**. And **I agree with him that other factors can be taken into account and could prevail** but these ones that are listed out in the Act, they must be taken into account.
>
> Now, I also agree that this is **not a box-ticking exercise** and I agree also with Justice Mithani that there is **a considerable amount of leeway** in the Court's assessment of whether or not the various factors should result in leave being granted or the like. **I do not say that those factors set out in**

> **the statute are a cumulative list of hurdles to be overcome**, such as Mr. Lord has suggested, that you have to satisfy the Court on all of them in order to get leave. I don't see it as hard and fast as that. It is the **overall picture** which should inform the Court's discretion." (emphasis added)

[124] Having considered the dicta of Bannister J in **Basab** (above), the learned judge opined further-

> "Now what's clear from this is that **Justice Bannister is not saying that you have to absolutely succeed on all of these to get permission.** It's a **prima facie consideration** and it **points to something**, but **there's an overriding discretion** which means that you **take the matter in the round**."
> "Equally, one mustn't be obtuse about it and grant leave where there be absolutely no point in granting leave."
>
> So, for example, I mean, extreme cases can always be thought out.
> "… I accept what Justice Bannister is saying that **it's a pointer**. It's prima facie and the Court has an **overall discretion**. It's a **nuanced exercise** to which some common sense has to come in as well." (emphasis added)

[125] Having set out above my interpretation of section 184C (1), (2) and (3) it is clear that I am in agreement with the views and opinion expressed by the learned judge on these matters as set out in the passages above from his *ex tempore* judgment in this matter.

[126] Accordingly, for these reasons ground 6 of Xeno's notice of appeal fails. The learned judge properly analyzed section 184C(2). Xeno is incorrect when it submits that he ought to have treated a failure to satisfy one of the five requirements as fatal to the leave application. The weight to be accorded to each of the five mandatory considerations is a matter for the learned judge to determine based on the particular circumstances of each leave application. However, consideration (c) -whether the proceedings are likely to succeed- is of paramount importance to the success or failure of every leave application to bring derivative proceedings in the name and on behalf of the company and may often be decisive of such application.

[127] In the judgment the learned judge went on to consider first the "good faith" requirement at (a). He held that –

> "Mr. Ma and Mr. Lim are concerned with making sure that a cause of action which the Company has and which the Receivers will not pursue because it is against the Receivers themselves, that the Company does go and pursues that action, and I see that it is perfectly sensible and indeed good faith reason for wanting to bring a derivative action. It's a very simple point and I am totally with Mr. Cook on it."

[128] Xeno has not appealed or challenged this finding of "good faith". However, by grounds 1 and 2 Xeno challenges the judge's treatment of and findings in relation to the "likely to succeed" consideration at subparagraph (c) and whether, in his approach to this issue, he erred in giving blanket permission to pursue all of the pleaded causes of action in the Amended Statement of Claim ("ASOC") in First HK Proceedings. This is in addition to challenging by ground 5 whether the derivative proceedings are in the interest of Xeno - considerations (b); ground 3 whether the judge erred in finding that there was not alternative remedy to the derivative claim available to Mr. Ma – consideration (e); and by ground 4 the cost of the derivative litigation in relation to the likely reliefs to be obtained – consideration (d)

Appeal 24/2025: **Issue 4 (Ground 1) - "Likely to Succeed"; and Issue 5 (Ground 2) – Blanket Prospective Leave**

[129] By Issue 4 (ground 1) of its appeal, Xeno contends that the learned judge erred in finding that the Derivative Claims sought to be brought anew by Mr. Ma in Hong Kong in the name and on behalf of the company, were "likely to succeed". Issue 4 (ground 1) necessarily involves a consideration of a number of sub-issues. First, what is the meaning of the expression "likely to succeed" in consideration (c) of subsection (2) of section 184C. Second, did the learned judge apply the correct test when evaluating the evidence before him. Third, did the learned judge err in holding, on the evidence before him or the lack thereof, that Mr. Ma had satisfied the "likely to succeed" threshold? This third sub-issue involves, *inter alia*, a consideration of whether (a) the absence of a professional valuation of the market value of the Sale Assets at the date of the sale of them by the Receivers was fatal to any finding that the Derivative Claims were "likely to succeed"; (b) if not, was the learned judge entitled to rely on evidence of "offers" and other documentary evidence adduced by

Mr. Ma as evidence indicative of the market value of the 49% Shares and supportive of the allegation that the sale of the such assets was at a gross undervalue; and (c) was the judge correct in finding that the Derivative Claims were likely to succeed.

[130] Issue 5 (grounds 2) concerns whether the judge erred in granting leave to bring all the Derivative Claims substantially in the form as pleaded in the ASOC in the First HK Proceedings. This issue will be considered when dealing with Issue 4 sub-issue 3(c) above.

The Test of "Likely to Succeed"

[131] It is not in dispute that the learned judge identified the correct meaning and test to be applied when evaluating the question of whether Mr. Ma had, in his application for leave, satisfied him as to the likelihood of success of the prospective derivative claim/proceedings. The learned judge relied on the test and guidance given by this Court of Appeal in **Basab Ins. V Accufit Investments Inc** and concluded:

> "[I]t is whether it is **more probable than not** that the proceedings will succeed. It does not require that the Applicant demonstrate that success is very strong. So it's just more probable than not. And what the Court has to do is a proper evaluation of the evidence, but without descending into a mini trial on the merits of the claim." (emphasis added)
>
> "Equally, a claim succeeds if he obtains meaningful and effective relief. That's Glory Advance at paragraph 26. There is no requirement he is likely to obtain any particular quantum of damages or compensation."

Did the Learned Judge apply an Incorrect Test or Lower Standard of Scrutiny in his Evaluation of the likely to Succeed Threshold?

[132] Xeno submits that in evaluating Mr. Ma's evidence on this issue, the learned judge, having identified the correct test, misdirected himself as to the correct legal standard, adopting instead a "possibility" standard, by describing the cause of action of conspiracy a "less likely, but also possible", and treating the claim in negligence as "possible". It is submitted that comparatively the "likely to succeed" threshold in section 184C(2)(c) of the BCA is much higher than the applicable threshold or standard in certain other jurisdictions, such as a *prima facie* case in England, or a

serious question to be tried in Hong Kong and Australia. It is submitted, therefore, that the learned judge not only failed to apply the correct test when evaluating the evidence, but applied a lower threshold or standard than that prescribed in consideration (c) as interpreted in **Basab**. Secondly, and most importantly, he failed to appreciate the extent and degree of scrutiny of the evidence adduced by Mr. Ma, as the applicant with the burden of proof, when determining whether he had met the requirement that the derivative proceedings to be brought in Hong Kong were "likely to succeed". In doing so, it is contended, the learned judge committed material errors which ought to lead to his decision that the prospective claims were "likely to succeed" being set aside and Mr. Ma's leave application dismissed.

[133] As to the correct legal test, Xeno relies on this passage from the judgment of the Court of Appeal in **Basab** at para. 42, which passage is most instructive:

> "In relation to the level of the examination of the evidence required, the threshold (that of determining whether the proceedings are likely to succeed) **would require a full and proper examination of the evidence then before the court**. The Court agrees with the appellant that the potential nature of derivative claims, especially those that may be both complex and defended, **do not predispose themselves to a cursory review and require the court to evaluate the evidence before it and the arguments advanced by both parties** in order to determine "whether the proceedings are likely to succeed". Bearing this threshold in mind, it is difficult to see how this test can be properly applied without the court carrying out a proper evaluation of the evidence then before it." (emphasis added)

[134] As to the correct threshold test, Mr. Ma relies of the dicta at paragraph [39] in **Basab** – the "more probable than not" standard, as the correct test to be applied, as did the learned judge. He disputes that the learned judge applied an incorrect or a lower standard of "possibility". It is his submission that while the learned judge did use the word "possibility" in two passages in his judgment, the use of that word must be put into its proper context. Mr. Ma submits that what is clear is that the learned judge did not apply a lower threshold to his evaluation of the evidence on the issue or requirement of "likely to succeed", and Xeno's submission that he applied the wrong test is entirely unjustified.

Analysis and Conclusion on Whether the Judge applied the wrong test or Standard of Evaluation of the Evidence on the likely to Succeed Issue

[135] It is accepted by the parties that the correct threshold test for determining whether the intended derivative claim is "likely to succeed" is as set out in the passages cited from paragraphs [39] and [42] of the decision of this Court in **Basab** (as set out above). Xeno's first complaint is that by the use of the iterations of the word "possible" and "possibly" at certain parts of the judgment, the learned judge was applying a much lower threshold test to his evaluation of Mr. Ma's evidence as to the likelihood of success of the derivative claims, whether in negligence or in conspiracy. This is not the only point of criticism lodged by Xeno in its appeal against the judge's application of the test in **Basab**.

[136] The two passages in the judgment where the learned judge used the words "possible" and "possibly" to categorize certain derivative claims, are as follows:

> "So whether it's tiredness, whether it's well warned and knowing how these things always work and taking it for granted with being caught short and wrong-footed by it all, whether they are being hoodwinked by Mr. Lee in the way that Mr. Lim says he was hoodwinked? **Possible**. Whether they are in this in trying to achieve the goals of the people that put them in there. **Possible**. So where we are left with on that is that there is, to my mind, actually, **a very strong case** that these Receivers did not do their jobs properly, either in discharging their duties or fulfilling the requirements of the law of **negligence**, or indeed, whether they are in some kind of **conspiracy**. Certainly, they should be tested on it and that if they are not, then they will be, you know, they should have no problem fully explaining how they did things. I find it **rather extraordinary** that receivers should, apparently for 30 months, try and ostensibly market the shares in the Company. When people come with real offers on their face of it, with real money in them, immediately conditions get laid down which they cannot hope to fulfil, and when somebody comes along and say well, we want to take over the whole project and, by the way, we want 49 percent shareholding for, what it was it, 258 million, two hundred and eighty something million in Hopu. Hopu comes along and want to buy the whole project for this 49 percent and the Receivers says I didn't do anything because I was only copied in on it. It's incredible…. That's either i**ncredible** from a receiver who is doing his duty, the terms of trying to get the best price for the sale of these shares or it is entirely credible if they are in some scheme to go and actually try and make this whole deal go in the pocket of

somebody else."(emphasis added) (Transcript at page 225 L 7-25 & 226 L 1-10, 20 - 25)

"Now, I have touched on why the Receivers failed to act reasonable. Was it negligence? **Possibly**. Was it part that they are part of a conspiracy? **Less likely, but also possibly**. In any event, I think the merits are sufficient that there is **more probable than not that they are likely to succeed** and I have looked at the pleadings." (emphasis added) (Transcript page 228 tL22-25 & page 229 L 1-3)

[137] I have given very careful consideration to these extracts from the *ex tempore* judgment of the learned judge and to the criticism by Xeno that he applied a lower test or standard to the issue of the "likely success" of the prospective derivative claims, and the arguments and counterarguments of the parties on this issue. I am not satisfied that the learned judge either applied an incorrect test or a lower standard or threshold by the use, simpliciter, of the words "possible" and "possibly" in the two passages above. While the use by the learned judge of these words is not strictly in conformity with the formulation and articulation of the threshold test in **Basab** of "more probable than not" that the derivative proceedings will succeed and can be interpreted as indicative of him applying a lower standard to his assessment of the evidence under consideration (c) of section 184C(2), it is clear from the extract from the judgment set out at paragraph [124] above (Transcript page 219 L 11-24) that the judge was fully cognizant of the proper test and what it means as set out in **Basab**. It is also clear from a full reading of the passages above from the judgment where the judge used the words "possible" and "possibly" in relation to his evaluation of the strength of each of the causes of action of negligence and conspiracy, that he lost sight of the test of "more probable than not" that these claims will succeed. In the said passages the judge concluded that the case in both negligence and conspiracy was "very strong", albeit he considered that the receivers were "less likely" to have been involved in a conspiracy. He also concluded that in his opinion "the merits are sufficient that there is more probable than not that they are likely to succeed and I have looked at the pleadings."

[138] My conclusion that the learned judge applied the correct threshold test is also borne out by this extract from the judgment (Transcript page 227 L 1 – 10) –

> "So to my mind there is **a very strong case** here, **there is a good likelihood of success**. Had the Receivers acted reasonably on the face of it, they haven't. Have they conducted sufficient due diligence? Again, on the face of it they did not. They didn't get an expert view of value of the shares. They seemed to have gone entirely with what the deal dictated and that they ultimately went with the only offer that they didn't block. Well how good a deal is that? They can easily have blocked that one as well…"

[139] For the reasons above, issue 4 is decided in favour of Mr. Ma.

[140] However, this is not a complete answer to ground 1 of Xeno's notice of appeal. I must go on to consider whether the judge erred by giving blanket prospective leave on all causes of action pleaded in the ASOC (Issue 5/ground 2) and ultimately Issue 6 (ground 4(i)) dealing with the question of "valuation evidence" and Issue 7 (ground 4(ii)) whether the judge erred in considering the "offers" as indicative of the value of the 49% Shares.

Was the Judge Wrong to hold that Mr. Ma had satisfied the "Likely to Succeed" Requirement – Consideration (c)

[141] Xeno in its submissions has challenged this finding on several grounds, each of which will be addressed hereafter seriatim.

Absence of a Professional Valuation of the 49% Shares as at the Date of the Sale

Xeno's Submissions

[142] In challenging the quality and probative value of the evidence adduced by Mr. Ma below on this issue, and the learned judge's evaluation of such evidence and his finding "likely to succeed', Xeno has identified from the judgment, what it considers to be two primary but fundamentally wrong in principle propositions upon which the judge's reasoning and findings turn. First is that no valuation evidence was required as to the value of the Sale Assets at the date of the Sale; and second, evidence of third-party non-binding "offers" could be treated as evidence of value. These two

bases as identified by Xeno in its written submissions on ground 1, are not necessarily inconsistent statements or propositions. The first speaks only to the necessity for and lack of valuation evidence as of the date of sale of the Sale Assets. While the second speaks to what evidence the learned judge considered to be valuation evidence, namely the "offers", upon which he could rely as cogent evidence of value or evidence indicative of the market value of the Sale Assets (in particular, Xeno's 49% Shares in HK Aether) at the date of the sale of the Sale Assets.

[143] Xeno submits the absence of "valuation evidence" or proper valuation evidence of the 49% Shares, meant that the respondent, Mr. Ma, on whom the legal and evidential burden rest, had failed to discharge his burden in relation to consideration (c), one of the five mandatory and critical considerations to be satisfied by any member-applicant for leave under section 184C of the BCA. Accordingly, and for this reason only, leave ought not to have been granted and Mr. Ma's application ought to have been dismissed.

