EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 2016/102

BETWEEN:

TIPP INVESTMENTS PCC

Claimant

-and-

[1] CHAGALA GROUP LIMITED
[2] MICHAEL CARTER
[3] FRANCISCO PARILLA
[4] JAVIER DEL SER PEREZ
[5] COMPUTERSHARE COMPANY NOMINEES LIMITED
[6] EUROCLEAR NOMINEES LIMITED

Defendants

Appearances:

Mr. Michael McParland and Mr. Richard Baird for the Claimant
Mr. Richard Evans for the 1st Defendant
Mr. Michael Todd QC and Miss Rosalind Nicholson for the 2nd to 4th Defendants

……..
2016: October 27;
November 9.
……..

JUDGMENT

Introduction

[1] **Davis-White QC, J (Ag)**: I have before me five applications. They arise in the context of proceedings brought by Tipp Investments PCC ("**Tipp**"), a company incorporated in Mauritius, in effect complaining, and seeking relief in respect, of a

restriction notice (the "Restriction Notice") placed on shares, in which it has a beneficial interest, in the capital of Chagala Group Limited ("Chagala"). Chagala is a company incorporated in the British Virgin Islands. Its ordinary shares are admitted to the standard segment of the Official List and to trading on the London Stock Exchange's Main Market. (A standard listing offers a lower degree of protection than a listing on the premium segment of the Official List). Chagala is the first defendant in the proceedings. It is the holding company of a group of companies whose business is to provide administrative services to the oil and gas industry in Kazakhstan. This involves a primary focus on developing real estate in Western Kazakhstan and the provision of accommodation, catering, leisure, transport, office space warehousing and logistics support. Its headquarters are situated at Almaty in Kazakhstan.

[2] The 2nd to 4th defendants to the proceedings are three individuals who are directors of Chagala ("the Directors"). The fifth and sixth defendants have recently been joined to the proceedings in circumstances that I shall explain later. They are respectively Computershare Company Nominees Limited ("Computershare") and Euroclear Nominees Limited ("Euroclear") (together the "Nominees"). No relief is sought against the Nominees but they have been joined to remedy any defect, which is denied, in the claimant's locus or standing to bring the current proceedings. The Nominees are each incorporated in different constituent parts of the United Kingdom. Computershare is registered in Scotland. Euroclear is registered in England and Wales. They are part of the structure that is in place to enable Chagala's ordinary shares to be traded through the well-known CREST system. Essentially this system comprises a computerised central securities depositary and electronic settlement system for securities traded through the London Stock exchange. For present purposes it is, in effect, a paperless securities settlement system. The legal structure which has been set up to enable trading through CREST is something that I will have to return to later. For present purposes it suffices to say that the economic owner of shares in Chagala may not be the legal registered owner of those shares. Indeed, the

challenge made to the locus of Tipp to bring the current proceedings is on the basis that Tipp is not the registered holder of the shares in question and therefore not a member of Chagala with power to bring proceedings under s184B of the BVI Companies Act, 2004.

[3] Although the two companies mentioned have been added to the amended claim form, they have yet to be served. One of the applications before me is for leave to serve the amended claim form on them out of the jurisdiction. For the purposes of the section of this judgment under the heading "Factual background", I shall treat the economic owners of shares as if they were shareholders for ease of reference only and ignore the legal technicality that such holding may be indirect through one or more other entities.

Factual background

[4] By notice dated 18th May 2016 Chagala gave notice that its Annual General Meeting would be held at an address in Hong Kong on 13th June 2016. Among the items to be considered were three separate resolutions to re-elect each of the Directors as executive or non-executive directors of Chagala.

[5] On 31st May 2016 Tipp acquired 3,075,000 ordinary shares in the capital of Chagala. This represented a holding of just under 14.5%. The shares in question were already in the CREST system and were acquired from investment funds managed by Sturgeon Capital Limited.

[6] By letter dated 6th June 2016 two other shareholders, Eagle Resource Holdings Limited ("Eagle") and Typhoon Developments Limited ("Typhoon"), holding between them just over 11.3% of Chagala's ordinary shares, sought to requisition a general meeting of members to consider the appointment of three named

individuals as new independent non-executive directors. The letter effectively expressed disappointment in the performance of Chagala under its existing board of directors and expressed the belief of the authors that the appointment of new independent Non-Executive directors to work with, and strengthen, the board was the best way to enable Chagala to return to growth. Tipp's position is that it did not know of this letter at the time and that it was not involved in the proposals set out in it.

[7] By notice dated 10th June 2016, signed by chairman of the board of Chagala, Mr Carter, the second defendant in these proceedings, notice was given pursuant to regulation 13.8 of Chagala's articles of association to a number of parties (the "Direction Notice"). The first party was Computershare defined as "*the Nominee*". It was addressed as being "*for the following accounts*", there were then listed four accounts. The first three accounts specified were in the name of Euroclear. The first account referred to being in the amount of "3,075,000 Tipp Investments PCC"; the second was an account in the amount of 1,225,875, the third was in the amount of 208,271. A fourth account in the name of HSBC Global Custody Nominee (UK) Limited was then identified in the amount of 1,526,548. There were then identified three certified "shares holders" (sic): being Eagle, Nautilus Fiduciary (Asia) Limited and Typhoon. Each of the persons set out in the "addressees part" of the Notice, other than the Nominee (Computershare) were defined as being a "*Concert Party Member*" and the Concert Party Members together as being the "*Concert Party*". The notice then referred to a number of matters including the acquisition of shares by Tipp on 31st May 2016; the requisition of Eagle and Typhoon dated 6 June 2016; "*certain other correspondence and communications which the Company has had with representatives of Concert Party Members*" and regulation 13.1 of Chagala's articles of association which it then set out.

[8] Regulation 13.1 of Chagala's articles of association provides as follows:

"13. TAKEOVER PROVISIONS

13.1 Except with the consent of the Board, when:-

(a) any person acquires, whether by a series of transactions over a period of time or not, Shares which (taken together with Shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of the Company; or

(b) any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires additional Shares which increase his percentage of the voting rights:

*such person ("**the offeror**") shall extend an offer, on the basis set out in this Regulation 13, to the holders of all the issued Shares."*

[9] The regulation goes on to deal with the terms of the offer to be made pursuant to regulation 13.1, places limits on acquisitions of shares which might trigger obligations to make an offer under regulation 13.1, limits the rights of offerors under the article while an offer is in progress, and makes provisions regarding the application of the United Kingdom City Code on Takeovers and Mergers and so on. Regulations 13.8 and 13.9 provide as follows:

"*13.8 if at any time the Board is satisfied that any Shareholder having incurred an obligation under this Regulation 13 to extend an offer to the holders of all the issued Shares shall have failed so to do, or that any Shareholder is in default of any other obligation imposed upon Shareholders pursuant to this Regulation 13, then the Board may, in its absolute discretion at any time thereafter by notice (a "**direction notice**") to such Shareholders and any other Shareholders acting in concert with such Shareholders (together "**the defaulters**") direct that:*

*(a) in respect of the Shares held by the defaulters (the "**default shares**") the defaulters shall not be entitled to vote at a general meeting either personally or by proxy or to exercise any other rights conferred by membership in relation to meetings of the Company;*

(b) except in a liquidation of the Company, no payment shall be made of any sums due from the Company on the default shares, whether in respect of capital or dividend or otherwise, and the Company shall not meet any liability to pay interest on any such payment when it is finally paid to the Shareholders;

(c) no other distribution shall be made on the default shares.