[144] As to the kind of evidence of value necessary to discharge the burden to towards establishing that an asset was sold at a gross undervalue giving rise to a cause of action which is or can be said to be more probable than not "likely to succeed", Xeno points to this statement by Lord Toulson in **Caribbean Steel Company Limited v Price Waterhouse (a Firm):**[18]

> "… it is important to remember that the valuation of the shares in a company is an exercise requiring professional skill and judgment."

[145] It is important to state that neither Mr. Ma nor the Receivers produced before the lower court any evidence of or from a qualified professional valuer as to the value of the 49% Shares, either at the time of their sale or at any time of relevance. If fact, as the judge remarked or observed as evidence indicative of negligence by the Receivers themselves, they did not obtain an independent professional valuation of

[18] [2013] UKPC 18.

the Sale Assets (including the 49% Shares) at the time or immediately before they contracted to and sold them for the sum of US$1 million.

[146] Further, Xeno contends that a claim premised on a sale of assets including the 49% Shares at a gross undervalue, cannot satisfy the threshold test in **Basab** with respect to "likely to succeed", absent "probative valuation evidence". It is submitted that absent such evidence from a professional valuer of the 49% Shares held by Xeno in HK Aether at the time of the sale said to be at a gross undervalue, the learned judge was not in a position on the evidence before him to determine whether it was more probable than not that the sale had been at an undervalue, and therefore the Receiver can be said to have acted negligently, at minimum.

[147] Xeno also submits that any valuation of the 49% Shares (said to have been sold at an undervalue) would have to take into account two important factors affecting the value of the Shares, and absent any professional evidence addressing these factors as part of an objective and independent valuation, the judge could not properly "conclude" that the claim in negligence and conspiracy, based on a sale at an undervalue, was likely to succeed, or more probably than not would succeed. These two important matters are: (1) the amount of at least US$404,746,473.26 owed pursuant to the Xeno Facility Agreements as at 17th April 2023 in light of which the net equity of the 49% shareholding was likely to have no value or very limited value; and (2) the difficulties faced by the Receivers, as explained by Mr. Borrelli in his affirmations (and summarized at paragraph 33(2) of Xeno's written submissions).

[148] Xeno also underscored that there was no explanation from Mr. Ma as to the absence of any independent professional valuation evidence of the 49% Shares and, more particularly, at the date of their actual sale. Xeno argues that **Basab** (at para. 42) requires a full and proper evaluation of the evidence by a judge, which the learned judge did not do. Moreover, in a case such as this where the alleged causes of action and derivative claim is founded on the allegation of a sale at an undervalue (in this case of shares in a company), a full and proper evaluation must entail a

cogent valuation evidence analysis for the specific asset as at the sale date. No such valuation evidence was adduced by Mr. Ma and, accordingly, the learned judge could not undertake a full and proper evaluation of such evidence, except to find that there was no such evidence and that Mr. Ma had failed to discharge the burden on him to show that the sale of the 49% Shares had taken place on 31st December 2020 at a gross undervalue, leading to a finding that the causes of action to be mounted in the prospective derivative proceedings, were not "likely to succeed".

[149] In support of this proposition, Xeno prays in aid this evaluative reasoning by Bannister J at paragraph 20 of his first instance decision in **Basab** (which finding was upheld by this Court of Appeal): -

> "[The Applicant] relies heavily on the failure to conduct any proper marketing of the sale shares. That may or, in the circumstances may not, have been commercially unwise, **but what it does not do is support a claim that the sale shares were sold at a gross, or indeed any undervalue.**" (emphasis added)

Mr. Ma's Submissions on Absence of Professional Valuation

[150] Mr. Ma responds at paragraph 86 of his appeal submissions to Xeno's submission that an undervalue cannot be established absent adducing evidence of an independent professional valuation, capable of showing that as of the date of the sale (31st December 2020) the 49% Shares were sold by the Receivers at a gross undervalue. Mr. Ma submits that the 49% Shares sold for US$1.3 million were plainly sold at a gross undervalue, and the learned judge had before him cogent documentary evidence of the value of the Development Properties; of the "offers made for the said 49% Shares held by Xeno in HK Aether; and the value transferred to Guanghua SSF for the 49% Shares under the Master Agreement.

[151] In short, Mr. Ma argues that it is wrong as a matter of principle, in an application under section 184C for leave to bring a derivative claim or proceedings where a sale at a gross undervalue is alleged, to require that absent independent evidence of value of the sale asset(s) from a professional valuer, the applicant-member's application must fail on the "likely to succeed" mandatory consideration at (c) of

subsection (2). Second, it is submitted that the learned judge was entitled, on a section 184C leave application, to consider other reliable evidence of value of the 49% Shares in HK Aether, and to conclude that the claim grounded in negligence or otherwise of a sale of that asset at a gross undervalue, is "likely to succeed".

Discussion and Conclusion on Absence of a Professional Valuation

[152] I do not agree with nor do I accept that absent a professional valuation of shares in a company allegedly sold at a gross undervalue, an application for leave under section 184C premised on such claim, is bound to fail or must be refused as not having satisfied the court that the prospective derivative claim is "likely to succeed" or that it is more probable than not that it would succeed.

[153] The starting point is that the consideration at subparagraph (c) of subsection (2), is an important and mandatory consideration in the exercise of the court's discretion under subsection (1) whether to grant leave to bring derivative proceedings in the name and on behalf of the company. This is manifestly so because it would be pointless, unfair, and a waste of money and resources, for a court to grant leave to bring such a derivative claim where it had not been satisfied that such claim was likely to succeed.

[154] In this respect, the guidance of this Court in the passage at paragraph [42] of this Court's judgment in **Basab** (see para. [127] above) is most instructive. It is most instructive as to the quality and degree of examination and scrutiny a court or judge must undertake when determining whether the test of "more probable than not" is being assessed. These requirements are clear and purposeful. A judge must carry out "a full and proper examination of the evidence" before him. This is to be compared and contrasted with a "cursory review" which is too low a standard as the court or judge is carrying out under section 184C a sifting or gatekeeper role, to ensure that only claims or defences which not only has merit but which can be said to be more probable than not to succeed, are permitted to be brought by a member in the name and on behalf of the company. A "full and proper examination" of the

evidence requires the judge to also evaluate not just the evidence adduced but also with and in the context and light of the arguments and counterarguments advanced by the parties, in determining whether the proposed or intended derivative claim or claims are “likely to succeed”.

[155] It is clear beyond argument or speculation that the test to be applied and the standard of evaluation of the evidence to be undertaken by a judge in a section 184C leave application as held in **Basab**, is not the same and does not accord with or equate to the test or standard of “possible” or “possibility”, which terms were used rather loosely by the learned judge when dealing with the claims in negligence and in conspiracy. The use of such terms by the judge in the context of a section 184C application for leave, is certainly ill advised and should be frowned upon by this Court as they could lead to some uncertainty as to whether the judge had in mind the correct threshold test. However, as is addressed later in this judgment, viewed in the proper context and reading the judge’s decision as a whole his use of these terms does not lead to the conclusion that the learned judge applied or was applying a less stringent or too low a standard or threshold. To arrive at a proper decision on this point, one must consider the totality of the learned judge’s decision and reasoning on the issue of “likely to succeed”.

[156] Apart from the obvious general requirement that the evidence adduced by an applicant for interlocutory relief must be cogent, relevant and reliable, section 184C is silent as to the kind of evidence needed to be adduced in support of the leave application and, in particular, the important requirement of “likely to succeed”. What is clear is that determination of the merits of consideration (c), is multifaceted. It must be evidence based, which evidence must be evaluated by the court in light of the parties’ submissions and argument as to the merits of the various causes of action and the relative strength or weakness of each as a matter of both fact and law.

[157] In my opinion, where the underlying basis of the derivative claim is an allegation of a sale by fiduciaries at an undervalue or gross undervalue, an applicant for leave must adduce cogent and reliable evidence indicative of value or of the likely value of the asset or assets at the time of the impugned sale of the asset or in such close proximity to such sale as to be reliable. This does not mean nor is the applicant required to adduce evidence of an independent professional valuation of the asset which is said to have been sold at a gross undervalue.

[158] Of course, an applicant for leave would be best placed by adducing and relying on such professional valuation. However, the absence of such professional and independent valuation at the leave stage, is by no means fatal to such an application, as Xeno submits. An applicant may rely on other cogent evidence indicative of value, including, as here, offers to purchase the Sale Assets, that is to say, "offers' by third parties unrelated to any of the parties or their principals, to purchase the 49% Shares and the Development Properties at or in close proximity in time to the date of the impugned sale. While such evidence indicative of value may, in most circumstances, not be as powerful or as convincing as a valuation report from a qualified professional valuer of assets of the type and kind in question, it must be remembered that the judge, in an 184C application for leave, is not required to conduct a mini trial nor is he required to decide the issue to be determined in the derivative proceedings, if leave is granted, as to what was the market value of the said asset and whether it was in fact sold at an undervalue and, if so, the extent of such undervalue.

[159] For these reasons, I do not accept the first premise of Xeno's submissions on valuation evidence in the instant matter. I hold that the absence of a professional valuation report of the 49% Shares or the Sale Assets (as the case may be) was not *ipso facto* fatal to the judge's assessment and determination of whether the claim or claims based upon the allegation of a sale at a gross undervalue must fail. The judge was entitled, as he did, to go on and to consider and evaluate whether the "offers" and any other documentary evidence before him, was sufficiently cogent and

probative as to be evidence of market value or evidence indicative of the market value of the 49% Shares and/or the Sale Assets, and, if so, to assess whether in light of such accepted valuation evidence it is more probable than not that the Derivative Claims based upon an allegation of a sale at a gross undervalue were likely to succeed or, put differently, were more probable than not to succeed.

Did the Judge err in Not Holding that Mr. Ma had Not Produced any "Valuation Evidence" and in accepting the "offers" to Purchase and Other Evidence as "Valuation Evidence" of the Sale Assets?

[160] The learned judge in his judgment rejected the submission on behalf of the Receivers that there was no evidence of the value of the 49% Shares before him, and that the "offers" were either inadmissible or not cogent or reliable evidence of the value of the 49% Shares. With respect to this issue, he observed (Transcript p. 220 L8-13):

> "Whether or not offers are admissible or inadmissible is a question of relevance. It depends what the offer concerned. Here it was about buying into the project before the Court, the very thing that we are concerned with. It was not an offer concerning a different property or a different company."

[161] The learned judge considered that any question as to the inadmissibility of the "offers" is a matter not for him but for the trial court. However, he was "*inclined to think they are relevant, that the offers are relevant and indicative of market value, if not evidence of market value because the offers concern the very assets that the receivers went on to sell.*" The judge also held that there was before him other documentary evidence of the value of the 49% Shares. These are documents pertaining to: (i) the sequestration; (ii) the auction; and (iii) "the value being banded about in relation to the 51 percent arm of the ownership structure". Accordingly, he was satisfied that "there is evidence of value" indicative of the sale being at an undervalue.

[162] Specifically in relation to the "offers', the learned judge observed –

> "…we are comparing various offers and various figures which are all in the hundred million and upwards for the shares in this company. And, on the

other hand, the $1 million that it was sold for, the shares was sold…… **Here the difference is huge, vast, stark, abysmal.** It's something that's clearly not connecting between the two of them. And so to my mind, offers which are made and there's no evidence that these were fabrications or gerrymandered offers obtained by Mr. Lim from the friendly people that he knows just to boost up the value of his claim or anything like that. **These offers appear to be offers from serious financial outfits**. And so, …**I cannot say that they are irrelevant**. I cannot say they are irrelevant." (Transcript p. 221 L4-20)

[163] The judge concluded on the value of the 49% Shares and the question of them having been sold by the Receivers at a gross undervalue in this way:

> "Now, I entirely accept that the 49 percent shares **were considered by the market to be worth in the hundreds of million [of US dollars]**. That it cannot be sensibly suggested that [US]$1 million was a proper price for the sale assets." (Transcript p. 228 L 17-21)

Xeno's Submissions

[164] It is Xeno's contention that based on the authorities dealing with the type and quality of valuation evidence when valuing shares in a company, the learned judge ought to have concluded that Mr. Ma had not put before the court any valuation evidence whatsoever, and that he gave no explanation for the absence of any independent valuation evidence of the 49% Shares as at the date of their sale by the Receivers. In support of this primary submission, Xeno argues that the principles elucidated by this Court in **Basab** require "a full and proper evaluation of the evidence before the court", and in a case such as the instant matter premised on a "sale at an undervalue"; and the evaluative exercise to be carried out necessitates or entails "cogent valuation analysis for the specific asset at the sale date."

[165] More specifically, Xeno takes issue with the learned judge's use of the "offers" and other documentary evidence, as cogent evidence of or as indicative of the value of the 49% Shares which Xeno held in HK Aether or other the other Sale Assets. Xeno argues that the learned judge wrongly relied on a scattering of non-binding "offers" to purchase as cogent and admissible valuation evidence, and he erroneously and incorrectly used these documents to support his "likelihood of success" finding. (para. 38) Xeno submits that the judge also erred in accepting, on the basis of such

evidence, that the market considered the 49% Shares to be worth in the hundreds of millions of dollars, and in determining that it cannot be sensibly suggested that the US$ 1 million accepted by the Receivers, was a proper price for the Sale Assets.

[166] In support of this argument, Xeno relies on a passage from the judgment of the court in **Warner v Ulysius International Trading Pty Ltd: -**[19]

> "In relation to the valuation of shares and other property, it is well-settled that the **best indicator of market value of property** is what a willing but not over-anxious purchaser would pay to a willing but not over-anxious vendor and that **an offer to buy is generally not admissible as direct evidence of the value of property of shares**."(emphasis added)

[167] Moreover, submits Xeno, the "offers" relied on by the learned judge were "disparate and inherently non-comparable", and "preliminary, non-binding, unproven as to funding, and heavily conditional". Xeno observed that several of the said "offers" concerned "different or broader asset bundles than the specific assets actually sold" by the Receivers; and were made "at different times and against shifting contingencies (including shortly before the winding up of HK Aether by parties that were either introduced by Mr. Lim or opposed to the winding up)". It is also submitted that none of these offers "share a common valuation date or assumption set"; and most of them were specifically stated to be a "letter of intent" or "expression of interest", and were "incapable of acceptance by the Receivers" as they included assets which the Receivers had no power to sell. For all these reasons, Xeno submits that, in actuality, the so-called offers were not "offers in any legal or commercial sense". Accordingly, they were incapable of being considered by the court as valuation evidence or cogent and relevant evidence indicative of the value of the 49% Shares in HK Aether. Accordingly, in relying on these 'offers" the learned judge committed a serious error of principle and of law, and his decision on the issue of "likelihood of success" or "likely to succeed" consideration was patently wrong and ought to be set aside and Mr. Ma's application for leave to bring derivative proceedings dismissed.

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[19] [2011] NSWSC 329 at para. 36 (Supreme Court of New South Wales (Equity Division), Australia).

[168] Xeno further submits that the “offers” ranged widely in amount from approximately US$100 million to US$531 million, reflecting significant differences in “asset scope, timing and incomplete due diligence rather than a defensible “market value” for the specific asset sold.” Furthermore, but crucially, these “offers” speak only to “headline, gross numbers and take no account of what Xeno would actually receive for its 49% equity” in HK Aether. It is Xeno’s case that notwithstanding over US$400 million of secured indebtedness, default interest and priority claims were ahead of Xeno’s 49% equity, the learned judge incorrectly treated the gross sum in each of the so-called “offers” as an “offer” with respect to the Sold Assets, and as cogent and relevant evidence indicative of their value. This, argues Xeno, is a fundamental error of principle as “market value of a minority equity interest must be assessed net of these factors”.

[169] Furthermore, submits Xeno, market value requires an assessment of what “a willing but not over-anxious purchaser would pay to a willing but not over-anxious vendor” for the same asset, on the same date, on comparable terms. (**Spencer v The Commonwealth** (1907) 5 CLR 418). This, argues Xeno, is precisely why the court would need to have before it proper and independent valuation evidence, and not a “scatter of conditional, apples-to oranges offers.”

[170] Xeno argues that, in any event, the Sale Price cannot be assessed in isolation as the learned judge sought, in error, to do when he mused “it cannot be sensibly suggested that $1 million was a proper price for the sale assets”. It points out that it had been made clear to the learned judge in the proceedings below that “the US$ 1 million was an allocation within a wider, integrated transaction in which the joint venture principally acquired the Xeno loans and related priority rights, with the equity ranking residually behind the over US$400 million of secured indebtedness and default interest.”

[171] It is submitted that any proper valuation analysis had also to examine whether the US$1 million attributed to the 49% Shares was '**commercially coherent** given the **capital structure economics** and the **deal construct**' and not to treat gross consideration circulating under the Master Agreement (US$185 million, of which US$1 million was allocated to the 49% Shares) as "share value". In relation to the latter point, Xeno points out that neither the Receivers nor Xeno itself were parties to nor did either of them control the Master Agreement, and the remit of the Receivers was limited to selling the 49% Shares.

[172] Xeno submits that absent expert valuation evidence which addresses (i) the integrated nature of the transaction and the rational for this allocation; and (ii) the translation of gross deal flows to net equity value for the 49% Shares as at the sale date, the learned judge could not be satisfied on the evidence before him, including the "offers", that a sale at an undervalue was more probable than not. Accordingly, he ought to have dismissed the leave application.

[173] Xeno criticizes the learned judge's reasoning and conclusion on the issue of whether a sale at an undervalue was more likely than not, on the basis that the judge made no reference to and did not take any of these crucial factors into consideration. In this respect Xeno has sought by schedule 2 to its appeal skeleton argument, to list the "offers" relied upon as valuation evidence, showing the explanations in relation to each of them provided by Mr. Borrelli in his affirmations and his evidence disputing any finding by the learned judge that the Receivers had been 'setting up these offers to fail'; which "offers" Xeno asserts "*were no more than initial indications or expressions of interest*" that were not pursued by the potential purchasers beyond such initial inquiry.

[174] In summary, Xeno submits that the so-called sale at an undervalue must also be considered in light of the difficulties faced by the Receivers, as explained by Mr. Borrelli in his affirmations. These included the size of the development project in Beijing which project had stalled for some time due to lack of funding and expiry or

lack of permits; contingent liabilities under a joint venture agreement; a freezing order against the Development Properties; the different security created at different levels in the corporate structure; the number of stakeholders involved; a failure by Mr. Lim on whose behalf Mr. Ma held the shares in Zeno as his nominee to engage with the Receivers and provide them with books and records, information and assistance; the multiple litigations commenced against BJ Aether, HK Aether and CBD Aether; the considerable uncertainties surrounding the underlying assets; and the serious downturn in the property market in China. None of these relevant factors, argues Xeno, were taken into account in any of the so-called “offers” nor were they considered by the learned judge in his assessment of the “likely to succeed” consideration.

[175] It is Xeno’s primary submissions, therefore, that Mr. Ma had not produced before the judge any valuation evidence in relation to the Sale Assets (including the 49% Shares in HK Aether) or any probative evidence of the value of such assets as at the date of their Sale. Further, the learned judge erred in relying on the evidence of “offers” as valuation evidence or as cogent evidence indicative of the value of the 49% Shares, when said offers where, for several reasons identified, inherently unreliable and lacking in probative value. Accordingly, Xeno submits that this ground of appeal ought to be disposed of on the two dispositive points at paragraph 29 of its appeal submissions (as set out above). Further, it is only if the Court is not with Xeno/the Receivers on those two dispositive points, ought it to go on to consider the conduct of the Receivers and the judge’s criticism of them. It is posited that the judge’s criticisms of the conduct of the Receivers are “secondary allegations” which cannot cure Mr. Ma’s fundamental failure to establish the value of the Sale Assets as of the sale date, on a “more probable than not” basis.

[176] Xeno submits that in light of the evidence or the lack thereof, the learned judge ought to have concluded that Mr. Ma had not satisfied the burden and standard of proof and failed to meet the threshold test of establishing that the Derivative Claims were likely to succeed. He misapplied the legal test, relied on matters he should not

have as a matter of law, ignored other very relevant considerations, failed to place any weight on the compelling evidence of the appellant's Hong Kong law expert, and reached a conclusion that he was not entitled to reach and which stands starkly at odds with this Court's decision in **Basab**.

Mr. Ma's Submissions

[177] In his written submissions in the appeals, Mr. Ma has dealt in some detail with the "*Merits of the Derivative Claims*" underground 1 of Xeno's appeal. At paragraph 90 of those submissions, Mr. Ma sets out in a short list the six "offers" made between 19th May 2021 and 12th July 2023 with respect to the Security Assets. The relevant particulars provided include the date of each offer, the name of the offeror, the subject asset to which each offer is concerned, and the amount of each such offer. This helpful summary shows four (4) offers made or received in the year 2021. Of these, three were made in May 2021, "the May Offers" and the fourth in September 2021. Of these four offers, three were for the purchase of the 49% Shares held by Xeno in HK Aether. The remaining two offers in 2023 are both, effectively, for assets inclusive of the 49% Shares. I summarize the pertinent particulars and features of each of these six "offers" as follows:

(1) 19th May 2021 by China Resources Capital Management Limited ("**CR Capital Offer**"), a Chinese State-owned conglomerate with assets under management exceeding RMB 130 billion as at the end of 2021, for the 49% Shares plus 20% Interests held by Beijing Guanghua Textile ("BGT") for the sum of RMB 3.412 billion (approximately US$531 million);

(2) 20th May 2021 by Wealth CBD Aman Ltd ("**Wealth CBD Offer**"), a shareholder of CBD Aether, for the 49% Shares in the sum of US$114 million;

(3) 27th May 2021 JIC Holding co Ltd ("**JIC Holding Offer**"), a reputable Chinese state-owned asset management company with issued and

paid-up capital of RMB 2 billion, for 44% of HK Aether in the sum of RMB 3.5 billion (US$547 million);

(4) 13th September 2021 by China Cinda (HK) Asset Management Co. Limited ("**Cinda HK Offer**") for the 49% Shares in the sum of US$100 million;

(5) 24th January 2022 by Hopu Capital ("**Hopu Capital Offer**") for Xeno Origin and Kenora (an indirect ownership of the 49% Shares) in the sum of RMB 1.813 billion (approximately US$ 286 million; and

(6) 12th July 2023 by ARA Capital ("**ARA Capital Offer**") for the 49% Shares and 51% Shares (in the sum of US$250 million.

[178] The expression "Security Assets" (as used by Mr. Ma in his submissions) is a reference to the assets over which Guanghua SS held security for the US$80 million loan facility to Xeno ("**Xeno 2**"), and over which Messrs. Borrelli and Malone were appointed Joint Receivers on 23rd November 2020 by SCH1 as security trustee. The Xeno 2 Facility was subsequently assigned to HK Aether which provided its own security for the loan sum by way of a share charge over its 80% interest in BJ Aether. The Security Assets include the 49% Shares held by Xeno in HK Aether and the 80% Interest in the Development Project in Beijing, China held by BJ Aether. The remaining 20% Interests in the Development Project was held initially by Guangzhou Hunyuan, the shares of which were held on trust for Mr. Lim.

[179] It is also of importance to record that on 17th April 2023, Cinda HK submitted an offer to purchase the 49% Shares in HK Aether for US$ 220 million, which offer was withdrawn by May 2023. Further, on 12th July 2023 ARA Capital had submitted an offer to acquire the entire issued share capital of HK Aether (equivalent of the 49% Shares) for US$ 250 million, and on 8th August 2023 had provided proof that it had the funding to complete the purchase. The offer was not acted upon, by the Receivers and ARA Capital was informed that it could no longer be considered

because of "recent developments". By 1st August 2023, the receivers had already entered into a sale and purchase agreement on 25th May 2023 with Guanghua SSF; and had transferred on 1st August 2023 the Sale Assets to Chang An.

[180] In relation to the issue of "valuation evidence" of the 49% Shares, Mr. Ma submits, as the learned judge found, the 49% Shares were plainly sold at a gross undervalue. In support of this primary submission Mr. Ma points to three matters: (i) the value of the Properties; (ii) the offers made for Xeno's shares in HK Aether; and (iii) the value transferred to Guanghua SSF for the 40% Shares under the Master Agreement dated 26th July 2023 entered into between MBK Partners, Guanghua SSF, Guanghua SS, Cinda HK and Chang An. In relation to the value of the Properties, Mr. Ma points to and relies upon (i) a valuation done by Cushman Wakefield at RMB 8.503 billion (approximately US$ 41.3 billion); and (ii) the sequestration of the Properties on 15th August 2022 by the Beijing Court to satisfy BJ Aether's debts under an arbitration award obtained against it by Guanghua SS in BJ Aether's capacity as a guarantor of the Xeno 2 Facility, whereby the Properties were valued by Beijing Baicheng Shouzin Real Estate Appraisal Co. Ltd on 21st September 2022 at RMB 5.417 billion (approximately US$ 785.5 million).

[181] However, Mr. Ma in his submissions recognizes and accepts that the value of the Properties is not the same as the value of the 49% Shares in HK Aether, as one must factor into the equation the liabilities of the latter company. In relation to this aspect, Mr. Ma argues that such liabilities do not come close to exceeding the value of the Properties. This proposition he bases on the financial statements of HK Aether made up to 31st August 2020 relied on by the Receivers which show that BJ Aether had liabilities of approximately RMB 919 million (approximately US$ 133.9 million) of which approximately US$80 million was the loan under the Xeno 2 Facility (which BJ Aether had guaranteed) and a further US$17.4 million which is a shareholder's loan from HK Aether. It is submitted, therefore, that on the evidence HK Aether was "massively balance sheet solvent".

[182] Mr. Ma also submits, in contradistinction to the arguments of the Receivers at paragraphs 33(1), 42 and 44 of their appeal submissions, that when considering the value of the 49% Shares which Xeno held in HK Aether (hence the value of HK Aether itself), it is only the amounts owed under the Xeno 2 Facility (US$80 million) which have to be taken into account, and it is wrong to submit that the amounts owing under the Xeno1 Facility must also be factored in, which sums are totally irrelevant.

[183] Accordingly, Mr. Ma submits that the learned judge had before him sufficient reliable and cogent evidence of the likely or indicative value of the 49% Share, which shares were considered "by the market to be worth in the hundreds of millions" of US dollars. Accordingly, as the learned judge correctly observed, it cannot sensibly be suggested that the US$1 million was a proper price for the Sale Assets. Additionally, the Master Agreement appears to have attributed "substantial value" to the 49% Shares otherwise the value of what Guanghua SSF contributed thereunder for the Sale Assets and Guang SS "would be nothing like the value it received" of US$185 million and a 10.8% interest in Chang An, which now hold both the 51% shares in HK Aether and the benefit of the CBD Aether Loan of US$ 315,514,986.

[184] Mr. Ma submits that both the "offers" and the other evidence from the sequestration and auction and the terms of the Master Agreement, clearly demonstrate that the learned judge was correct to find that the sum of US$1 million price for the 49% Shares was obviously at a gross undervalue, leading to a finding that it was more probable than not that the Derivative Claims would succeed. Moreover, the clearest evidence demonstrating that the issues identified by the Receivers as factors undermining value did not or could not have had such a negative effect, is "the fact that in 2018, CBD Aether purchase the 51% Shares in HK Aether for US$297.9 million in the full knowledge of those issues. Likewise, each of the May Offers was aware of these issues, and yet they proceeded to make the offers." Furthermore, the fact that HK Aether had been placed in liquidation in June 2021 did not put off Hopu and ARA Capital from making their respective offers to purchase the 49%

Shares. In short, none of the matters or factors relied on by the Receivers in Borrelli 1 and Borrelli 2 as explanations for them selling the 49% Shares for the sum of US$1 million, justify a sale of the Sale Assets at such a gross undervalue.

[185] Mr. Ma also submits that as a matter Hong Kong law he does not have to show that the Sale Assets were sold at below market value. Instead, he merely needs to show that the receivers did not take care to obtain the best price reasonably obtainable. It is also incorrect to contend, as does the receivers, that the "offers" to purchase are not admissible as evidence of the value of the 49% Shares. In this respect, they rely on the provisions of section 64 of the BVI Evidence Act to the effect that evidence relevant in the proceedings in BVI is admissible and "shall be admitted in the proceedings"; and on section 63 which defines "evidence relevant in proceedings' as "evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings."

[186] Mr. Ma also relies on this guidance from the authors of *Fisher & Lightwood*[20] at para. 30.24 –

> "Where the property has been exposed to the market, and a number of genuine offers were received, the court should start by considering the steps that the mortgagee took to sell the property, and then consider whether, in all the circumstances, the mortgagee acted reasonably in accepting the purchaser's offer, and contracting to sell the property at that price."