The Board may at any time give notice cancelling a direction notice.

13.9 in construing this Regulation 13, words and expressions used or defined in the City Code shall bear the same meanings given by the City Code."

[10] It is important to note that the United Kingdom City Code on Takeovers and Mergers the ("Takeover Code") contains in rule 9 the well-known requirement to make a mandatory takeover bid in circumstances where certain levels of control over a company are acquired. In very broad terms, regulation 13.1 of Chagala's articles of association mirrors rule 9.1. In fact Chagala is not subject to, and its shareholders do not have the protection of, the Takeover Code. Regulation 13 of its articles of association is clearly loosely based around rule 9 of the Takeover Code. The expedient of adopting such provisions in its articles of association is one which many companies which are not subject to the Takeover Code or any other similar regulatory regime, but which are listed on the London Stock Exchange, have adopted. It is also noticeable that whereas rule 9 of the Takeover Code bites upon the "acquisition of interests in shares", regulation 13.1 refers to "acquisitions of Shares".

[11] It is also important to note that the Takeover Code definitions in section C includes the following:

"*Shares or securities*

(1) *Except as set out below or as the context otherwise requires, references to shares, including when used in other expressions such as shareholders (but excluding equity share capital), include securities, and vice versa*"

[12] On the other hand Chagala's articles of association define "Shareholder" and "Shares" as follows

""Shareholder" means a Person whose name is entered in the register of members of the Company as the holder of one or more Shares or fractional Shares;

"Share" means a share issued or to be issued by the Company; "

[13] Returning to the Direction Notice, having cited regulation 13.1, it went on to say that:

> "*Based on the information available to it, the board of the company…has determined that each of the Concert Party Members is acting in concert with each other Concert Party member for the purposes of regulation 13 of the Articles (and, in so far as the Nominee holds any shares in the Company as nominee for any such person, such share shall be deemed to be shares held by the Concert Party). Accordingly, as a result of the aggregate number shares in the company already owned by the members of the Concert Party (either themselves or through the Nominee),TIPP has, by acquiring shares in the Company pursuant to the Acquisition, incurred an obligation under Regulation 13.1 to extend an offer to the holders of all of the issued shares in the Company on the basis set out in Regulation 13".*

The Default Notice went on to record that the board was satisfied that Tipp had not made a Mandatory Offer in accordance with and as required by regulation 13.1, or complied with regulation 13.7, as a result of which the board was serving the Default Notice. The notice then contained a direction "*in relation to each share in the Company held or controlled by a Concert Party Member (including any shares held by the Nominee on behalf of any Concert Party Member) as follows:*

> *1.neither the Nominee nor any Concert Party Member shall, in respect of the Default Shares….Be entitled to exercise any voting rights attaching to the Default Shares at a general meeting of the company either personally or by proxy or to exercise any other right conferred by membership in relation to meetings of the Company;"*

In numbered paragraphs 2 and 3 it then set out disentitlements to distributions as provided for by regulation 13.8.

[14] On 13th June 2016 the AGM of Chagala took place and the defendants were re-elected as directors. Tipp says that as regards the re-appointment of two of the directors the resolutions in question were only passed because of the disenfranchisement of shares pursuant to the Direction Notice, and the disallowance of proxy votes cast in respect of shares subject to the same.

[15] It appears that on 17th June 2016, on the basis of information then available to it, the board of Chagala cancelled the Direction Notice in respect of the 472,652 shares held by HSBC Global Custody Nominee (UK) Limited.

The course of the current proceedings

[16] On 27th July 2016, Tipp commenced the current proceedings. The claim form referred to the claimant making claims against the defendants for relief as there set out. These included a declaration that the Direction Notice (and a later request for further information) were given in contravention of the articles of association of Chagala and have no effect; various orders pursuant to section 184B of the BVI Business Companies Act, 2004 directed at (i) procuring the cancellation of the Direction Notice and a request for further information; (ii) restraining the defendants from denying Chagala's entitlement to enjoy and exercise rights attaching to its shares; (iii) requiring proxies cast at the AGM of Chagala held on 13th June 2016 to be recounted and for the votes of shareholders that were excluded, or not considered, to be taken into account on that recount; (iv) alternatively requiring the AGM to be reconvened; (v) a declaration that the EGM proposed by Eagle and Typhoon be held by Chagala; (vi) an order (in effect apparently a declaration) that the directors are not entitled to an indemnity under

regulation 15.1 of Chagala's articles of association in respect of the proceedings and further or other relief pursuant to the said section 184B.

[17] The statement of claim, dated 26th July 2016, dealt with most of the facts that I have dealt with above. It then went on to assert in paragraphs 14 onwards that:

(1) the Direction Notice was in contravention of the articles of association of Chagala on the basis that there was no proper basis on which the Directors acting in accordance with their duties, (first not to act in a manner contravening the articles; secondly to exercise powers conferred on them for a proper purpose and thirdly to act honestly and in good faith and in what they believed to be in the best interests of Chagala), could have reached a determination that Tipp was acting in concert as alleged;

(2) the Directors were in breach of their duties summarised by me in subparagraph (1) above;

(3) that the AGM, conducted in reliance upon the validity of the Direction Notice, and related matters, were therefore conducted in contravention of the articles and in breach of the same directors' duties and that in consequence Tipp had suffered and continues to suffer loss and damage. Although the pleading in relation to the breach of the articles of association which is said to justify declaratory relief does not in terms refer to section 184B of the BVI Business Companies Act, 2004, I understand it to be a claim based on that provision, given the wording adopted in the statement of claim.

[18] Section 184B of the BVI Business Companies Act, 2004 ("s184B BCA") is a provision that I will return to later. For present purposes it suffices to say that it is a section of the BCA which enables the court, on the application of, among others, "a member", to grant relief regarding actual or proposed conduct by a company or a director of a company which contravenes the BCA or the memorandum or articles of the company.