[187] Also, as the learned judge found, even without the "offers" the court had sufficient evidence to conclude that the Receivers could have sold the Sale Assets for far more than US$1 million. This evidence included: (i) the Cushman valuations of the Properties and the values appointed by the Beijing Court in relation to the sequestration proceedings; (ii) in 2018 the 51% Shares in HK Aether were sold to CBD Aether for US$ 297.9 million; and (iii) the fact that Guanghua SSF immediately sold the Sale Assets on to Chang An for a value in the hundreds of millions of dollars.

[20] Fisher and Lightwood's Law of Mortgage (15th edn, LexisNexis Butterworths 2019)

Analysis and Conclusion on Absence of Valuation Evidence and Use of Offers and Other Evidence as Indicative of Value of Sale Assets

[188] Mr. Ma's application for leave to bring derivative proceedings on the basis of the Derivative Claims (as set out in the ASOC in the First HK Proceedings) was not accompanied by an expert valuation of the Sale Assets (in particular the 49% Shares).It has been concluded above that the absence of evidence of a professional valuation in support of the leave application was not necessarily fatal to a consideration of the "likely to succeed" consideration under subsection (2) of section 184C of the BCA and, therefore, not fatal to the application. Further, the learned judge was entitled to consider what other documentary evidence adduced before him was probative and reliable of the market value of the Sale Assets as at or sufficiently proximate to the Sale Date.

[189] The learned judge considered and gave credence and weight to the "offers" to purchase as reliable evidence indicative of the market value of the 49% Shares and the other Sale Assets. In particular, he relied on the Hopu Offer of US$286 million for the purchase of Xeno and Kenora and the ARA Capital Offer to purchase the 49% Shares and the 51% Shares in HK Aether for US$250 million, both made in 2023, as sufficiently cogent and reliable evidence of the market value of the Development Project or more specifically, the 49% Shares. He compared the sum offered as a purchase price in each of these "offers" with the US$1 million attributed to the sale of the 49% Shares by the Receivers, in reaching the conclusion that "the difference is huge, vast, stark, abysmal". He found there was no evidence that the "offers" made were "fabrications or gerrymandered offers obtained by Mr. Lin from friendly people" to "boost up the value of his claim or anything like that." He was also satisfied that the "offers" appeared to be from "serious financial outfits". He also concluded that they were not "irrelevant".

[190] The learned judge dealt with the challenge to these "offers" on the ground of admissibility. He considered that any issue as to the admissibility is an issue of

"relevance", which is directly related to what each of the "offers" concerned with. He was satisfied that they each concerned buying into the Development Project, which is the very matter with which the application for leave is concerned, and to which the allegation of a sale by the Receivers at a gross undervalue of US$1 million is made. I agree with the learned judge that these issues of admissibility of evidence are matters to be considered and determined by the trial court, in this instance, in Hong Kong. At this early stage where the judge was dealing with an application under section 184C for leave or permission to bring derivative proceedings in Hong Kong, the court need only be satisfied as to whether the documentary evidence of "offers" were legitimate, being made by persons or entities of repute of substantial worth, were concerned with the same asset or assets that had been sold or the same Project and Development property in Beijing. In this respect, the learned judge was generally correct in holding that these offers had met those criteria and were therefore of some relevance to the issue of the market value of the Sale Assets in or around the time they were sold by the Receivers.

[191] The learned judge, however, did not rely exclusively on these "offers" as evidence indicative of the market value of the 40% Shares. He took account of other evidence adduced before him which gave some indication as to what the [49% Shares] would be worth." And as "evidence of what the value could be or is likely to be". This included (i) the evidence relation to the sequestration proceedings and auction in August 2022 of the Properties by the Beijing Court to satisfy BJ Aether's debts under an arbitral award obtained against it as guarantor of the Xeno 2 Facility wherein the Development Properties were valued by Beijing Baicheng Shouzin Real Estate Appraisal Co. Ltd for US$ 785.5 million as at 21st September 2022; (ii) the US$1.3 billion valuation of the Development Properties in December 2020 by Cushman Wakefield; and (iii) the value of US$ 315,514,986 plus a 10.8% interest in Chang An (the purchaser company) to be attributed under the Master Agreement for the 51% Shares in HK Aether extrapolated by way of that value to the 49% Shares in said company sold by the Receivers for US$1 million.

[192] In my judgment, the learned judge dealing with an application for leave to bring the Derivative Claims, was entitled to rely on the "offers", especially those in 2023, as evidence indicative of the market value of the 49% Shares sold by the Receivers at a price of US$1 million. The Receivers argue that these "offers" were not cogent evidence probative of a sale at an under value, much less at a gross undervalue, and there are several issues and problems with considering these "offers", all of which have been set out above. Xeno has invited this Court to conclude that the "offers" to purchase ought not to have be considered by the court below as evidence of the market value of a property or assets.

[193] While it is the position in law that, generally, when one is dealing with a claim involving proof of market value of a property or asset, offers to purchase that asset or property are not to be considered evidence of value because market value has to be determined objectively by what at willing but not over-zealous purchaser would be willing to pay to a willing but not over-zealous seller for that property, this is not the case in the instant matter. In the instant matter, the judge was concerned with an application under section 184 of the BCA for leave or permission to bring derivative proceedings. Such application gives rise to a discretion which the judge must exercise judicially, taking into account the five mandatory considerations under subsection (2), the dispositive considerations under subsection (3), and any other relevant factors or considerations properly arising in the circumstances of the case. Here Mr. Ma was not required under condition (c) of section 184(2) to prove or to lead evidence to establish, on the civil standard of a balance of probabilities, the market value of the Sale Assets or the 49% Shares in order to demonstrate that any claim that the Receivers had sold said assets and Properties at an undervalue or gross undervalue, was more probable than not. Indeed, this is the issue to be determined in the derivative proceedings themselves to be commenced (and which has been commenced) by Mr. Ma before the Courts in Hong Kong for and on behalf of Xeno.

[194] In my judgment, the learned judge was also entitled to consider, to weigh and to rely upon, the other documentary evidence indicative of value (set out at para. [186] above), collectively and in conjunction with the evidence of the "offers". Such additional or other evidence was sufficiently reliable and probative of the issue of market value of the Sale Assets so as to be properly taken into account and relied on by the judge in deciding whether there was sufficient evidence before him indicative of market value at or around the relevant sale date, and supportive of a claim of a sale by the Receivers at a gross undervalue. Taken together this is the cumulative effect of such evidence and is supportive of the conclusion that a derivative claim based on gross undervalue is "likely to succeed".

Did the Learned Judge err in (i) Finding that the Derivative Claims were likely to succeed (Issue 4 - Ground 1); and (ii) in Granting Blanket Leave to Commence all the Derivative Claims (Issue 5 - Ground 2)

Xeno's Submissions

[195] Xeno submitted that should the Court not be with it on its primary issue and grounds of appeal dealing with the alleged lack of "valuation evidence" (which this Court is not), it ought to go on to consider certain "secondary allegations". These concern the learned judge's criticisms of the conduct of the Receivers in the discharge of their duties, particularly with respect to the judge's criticisms of the Receivers' handling of and treatment of the "offers". It is Xeno's submission that these criticisms are all unwarranted, do not establish any probable breach of the pleaded or accepted standards of a receiver under Hong Kong law, nor do they move the "likely to succeed" dial in favour of Mr. Ma being granted prospective leave to commence the Derivative Claims.

[196] In support of these submissions, Xeno argues that the learned judge, in granting leave to commence the Derivative Claims, appears to have lost sight of three important matters or considerations, which are borne out or demonstrated by the evidence of Mr. Borrelli in Borrelli 1 and Borrelli 2. These three considerations are –

(1) *<u>The steps taken by the Receivers over a prolonged period to market and sell the Security Assets</u>*: -

(a) Advertising the sale of the 49% Shares in a number of international newspapers such as the South China Morning Post, the Financial Times, the China Business Herald and Business Youth Daily on 4th December 2020, 29th March 2021 and 23rd July 2021; and three rounds of letters sent to 375 potentially interested parties (para. 53 Borrelli 1).

(b) Steps taken to demonstrate that the Receivers sold the Sale Assets after a genuine sophisticated sales process over a 30-month period, including engaging with numerous parties to try and sell the assets at the best price reasonably obtainable:

(i) steps to establish and understand the Security Assets, revealing several "issues" with the Development Properties which would make a sale process challenging (paras. 41-52 Borrelli 1);

(ii) sought full information about the Security Assets by engaging with key stakeholders, such efforts being hampered by lack of cooperation, including by Mr. Ma and Mr. Lim (para. 53(a) Borrelli 1);

(iii) undertaking a genuine and well-planned sales process in circumstances where the market was suffering and is suffering "unprecedented challenges", and having discussions and negotiations with various interested parties over an extended period (para. 53 Borrelli 1); and

(iv) ultimately selling the assets for the best price reasonably obtainable in the prevailing circumstances, following receipt of the only offer that was capable of being accepted by the Receivers since taking up their appointment, and after having considered "all the significant issues with the underlying assets - the Development Properties" (paras. 93-96 Borrelli 1).

(2) *<u>The evidence of Mr. Ma's Hong Kong law expert, Mr. Abraham Chan SC who rendered his opinion after having reviewed the pleadings in the First HK Proceedings and the evidence filed by both parties (with which opinion Xeno's HK law expert agreed in his Further Opinion), as to the limited nature of the Receiver's obligations, the latitude given to a receiver by the Hong Kong Court, and the importance of the express contractual provisions: -</u>*

(a) Mr. Chan SC opinion being to the effect that under Hong Kong law receivers are afforded broad and unfettered powers to do "*all things … which appear to the receivers to be incidental or conducive*" to sell "*in such manner and generally on such terms as he thinks fit*" and "*as he shall deem appropriate*" (para. 60)

(b) Further, Mr. Chan SC's opinion (at paragraphs 67 and 69) that there is nothing which the Receivers did, including during the negotiations, which was unusual or out of the ordinary or which would put this matter beyond the realm of decisions within the prerogative of the commercial judgment of receivers; and that Mr. Ma (Xeno derivatively) was unlikely to succeed in establishing any breach of duty by the Receivers especially taking into account the chequered history of the Sale Assets and the difficulties encountered by the Receivers in effecting a sale (para. 78).

(c) Hong Kong law does not impose a duty on receivers to obtain an independent valuation of the assets before effecting a sale of Security Assets, and the Hong Kong court is likely to accord significant weight to the substantial expertise and experience of these Receivers in selling of assets of this kind and to their commercial judgment.

(d) the claim setting aside the sale at an undervalue is unlikely to succeed because the evidence does not suggest that the Sale Assets were sold at an undervalue.

(e) Moreover, the contractual documents are important in understanding the scope of the Receivers' duties, in particular, that they afforded to the Receivers wide and unfettered powers to sell the Security Assets "*in such manner and generally on such terms as he thinks fit and in such amount as he shall deem appropriate*" (para. 35 Borrelli 1)

(3) *The learned judge was wrong to conclude, as a matter of Hong Kong law, that the Derivative Claims being advanced against the Receivers in the First HK Proceedings, relied on mere negligence on the part of the Receivers, when the nature of said claims had alleged "reckless indifference" and "lack of faith", neither of which the judge specified as to which duty was likely to have been breached. Furthermore, the judge "collapsed the negligence-standard criticisms into leave on all claims", including those requiring dishonesty or intention, and did so without the requisite evidential foundation*: -

(a) Mr. Chan, SC (at paras. 28-31) addressed the alleged duties owed by receivers as pleaded in the Amended Statement of Claim (in the First HK Proceedings), in particular, the necessity to plead and establish "intentional conduct" on the part of receivers, none of which were identified or dealt with by the learned judge in his judgment. Mr. Chan SC opined:

(i) "*A receiver cannot be in breach of his duty of good faith to the mortgagor in the absence of some dishonesty, improper motive or element of bad faith*" (para. 28.4)

(ii) "*Put another way, a breach of this duty necessarily involves intentional conduct amounting to more than mere negligence and encompassing either an improper motive or an element of bad faith, but it need not amount to dishonesty*". (para. 30)

(iii) "*the courts [HK Courts] have underscored the limited nature of a receiver's obligations vis-à-vis the mortgagors and others interested in the equity of redemption*" (para. 31)

(b) Instead, the learned judge in addition to erroneously relying on the "offers", wrongly focused on or placed undue weight on:

(i) **The Structure of the Transaction**

The judge erred in "treating the headline flows under the Master Agreement (to which neither the Receivers or Xeno were parties to nor did they control) as "value" attributable to the 49% Shares, where the economic reality was that the US$1 million Sale Price was only one component of a wider, integrated transaction whereby the joint venture primarily acquired the Xeno loans and related rights."

Properly analyzed, the US$1 million Sale Price for the 49% Shares was "*commercially coherent because* *the consideration in the wider deal principally reflected senior loan economics and priority rights, with equity ranking residually "at the back of the train*." The judge failed to recognize that "a nominal allocation to the equity [the 49% Shares] was consistent with its subordinated position and with the Receivers' limited remit over the share sale."

(ii) **The MBK "justification" Paper**

The learned judge placed undue weight on the fact that MBK provided a draft justification memorandum, and failed to appreciate, as explained at para. 97 Borrell 1, that it is not unusual in a credit-bid or structured enforcement for a bidding creditor to assist with the transaction papers. In any event, the memorandum's provenance does not evidence any abdication of the Receivers' independent judgment, nor is it evidence of their bad faith.

(iii) **The Lack of An Independent Valuation**

It was explained by Mr. Borrelli (at para. 101 Borrelli 1) why the Receivers did not obtain an independent valuation of the Sale Assets prior to the sale: "given the numerous unresolved issues with the Security Assets and the lack of meaningful information, a valuation would have had no utility and, in practice, value would be determined by a genuine sales price."

[197] Xeno submits that properly analyzed the learned judge was not in a position to and ought not to have concluded that these experienced receivers had done anything wrong or that they had sold the Sale Assets at a gross undervalue or that the

intended Hong Kong proceedings based "substantially" on the Derivative Claims in the amended statement of case "(ASOC" were likely to succeed. There was not direct valuation evidence of the 49% Shares and, critically, "any assessment of equity value had to be undertaken net of the capital structure (including the substantial indebtedness under the Xeno Facility Agreements [Xeno 1 and Xeno 2] and against the backdrop of the difficulties and uncertainties surrounding the underlying project." It is submitted that the learned judge failed to grapple with any of these pertinent issues and in doing so he erred in his determination of the "likely to succeed' consideration in favour of Mr. Ma and derivatively, Xeno. To the contrary, on the evidence before him, including the expert evidence of Hong Kong law from both law experts, he ought to have concluded that Mr. ma had failed to discharge the burden on him to satisfy the court and had failed to meet the threshold consideration that the Derivative Claims (or all of them) were likely to succeed.

[198] As to the interrelated ground 2 (Issue 5) - the grant of "blanket prospective leave, Xeno observes that the learned judge did not undertake a "claim-by-claim" assessment of the different Derivitive Claims and causes of action pleaded in the ASOC in the First HK Proceedings, as he was required to do pursuant to section 184C, and as he had been expressly invited by the Receivers to do in the proceedings below. It is submitted that while section 184C frames the enquiry to be undertaken under consideration (c) a "whether the proceedings are likely to succeed", where there are (as here) multiple and distinct causes of action advanced or being advanced by the applicant for leave, the court or judge "must consider each one independently and only grant leave to bring a particular claim if that claim is more probable than not to succeed. Otherwise, a claimant could tack on a whole suite of hopeless derivative claims on the back of one claim that meets the "likely to succeed" test." (para. 62)

[199] Xeno submits that the judge failed to adopt this approach to his consideration of the "likely to succeed" issue. Importantly, argues Xeno, he gave no discrete consideration and assessment to any claim alleging breach of directors' duties,

which claim has no realistic prospect of success since the Sale was conducted by the receivers and not by the directors of HK Aether, and not actionable acts were identified in the ASOC *qua* director. Furthermore, as to the cause of action of "*dishonest assistance*", the applicable test requires proof of dishonesty measured objectively by the standards of ordinary honest people as assessed in light of a defendant's actual knowledge.[21] In relation to this cause of action, a claimant is required to plead it case with particularity and evidence pointing to the alleged "dishonesty" and actual knowledge of the defendant, are essential. However, neither of these were pleaded in the ASOC. It is submitted therefore that leave ought not properly to have been granted in relation to any directors' duty claims, and it is questionable whether any "receivership-duty claims" as pleaded would satisfy the likely to succeed threshold requirement.

[200] Xeno submits that, in any event, the judgment contains no mention whatsoever of the "dishonest assistance" claim; the learned judge failed to appreciate and to draw the necessary legal and technical distinction between the distinct roles and hence claims) of directors and receivers and to separate the duties attached to each as a matter of law; and does not engage with whether the pleaded and evidential case can meet the dishonesty threshold. Furthermore, argues Xeno, on any reasonable view, the judge's criticisms of the sales process undertaken leading up to and involving the Sale, do not amount and cannot amount to dishonesty on the part of the Receivers and, absent any particularization and evidence, this cause of action could not meet the "likely to succeed" test.

[201] In relation to the "conspiracy" claim, Xeno submits that this cause of action could not on any sensible or sound basis and assessment of the evidence be found to be "likely to succeed". In this respect, Xeno underscores and relies on the judge's own assessment of the claim or cause of action of "conspiracy" as "less likely, but also possibly". It is submitted, that based on the judge's own conclusion permission ought not to have been granted to Mr. Ma to bring a derivative claim based on "conspiracy"

[21] Royal Brunei Sdn Bhd v Tan [1995] AC 378 at 389E.

Furthermore, having regard to how the "conspiracy" claim is pleaded in the ASOC and the bare assertions by Mr. Lim in Lim 1 (at paras. 26 and 27, the judge ought to have determined that "the elements of conspiracy, including as to the alleged agreement involving the receivers and/or the other defendants to injure the plaintiffs, are so demonstrably lacking in particulars that they would be liable to be struck out", and would therefore not be successful or "likely to succeed". (para. 65)

[202] Xeno further contends that there was simply no evidence to support or capable of supporting discussions between MBK Partners, Guanghua AA and Cinda HK about "collaborating in the enforcement of their respective securities" amounting to an "agreement between MBK Partners, Guanghua SS, the Receivers and Cinda HK that the Receivers would only sell the [HK Aether Shares] to Cinda HK, thereby enabling Cinda Group to take complete control of HK Aether, and through it, the Project", as asserted by Mr. Lim.

[203] Xeno also argues that the conspiracy claim is pleaded not as an intention to injure Xeno but as an intention to injure the guarantors/chargors personally (ASOC para. 75), is unsustainable as a derivative claim to be brought by Xeno. (**Kuwait Oil Tanker Co SAK v Al Bader**).[22] Accordingly, there is no proper basis upon which to contend that the alleged conspirators had any intention to injure Xeno (as opposed to the other plaintiffs in the HK Proceedings). On this basis this derivative claim has no prospect of success, and permission to bring such a claim ought to have been refused by the learned judge.

[204] Based on its submissions on this issue, it is Xeno's position that at minimum, any leave granted by the judge should have been confined to such cause(s), if any, shown on the evidence to be more probable than not to succeed." This would mean, contends Xeno, that leave should have been refused to bring claims for breach of directors' duties, dishonest assistance and conspiracy, and even if the judge was

[22] No. 3 2000 WL 571379.

minded to uphold a “narrower negligence-based receivership duty case, the remainder causes of action in negligence ought to have been refused. (para. 68)

Mr. Ma’s Submissions

[205] In responding to the Receivers’ submissions as to the merits or lack thereof of the Derivative Claims as set out in the ASOC in the First HK Proceedings, and the soundness of the learned judge’s decision to grant leave to Mr. Ma to bring all such claims in the name and on behalf of Xeno in fresh or New HK Proceedings, Mr. Ma, in his appeal submissions, summarized the bases of the “conspiracy” claim (paragraph 20); the actions taken or not taken by the Receivers after their appointment, including in marketing the Sale Assets; the “offers” to purchase the 49% Shares received by them and their responses thereto (paragraphs 21 to 25). Mr. Ma also addressed the documentary evidence and circumstances surrounding the ultimate sale of the Security Assets to Guanghua SSF in the name of its subsidiary company Chang An. These include the formal offer made on 23rd May 2023 by Guanghua SSF to purchase the Sale Assets, the Sale and Purchase Agreement entered into 2 days later on 25th May 2023 between the Receivers and Guanghua SSF, the incorporation by Cinda HK on 13th July 2023 of the new joint venture company Chang An to receive and hold title to the Sale Assets, the Master Agreement dated 26th July 2023 entered into between MBK Partners, Guanghua SSF, Guanghua SS, Cinda HK and Chang An facilitating the acquisition of the Project, and the transfer by the Receivers on 1st August 2023 of the Sale Assets to Chang An and, also on said date, the transfer by Cinda HK to Guanghua SSF of the sum of US$184 million (paragraphs 26 to 33). These matters and steps have been set out in greater detail above.

[206] In the First HK Proceedings, Mr. Ma, purportedly on behalf of Xeno, brought the following claims:

(1) against the Receivers, for breaches of their duties in equity and as directors of Xeno;

(2) against Guanghua SS, for breaches of its duties as chargee;

(3) against Cinda HK, for dishonestly assisting in the Receivers' breaches of duty;

(4) against Guanghua SSF and Chang An, to set aside the sale of the Sale Assets; and

(5) against all Defendants, for unlawful means conspiracy.

[207] The reliefs sought by Mr. Ma on behalf of Xeno were:

(1) damages in the sum of RMB 6.8 billion (US$1.056 billion) on the basis that the Security Assets could and should have been realized for that amount within six months of the Receivers' appointment;

(2) alternatively, damages in the sum of RMB 3.33 billion (US$517.5 million) on the basis that the Sale Assets could and should have been sold for at least this amount; or

(3) in the further alternative, to set aside the SPA and the subsequent sale on the basis that that agreement was entered into by the Receivers in breach of duty, and the other parties were on notice of that breach.

[208] As to the alleged 'conspiracy' or the Conspiracy Claim, Mr. Ma put it this way at paragraph 20 of its appeal submissions:

> "Guanghua SS and Cinda HK have admitted in the [First HK Proceedings], that "since around 2021, MBK Partners and Guanghua [SS] on the one hand and Cinda HK on the other hand engaged in discussions about collaborating in the enforcement of their respective securities". (Amended Defence of 3rd, 4th and 5th Defendants) The Plaintiffs' case is that the product of these discussions was an agreement that MBK Partners/Guanghua SS that would procure that Receivers only to sell the 49% Shares to Cinda HK, thereby enabling Cinda HK to take complete control over HK Aether, and through it, the Project. This explains why, in the years following their appointment, the Receivers took such lacklustre

steps to market the Security Assets and even at times took steps that appear calculated to put off prospective purchasers."

[209] At paragraphs 59 and 60 of his appeal submissions, Mr. Ma deals with the principles applicable to the claims of breach of duty of receivers, breach of duty of directors' and breach of duty of chargees, respectively. It is accepted and common ground between the parties that according to Hong Kong conflict laws breaches of directors' duties are governed by BVI law; dishonest assistance and unlawful means conspiracy are govern by the laws of Hong Kong. It is conceded at paragraph 62, that Mr. Chan's report on Hong Kong law, "contains a summary of the pleading requirements in Hong Kong, which he suggests were not met by parts of the [ASOC] in the [First] HK Proceedings (Chan para. 50-53). However, argues Mr. Ma, no application had been made by any of the defendants in these proceedings to strike out any claim or pleading of a cause of action; and, likewise, no such strike out application has been made in the New HK Proceedings.

[210] Mr. Ma submits that in the New HK Proceedings, the Derivative Claims and causes of action will all turn on two main issues:

(1) In their dealing with the Security Assets since their appointment, have the Receivers acted with reasonable care, skill and diligence, that is, have they taken care to obtain the best price reasonably obtainable for the Security Assets? and

(2) If the Receivers did not act reasonably, is this because they were acting at the behest of and in combination with MBK Partners and/or Cinda HK?

[211] As to the first of these considerations -did the receivers act reasonably in the discharge of their duties – Mr. Ma relies, to a large extent, on the expert report on Hong Kong law of Mr. Ho, a partner at Deloitte Touche Tohmatsu ((Vol. 9 pp. 5675-5689). Mr. Ho is described as a National Leader of Restructuring, Turnaround and Cost Transformation at Deloitte China. From his CV, Mr. Ho has considerable

experience as a receiver/liquidator in realizing the best value of high value real property in various parts of Asia, including the People's Republic of China, and of shares in companies holding such high value assets and real property. In essence, Mr. Ho in his report answers this first question with a definitive "No".

[212] Mr. Ma, in his submissions, has extracted from the Ho Report the various ways in which Mr. Ho concluded that the Receivers in the instant matter deviated from what he considers to be the "norm" for Receivers in the discharge of their duties and in the handling of complex and high value assets, which steps or the lack thereof may have jeopardized their ability to obtain the best price possible for the Security Assets. These criticisms are addressed under the following heads:

(1) *Failure to carry out proper due diligence to gain a comprehensive understanding of the status of such a complex security asset*

By acting too precipitously and without affording themselves sufficient time to fully or properly understand the complexity of the Security Assets by publishing advertisements of the sale of the 49% Shares, sending out invitations for expressions of interest and circulating the Information memorandum, all within less than 3 weeks of their appointment on 23rd November 2020. This is said to have left the Receivers with several misapprehensions as to "the nature and merits" of the Security Assets, which in turn left them unable to allay prospective investors' concerns in these areas. In this respect, Mr. Ma points to what is stated by Mr. Borrelli at paragraphs 46, 50 of Borrelli 1 and paragraphs 36,39,72, 75(b),76,79(a),88, 89 of Borrelli 2 (addressed and replicated (to some extent) at para.69.1, 69.2 and 69.3 of Mr. Ma's written submissions)

(2) Failure to appoint proper experts (in particular a valuation expert)

Mr. Ma prays in aid on this subject what is said at paragraph 113 of the Ho Report: "It is crucial for a receiver to appoint industry experts such as property agents or surveyors or architects who can enhance the proceeds by advising on the most suitable mode of sale (i.e.by public auction, private tender or private treaty), and by structuring the execution plan of the marketing campaign …"

Mr. Ma submits that this approach accords with the learning from the judgment of Parker LJ in **Michael v Miller** [2004] EWCA Civ 282 at para. 134:

> "*[t]he need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a **prudent mortgagee** will take advice, including (where appropriate) **valuation advice, from a duly qualified agent**." (emphasis added)*

Accordingly, Mr. Ma submits, in contradistinction to Mr. Borrelli's evidence and the Receiver's position on this issue, that it was vital for the Receivers, in the circumstances of the sale of these admittedly complex Sale Assets, to have appointed experts to advise them how best to market the value of those Properties, including an expert valuer, to do so at a fairly early stage after their appointment, and before proceeding to enter into a SPA for the sale of the Security Assets to Guanghua SSF at a grossly absurd price of US$1 million. In particular, Mr. Ma relies on this opinion of Mr. Ho at para.116 of his report: "*[t]he absence of professional market guidance may have affected investor confidence, limited the effectiveness of the sales execution strategy."* And (at para. 101(b) and 105) where Mr Ho states:

> "The Security Assets in the present case and the circumstances were challenging and unique and, on that basis, the Receivers concluded that a valuation would be highly subjective and not a substitute for or helpful for a sales process – it would likely be expensive and of little utility." (para. 101(b))
>
> "…an **independent valuation** was, in my view, a **necessary step to demonstrate that the Receivers have secured the fair value**, and the most efficient means of designing a marketing strategy and assessing subsequent offers." (para. 105) (emphasis added)

Mr. Ma also points to the various instances where the failure by the Receivers to obtain and share with prospective purchasers an independent valuation of the Security Assets was "actively off-putting". One such example is Olayan who wrote, to no avail, to the Receivers on three occasions (5th January 2021, 14th January 2021 and 25th January 2021) requesting a "current valuation report" concerning the Security Assets.

(3) Inadequate Marketing

Mr. Ho characterized the marketing produced by the receivers as "poor and incomplete". He refers to Mr. Ho's assessment at paragraphs 120 of his report where he describes the receivers' one page advertisement as "*uncompelling*" and not accompanied by "any teaser or sale brochure", the use of which is "*critical and basic components of a well-structured marketing campaign*"; at page 119 where the criticism is that the advertisement "provided only basic information … while failing to highlight key investment merits" such as prime location; and at page 121 where Mr. Ho observed that the key Information Memorandum lacked important information about the Security Assets, such as the land's development potential or market data, which lack of information was of concern to prospective purchasers like Olayan (email 5th January 2021 asking for "more property details(preferably like an (sic) Goldin IM, as different property over which Mr. Borrelli had been previously appointed) No explanation for these marketing failures is provided in Borrelli 2.

(4) Approach to Prospective Buyers

Mr. Ma submits that the Receivers adopted an entirely passive approach to prospective purchasers, answering queries only when asked, but then slowly, vaguely and without any proactive effort to address their concerns. This approach was in contradistinction to the approach and "*proactive investor engagement*" set out at paragraph 124 of the Ho Report. As examples of the receivers' less than proactive approach to dealing with potential purchasers, Mr. Ma refers to the correspondence from Olayan to the Receivers on 14th, 25th and 29th January and 22nd March 2021, and the failure by the Receivers to respond to all but the second of these (on 29/01/2021) by merely stating *"[a] valuation report is not available*".