[19] Also on 27th July 2016 Tipp issued a notice of application seeking leave to serve out of the jurisdiction on each of the Directors, an interim injunction, and directions for trial. The application was dealt with, ex parte, by Wallbank J (Ag). On 29th July 2016 he granted permission to serve the claim form and statement of claim out of the jurisdiction on each of the Defendants. He also granted an ex-parte injunction over until the return date on 29th August 2016 against each of the directors that each of them

> "*must not in any way:*
>
> (a) *cause, permit or procure the affairs of* [Chagala] *to be carried on other than in the usual and regular course of business; or*
> (b) *cause, permit or procure the convening of a meeting of Shareholders of* [Chagala]……[other than reconvening the AGM or convening the EGM subject of the Eagle/Typhoon requisition].
> (c) *authorise or otherwise permit the making of any payment by* [Chagala] *to any member by way of dividend or other distribution including by* [sic] *not limited to the distribution resolved to be made by way of a dividend at the purported Annual General Meeting on 13 June 2016 save by way of payment into a client account in escrow for the Claimant."*

[20] By notice of application dated 17th August 2016, Tipp sought (among other things) the continuation of the interim injunction made on 29th July 2016 and a speedy trial. The return date of 29th August 2016 was in fact not used as such. With the consent of the parties the hearing was then further adjourned to a return date of 27th October 2016, the injunction being continued in the meantime with directions for service of evidence. One of the directions was that the defendants should file and serve any evidence in opposition to the injunction application by 4.30 p.m. on 26th September 2016. No evidence in opposition was so filed.

[21] On 5th September 2016 the company and (together) the Directors each issued applications, supported by witness statement evidence from third defendant, Mr Parrilla. Those applications sought the striking out of the claim and statement of claim pursuant to CPR part 26.3 (b) and/or (c) and/or the inherent jurisdiction of

the court and/or summary judgment against the claimant pursuant to CPR 15.2 (a). The application by Chagala was in slightly fuller terms but in substance the same points are relied upon by all defendants. Consequential orders were sought discharging the interim injunction of 29th July 2016, that there be an inquiry into damages under the cross-undertaking in damages and for costs. The grounds for the applications, in broad summary, was that Tipp is not a shareholder or member and therefore there could be no personal claim based on breaches of the articles of association or breaches of directors duties owed to Chagala nor could there be a claim by Tipp pursuant to section 184B BCA. Accordingly, it is said, the statement of claim discloses no reasonable grounds for bringing a claim and/or is an abuse of process and/or Chagala has no real prospect of success and therefore summary judgment should be entered against it. So far as the injunction is concerned, Chagala's Notice of Application says that there was no serious issue to be tried, given the absence of locus of Tipp, and that accordingly the injunction should never have been made. Further the application notice asserts a failure of full and frank disclosure, in that far from highlighting the point that Chagala was not a shareholder, that point was not revealed, even when touched on by the court, nor was the question mark over locus under s184B.

[22] On 6th September 2016 a Placing and Open Offer of new issued shares in Chagala was announced (the "Placing and Open Offer"). The relevant offer document (the "Placing Prospectus") made clear that the net sums intended to be raised of some US$5.55 million were intended to be used towards the redemption of outstanding KZT Bonds which will mature on 1st December 2016. Under the open offer existing shareholders were entitled to take up shares but in the event that a shareholder did not, then its shareholding was anticipated to be diluted by approximately 26.9%, if the placing and open offer went ahead and was successful.

[23] A dispute then emerged between Tipp and the Director defendants as to whether the Placing and Open Offer placed the latter in breach of the injunction and in

contempt of court. Although the possibility of contempt proceedings has been adverted to in evidence filed on behalf of Tipp, as I understand it no application has yet been launched in that respect. The Directors' position, as I understand it, is that there has been no breach of the injunction and that refinancing of existing indebtedness is in the ordinary course of Chagala's business.

[24] In response to the Placing and Open Offer a further application for injunctive relief was issued by Tipp on 16th September 2016. In effect the injunction sought was to require Chagala to suspend the Placing and Open Offer and to prevent the Directors from causing or permitting Chagala to carry out any further activity in relation to that. On 22nd September 2016, Wallbank J heard that application inter parties. Tipp, Chagala and the Directors were separately represented. At that stage the Placing and Open Offer was due to close at 11 AM London time the following day. The hearing commenced at about 2:30pm and finished at 4:40pm. There was plainly inadequate time for counsel to develop all the submissions that they wished to do. Indeed, Mr Todd QC, who appeared then for the Directors, as he does before me, indicated to Wallbank J that at an adjourned hearing he would probably need a day to a day and a half to develop his submissions, even the basis that the court had already read beforehand the evidence and skeleton arguments. In the end the learned Judge adjourned the hearing, in effect part heard, to 27th October 2016 and as an interim measure imposed an interim injunction requiring Chagala to suspend the Placing and Open Offer, preventing the Directors from causing permitting or procuring Chagala to carry out any further activity in relation to the same and requiring the Defendants to answer any written request served by Tipp regarding information relating to potential debt financing of Chagala's obligations in respect of the KZT bonds (the "September Injunction").

[25] By notice of appeal the defendants sought an urgent hearing of an appeal against the making of the September Injunction. An oral hearing by way of teleconference took place before the Chief Justice, the Hon. Dame Janice M Pereira, on 4th October 2016. However, being noted that the urgency of the appeal had fallen

away, the appeal was directed to be listed in the usual course, but following the outcome of the proceedings listed for hearing on 27th October 2016.

[26] On 24th October 2016, the claim form in this matter was amended by the addition of the fifth and sixth defendants being, as I have already explained, Computershare and Euroclear. The only amendment to the claim form was to insert the two extra defendants. The statement of claim was also amended on the same date. The amendments made are:

(1) to state that Chagala's shares are listed on the London Stock Exchange (amended paragraph 2);

(2) to describe Computershare, as a custodian holding shares in Chagala for the purposes of trading through the CREST system and to aver that it is the nominee of the Claimant and a registered shareholder of Chagala (amended paragraph 4)

(3) to describe Euroclear as the owner and operator of CREST, and to describe that electronic share transfer system (amended paragraph 5);

(4) to expand upon the statement regarding Tipp's acquisition of shares in Chagala in May 2016 by explaining that they were purchased in the form of "*Depository Interests traded on the LSE.* [Tipp's] *shares are therefore held in an account with* [Euroclear] *in the name of* [Computershare], *which holds the shares as* [Tipp's] *nominee. At all material times*, [Tipp] *has been and is the beneficial owner of its shareholding*." (amended paragraph 7);

(5) by way of a new paragraph 9, to make clear that no relief is sought against either Computershare or Euroclear but that those parties have been joined as Tip's nominee and/or parties involved in handling Tipp's shareholding so as to be bound by the results of these proceedings. In circumstances where they have not consented to act as claimants they have had to be joined as defendants. "*In the alternative, if, which is denied, the Claimant does not itself have <u>locus standi</u> to bring these*

proceedings, the Claimant contends that it has made this claim and is entitled to make this claim on behalf of" Computershare and/or Euroclear;

(6) by amendments to paragraphs 12 and 13, to refer appropriately to Euroclear and/or Computershare as dealt with in the Direction Notice.