(5) *Imposition of unreasonable Conditions*

This issue has been traversed much by the learned judge in his *ex tempore* judgment. It is dealt with in some detail by Mr. Ma at paragraphs 81 to 83 of his appeal submissions. I do not consider it necessary for present purposes to traverse what has been said about the instances in which this occurred in response to "offers' made to purchase the 49% Shares or the explanations proffered by Mr. Borrelli (paras 66 & 67 Borrelli 1) in response to the criticisms from Mr. Ma's side of the "stern" and impractical process adopted and deployed by the Receivers; and from Mr. Ho in his report at paragraph 129 on such matters of the reasonable time usually afforded to offerors or potential investors to conduct comprehensive due diligence on the assets for sale, obtain internal approvals and negotiate terms sheets; and his opinion based on experience, that "non-refundable deposits" are only stipulated at the stage "after a deal has materially progressed and critical evaluations have been completed."

(6) *Failure to negotiate with Guanghua SSF or seek to re-engage other interested parties*

The criticism of the Receivers' conduct and approach to concluding the sale of the Security Assets with Guanghua SSF, is that they received Guanghua SSF's offer at 20:39 on 23rd May 2023 and by 25th May 2023 the Receivers had executed the SPA, which document had been drafted by Guanghua SSF. There was no evidence of the receivers attempting to negotiate with Guaghua SSF for a higher price for the 49% Shares or to negotiate anything concerning the offer or the transaction agreement, This, according to Mr. Ma, is "astonishing" on any reasonable view, and coming from experienced Receivers. Moreover, the Receivers knew from having been copied on an email from MBK Partners to Cinda HK dated 3rd May 2023, that MBK Partners had committed to transferring the 49% Shares upon conclusion of the purchase to Cinda HK, and that MBK was expected to receive approximately US$200 million in consideration for those shares plus the Xeno 1 and Xeno 2 Facilities.

Furthermore, not only did the Receivers neither sought to re-engage with previously interested parties in the hope of creating a competitive bidding process or to obtain first an independent valuation of the 49% Shares before accepting Guanghua SSF's offer of US$1 million for them, but they rushed forth within less than 2 days to enter into a binding SPA with Guanghua SSF for the sale to them of the 40% Shares.

Mr. Ma submits that by acting in this way with such haste, which actions cannot be justified on any reasonable and objective standard, raises serious questions as to the breach of duty by the Receivers and, in particular, their duty to take reasonable steps to obtain the best price for the Security Assets.(see para. 146 of the Ho Report)

(7) _Sale at an Undervalue_

Mr. Ma submits, that the 49% Shares were plainly sold at a gross undervalue. This much they say is clear from the value of the Properties and the 49% Shares and from the value which by the Sale has been transferred to Guanghua SSF for the 40% Shares under the Master Agreement. In relation to value, Mr. Ma also relies, in addition to the offers, on the Cushman Wakefield valuation of 31st December 2020 in the sum of approximately US$1.3 billion for the Development Properties. Mr. Ma also relies on the valuation used for the purpose of the auction undertaken as part of the sequestration process in 2022, which showed that as of 21st September 2022, the Development Properties were worth approximately US$785.5 million.

As to liabilities, Mr. Ma submits that any liabilities of HK Aether did not come close to exceeding the value of the Development Properties, as is shown by the financial statements relied on by Mr. Borrelli made up to 31st August 2020 which shows that BJ Aether had liabilities of approximately US$133.9 million of which approximately US$80 million was the Xeno 2 Facility and a further US$17.4 million as a shareholder loan from HK Aether, which loan would be for the benefit of any purchaser. HK Aether also had liabilities of US$80 million which was the same Xeno2 Facility, which ought not to be double counted. Mr. Ma submits, therefore, that on the evidence HK Aether was nothing but "massively balance sheet solvent".

Finally, Mr. Ma submits that the Xeno 1 Facility is not to be taken into account in valuing the 40% Shares as this loan facility was owed by Xeno Origin and not by HK Aether. Accordingly, the amounts owed under the Xeno 1 Facility are irrelevant.

[213] As to Issue 5 (ground 2) - blanket leave for all Derivative Claims – Mr. Ma accepts (at para. 112 of his appeal submissions) that it is common ground that the learned judge was required to consider the merits of all the causes of action asserted by Mr. Ma in the ASOC in the First HK Proceedings. However, it is argued that all of these claims and causes of action turn on two issues: (i) whether the Receivers acted with reasonable care, and (ii) did they fail to do so because they were suborned by MBK Partners and Cinda HK. Approached in this way, submits Mr. Ma, it would not have made sense for the learned judge to consider each element of each cause of action

in turn, as he would effectively have been asking himself the same question multiple times.

[214] In relation to each of the specific elements of certain causes of action which Xeno argued had not been met by the evidence adduced by Mr. Ma and therefore leave to bring such causes of action ought not properly to have been granted by the judge, Mr. Ma counters as follows:

(1) *Breach of Directors' Duties*: Mr. Ma's short submission is that director's duties are owed even when they are exercising powers not given to them as a director. The upshot of this submission is that even when exercising their powers as receivers, the receivers must nevertheless not do anything incompatible with their duties as directors of the very same company.

(2) *Dishonesty*: Mr. Ma submits that there was compelling evidence that Cinda HK induced the Receivers to sell the Sale Assets at a gross undervalue.

(3) *The Receivers' Involvement in the Conspiracy*: Mr. Ma submits that, on the documentary evidence before the judge, the reason why the Receivers acted in breach of their duties in selling the Sale Assets at a gross undervalue is "because they had been suborned by and conspiring with MBK Partners and/or Cinda HK to do so. (para. 101) Many of their "failures' are difficult to explain as a simple oversight or misjudgement; at all material times MBK Partners and Cinda HK have treated the Receivers as agents of MBK Partners who would do what MBK Partners want; the Master Agreement appears to presume that the Receivers will act at the direction of MBK Partners; and MBK Partners and Cinda HK discussed the acquisition of the 49% Shares in an email copied to the Receivers, with no demur from the Receivers as to their role and powers to sell the 49% Shares and at what price.

(4) *Intention to Injure*: Mr. Ma submits that Xeno/the Receivers are wrong to contend that the ASOC did not plead in the ASOC an intention to injure Xeno Origin. Reliance is placed on paragraph 75 of the ASOC where it is pleaded, with specific reference to "the Chargors", defined at paragraph 11 of the ASOC to expressly include Xeno Origin:

> "…the Receivers, Guanghua SS, Cinda HK and the 7th and 8th defendants (or any two of them) have wrongfully and with intent to injure the Guarantors and the Chargors by unlawful means conspiracy and combined to defraud the Guarantors and the Chargors."

(5) *Conspiracy Claim "less likely to succeed"*: Mr. Ma seeks to counter Xeno's argument that based on what the learned judge found was the likelihood of success of the conspiracy claim, this claim ought not to have been permitted. Mr. Ma argues that "it is perfectly possible … for the conspiracy claim to be less likely to succeed than the negligence claims, and yet still more probable to succeed than not, as the judge clearly found", the judge having held that the negligence claims did not just meet the "more probable than not" test, but that "there was a very strong case here, there is good likelihood of success". (para. 114.5)

Analysis and Conclusion on "Likely to Succeed" (Issue 4 - Ground 1) and Blanket Prospective Leave (Issue 5 - Ground 2)

[215] Fundamentally, Issue 4 – whether the Derivative Claims in the ASOC met the threshold test of "likely to succeed"- is concerned with the judge's assessment of the relative merits of the Derivative Claims and causes of action therein. In relation to this issue, it must be borne in mind that it is only the claim based on breaches of directors' duties which is governed by the laws of the BVI, all other derivative claims in the ASOC are governed by the laws of Hong Kong. Issue 5 (ground 2) is intertwined with Issue 4, as it concerns whether the judge erred in granting of blanket leave to pursue all Derivative Claims, without considering and assessing each of them individually as to their likelihood of success, and if a cause of action or claim

did not meet that threshold test, he ought not to have granted leave to proceed derivatively in relation to such cause of action or claim.

[216] From their respective submissions on ground 2, the parties appear to be in agreement that, as a matter of principle, the correct approach by a judge to consideration (c) '*whether the proceedings are likely to succeed*', required the judge to consider and assess the apparent merits of each cause of action (of each claim) sought to be commenced derivatively, and to determine whether each had met the threshold test of "likely to succeed", albeit the judge's role on a leave application is not to determine whether each claim or cause of action is bound to succeed.

[217] In my opinion, the mandatory exercise of determining whether prospective derivative proceedings are "likely to succeed" is of fundamental importance to the determination of an application under section 184C for leave to bring a derivative claim in the name of a company. This is for the reason, as stated above, that derivative claims are the exception to the norm whereby a company acts through its directors and/or shareholders in general meeting. Under section 184C, the court is therefore performing a sifting or gatekeeper exercise under section 184C permitting only claims which have satisfied the "likely to succeed" threshold test, to be proceeded with by the applicant/member for and on behalf of the company. In performing this role and in carrying out this exercise, the judge is required to consider all the mandatory and relevant factors and to weed-out and not permit to go forward, unmeritorious claims or claims which are vexatious or frivolous.

[218] This gatekeeper exercise requires the judge to assess each prospective claim or cause of action individually (although some claims or causes of action may overlap) and with the degree of care and level of scrutiny required in accordance with the guidance provided by this Court in **Basab**. This does not mean that the judge must embark upon a mini trial of each cause of action and the proposed derivative claims. Likewise, the applicant is not required to demonstrate that the success of the prospective claim or of any one of the causes of action is an absolute certainty or

even that their probability of success is very strong, as the learned judge correctly cautioned in his *ex tempore* judgment.

[219] This means that the judge is required to conduct a full and proper (as opposed to a cursory) review or assessment of the likely merits of each cause of action being relied on, taking into account the intended or draft pleadings (if any), but cognizant that the proposed statement of claim or other pleadings are essentially draft or preliminary documents which, it would be reasonable to assume, may or are likely to undergo a measure of refinement, redrafting or improvement before being filed, with the court's permission, as the derivative claim or proceeding.

[220] Importantly, the judge is also required to take into full account the particular cause or causes of action intended to be relied on; the elements of each cause of action and the kind of evidence or proof necessary to establish the elements of each; the nature, cogency, relevance and probative value of the evidence adduced by the applicant/member in support of the leave application and toward satisfying the "likely to succeed" threshold test; any relevant counter-evidence adduced or defence intended to be relied on by the respondent in opposing the leave application; the applicable principles of law, including expert evidence as to foreign law where appropriate; and the competing submissions of the parties pertinent to the merits of each cause of action and to the overall likelihood of success of the intended derivative claim. This latter consideration may, in some instances, be decisive not just of the "likely to succeed" threshold, but of the application for leave itself. For example, where there is an applicable limitation period, or some other unassailable defence which would render the derivative claim hopeless, notwithstanding (on paper) the good or even strong merits of the causes of action (or some of them) being relied on.

[221] As to the degree of scrutiny and evaluation of the evidence adduced by the applicant/member, this Court in **Basab** (at para. 42) explained that the judge is required to undertake "a **full and proper** examination of the evidence then before

the court". This necessarily involves the judge "evaluating the evidence before it and the arguments advanced by both parties" in order to determine whether the proceedings are likely to succeed.

[222] It is with these principles and guidance in mind, that I go on to consider and to assess the soundness of learned judge's approach to and consideration of the "likely to succeed" requirement, his approach to and evaluation of the causes of action in the ASOC and the evidence adduced by Mr. Ma, in arriving at a determination that the Derivative Claims (all such claims) were more likely than not to succeed. Before embarking upon that analysis, I consider it appropriate to set out in greater detail the provisions in the ASOC relied on by Mr. Ma as the bases for his application for leave to commence new derivative proceedings against the receivers and other defendants before the courts of Hong Kong.

Amended Statement of Claim ("ASOC")

[223] The ASOC was filed in the First HK Proceedings (HCA 1976/2023) on 20th January 2025. The Plaintiffs were Mr. Lim, Mr. Lin and Mr. Ma suing in a personal capacity and derivatively on behalf of Xeno Origin limited. The named defendants are (in order in which they appear) Mr. Borrelli, Mr. Malone, Guanghua SS, Cinda HK, Kenora Corporation Limited, Xeno Origin Limited, Chang An and Guanghua SSF. At paragraph 4, it is pleaded that Mr. Ma is the sole shareholder of Xeno holding such shares as a nominee for Mr. Lim; and a chargor under the Composite Share Charge "whereby a 100% shareholding in Xeno Origin was charged by Mr. Ma in favour of the 3rd Defendant [Guanghua SS]." Paragraph 5 makes clear that Mr. Ma is suing in two capacities. The first is "in his personal capacity against the 1st to 4th Defendants (as a charger as pleaded above)"; and the second is "on behalf of himself as a shareholder of Xeno Origin in a common derivative action against each of the 1st to 4th and 7th [Chang An] and 8th [Guanghua SSF] Defendants".

[224] By paragraph 6 of the ASOC, it is pleaded that Messrs. Borrelli and Malone, both insolvency practitioners, are the joint and several receivers and managers over the

Security Assets under the Security Agreements, appointed as such by notice of appointment dated 23rd November 2020. Additionally, Mr. Borrelli is the sole director of Kenora, and both Mr. Borrelli and Mr. Malone have been the only directors of Xeno Origin since being appointed as such on 23 November 2020 (from the same date as their appointment as joint receivers).

[225] It is pleaded in the ASOC at paragraph 8.2A, that Cinda HK, inter alia, "now holds 89.2% of the issued shares of Chang An, which holds (inter alia) 100% of the issued shares of Guanghua SS and 49% of the issued shares of HK Aether transferred to it from Xeno Origin and Kenora in circumstances pleaded hereinbelow (the "49% Shareholding in HK Aether")." It is pleaded at paragraph 9.1, that Kenora is also a chargor under the Composite Share Charge whereby 0.000003% shareholding in HK Aether was charged to Kenora in favour of Guanghua SS; and at paragraph 10.1, that Xeno Origin is a chargor under the Composite Share Charge whereby a 48.999997% shareholding in HK Aether was charged by Xeno Origin in favour of Guanghua SS.

[226] By paragraphs 12 and 13 of the ASOC, it is pleaded that HK Aether, a Hong Kong company, was wound up by the High Court on 7th June 2021 and joint and several provisional liquidators appointed; and that at all material times it owned 100% shareholding and 80% of the equity interest ("the 80% Interest") in BJ Aether, which is a joint venture company incorporated in the PRC which holds the "valuable" Development Properties in Beijing, "on which there is an ongoing commercial property construction and development project (the "Project")."

[227] The term "Security Agreements" in relation to the **Xeno 1 Loan Facility**, under which the Receivers were appointed by SCH 1 as agent and security trustee, is stated at paragraph 23 of the ASOC to be the following:

(1) a share charge dated 21st December 2017 known as "the Composite Shares Charge" whereby the following assets were charged in favour of Guanghua SS ("SCH 1") being its agent and security trustee –

(a) the 49% Shares in HK Aether held by Xeno Origin;

(b) 0.000003% shares in HK Aether held by Kenora;

(c) 100% shares in Xeno Origin held by Mr. Ma; and

(d) 100% shares in Kenora held by Mr. Lim. (as agent and security trustee for Guanghua SS) over a bank account under Xeno Origin with United Overseas Bank Limited, Singapore.)

(2) the Xeno 1 Security Agreement (as amended) dated 21st December 2017 creating a fixed floating charge granted by Xeno Origin in favour of SCH 1

[228] The Security Agreements for the **Xeno 2 Loan Facility** is stated at paragraph 24 to be:

(1) the Xeno 2 Security Agreement dated 26th October 2018 whereby HK Aether charged its 80% Interests in BJ Aether (which owned the land and Development Project) in favour of Guanghua SS; and

(2) the Deed of Assignment dated 26th October 2018 (the "Assignment of Intercompany Loan") whereby an intercompany loan of US$17,400,000 owed to HK Aether by BJ Aether, was assigned by HK Aether in favour of Guanghua SS.

[229] The security documents pertaining to both the Xeno 1 and Xeno 2 Facilities (set out above) are collectively called the "Security Agreements"; and the term "Chargors" is expressly stated (at paragraph 25) to be Mr. Lim, Mr. Ma, Xeno Origin and Kenora. It is pursuant to the powers exercised by SCH 1 as security trustee under both sets of the Security Agreements, that the Receivers were appointed on 23rd November 2020 by SCH 1, as joint and several receivers and

managers over the Security Assets set out in Annex 1 of the Deed of Appointment. The "Security Assets" consist of the following:

(1) the 49% Shares;

(2) the 80% Interest in BJ Aether charged by HK Aether in favour of Guanghua SS under the Xeno 2 Security Agreement (this being effectively an 80% Interest in the Project).

[230] At paragraph 28 of the ASOC, the various appointments of Mr. Borrelli as a director of Xeno Origin, Kenora and BJ Aether are pleaded. It is pleaded that Mr. Borrelli was appointed by HK Aether as the director and legal representative of BJ Aether on 7th July 2021 and was replaced by Mr. Wu Jun on 20th September 2023. Also, that Mr. Borrelli acted as a general manager and financial manager of BJ Aether since 31st March 2023 until 29th December 2023.

[231] The various "offers", said to have been *bona fide* offers, received by the Receivers since their appointment, are pleaded and detailed at paragraphs 29, 30, 30A, 30B, 30C, 31 to 34 of the ASOC; and the Receivers handling of the Security Assets is dealt with at paragraphs 36A and 36B. The pleaded case of a sale of the Security Assets by the Receivers at a "gross undervalue", is set out at paragraphs 36C to 36G (inclusive) and 37 to 42.

[232] The specifics of the terms of sale are set out at paragraphs 36C and 36D as follows:

> 36C. On 23 May 2023, Ms. Daisy Shen of MBK Partners (on behalf of Guanghua SSF) made an offer to the Receivers for the purchase of the Sale Assets for US$1,000,000.00 (the "Offer by Guanghua SSF")
>
> 36D. On 25 May 2023, Xeno Origin and Kenora (as sellers acting through the 1st and 2nd Defendants as joint receivers and manager) and Guanghua SSF (as purchaser) entered into a Sale and Purchase Agreement (the "SPA") whereby (*inter alia*):

36D.1 Xeno Origin agreed to sell to Guanghua SSF 16,047,499 ordinary shares (i.e. 48.999997% of the shareholding) of HK Aether and receivables in the amount of HK$856,880 owed by HK Aether to Xeno Origin (the Receivables");

36D.2 Kenora agreed to sell to Guanghua SSF 1 ordinary share (i.e. 000003% of the shareholding) of HK Aether; and

36D.3 Guanghua agreed to purchase from Xeno Origin and Kenora the 16,047,500 ordinary shares of HK Aether (the "Sale Shares") and the Receivables for the consideration of US$1,000,000 (the "Sale Price").

The 49% Shares and the Receivables are collectively referred to as the "Sale Assets".

[233] At paragraph 39 of the ASOC, the Plaintiffs pleaded that the true value of the Properties (in which HK Aether has an interest through the 80% Interest in BJ Aether - the joint venture company), "was, at the time of the Sale…, at least RMB8,503,000,000.00 (around US$1,192,901,234); and the true value of the 49% Shares in HK Aether (and hence the Sale Assets) at the time of the Sale …was at least RMB 3,333,176,000.00 (i.e. around US$467,617,283.95). And at paragraph 40, the Plaintiffs plead that –

(1) the sale of the Sale Assets was at a gross undervalue;

(2) The Receivers had **deliberately** and in lack of good faith sold or procured to sell the Sale Assets at a gross undervalue;

(3) The Receivers had **deliberately** and in lack of good faith withheld and/or delayed the sale of the Sale Assets (until the Sale at Undervalue);

(4) Chang An had benefitted from the Sale at Undervalue by acquiring the Sale Assets at a gross undervalue;

(5) The Receivers had carried out the above acts and conduct at the instruction of Guanghua SS and/or Cinda HK;

(6) Guanghua SS (and those who have or had a beneficial interest in Guanghua SS including Chang An, Guanghua SSF and Cinda HK) have (sic) benefitted from the Sale at Undervalue and the withholding and delay by the Receivers in the sale of the Sale Assets due to the accumulation of default interests at 24% per annum (the Default Interests") under the Facility Agreements (at the expense of the 1st and 2nd Plaintiffs [Mr. Lim and Mr. Lin) as Xeno Origin's guarantors thereunder).

[234] At Section G of the ASOC, under the heading "**Breach of the Receivers Duties at Equity**", the Plaintiffs set out at G.1 paragraph 56, the duties owed by the Receivers in equity and at common law "*in the exercise of their powers in dealing with the Security Assets… to the Guarantors and the Chargors*" (defined to include Xeno Origin). At Part G2 paragraph 58, the Plaintiffs allege that the Receivers have (negligently, in reckless indifference to the rights or interests of the Guarantors and Chargors, in a lack of good faith, or otherwise) wrongfully breached the Receivers' Duties at Equity" and sets out there in particulars of such breaches. These include that they have (at 58.2) "*sold or procured to sell the Sale Assets at a gross undervalue in the Sale at Undervalue*". And (at 58.3) "have failed to respond in good faith and consistently with the duties pleaded in paragraphs 56.1, 56.2 and 56.3 hereinbefore to the Interested Parties and to consider their offers by –

(1) unreasonably imposing the Conditions…as conditions for considering the offers made by CR Capital

(2) refusing (whether directly or through Guanghua SS and/or MBK Partners) to consider the offers made by ARA Capital including the offers leading to MBK Partners' 15.8.2023 Email; and

(3) Failing to respond (whether directly or through Guanghua SS and/or MBK Partners and/or the Provisional Liquidators [of HK Aether]) to the expression of interest and offers made by Hopu Capital and Wanhou Capital.

[235] At paragraphs 58.4 to 58.12, the Plaintiffs plead various other alleged breaches of duty by the Receivers. I do not consider it necessary for present purposes to set these out in detail. Also, at Section H1 paragraphs 63, 64, and 65, the Plaintiffs set out the fiduciary duties of Mr. Borrelli as a director of Kenora; at paragraph 64 the fiduciary duties of Mr. Borrelli and Mr. Malone as directors of Xeno Origin; and at H2 from paragraph 66 the alleged breaches of duty by the 1st and 2nd Defendants (Messrs. Borrelli and Malone) in their capacities as directors of the said three companies. At Section I paragraphs 68, 69 and 70, the Plaintiffs plead the duties of Guanghua SS as Chargee and the alleged breaches thereof.

[236] Section J of the ASOC addresses under the heading "Common Law Derivative Action", the derivative actions commenced (or to be commenced) by Mr. Lim on behalf of Kenora and Mr. Ma on behalf of Xeno Origin. The first claim (at para. 71.1) is by Xeno Origin against the Receivers "for breach of the Receivers' Duties at Equity and the Director's Duties, against Guanghua SS for breach of the Chargee's Duties, against Cinda HK for dishonest assistance and against the 1st to 4th and 7th and 8th defendants for Conspiracy (defined hereinbelow) ("**Xeno Orgin's Claims**").

[237] The Conspiracy Claim is dealt with at paragraphs 75 to 79 of the ASOC under the heading "**Conspiracy to Injure by Unlawful Means**". At paragraph 75 the actual "conspiracy" is put this way:

> "75. From not later than May 2021 **the Receivers**, Guanghua SS, Cinda HK and the 7th and 8th Defendants [Chang An and Guanghua SSF] (or any

two of them) have wrongfully and **with intent to injure** the Guarantors and **the Chargors by unlawful means conspired and combined to defraud the Guarantors and the Chargors** (the "Conspiracy")."

[238] At paragraph 76, the Plaintiffs set out what they plead were the "*objectives of the Conspiracy as something to be inferred from the matters in Section A and set out at paragraph 76A below, and that they were "at the expense of and with the intent to injure … the Chargors*." At paragraph 76A, in nine subparagraphs, the Plaintiffs plead the matters from which they assert the Conspiracy can be inferred. I do not consider it necessary to set these out here.

[239] Also, at paragraph 77, it is pleaded that "[p]ursuant to and in furtherance of the Conspiracy the Receivers, Guanghua SS, Cinda HK and [Chang An and Guanghua SSF] (or any two of them) carried out the following unlawful acts and means by which the Guarantors and the Chargors were injured (the "**Unlawful Means**"). There follows in four sub-paragraphs (numbered 77.1,77.2,77.3 and 77.4) the particulars of the alleged Unlawful Means, each by reference back to what has been pleaded in a previous Section or paragraph of the ASOC. These are (i) wrongful breaches of director's duties at Section H; (ii) wrongful breaches of the Receivers' Duties at Section G; (iii) Guanghua SS wrongfully breaching the Chargee's Duties at Section I; and (iv) Cinda HK dishonestly assisting or facilitating the receivers in breaching their Director's Duties at paragraph 50.

[240] It is also pleaded at paragraph 78, that as a result of these matters, the Guarantors and Chargors have suffered loss and damage. Specifically in relation to the Unlawful means conspiracy cause of action, it is pleaded at paragraph 79.2 that the Receivers are each liable to compensate Xeno Origin in equity for their breach of the Director's Duties; at paragraph 79.3 for their breach of the Receivers' Duties at Equity; and at paragraph 79.6 (along with Guanghua SS, Cinda HK, Chang An and Guanghua SSF) jointly and severally liable to the Guarantors and the Chargors in damages for conspiracy.

[241] At Section L (paragraphs 80 to 82(1),(2,)(3) & (4)) it is pleaded that had the Security Assets (including the Sale Assets and the 80% Interest in BJ Aether) been properly sold by the Receivers, the sale proceeds therefrom would be at least RMB6,802,400,000.00 as the true value of the security Assets, "which substantially exceeded the amount of all outstanding debts under the Facility Agreements." Alternatively, if the Sale Assets had been properly sold that sale would have realized at least RMB 3,333,176,000.00 (around US$467,617,283.96), "which is also substantially in excess of all outstanding debts under the Facility Agreements.

[242] The pleading of loss suffered by Xeno Origin is alleged to include:

(1) the difference between the true Value of the Security Assets and the Sale Price or alternatively the difference between the true Value and the Sale Asset and Sale Price;

(2) the surplus or difference between the sale proceeds which should have been generated by the Security Assets (alternatively the Sale Assets) and the amount of the outstanding debts under the Facility Agreement; and

(3) on the basis that the Sale at Undervalue is set aside, the drop in value of the Security Assets since 23 May 2021 (when the Security Assets should have been sold or procured to be sold by the Receivers at the latest).

[243] It is also pleaded that the Guarantors and Xeno Origin have also suffered loss and damage by way of interest, including Default Interests, that allegedly accrued under the Facility Agreements after 23 May 2021 (at the latest).

Did the Judge Err by Not Considering Each Claim/Cause of Action Individually?

[244] Having reviewed in some detail the documentary evidence as to the value or likely value of the 49% Shares and the Sale Assets, the judge concluded that from the

"offers" there is evidence indicative of their value which was a "huge, vast, stark and abysmal" difference to the sale price of US$1 million for the 49% Shares. He also concluded that there was other evidence indicative of the value of the 49% Shares and the Sale Assets, including the sequestration and auction and accompanying property valuation. He also reviewed and assessed the Receivers' conduct since their appointment including the manner in which they dealt with the "offers" when received and the "extraordinary" conditions which they imposed including demanding of the offerees a 10% non-refundable deposit before they were permitted to conduct any due diligence. He observed that "the receivers were setting up these offers to fail". Also, the requirement by the Receivers that the offerees sign a term sheet within a matter of days, which demand the learned judge termed "not realistic".