[27] On 25th October 2016 Tipp issued a further *ex parte* notice of application seeking permission to serve the amended claim form and the amended statement of claim on the fifth and sixth defendants out of the jurisdiction. The late issue of this application, and its late service, meant that the skeleton arguments on behalf of the defendants did not deal with this late turn in events. Furthermore, as I shall explain, no relevant authorities on the issue of derivative claims in the context of trusts were produced or referred to me by the claimant. Instead, it was counsel for the directors who produced for me, during the course of the hearing, the decision of the Supreme Court of the United Kingdom, ***Roberts (FC) v Gill and Co.***[1]

[28] Accordingly, before me are the following matters:

(1) the return day for the ex-parte injunction granted on 29th July 2016 (the "**July Injunction**"), Tipp seeking a continuation thereof until trial, and directions for a speedy trial in the meantime;

(2) the two applications on behalf of the Defendants seeking the striking out of the proceedings and/or summary judgment;

(3) the return day for the September Injunction. (Although I was informed that this had fallen away my attention was not drawn to that part of the injunction dealing with the provision of information. Further, as I made clear, I was concerned that if I was otherwise minded to continue the July injunction, I should avoid a situation in which the continuation could give rise to the same dispute as to its interpretation which had resulted in the application and grant of the September Injunction);

[1] [2010] UKSC 22.

(4) the application for leave to serve out of the jurisdiction on Euroclear and Computershare.

[29] The hearing bundles were numerous and supplemented on the afternoon before the day that the hearing commenced by a further bundle containing some 454 pages. In the end I was faced with some 16 affidavits, two witness statements, and a myriad of exhibits and authorities. The claimant, Tipp, was represented by Mr Michael McParland. The Directors, who made the main running on the defence, were represented by Mr Michael Todd QC and Miss Rosalind Nicholson. The company, Chagala, was represented by Mr Richard Evans. I am grateful to all the advocates for their assistance in this matter, and in particular their respective skeleton arguments, and for the care with which the bundles were prepared.

[30] In my view, the logical starting point, is the question of the locus of Tipp to bring the proceedings. That issue took up almost the entirety of the hearing before me, and was argued on the basis that leave to serve out on Euroclear and Computershare would be granted and be effected, so that they became parties, if I were to decide that their joinder would be necessary to cure any defect in the proceedings.

[31] As I have indicated, the short submission of the defendants was that Tipp was not a member of Chagala and therefore not entitled to bring the current proceedings under s184B BCA. Before I turn to the respective submissions on this topic it is necessary to set out more precisely the ownership structure of the shares in respect of which Tipp claims to be a member.

The Tipp Shares

[32] The position regarding trading in dematerialised shares of Tipp is governed by a number of provisions. The CREST system and what those operating within it may

do are primarily governed by the Uncertificated Securities Regulations 2001 (SI 2001 No. 3755) (the "Regulations") and the Crest Manual and Rules. The capacity of Chagala and terms of BVI law governing its ability to enter the system are governed by the BCA and Chagala's memorandum and articles of association. The specific conditions governing the dematerialisation of the shares in Chagala are set out in a Deed (the "DI Deed") dated 17th September 2015 made by Computershare Investor Services plc ("Computershare IS") in favour of the holders of Chagala Group Limited Depositary Interests ("Chagala DIs) and an agreement for the provision of depositary and custody services in respect of Chagala Group Limited made between Computershare IS and Chagala (the copy before me is signed but not dated).

[33] In summary, the position is as follows. The CREST system enables title to units of a security to be evidenced otherwise than by a certificate and transferred otherwise than by written instrument.[2] The manner in which the dematerialisation of shares operates is, in normal circumstances, that the relevant company maintains an issuer register of members. The "Operator" also maintains an "Operator register of members". The Operator register of members is, in effect, the lead register which should be reflected by the company's register of members.[3] In the case of, say an English company, whose securities are within the CREST system, a relevant member of CREST will be the registered holder of the shares in the Operator register of members and will designate certain shares held by it as a designated numbered account, or held within a designated numbered account, for a particular beneficiary. Trades in the underlying beneficial interests will usually take place without a change in the registered member. Instead the beneficiary of the account will change.

[2] Regulation 2 of the Regulations.
[3] Regulation 20 of the Regulations.

[34] However the CREST regime does not provide for the direct holding and settlement of foreign securities (such as the shares in Chagala) by participants in CREST.[4] Accordingly the dematerialisation of such shares is effected by the creation of depositary receipts. In effect, shares in Chagala are held by the depositary (Computershare IS), which may hold them, as it does, through a custodian (at present, its related company Computershare). Computershare IS issues to a CREST member (which Chagala is not) the number or amount of Chagala DIs as is equal to the number of Chagala shares issued or transferred to the custodian for the account of that CREST member. The CREST member will be the registered holder of the DIs as recorded in the register of corporate securities maintained by the issuer of such DIs.[5] The CREST member will hold or designate its holding as held in a specific numbered account which in practice will reflect a specific block of DIs beneficially owned by a specific person. So far as concerns the interest of the holders of the DIs in the underlying shares, held by Computershare for Computershare IS, that is as tenant in common with all the other holders of DIs relating to the entire block of Chagala Shares held by the custodian under the DI Deed.[6] The DI Deed permits the dematerialised shares to be materialised again and removed from the CREST system. A withdrawal operates as an instruction to cancel the relevant DIs and to withdraw and transfer the relevant deposited property represented by such DIs (i.e. the relevant number of shares in Chagala) as directed.[7]

[35] In this particular case therefore, the shares which Tipp has "acquired" are registered in the name of Computershare. Computershare IS has issued Chagala DIs in respect of those (among other) Chagala Shares. It holds the Chagala Shares on bare trust through Computershare for the benefit of the holders of the DIs which represent such shares, as tenants in common. Although the evidence is not explicit I take it that Euroclear is the registered holder of the DIs acquired by

[4] See e.g. the recitals to the DI Deed.
[5] See Regulation 22 of the Regulations and e.g. clauses 2.9 and 2.10 of the DI Deed.
[6] See DI Deed clause 5.
[7] See e.g. DI Deed Clause 6.

Chagala, which it holds in or as a designated account reflecting the beneficial ownership of Tipp of such DIs. The precise terms upon which Euroclear holds these DIs for Tipp was not explored before me in argument. What Tipp acquired as a matter of law in May 2016 was therefore not shares but a beneficial interest in Chagala DIs (and indirectly an interest in the underlying Chagala Shares).

[36] So far as the BCA is concerned, s41 has been amended by the insertion of a new s41(1A) permitting the company, where it is listed on a recognised exchange, to keep a register of members containing the information referred to in s41(1) or such other information as the company's articles of association permit. In terms it says nothing about DIs but simply delineates the information that a register of members (i.e. register of holders of shares) should contain. Regulations 2.9 and 2.10 also permit Chagala's register of members to be kept in accordance with any relevant system permitting uncertificated holdings of shares and the transfer of interests in such shares by means of a relevant system.

[37] The register of DIs is entirely separate from the register of shareholders in Chagala. Thus, the latter, a copy of which as at 27th July 2016 is exhibited shows that Computershare is the registered holder of 10,832,332 ordinary shares. By deduction the holders of DIs are also recorded there but not the accounts attributable to the beneficial owners of the DIs. Euroclear is shown as holding some 6,143,728 DIs but there is no breakdown of the different accounts in which Euroclear holds the same nor any details of the beneficial owners of the DIs in question.

Defendants' submission regarding Tipp's locus

[38] As I have already said, the defendants' submission regarding locus is simple.

(1) Section 184B BCA confers a right to apply to the Court on, among others, a "member" with regards to conduct of the company or of a director of the

company which contravenes the BCA or the memorandum or articles of the company.

(2) A "member" is defined by s2 BCA as (among others) "a shareholder".

(3) A "shareholder" is defined by ss2 and 78 BCA as "a person whose name is entered in the register of members as the holder of one or more shares, or fractional shares, in the company".

(4) Tipp is not the registered holder of the shares that it "acquired", rather Computershare is the registered holder and therefore member.

(5) Tipp, therefore, has no locus to bring the current proceedings.

Tipp's submissions regarding locus

[39] Tipp's submissions regarding locus can be summarised as follows:-

(1) The beneficial owner of a DI, (itself held by, and registered in the name of, another person, in this case Euroclear) is nonetheless "a shareholder" within the meaning of s78 BCA, and thus "a member" for the purposes of s184B BCA;

(2) In any event, in the circumstances of this case, Tipp has a strong case that the defendants are estopped from denying that Tipp is a "shareholder" for the purposes of s 184B BCA.

(3) As beneficial owner of the Chagala shares in question the claimant is entitled to bring these proceedings.

(4) Finally, in any event, Computershare and Euroclear are to be joined as defendants, and the proceedings are to continue as a derivative trust claim, which cures any defect.

Discussion of *locus*/ standing

The BCA and the articles

[40] As is clear from my analysis above, the shareholder of the relevant block of Chagala shares is in fact Computershare. In my view, the amendments to the BCA by the insertion of a new s41(1A), does not alter the law as to the identification of membership with those whose names are inserted as the holder of shares in the register of members. Tipp is the beneficial owner of DIs and not the registered holder of shares in Chagala.

[41] I do not accept the submission that the BCA, whether alone, or taken together with the provisions of Chagala's articles of association is such that the register of members includes not only the register of shareholders but also the register of holders of DIs. Even if both registers were in some way to be treated as the register of members of Chagala it would still not make Tipp a "member" of Chagala because Tipp is not the registered holder of Chagala DIs but only a beneficial owner.

Estoppel

[42] The second submission is that the defendants are estopped from denying the position of Tipp as shareholder of Chagala. Three matters are relied upon in this context, first the listing prospectus under which the DI system was set up; secondly the Direction Notice and associated matters (for example, RNS notices on the London Stock Exchange) and thirdly the placing prospectus.

[43] As regards the listing prospectus, having been carefully taken through its terms, I am entirely satisfied that, as might be expected, it accurately sets out the legal structure. Under the heading "*RISKS RELATING TO THE ORDINARY SHARES*", there is a section as follows:

> " *Holders of Depository Interests must rely on the Depositary or the Custodian to exercise rights attaching to the underlying Ordinary Shares for the benefit of the holders of Depositary Interests*
> *The Company has entered into depositary arrangements to enable investors to settle and pay for Ordinary Shares through the CREST system, the rights of holders of Depositary Interests will be governed by, among other things, the relevant provisions of the CREST Manual and the CREST Rules.... As the registered shareholder, the Depositary will have the power to exercise voting and other rights conferred by BVI law and the Articles of the Company on behalf of the relevant holder. Consequently, the holders of Depositary Interests must rely on the Depositary to exercise such rights for the benefit of the holders of Depositary Interests. Although the Company will enter into arrangements…* [which will]… *enable the Company to send out notices of shareholder meetings and proxy forms to its holders of Depositary Interests and…. Subject to certain requirements, the Depositary will be able to give each beneficial owner of a Depositary Interest the right to vote directly in respect of such owner's underlying Ordinary Shares, there can be no assurance that such information, and consequently, all such rights and, entitlements, will at all times be duly and timely passed on or that such proxy arrangements will be effective*."

[44] Part 15 of the listing prospectus sets out the position that I have explained briefly with regard to "CREST and Depositary Arrangements". It makes clear that the depositary holds the Ordinary Shares on trust for shareholders and that individual shareholders' CREST accounts have credited to them dematerialised Depositary Interests which represent the underlying Ordinary Shares. The statement in paragraph 1.5 that:

"*although the Company's register shows the Custodian as the legal holder of the Ordinary Shares, the beneficial interest in the Ordinary Shares remains with the holder of the Depositary Interest, who has the benefit of all the rights attaching to the Ordinary Shares as if the holder of Depositary Interests were named on the certificated Ordinary Share register itself*" has to be read in context of the entirety of part 15 and of course deals with the registered holder of the Depositary Interest not the beneficial owner of the same.

[45] Whether or not the other requirements of estoppel are satisfied, such as a representation to Tipp or detrimental reliance by Tipp, I am satisfied that the listing prospectus does not provide a basis for the estoppel argument raised by Tipp.

[46] So far as the Direction Notice is concerned, I have difficulty in seeing how it can form the basis of an estoppel as submitted by Tipp. An "acquisition of shares" on which article 13 bites is, in my view, arguable wide enough to cover acquisition of indirect beneficial ownership rather than, necessarily, legal title. True it is that the Direction Notice refers to Tipp as being "deemed" to be the shareholder for the purposes of being required to make the article 13 offer but in my view this cannot be taken as making any representation about article 184B.

[47] Rhetorically, the question is posed by Tipp as to how Tipp can be treated by the Company as a "shareholder" for the purposes of article 13, and yet not for the purposes of ss 78 and 184B BCA. These are two different groups of provisions with potentially different definition sections. However, it seems to me that the construction of s184B is clear. If I am correct, and if Tipp is correct that article 13 is being interpreted in an inconsistent manner and wrongly, it would, in my view, be open to Tipp to bring a claim as an interested person for declaratory relief that its acquisition of an interest in depositary interests does not make it an "acquirer of shares" within article 13 and/or a "Shareholder" required to make an offer under that provision. No such claim is currently bought although, in response to a question from me, counsel for Tipp indicated that an amendment bringing such a claim and seeking appropriate relief might be brought by way of amendment in the future.

[48] So far as the placing prospectus is concerned, I am again satisfied that that provides no basis for a successful argument as to estoppel. Leaving aside the question of detrimental reliance, the document, in my view, provides no basis for an argument either of representation or assumption that Tipp is a member of Chagala within the meaning of s184B BCA.

Beneficial owners

[49] Tipp relies on two relevant case lines. First, the litigation in the ***Eclairs*** case: ***Eclairs Group Limited v JKX Oil and Gas plc*** [2013] EWHC 2631 (Mann J) and

[2014] EWCA Civ 640 (Court of Appeal) and secondly that relating to other statutory provisions where locus or standing is conferred on "members".

[50] The *Eclairs* case also involved the service of a notice under a company's articles of association, akin to the Direction Notice in this case and referred to as a "restriction notice". In that case, as in this case, it was said (among other things) that the notice was served for an improper purpose, in breach of the directors' duties owed to the company. The claimants held shares beneficially in the company. However the shares were registered in the names of nominees. One issue was whether the beneficial owners were entitled to bring the claim (with the nominees as defendants) or whether only the nominee shareholders could bring the claim. Eclairs itself, one of the claimants, had only an indirect interest in the relevant shares, the registered holder of the shares being Hanover Nominees Ltd which held the shares as nominee for Renaissance Securities (Cyprus) Ltd which in turn held the rights to the shares on behalf of Renaissance Advisory Services Ltd. Finally Renaissance Advisory Services Ltd held the shares as custodian for Eclairs. A similar (though less long) line of interests applied as regards the other claimant, Glengary. As mentioned, the beneficial owners had joined some or all of the intervening nominees.

[51] In that case there was no legislation equivalent to s184B BCA. As is clear from paragraph 249 of the judgment of Mann J, the company did not challenge the basis on which it was said to have been right that the claimants, rather than the shareholders, should have sued in the proceedings. Accordingly the judge did not have to spend time in considering the locus of the beneficial owners to sue, save for the one point raised by the company. That one point was that, at least as regards Eclairs, certain provisions of the relevant custodian/nomineeship agreements were said to demonstrate that the relevant custodians/nominees reserved to themselves the discretion not to do anything that they perceived to be against local stock exchange rules and the like. The judge dealt with the position on the basis that there was no evidence that the nominees refused to act because

they thought there was something untoward going on. If and insofar as they positively refused to act it was not apparent that that was because of their misgivings about the behaviour furthermore, even if they had refused on such basis, that might be thought to be a reason why the beneficiaries should be allowed to sue themselves in circumstances where urgency did not permit an application to court the directions to be given to the trustees/nominees or the replacement of nominees. As he concluded, on this point:

> "*the rules which govern the circumstances in which beneficiaries may and may not sue in their own name, joining the trustees, do not proceed on the basis of some public policy which would leave the beneficiary saddled with the judgment of the trustee. Where that trustee is a mere nominee there is no reason why the beneficiary should be so saddled."* (see paragraph 254).

The case therefore proceeded on the basis that it was a derivative trust claim by the beneficiaries, joining the trustees as defendants, and suing on their behalf. It was not a case where the court determined that the beneficiaries by themselves had locus to bring the proceedings.

[52] In the Court of Appeal, the locus point was dealt with by Briggs LJ as follows:

> "*[33]. The standing issue arises in this way. Companies are, in general, both entitled and obliged to deal only with those who are registered as having the legal ownership of their shares. Companies are, in general, entitled to decline to deal with mere beneficial owners.*
>
> *[34]. In the present case, the immediate legal consequence of the restrictions was that Eclairs' and Glengary's respective nominees, Hanover and Lynchwood, were disabled from voting or transferring their shares. Eclairs and Glengary commenced their respective claims in the form of derivative actions, joining the two nominee companies as defendants, on the basis that they anticipated that it would be difficult if not impossible to galvanise the nominee companies into action in time to obtain the urgent interim relief sought (successfully in the event) ahead of the AGM. Both David Richards J, at the hearing of the interim application, and Mann J, at the trial, permitted them to do so notwithstanding JKX's objection at trial. The objection was not based on any issue or even uncertainty about the status of Eclairs and Glengary as beneficial owners of the shares.... Rather, the objection was*

based (both at trial and on JKX's appeal) on the fact that the nominee agreement between Eclairs and Hanover contained provisions entitling Hanover to refuse to act on instructions which might contravene Stock Exchange rules, and that the nominee agreement between Glengary and Lynchwood (which had not been disclosed) might be expected to contain similar provisions. Mr Michael Swainston submitted for JKX (both here below) that, having chosen to hold their shares through reputable nominees, the alleged raider should be required to litigate about the shares through those nominees, or not at all.

[35] The judge did not find it necessary to examine, still less decide, whether the nominee companies had declined to sue, and if so on what grounds. It was sufficient in his view that Eclairs and Glengary were the undisputed beneficial owners, that the application before David Richards J for interim relief had been urgent, and that the law about when beneficiaries may or may not sue was not based on any public policy which would lead to the beneficiary being saddled with the judgment of the trustee, especially where the trustees were, as here, mere nominees.

[36] I have been no more persuaded by JKX's submissions in relation to standing and was the judge. Indeed, I would go further. Part 22 of the 2006 Act is a remarkable exception to the general principle companies are only concerned with the legal owners of their shares. It is specifically designed to enable public companies to inform themselves about interests in their shares (and make that information known to their shareholders generally), pursuant to a statutory code in which the concept of "interest" is very widely defined, extending way beyond what the law, and even equity, would recognise as conferring proprietary interests. The statutory powers enable the company to seek information from all persons interested in that broad sense in shares, and seek from the court restrictions which, while bearing primarily on the legal rights of the registered shareholder, plainly have, and are intended to have, important economic consequences the wide class those with interests in the shares as defined. JKX's article 42 is designed to have much the same effect, and since restrictions may be imposed by the company's directors, without having to go to court, the company's ability to impose those economic consequences is even greater.

[37] In these circumstances it seems to me plain that, where a genuine dispute arises as to the validity or regularity of steps taken under the part 22 or article 42 regimes, the law ought to afford the widest scope to persons economically affected by the taking of those steps to challenge them in court. Eclairs and

> *Glengary have the most substantial proprietary interests in the shares affected, being respectively the sole beneficial owners of each block of them. The economic consequences of the restrictions for Eclairs and Glengary are large indeed.*
>
> *[38] I would therefore reject JKX's challenge to the standing of Eclairs and Glengary to bring these proceedings."*

In the Supreme Court the question of locus or standing was not taken further.

[53] In my view it is clear that the ***Eclairs*** case was one where the only challenge to the bringing of a derivative trust claim was the narrow one described by Mann J and Briggs LJ. The claim was framed as a derivative trust claim. The case is no authority that beneficial owners of shares may bring a claim properly vested in the legal owner in their own name and without joining the legal owner by way of derivative trust claim. When Briggs LJ referred to the submission of the company that the beneficial owners of shares in that case "*should be required to litigate about the shares through those nominees, or not at all"* he was referring to a submission that the claims should only be permitted to be brought by the legal owners of the shares rather than by the beneficial owners, on behalf of the legal owners, by way of derivative trust claim.

[54] The second line of authority relied upon by Tipp is based upon the cases of ***Headstart Class F Holdings Limited v Y2K Finance Inc***[8] and, on appeal, ***Citco Global Custody v Y2K Finance Inc***.[9] The ***Headstart*** case was a claim for unfair prejudice brought pursuant to s184I BCA. Under s184I

> "*a member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section*".

[8] BVIHCV No. 278 of 2007 (Hariprashad-Charles J).
[9] (October 19 2009).

As on the facts of this case, the key question therefore is whether the person bringing the claim is "a member".

[55] At first instance, both the alleged legal owner of the shares, Citco, and the alleged beneficial owner, Headstart, were joined as claimants. At first instance the claims were struck out in their entirety. As regards Headstart, this was on the basis that the claimants had failed to prove that Headstart had a beneficial interest in the shares registered in the name of Citco (see paragraphs [40] and [41]). In addition, there were additional reasons on the facts why the claim by Headstart (or Citco) was said to be one that was bound to fail. I need not explain the detail of this. The learned Judge however was of the view that Citco (as legal owner) and Headstart (had it been shown to be the beneficial owner of the shares) and had an arguable case of unfair prejudice been pleaded, would have both had locus to be claimants. In so deciding he relied upon the decision of Mr Jonathan Crow sitting as a deputy Judge of the High Court of England and Wales in the case of ***re Brightview Limited, Atlasview v Brightview***.[10]

[56] The ***Brightview*** case concerned a Petition brought by both the beneficial owner and the registered holder of shares pursuant to the then English equivalent of s184I BCA, s459 of the Companies Act 1985 (see now s994 Companies Act 2006). The English statute confers power to bring such a claim by petition on a "member", but the definition is widened under the English legislation to encompass persons to whom shares have been transferred by operation of law. One of the Petitioners, Mrs Barton, was the beneficial owner of shares registered in the name of Atlasview. Her husband, who held no beneficial interest in any of the Company's shares, was also joined as petitioner. Both Mrs Barton and Mr Barton were struck out as petitioners. Mr Barton on the basis that he had no interest in any shares of the Company, Mrs Barton on the basis that she held only a beneficial interest. The learned Judge in that case noted that it was accepted that neither Mr or Mrs Barton were members, within the meaning of s22 of the

[10] [2004] BCC 542.

Companies Act 1985 nor persons to whom shares had been transferred by operation of law pursuant to s459(2), but it was submitted that it was desirable to join them as petitioners so that they would be bound by the proceedings. Having considered, ***Re Quickdome Limited***,[11] where an unfair prejudice petition brought by a non-member who claimed to be contractually entitled to become a member was struck out, he held as follows:

> *"[31] In my judgment, there is no proper basis on which Mr or Mrs Barton could be joined as petitioners. There is some latitude in the range of respondents who can properly be joined, as will be seen from the discussion that follows: but there is no such latitude in the joinder of petitioners. The right to petition the court under s.459 is conferred only on members and those to whom shares have been transferred by operation of law, and neither Mr nor Mrs Barton falls within those categories. No rights are conferred on them by section 459, and although there may be room for nominal defendants in certain types proceedings, there is in my view no room for nominal petitioners in this context……*"

[57] The Learned Judge went on to consider the submission that the registered member, Atlasview, could not complain of any prejudice to its "interests" under section 459 because it was a bare nominee and as such had no economic interest in the value of the shares in Brightview registered in its name. He ruled that the legal submission in question was:

> "*plainly wrong. The "interests" which section 459 is able to protect include matters going beyond the economic interest of the legal owner in the shares registered in his name*."

He then went on to consider the case of ***O'Neill v Phillips***[12] and various other cases. He concluded as follows:-

"*[38] for the purposes of this strike out application, all I have to decide is whether it is properly arguable that the "interests" of a nominee shareholder under section 459 are capable of including the economic and contractual interests of the beneficial owners of the shares. In my judgment, based on both the language of section 459 and the authorities mentioned above, I consider it*

[11] (1988) 4 BCC 296.
[12] [1999] BCC 600.

to be well arguable: indeed, if I had to decide point, I would find that it was correct."

Accordingly he declined to strike out the claim by Atlasview.

[58] In the ***Headstart*** case, Hariprashad-Charles J relied on the case of ***Brightview***. In paragraph [37] of his judgment, having cited paragraph [31] of the judgment of Mr Jonathan Crow, she went on to say as follows:

> "[37] However, the court in *Brighview* continued, and took into consideration, the position of the law on quote "nominee shareholders" and "beneficial owners" of shares, which is applicable in the case at hand. The court explored the law and eventually found that it was within the right of both the nominee shareholder and the beneficial owner of the shares to make an application under section 459 of the CA."

She then cited paragraphs 37 and 38 of the judgment of Mr Jonathan Crow which dealt with the question of whether the claim brought by the nominee shareholder should be struck out.

[59] With great respect, I consider that Hariprashad-Charles J erred in her analysis of the ***Brightview*** case. As is, in my view, plain, Mr Jonathan Crow struck out Mrs Barton as petitioner on the basis she was neither "a member" nor a person to whom shares had been transferred by operation of law. Far from deciding that it was within "*the right of both the nominee shareholder and the beneficial owner of the shares to make an application under s. 459 of the Companies Act 1985*", Mr Crow decided that it was <u>not</u> the right of the beneficial owner as such to make such an application and he duly struck out the name of the beneficial owner as petitioner. I therefore cannot agree with the conclusion at paragraph [38] that section 459 can be interpreted to include petitions by both nominee shareholders and beneficial owners of shares, as opposed to only members (and persons to whom shares have been transferred by operation of law). I do however agree with Hariprashad-Charles J, that ***Brightview*** is persuasive authority as to the interpretation of s184I and, I would add, in my view, s184B BCA.

[60] The next question is whether I am prevented from applying my analysis by reason of the decision of the Court of Appeal in the ***Headstart*** case. The appeal appears to have been brought solely by Citco. In the Court of Appeal the focus was on whether the learned judge below had applied the correct test in determining that Citco was to be treated as a nominee shareholder of Headstart. In summary, one of the grounds was that the judge was wrong in law to find that the appellant had not provided sufficient evidence to support the allegation that the appellant was the nominee of Headstart, and that Headstart was the beneficial owner of the shares in the company. That ground of appeal was upheld. The court accordingly found that the judge erred in striking out Headstart as a claimant. However it is plain from the leading judgment of Edwards J.A. (with whom the other two Judges agreed), that the court did not in terms consider any argument as to whether a beneficial owner could be an applicant under section 184I BCA. Instead the court simply applied the determination of the learning judge below regarding the interpretation of section 184I. In the circumstances therefore I do not find that anything in the Court of Appeal decision binds me as to interpretation to be given to either section 184I or section 184B of the BCA. Indeed, the respondent's counter notice, so far as relevant to the question of locus, seems to have been limited to the same submission as was rejected by Mr Crow in the ***Brightview*** case, namely that a nominee shareholder could not complain of any prejudice to its own (as opposed to the beneficial owner's) economic interests and therefore could not complain of unfair prejudice under the relevant statutory provision (see paragraph [10]).

[61] In summary, therefore, I conclude that beneficial owners of shares are not as such entitled to bring proceedings under either section 184I or section 184B.

Derivative trust claim

[62] The amended Statement of Claim and amended claim form are amended on the basis that the beneficial owner of shares, Tipp, brings a claim for, and on behalf,

and in the names, of the registered holder of the DIs and the registered holder of the Chagala shares in which it has an interest.

[63] As such it seems to me that this is in effect a double derivative claim. In the light of *In the Matter of Fort Gilkicker Ltd, Sub Nom Universal Project Management Services Ltd v (1) Fort Gilkicker Ltd (2) Ian Pearce (3) Fort Gilkicker Properties Ltd* (2013)[13] and the decision of the UK Supreme Court in ***Roberts (FC) v Gill & Co***.[14] I do not see that there is any inherent objection in principle to a double derivative trust claim.

[64] Mr Todd QC for the Directors submitted that a derivative trust claim was not possible in the context of a claim under s184B BCA. Only a member could bring the claim. In effect, this argument echoed that put forward for the Company in the ***Eclairs*** case that, having elected to hold an interest in shares through nominees, the person beneficially interested should not be able to litigate pursuant to s184B unless through the nominee shareholder itself being the claimant. The context here is different because in the ***Eclairs*** case the argument was not that a derivative trust claim was impossible in all cases but that it was not permitted on the facts of that case. I therefore have to determine the issue which was not contested in the ***Eclairs*** case. However, it seems to me that the reasoning of Briggs LJ, in particular, convincingly explains why the Court should be slow to shut out beneficial owners from being able to litigate by derivative trust proceedings in an appropriate case.

[65] That then raises the question of whether this is an appropriate case. As the ***Roberts v Gill*** case shows, the Court has normally required special circumstances to exist before it will permit a derivative trust claim to proceed. In the circumstances here it seems to me that special circumstances are made out. First, there has been an inability speedily to obtain the dematerialisation of the

[13] [2013] EWHC 348 (Ch); [2013] 3 WLR 164.
[14] [2010] UKSC 22.

shares so that they are registered in the name of Tipp. Although the evidence as regards this is less than satisfactory in terms of the detail provided to the Court and the other parties, I consider that it is adequate to demonstrate that dematerialisation is not going to be achieved speedily, even if there is a right to the same. Secondly, and although again the evidence is less than satisfactory, it seems that there has been an attempt to obtain consent of the legal owners of DIs and of the shares to use their names to litigate, with the provision to them of an indemnity. Not surprisingly consent has not yet been obtained and I suspect it is unlikely to be obtained, certainly in the near future. Thirdly, the position is one where the legal owner of the shares holds a pool of shares in which the holder of the DIs (and therefore indirectly Tipp) only has an interest as tenant in common rather than as sole beneficial owner of the specific number of shares which Tipp "acquired". In these circumstances there are obviously difficulties in the legal owner of such a pool of shares agreeing to its name being used as claimant in proceedings. Finally, there is the dicta of Briggs LJ in the ***Eclairs*** case regarding the need to afford "*the widest scope for persons economically affected by the taking of ...steps [such as in this case] to challenge them in court*." In any event, given this is a summary judgment/strike out application it seems to me that I only need to be satisfied that it is properly arguable that a double derivative trust claim is available. On the present information not only do I consider that it is well arguable; if I had to decide the point I would find that it was correct.

Conclusions:

Strike out/summary judgment

[66] It follows that I decline to strike out the claim and decline to grant the Defendants summary judgment.

Service out of the jurisdiction

[67] Somewhat surprisingly Tipp made no relevant submissions regarding possible problems of service out and it was the Court and/or the Defendants who identified various issues including an exclusive English jurisdiction clause under the DI Deed and the question of whether an indemnity, possibly a fortified or secured indemnity, for the legal owner(s) might be necessary, not least in case any costs awarded in favour of the Defendants became costs for which they became liable in circumstances where they (or at least Computershare) would, prima facie, have resort to the entire holding of Chagala shares held by it, and not simply that number of shares representing Tipp's "holding".

[68] Nevertheless, in the light of what I have already said I am persuaded that there is both a prima facie case against the Defendants and that Tipp has the better argument regarding an applicable gateway for service out of the jurisdiction under CPR rule 7.3, being that provided for by rule 7.3(7)(a). In those circumstances I do not need to consider the "necessary" party route and the difficulties considered in the ***Robert's*** case. Accordingly I will order service out but, because an order for service out has to deal with the question of time for acknowledgement and defence will not make the order at this stage until it is clear what timetable will be laid down for the trial or, alternatively, it is clear the time period by which a further hearing will take place (or it is clear within what time period it will not take place).

Continuation of July injunction

[69] At the end of the hearing before me I extended the July Injunction over and until after judgment on the applications before me. I made clear that I considered that, if I were to put in place any injunctive relief after my judgment I would not be prepared that injunction should be in the same wording as the first injunction given the dispute as to its effect which resulted in the September Injunction. It was accepted before me that there needs to be further oral argument regarding the relevant wording. I therefore put in place injunctive relief in the same terms as the first injunction pending a further hearing and judgment thereon regarding the

precise terms of the injunctive relief to be granted. In the light of this judgment there will need to be directions as to such further hearing. Although I have received further submissions on behalf of the Directors on this issue in the light of some proposed wording put forward by Tipp I assume that all remain of agreement that this important matter should be dealt with by further oral rather than just written submission.

Discharge of the July Injunction

[70] The next issue is whether or not I should discharge the first injunction and, if so, whether I should impose a new injunction. I have not heard detailed argument on this point. My present inclination is to set aside the first injunction on the basis that the beneficial owner had no locus to bring it and that in cases under s184B, whatever the normal rule as regards the right of a beneficial owner to join the legal owner later in a derivative trust claim (see the disagreement in ***Roberts v Gill***), that does not apply in the case of proceedings brought under s184B against a background where the company is entitled to ignore beneficial interests in shares. Further there is the point that the Court's attention was not drawn to the difficulties of locus and it was not suggested that the proceedings were issued as holding proceedings with an intention to join the relevant legal owners by way of double derivative trust claim. However, if I reach that conclusion my current inclination would be to re-impose injunctive relief (but in appropriate terms, avoiding the uncertainty revealed as to the current wording of the injunction referred to above). For the purposes of continuation of injunctive relief no point is now taken other than the locus one and it is not suggested that the injunction should not be continued for want of a prima facie case or because damages would be an adequate remedy. I am satisfied that there is evidence which justifies such relief. In those circumstances I will continue the existing injunction but leave open the question of whether I should discharge the original injunction and re-impose injunctive relief. Accordingly I give liberty to apply to discharge the injunction for these purposes.

[71] I also leave to further argument the question of whether there should be an enquiry as to damage in relation to the cross undertaking in damages accepted by the Court on the July Injunction,

The September Injunction

[72] The main part of the September Injunction is now spent. I am unclear what the respective positions of the parties are regarding that injunction both generally and in particular as regards that part of it dealing with the provision of further information. Accordingly I invite submissions on those questions.

Speedy trial

[73] It seems to me obvious that this case is one for a speedy trial. Despite the earlier position taken by the Company I did not understand any party now to dispute this. Accordingly there will need to be another hearing to deal with the appropriate timetable for such a trial, which in principle I am prepared to order.

Further hearing

[74] A further hearing should be set as soon as possible to deal with the matters outstanding from this judgment. I understood an oral hearing to be the preferred method and direct that the parties should fix any such hearing as soon as possible. At that hearing all questions left over from this judgment, including costs, should be dealt with.

Malcolm Davis-White QC J (Ag)
Commercial Court Judge
9 November 2016