[245] As to the strength of Mr. Ma's derivative case, the learned judge overall assessment of the merits of the claims for breaches of duty as receivers, negligence and unlawful means conspiracy are captured by this passage (Transcript p225 - 226):

> "there is, to my mind, actually, a very strong case that these receivers **did not do their jobs properly, either in discharging their duties or fulfilling the requirements of the law of negligence, or indeed, whether they are in some kind of conspiracy**. …I find it rather extraordinary that receivers should apparently for 30 months, try and ostensibly market the shares in the Company. When people come with real offers on their face of it, with real money in them, immediately conditions laid down which they cannot hope to fulfil, and when somebody comes along and say well, we want to take over the whole project and, by the way, we (sic) want 49 percent shareholding for, what it was it, 258 million two hundred and eighty something million in Hopu. Hopu comes along and want to buy the whole project for this 49 percent and the Receivers says I didn't do anything because I was only copied in on it. **It's incredible**. If they were really serious, if they were really not in a jigsaw puzzle in this composite scheme to obtain for MBK and Cinda this company, then they would have at least put down a marker and said, hold a minute, let me go and see if they might be interested in doing this, we don't have power to sell those shares there, but we do have power to sell these. They want to buy those 49 percent from X, Y and Z amount of money, let's go and find out if they are prepared to do something here. But, no, its just allowed to walk pass them. That's either **incredible from a receiver who is doing his duty**, the terms of **trying to get the best price for the sale of these shares** or it is entirely credible if

> they are in some scheme to go and actually try and **make this whole deal go in the pocket of somebody else**." (emphasis added)

[246] And at (transcript page 227 L 1 - 10):

> "So to my mind there is a **very strong case** here, there is a **good likelihood of success**. **Had the Receivers acted reasonably on the face of it, they haven't. Have they conducted sufficient due diligence? Again, on the face of it they did not.** They didn't get a expert view of value of the shares. They seemed to have gone entirely with what the deal dictated and that they ultimately went with the only offer that they didn't block. Well, how good a deal is that? They can easily have blocked that one as well." (emphasis added)

[247] The judge also assessed the Receivers approach toward third party prospective purchaser describing it as a "lackluster approach". He also concluded that the Receivers had, on the evidence, failed to negotiate with Guanghua SSF over its "offer" executing a SPA with this offeree within 2 days; and failing to reengage with other interested parties. He commented on the transaction which led to the conclusion of the sale of the Sale Assets by the Receivers and the transfer of the 49% Shares to Chan An, as one structured not by the receivers, but by Guanghua SSF and Cinda HK, which resulted in the 49% Shares being attributed a "minimal value" of US$1 million, leaving all the outstanding leans with Xeno. The learned judge accepted that the 49% Shares were considered by the market to be worth "in the hundreds of millions" of dollars and stressed that "it cannot be sensibly suggested that $1 million was a proper price for the sale of assets."

[248] Having dealt with the several ways in which it can be said that the receivers, in breach of their duty, had not acted reasonably in seeking to obtain the best price for the Security Assets including the 49% Shares, the judge went on to consider whether such actions or the lack thereof in breach of their duty could amount to "negligence" and/ or "conspiracy". He stated:

> "Was it negligence? Possibly. Was it that they are part of a conspiracy? Less likely, but also possibly. In any event, I think the merits are sufficient that there is more probable than not that they are likely to succeed and I have looked as the pleadings."

[249] I do not accept the interpretation and consequence placed by Xeno on the above extract from the judgment. It would be an incorrect and unfair interpretation to conclude that the learned judge had made a finding that the Conspiracy Claim had not met the threshold test of "likely to succeed". Properly read, the learned judge was simply stating that the cause of action alleging unlawful means conspiracy by the Receivers, was less probable than the allegation that their conduct, as found by the judge, more probably amounted to negligence, as Ma. Ma has argued. This is clear from the very next sentence in the judgment that, in any event, "*the merits are sufficient that there is more probable than not that they [both negligence and unlawful means conspiracy] are likely to succeed…*" (Transcript page 229 l 1-3)

[250] The ASOC relied on five causes of action, as set out at paragraph [232} above. It is clear from his ex tempore judgment, that the learned judge considered in some detail what he saw as the allegations of wrongdoing on the part of the Receivers leading to them selling the Security Assets at what the learned judge considered to be a *huge, vast, stark and abysmal* price. In examining the evidence before him the learned judge clearly considered and dealt with the causes of action of breach of the receivers' duty to obtain the best price, negligence, and conspiracy and found that the merits of these claims were "very strong" with "*a good likelihood of success*". While the learned judge did not consider specifically the cause of action of breach of fiduciary duties as directors and as the Chargee, it is obvious that these were considered when dealing with the Receivers' breaches of duties generally. Specifically, as to the pleading of unlawful means conspiracy, this cause of action was in my judgment sufficiently pleaded in the ASOC including the element of deliberateness on the part of the Receivers, as is more than amply borne out in the passages summarized above from the ASOC.

[251] I am satisfied, therefore, that the learned judge dealt, albeit somewhat differentially, with each of the causes of action and was satisfied on the evidence adduced before him, including the documentary evidence, that the proposed Derivative Claims and each of them had been shown to be likely to succeed and, accordingly, Mr. Ma had

satisfied consideration (c) of section 184C of the BCA. For these reasons Issues 4 and 5 are decided against Xeno/the Receivers and, accordingly, grounds 1 and 2 fail.

Issue 8: Ground 4(ii) Likely Litigation Costs – Consideration (d)

[252] The next mandatory requirement considered by the learned judge was (d) – the cost of the derivative proceedings in relation to the value of any relief likely to be obtained. The learned judge dealt with this briefly in the judgment. He considered Xeno's submission that he could not deal with this issue at all because there was no evidence before him as to the likely costs of the derivative proceedings, if leave were granted under section 184C. Such costs would have to be juxtaposed or weighed by way of comparison with the likely recoveries, if the Derivative Claims or some of them were to succeed.

[253] This latter question goes back to the fundamental issue of what the likely market value of the 49% Shares was as of the date of the Sale of the Sale Assets. This issue has been considered in some detail above, including Xeno's submission that there was a total lack of any or any cogent "valuation evidence" as to the 49% Shares and the Sale Assets and the decision of the learned judge to rely on the evidence of the "offers' and additional evidence of the sequestration and auction proceedings, upheld as evidence indicative of the value of the 49% Shares as at the date of the Sale.

[254] The judge observed that he did not know how much the derivative proceedings are going to cost. However, he took the position "we do not have to overthink this. It's obvious that if the claim is good, then the financial result is probably going to be upwards of 100 million and it's also obvious that litigation this size might cost a few million, but nowhere near 100 million." He also considered the offer of an indemnity by Mr. Ma and concluded that "there is zero downside", and that "this has to be a good deal for the Company.

[255] In support of this ground of appeal, Xeno argued that in relation to the likely costs of the derivative litigation, there was an evidential vacuum in that Mr. Ma had provided "no costs budget, no evidence of funding sources and no principled quantification of likely recoveries net of indebtedness, default interest disputes and creditor priorities." (para. 80) In support of this submission as to an evidential vacuum, Xeno cites the condemnation by Leon J in **Glory Advance International Limited v Merit Fortune Holdings** 0090 at paragraph 100 which states: '[a]bsent factual evidence as opposed to conclusory views, this Court cannot balance the costs in relation to relief.'

[256] Xeno submits that absent such information, the court cannot carry out the exercise contemplated by consideration (d). It is also submitted that the indemnity as to costs offered by Mr. Ma does not affect the court's assessment of this consideration because, in particular, there was no evidence before the court of Mr. Ma's ability to meet those costs. In short, a bare indemnity cannot satisfy the statutory weighing exercise required under consideration (d).

[257] In response to these submissions, Mr. Ma contends that the above extract from the judgment of Leon J in **Glory Advance**, is not a statement of principle that the court or judge must be provided with a cost budget and must do so even in cases where, as here, "it is self-evident that the likely benefit of the litigation will outweigh the costs." (para. 123) Furthermore, while in most cases the cost of the derivative litigation would be borne by the company, in the instant matter Mr. Ma has by his indemnity undertaken to personally bear the costs of the proceedings. Further, in this matter Mr. Ma has only sought and has only been granted an order that he be reimbursed for those costs up to the value of any order in Xeno's favour (para. 1 25th September 2025 Order). Accordingly, as the learned judge found, there is no downside from Xeno's perspective.

[258] As to the contention that there is no evidence that Mr. Ma might have the financial wherewithal to meet these costs and his indemnity is a bare one, Mr. Ma counters

that there is no reason to doubt his ability to meet such costs "in circumstances where he has successfully done so to date", which I understand to be a reference to his funding of Xeno in the First HK Proceedings. Further, Mr. Ma as the only member of Xeno is the only person aside from the company itself, who can bring the Derivative Claims.

Conclusion of Issue 8: Ground 4(ii) – Litigation Cost

[259] This is a short point. In my judgment, while it would have been preferable for Mr. Ma to put before the judge below a litigation budget for the prospective derivation litigation, this was not, as a matter of principle or evidence, an absolute requirement for a proper consideration of the balancing exercise or comparison required under consideration (d). In a matter of this sort where, as the judge observed, should Mr. Ma be successful in the Derivative Claims, Xeno was likely to receive a judgment for many millions of dollars - sums far in excess of the likely litigation costs- it was open to the judge to reach the conclusion that consideration (d) had been satisfied to the requisite standard, absent an actual litigation budget or costing from Mr. Ma. In any event, such an estimate of the likely costs of intended litigation, is just that, an estimate intended purely to provide the judge with a ball-park amount of the likely costs in order for the court to compare such likely costs with the likely recoveries if leave was granted to an applicant member to commence the derivative claim. The learned judge was satisfied based on the Derivative Claims as pleaded in the ASOC including the claims for loss and damage to Xeno and the vast difference between the value of the 49% Shares and the sum of US$1 million attributed by the Receivers to the sale of those shares, that the likely recoveries would far exceed any reasonable amount of the likely litigation costs in such a matter. In my judgment this was a conclusion which the learned judge was entitled to reach and one which this Court ought not to disturb. Furthermore, the judge was entitled to consider and to rely on the indemnity offered by Mr. Ma to meet the litigation costs of the Derivative Claim before the court in Hong Kong, a financial responsibility which he had clearly met in relation to the First HK Proceedings. Accordingly, Issue 8 is decided against Xeno and ground 4(ii) also fails.

Issue 9: Ground 5 – Whether Derivative Claim in the Interest of Xeno

[260] This ground of appeal and Xeno's submissions in relation thereto, are predicated on this Court finding that Mr. Ma had failed to satisfy the court below that the Derivative Claims were "likely to succeed" or that he was in fact able to fund the said litigation. As both of these matters have been decided above against Xeno, it follows that this Issue 9 must also be decided against Xeno and ground 5 also fails.

Issue 10: Ground 3 – Adequate Alternative Remedies - Consideration (e)

[261] Next the judge considered the requirement at subparagraph (e) relating to the availability of alternative remedies to the derivative claim. He confessed that this issue did cause him some "problems". However, he concluded that it is only the company (Xeno) which has a cause of action against the Receivers and there is "no alternative relief to that cause of action".

[262] Xeno submits that the problems which concerned the learned judge with this issue were "insurmountable from [Mr. Ma's] perspective." (para. 69) It is contended that in the First HK Proceedings Mr. Ma, Mr. Lim and his son Mr. Lim are suing in their personal capacity the Receivers, Guanghua SS and Cinda HK as guarantors and chargors. Further, the conspiracy claim is brought also in a personal capacity since, at paragraph 75 of the ASOC, the pleading is that the Defendants "have wrongfully and with intent to injure the Guarantors and the Chargors". Furthermore, at paragraph 65 of Mr. Man's Report, it is pleaded: "I believe that the company claim by the 3rd Plaintiff [Mr. Ma] would likely succeed."

[263] Xeno contends that if the judge had refused Mr. Ma's leave application to commence a derivative claim, "those personal claims would remain and, on the advice received from his own Hong Kong expert, those claims (as pleaded) are likely to succeed."

[264] Xeno also submits, in reliance on the statement by Mr. Lim at paragraph 48 of Lim 2 concerning the Singapore proceedings commenced by him and Mr. Lin, that if

what Mr. Lim says there is correct this would also constitute an adequate alternative remedy under section 184C(2). Further, Mr. Ma had an obligation to explain by his evidence and submissions why a particular alternative remedy is not available or isn't adequate, but no such evidence was before the court, and the learned judge did not deal with this issue. At paragraph 48 of Lim 2, Mr. Lim states: -

> "I have done all this in order to prove that the Xeno Facility Agreements were fraudulent documents or, at the very least, had been entered into pursuant to fraud perpetuated upon me and in bad faith on the part of Stephen Le. Subsequently, all actions and events that occurred subsequently to the Xeno Facility Agreements, including the appointment of the receivers and the actions of the Receivers subsequent to their appointment, would therefore be invalid as a result."

[265] Mr. Ma submits that Xeno's predicate position that because the Plaintiffs in the First HK Proceedings are seeking relief in their personal capacities, as well as derivatively, it is unnecessary for Xeno to do so, is entirely misconceived. It is submitted that there is no overlap between the relief sought by Mr. Ma, Mr. Lim and Mr. Lin in their personal capacities and those sought by Mr. Ma for and on behalf of Xeno. In this respect, Mr. Ma argues that the plaintiffs' personal claims are for financial compensation for loss suffered by them for breaches of duty owed to them in their capacities as guarantors and chargors. They are not seeking compensation for any loss suffered by Xeno.

[266] Mr. Ma also submits that it is obviously wrong to conclude that because the Plaintiffs and Mr. Ma in his derivative claim are seeking the same remedy (for example, equitable compensation) that must mean that the compensation that Mr. Ma seeks for himself and the compensation which he seeks for Xeno are the same. It is also submitted that the issue of reflective loss raised by Xeno/the Receivers is simply a red herring.

[267] Mr. Ma also argues that the Singapore Proceedings were brought by Mr. Lim and Mr. Lin against Stephen Le. These proceedings do not include a claim to set aside the Xeno 1 and Xeno 2 Facilities and, in any event, this remedy would not be available to Mr. Ma or Xeno who are not parties to those proceedings.

Conclusion on Issue 10: Ground 3 – Adequate Alternative Remedies

[268] Xeno/the Receivers have not put forward any convincing argument on the issue of adequate alternative remedies or to demonstrate that the learned judge's conclusion that there were none is incorrect. In my view, the arguments based on the personal claims of Mr. Ma, Mr. Lim and Mr. Lin for relief being the same as the relief being sought by Xeno or being reflective of loss which Xeno has or may have suffered by the alleged breaches of duty by the Receivers, is misplaced. This much is clear from a proper reading of the ASOC, the various causes of action and the reliefs sought therein. Accordingly, Issue 10 is decided against Xeno/the Receivers and ground 3 fails.

Summary and Disposition of the Appeals

[269] Mr. Ma has failed on both Issues (1 and 2) in his Appeal No. 26/2025. Accordingly Appeal 26/2025 is dismissed with costs to Xeno/the Receivers in that appeal, such costs to be assessed by a judge of the Commercial Division of the High Court in the Virgin Islands, if not agreed by the parties within 30 days from the date of delivery of this judgment.

[270] Xeno / the Receivers have failed on all 8 grounds of appeal in Appeal No. 24/2025. Accordingly, Appeal No. 24/2025 is dismissed with costs to Mr. Ma, such costs to be assessed by a judge of the Commercial Division of the High Court of the Virgin Islands, if not agreed by the parties within 30 days of the date of delivery of this judgment.

I concur.
Margaret Price Findlay
Chief Justice [Ag.]

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar