



Cause No: FSD 2023-0113 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

**IN THE MATTER OF HAMMER INTERNATIONAL FOUNDATION
AND IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)**

BETWEEN:

THE ARMAND HAMMER FOUNDATION, INC.

Plaintiff

-and-

- (1) HAMMER INTERNATIONAL FOUNDATION**
- (2) MARK ALFANO**
- (3) SAMUEL 1 LTD**
- (4) REX ALEXANDER**
- (5) MISTY HAMMER**
- (6) JEFF KATOFSKY**
- (7) RANDALL BARTON**
- (8) RAISHA PARK**
- (9) CECIL KYTE**
- (10) ALEXANDER MENZEL**
- (11) THE ATTORNEY-GENERAL**

Defendants

Appearances: **Mr Graeme McPherson KC instructed by Mr Matthew Dors of Collas Crill for the Plaintiff**

Ms Alice Carver of Nelsons for the Second to Tenth Defendants

The First and Eleventh Defendants were not represented and did not appear

Before: **The Honourable Justice Jalil Asif KC**

Heard: **3-5 June 2024**

Judgment **14 August 2024**

Company law—transmission of membership interest in Cayman Islands not-for-profit corporation as part of corporate merger under US law—whether membership interest is a transferrable right

Company law—whether appointments of additional members, directors and officers of Cayman Islands not-for-profit corporation are valid

Civil procedure—debaring order—principles to be applied regarding effect on ability of party to participate in hearing

JUDGMENT

A. Introduction

1. This is my judgment following the trial of this matter on 3-5 June 2024. The fundamental issue for trial is the question of who is properly authorised to control and give instructions on behalf of the First Defendant, Hammer International Foundation, Inc (“Cayman Hammer”).
2. The Plaintiff (“Florida Hammer”) contends that it is the legal person with those rights. The Second to Tenth Defendants contend that it is they who have that authority. However, due to procedural default on their part, which I describe below, they have been debarred from taking part in the trial.
3. Cayman Hammer did not take any part in the proceedings. The Attorney General was joined as Eleventh Defendant because Cayman Hammer is a charitable foundation. The Attorney General appeared at some of the interlocutory hearings but did not attend the trial. I therefore ignore Cayman Hammer and the Attorney General as defendants for present purposes and refer to the Second to Tenth Defendants collectively in this judgment as “the Defendants”.
4. Florida Hammer, which was represented by Mr Graeme McPherson KC instructed by Mr Matthew Dors of Collas Crill, has proceeded to attempt to prove its case on the evidence. The Defendants were present at the trial through the attendance of Ms Alice Carver of Nelsons but, for the reasons explained later in this judgment, she was not permitted to advance any positive case nor to call any witnesses or make submissions on the Defendants’ behalf on the merits.
5. In addition to these Cayman proceedings, there are ongoing proceedings in California and two ongoing actions in Florida involving the same or overlapping parties. Further, as I describe later in this judgment, bankruptcy proceedings under Chapter 11 of the US Bankruptcy Code were initiated in California in respect of Cayman Hammer in May 2024.
6. I have been told that my decision in this case is likely to be relevant to the issues in at least some of the US proceedings, and that the parties wish to put my judgment before the judges with conduct of those matters. I regret that it has taken me longer than anticipated to complete this judgment.

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8. Finally, by way of introductory remarks, I record (as I have done at each of the hearings in this matter that have been before me) that Mr McPherson and I both practised as barristers from the same Chambers in London for about 17 years leading up to 2011. I am satisfied, having regard to the review of the relevant law in the judgment of Doyle J in *Credit Suisse London Nominees Ltd v Principal Investing* (unreported, 21/11/22), that there is no basis for requiring me to recuse myself from hearing this matter. None of the parties suggested at earlier hearings that I should do so, and neither was this suggested at the trial.

B. The background factual context

9. Mr Michael Hammer (“Michael”) was a scion of the wealthy Hammer family. He was committed to the advancement of charitable causes in the United States and the Cayman Islands through his philanthropy. Within the Cayman Islands, one of Michael’s particular projects was the support and development of the Grace Christian Academy, a school in West Bay, Grand Cayman.

10. Michael’s grandfather, Armand Hammer, had incorporated The Armand Hammer Foundation, Inc. many years ago as a California-incorporated non-profit public benefit corporation (“California Hammer”). Several generations of the Hammer family had used California Hammer for philanthropic and charitable purposes. Its assets included a valuable real-estate property at 3501 Villa Real, Carpinteria, California (“the Carpinteria Property”) and a large and famous art collection. Florida Hammer estimates the value of the assets overall as being about US \$100 million. In proceedings in California, the Defendants stated in January 2023 that the Carpinteria Property had a likely value of US \$7-8 million, and that 8 items from the art collection were probably worth US \$60-80 million on their own. In a letter from the Defendants’ Cayman attorneys-at-law dated 24 May 2023, the

Defendants valued the Carpinteria Property at US \$10 million and the art collection at over US \$68 million. The differences in assessment of the value of the assets in question is not material to my determination of the issues but the overall values provide useful context to the dispute.

11. In recent years, until June 2021, the directors of California Hammer were Michael, his younger son Viktor Hammer (“Viktor”) and three of Michael’s trusted business associates, Jim Fraser, Peter Sansone¹ and Rex Alexander (the Fourth Defendant). Michael effectively controlled California Hammer through the loyalty of its board of directors to him.
12. Michael, his first wife, Dru, and his family moved to the Cayman Islands in about 1993, where they lived until about 1998. Even after they left, they maintained a house in the Cayman Islands. Michael and Dru divorced in 2012. Michael met Misty in about 2012 and started a personal relationship with her in about 2015. In 2017, Michael and Misty returned to live in the Cayman Islands and were married.
13. In June 1995, Michael caused Cayman Hammer to be incorporated in the Cayman Islands as an association not for profit under what became s.80 of the current Companies Act. This was to facilitate his philanthropy within the Cayman Islands.
 - 13.1 Cayman Hammer’s sole founding member was California Hammer. As a not-for-profit corporation, Cayman Hammer does not have shareholders.
 - 13.2 Cayman Hammer’s initial directors were Michael, Dru and Samuel I Ltd, which was a Cayman Islands company, with Michael as its sole shareholder and director. Dru ceased to be a director of Cayman Hammer on 1 December 2010 and features in this case only as a minor character.
 - 13.3 Following Dru’s resignation, Cayman Hammer’s directors were Michael in his personal capacity and Michael acting via Samuel I Ltd.
14. Through California Hammer’s membership of Cayman Hammer, and Michael’s role in both entities, their operation was co-ordinated.

¹ Mr Sansone died in late 2023

15. In November 2020, California Hammer commenced a process to redomicile in Florida by way of a merger with Florida Hammer, which was incorporated in Florida on 30 November 2020 as a non-profit organisation solely for that purpose. For the period from 30 November 2020 until the merger was completed on 25 June 2021, both corporations used the same name, but were obviously separate legal persons, incorporated in different states within the US. Until the merger was completed, Florida Hammer did not have an active role. It is common ground that, as a consequence of the merger, California Hammer was automatically dissolved and immediately ceased to exist. One of the issues is, what was the effect of this merger and the dissolution of California Hammer on the membership of Cayman Hammer.

16. In November 2021, Michael was diagnosed with cancer. His health deteriorated during 2022 and he died on 20 November 2022. The second issue is, who are the directors of Cayman Hammer following Michael's death.

17. Before moving on, it is useful to provide a little more colour on the Defendants:
 - 17.1 Misty Hammer is Michael's widow. Misty is said by the Defendants to have become a member of Cayman Hammer on 19 October 2022 and to have been appointed to Cayman Hammer's board of directors on 1 November 2022.
 - 17.2 Samuel I Ltd was a director of Cayman Hammer at all material times until about 3 February 2023. It is a company incorporated in the Cayman Islands on 23 June 1995. Until 16 September 2022, Michael was Samuel I Ltd's sole shareholder and director. On 16 September 2022, Michael executed a deed of trust and effectively gave Mark Alfano control of Samuel I Ltd. Since then, Mr Alfano has been Samuel I's sole registered shareholder and director.
 - 17.3 Rex Alexander was a long-time confidante, friend and trusted advisor to Michael. He is said by the Defendants to have become a member of Cayman Hammer on 19 October 2022 and to have been appointed to Cayman Hammer's board of directors on 1 November 2022.
 - 17.4 Mark Alfano met Michael in 2005, and they initially became friends. He then became involved in the management of California Hammer and Cayman Hammer, and he appears to have been Chief of Staff for about 10 years. He is said by the Defendants to have become a member of Cayman Hammer on 19 October 2022 and to have been appointed to Cayman Hammer's board of directors on 1 November 2022.

- 17.5 Jeff Katofsky is a US qualified attorney at law and friend and/or advisor to Michael. He is said by the Defendants to have become a member of Cayman Hammer on 19 October 2022 and to have been appointed to Cayman Hammer's board of directors on 1 November 2022. It appears that he resigned as a director at some point in March 2024.
- 17.6 Randall Barton is a US qualified attorney at law and was Cayman Hammer's outside general counsel from 2015 until about November or December 2022.
- 17.7 Raisha Park's relationship with Michael and role is less clear. Mr McPherson was able to say only that Florida Hammer believes she may be the sister of Tyson Park, a deceased friend of Mr Alfano, who appears to have worked as a realtor in Carpinteria². Ms Park is said by the Defendants to have been appointed to Cayman Hammer's board of directors on 1 November 2022.
- 17.8 Cecil Kyte's relationship with Michael and role is even less clear. Mr McPherson was unable to provide any background information regarding Mr Kyte. He is said by the Defendants to have been appointed to Cayman Hammer's board of directors on 3 February 2022.
- 17.9 Alexander Menzel's relationship with Michael and role is similarly unclear. Mr McPherson could only say that he is understood by Florida Hammer to be an associate of Mr Alfano and Florida Hammer believes he may currently be in South America. He is said by the Defendants to have been appointed to Cayman Hammer's board of directors on 3 February 2022.

C. Florida Hammer's case in outline

18. Florida Hammer's case is that California Hammer and Florida Hammer merged in June 2021 purely for Michael's convenience. Florida Hammer was, and was intended to be, a fully operational replacement for California Hammer. Florida Hammer disputes the Defendants' claim, summarised below, that it had been intended since 2017 that California Hammer would merge with Cayman Hammer, and that the merger with Florida Hammer was part of a two-stage process to achieve this goal.

² The documents exhibited include a two-page memo dated 31 March 2020 regarding the value of the Carpinteria Property and commenting on local rental values, which was apparently prepared by Mr Park

19. Florida Hammer contends that, as Michael became sick, the Defendants sought to take over control of Cayman Hammer, and to strip Florida Hammer's assets to bring them under the Defendants' control.
20. Florida Hammer argues that the various steps that the Defendants took to achieve this are all invalid because of failures to comply with Florida Hammer's and Cayman Hammer's corporate governance requirements. Florida Hammer therefore argues that the appointments of the Defendants as members, directors and officers of Cayman Hammer are invalid. Florida Hammer contends that it has been Cayman Hammer's sole member at all times since 25 June 2021. It contends that on 29 March 2023 it successfully removed the Defendants as members, directors and officers of Cayman Hammer (assuming that their appointments were valid), and that at all times since then, Cayman Hammer's directors have been Viktor, Mr Fraser and Mr Sansone (prior to his death).
21. Florida Hammer therefore seeks rectification of Cayman Hammer's Register of Members to record the removal of California Hammer and its replacement by Florida Hammer with effect from 25 June 2021, consequent on the merger between California Hammer and Florida Hammer. Florida Hammer seeks a declaration that it has full voting rights, and a declaration that it is the sole member of Cayman Hammer with voting rights and has been since 25 June 2021.
22. Secondly, Florida Hammer seeks a declaration that Cayman Hammer's Register of Directors correctly records that Cayman Hammer's directors as from 29 March 2023 are Viktor, Mr Fraser and Mr Sansone (up to the date of his death). It also seeks a declaration that the Defendants were never properly appointed as directors or officers of Cayman Hammer; alternatively, if they were validly appointed, a declaration that they were validly removed on 29 March 2023 by Florida Hammer signing a unanimous written resolution as Cayman Hammer's member. As a consequence, Florida Hammer seeks a declaration that Viktor and Mr Fraser are the only persons authorised to act on behalf of Cayman Hammer and to give instructions on its behalf.
23. Finally, Florida Hammer seeks its costs of these proceedings against the Defendants personally on the indemnity basis.

D. The Defendants' case in outline

24. The Defendants' pleaded case is that in or around 2017, Michael decided to merge California Hammer and Cayman Hammer, to avoid duplication of effort and to improve efficiency, with Cayman Hammer to be the surviving entity. Accordingly, on 4 December 2017, California Hammer's board unanimously approved a plan to consolidate California Hammer with Cayman Hammer, with Cayman Hammer as the survivor.
25. Due to difficulties with progressing the intended merger, it was decided in 2020 to proceed by way of a two-stage process, with California Hammer merging with a newly incorporated Florida corporation first, and that corporation then transferring its assets to Cayman Hammer thereafter.
26. The Defendants accept that California Hammer remains on Cayman Hammer's Register of Members notwithstanding that it ceased to exist on 25 June 2021. However, their pleaded case is that Florida Hammer is not and never has been a member of Cayman Hammer and that Cayman Hammer ceased to have any members on 25 June 2021.
27. The Defendants assert that the intended transfer of assets from Florida Hammer to Cayman Hammer was interrupted by Michael's diagnosis with cancer in November 2021. They allege that in furtherance of Michael's wishes as to the future management of his charitable pursuits, the following relevant corporate events occurred:
- 27.1 On 25 April 2022, Mr Alexander, Mr Alfano and Misty were appointed directors of Florida Hammer.
- 27.2 On 19 October 2022, Misty, Mr Alexander, Mr Alfano and Mr Katofsky were appointed as members of Cayman Hammer, pursuant to Article 9 of its Articles of Association.
- 27.3 On 1 November 2022, Misty, Mr Alexander, Mr Alfano, Mr Katofsky and Ms Park were made additional directors of Cayman Hammer.
- 27.4 On 3 February 2023, Mr Kyte and Mr Menzel were made additional directors of Cayman Hammer.
28. The Defendants dispute the validity of the resolutions passed by Florida Hammer on 29 March 2023 on the grounds that:

- 28.1 Florida Hammer was not a member of, and was not entitled to be registered as a member of, Cayman Hammer. It therefore did not have any right to attend meetings of Cayman Hammer's members nor any power to vote or pass unanimous resolutions.
- 28.2 Further, even if Florida Hammer had become a member of Cayman Hammer, its membership had not been registered and so it was not entitled to vote or pass unanimous resolutions.
29. The Defendants counterclaim for declarations that:
- 29.1 California Hammer is not a member of Cayman Hammer following its dissolution on 25 June 2021;
- 29.2 Florida Hammer is not, and is not entitled to be registered as, a member of Cayman Hammer;
- 29.3 Cayman Hammer's members are Misty, Mr Alexander, Mr Alfano and Mr Katofsky;
- 29.4 Viktor, Mr Fraser and Mr Sansone were never validly appointed as directors of Cayman Hammer; and
- 29.5 Cayman Hammer's sole director at all material times following Michael's death on 20 November 2022 was Samuel I Ltd.
30. The Defendants also counterclaim for rectification of Cayman Hammer's Register of Directors:
- 30.1 to show Samuel I Ltd as the sole director; and
- 30.2 to show Misty, Mr Alexander, Mr Alfano, Mr Katofsky and Ms Park as directors.

E. The issues at the trial

31. Based on the above, Florida Hammer identifies the headline issues for determination as follows:
- 31.1 Who should be recorded as Cayman Hammer's member(s) on its Register of Members?
- 31.2 Who should be recorded as Cayman Hammer's directors on its the Register of Directors and Officers?
32. The first headline issue raises the following subsidiary questions:

- 32.1 Is Florida Hammer the sole member of Cayman Hammer with voting rights in accordance with Cayman Hammer's Articles of Association, and has it been since 25 June 2021?
- 32.2 Should Cayman Hammer's Register of Members be rectified to record:
- (a) the removal of California Hammer as a member with full voting rights with effect from 25 June 2021; and
 - (b) the replacement of California Hammer by Florida Hammer as a member with full voting rights with effect from 25 June 2021?
- 32.3 Are Misty, Mr Alexander, Mr Alfano and/or Mr Katofsky members of Cayman Hammer, and have they been members been since 19 October 2022, alternatively since 28 June 2023?
33. The second headline issue involves determination of the following sub-issues:
- 33.1 Following Michael's death on 20 November 2022, has Cayman Hammer's sole director been Samuel I Ltd at all times?
- 33.2 Were Mr Alfano, Mr Alexander, Misty, Mr Katofsky, Ms Park, Mr Kyte and Mr Menzel validly appointed as directors of Cayman Hammer?
- 33.3 If validly appointed as Cayman Hammer's directors, were Mr Alfano, Mr Alexander, Misty, Mr Katofsky, Ms Park, Mr Kyte and Mr Menzel validly removed as directors of Cayman Hammer as of 29 March 2023?
- 33.4 Were Viktor, Mr Fraser and Mr Sansone validly appointed as directors of Cayman Hammer on 29 March 2023?
- 33.5 As of 29 March 2023, are Cayman Hammer's directors correctly recorded on its Register of Directors and Officers dated 12 April 2023 as Viktor, Mr Fraser and Mr Sansone?
34. Mr McPherson stresses that the court is not being asked to determine any of the following three issues, which may be or may become the subject of different or subsequent litigation between the parties:
- 34.1 Michael's capacity during 2022 as his health deteriorated;
- 34.2 whether Michael may have been subject to undue influence during 2022 as his health deteriorated; and

34.3 whether the Defendants acted for an improper purpose during 2022 and 2023 in their capacities as directors or officers of Cayman Hammer.

F. The procedural background

35. In light of the debarring of the Defendants from participating in the trial, it is necessary to set out some details of the procedural history of the matter.
36. Florida Hammer commenced this claim on 4 May 2023 by way of an originating summons against Cayman Hammer alone. Conduct of the matter was assigned to the Chief Justice. On 9 May 2023, the Chief Justice agreed to Florida Hammer's request to abridge time for the hearing of the originating summons and listed it for final hearing on 16 May 2023.
37. At the hearing on 16 May 2023, it appears that Cayman Hammer argued that it needed more time to respond to the originating summons. The Chief Justice gave Florida Hammer leave to join the Defendants and the Attorney General. She ordered that the parties should endeavour to agree directions for the further conduct of the originating summons.
38. On 25 May 2023, Florida Cayman amended the originating summons to join the Defendants and the Attorney General, as ordered.
39. A Defence and Counterclaim was filed and served on behalf of Cayman Hammer and the Defendants collectively on 25 July 2023 but was immediately amended on 26 July 2023 to remove references to Cayman Hammer, so that the Amended Defence and Counterclaim was filed and served on behalf of the Defendants alone.
40. It appears that the parties were not able to agree directions. On 14 July 2023, Florida Hammer filed a summons for directions and on 25 July 2023, the Defendants filed a summons for leave to issue third party notices against Viktor, Mr Fraser and Mr Sansone. These summonses prompted a consent order dated 28 July 2023, which provided for the Defendants to re-amend their counterclaim and for Viktor, Mr Fraser and Mr Sansone to be joined as third parties. The consent order also dealt with filing of further factual evidence on both sides and expert evidence on the law of California and Florida and

ordered that a case management conference be listed for the first available date after 25 September 2023 to address further directions to a disposal hearing.

41. The re-amendment of the Defendants' Defence and Counterclaim took place on 7 August 2023, and mainly involved the deletion of the Defendants' counterclaim for damages.
42. The case management conference was fixed for 6 October 2023. Mr McPherson informed me at an earlier hearing, and a transcript of the case management conference is in the trial bundle, which confirms this, that the only outstanding issue at that point was whether or not there should be cross-examination at trial of the witnesses. The Chief Justice strongly encouraged the parties to discuss and reach agreement on this, which they appeared to have done.
43. However, the agreement rapidly fell apart, and it was necessary to re-list the matter before the Chief Justice on 12 December 2023, when the Chief Justice made an order for limited cross-examination of the factual witnesses. In addition, she dismissed a summons under GCR O.14A filed by the Defendants seeking a summary determination of a question of law.
44. On 3 January 2024, the trial was fixed to commence on Monday 8 April 2024, and the matter was subsequently re-assigned from the Chief Justice to me.
45. In the week before the trial was due to commence, the Defendants' then-attorneys filed an application to come off the record, and on Thursday 4 April 2024 they filed an application on behalf of the Defendants to adjourn the trial to enable a new firm of attorneys to take over.
46. The court made arrangements to accommodate the Defendants' application at very short notice and it was heard on Friday 5 April 2024. Mr McPherson for Florida Hammer argued strongly against granting any adjournment of the trial, which he said had been engineered by the Defendants to attempt to delay the inevitable findings that would be made against them. Mr McPherson argued that, if I were to adjourn the trial, the Defendants should be ordered to make a payment on account of Florida Hammer's costs thrown away, backed by a debaring order in the event of non-payment of those costs.

47. I was persuaded in the Defendants' favour that it would be unfair to require the trial to proceed on 8 April 2024, and I therefore adjourned it to commence on 3 June 2024. As the "price" for this, I ordered that the Defendants should pay the costs thrown away by the adjournment on the indemnity basis (which the Defendants had offered to do) and that they should make a payment on account of those costs in a sum to be determined. However, I did not make the debarring order requested by Mr McPherson. I refer to my judgment dated 9 April 2024 for a fuller explanation of my reasons for those decisions.
48. I heard argument on the amount of the payment on account of costs on 18 April 2024, when I ordered that the Defendants should pay a total of US \$213,000 by 26 April 2024. In relation to the relatively short time allowed for payment, I noted that the Defendants had been aware that they were likely to have to pay a sum of at least this figure since no later than 2 April 2024. I refer to my judgment dated 18 April 2024. I also bore in mind that the Defendants had volunteered to pay Florida Hammer's costs thrown away in advance of the adjournment application.
49. The Defendants did not make the payment on account of costs within the time ordered but did so just under one week late on or around 1 May 2024, after Florida Hammer had issued an application for a debarring order based on the Defendants' default in compliance.
50. The case then came back before me on 13 May 2024 on an urgent application by Florida Hammer for an interim injunction restraining the Defendants from acting or purporting to act on behalf of Cayman Hammer pending the determination of the trial. The application arose as a result of the Defendants causing Cayman Hammer to file for Chapter 11 bankruptcy protection in California on 6 May 2024. The Chapter 11 application was signed by Misty on behalf of Cayman Hammer. The filing identified Misty, Mr Alexander, Mr Alfano, Ms Park, Mr Kyte and Mr Menzel as being Cayman Hammer's directors and officers. Mr Katofsky had apparently resigned during March 2024. It did not mention Viktor and Mr Fraser's claim that they are Cayman Hammer's directors.
51. Mr McPherson argued that the Chapter 11 filing was not made for a *bona fide* reason. The information provided in the filing indicated that Cayman Hammer's alleged liabilities were covered many times over by its assets, so that it was questionable why Cayman Hammer needed bankruptcy protection at all. He pointed out that the filing purported to have been authorised by a resolution of the Defendants

as Cayman Hammer's directors passed on 18 March 2024, which was not disclosed to me when the Defendants applied to adjourn the trial on 5 April 2024.

52. The Defendants did not file any evidence in response to the injunction application to explain why they had decided that Cayman Hammer needed to seek Chapter 11 protection, nor why it needed it at that particular time. Whilst Mr Harris of Nelsons, who appeared for the Defendants at the hearing, disclaimed that this was the Defendants' intention, it appeared that the filing had been made for tactical reasons, to obtain and rely on the automatic stay of proceedings resulting from the Chapter 11 filing to prevent this action from progressing to trial.
53. I granted the injunction requested by Florida Hammer for the reasons set out in my extempore judgment dated 13 May 2024, as finalised and approved on 16 May 2024. In brief, I considered that the Defendants' action in: (a) unilaterally terminating the informal arrangement between the parties that neither would purport to take unilateral steps on behalf of Cayman Hammer until the conclusion of the trial of the Cayman action, and (b) proceeding with the Chapter 11 filing, was an attempt to pre-judge the outcome of this trial. I was also satisfied that there was a real and significant risk that Cayman Hammer's assets would be dissipated by the Defendants, and that an eventual order for damages against the Defendants personally would not be a sufficient remedy.
54. In addition to my substantive order, I ordered that the Defendants should pay the costs of the application on the indemnity basis and that the Defendants should make a payment on account of those costs in the sum of US \$45,000 by 21 May 2024. And, on this occasion, I ordered that in default of payment, the Defendants would be debarred from defending the claim against them and from pursuing their counterclaim.
55. The Defendants did not make the payment ordered. Accordingly, the debarring order came into effect on 22 May 2024. They did not apply to me for a stay or for more time to pay. They did not put forward any evidence that they were unable to make the payment. Given that they had paid US \$213,000 approximately 3 weeks earlier, I am driven to the conclusion that the Defendants decided that they would no longer participate in the Cayman proceedings.
56. Moreover, despite statements to me by their counsel in court on 13 May 2024 that the Defendants had no intention of seeking further to delay or to disrupt this trial and that they wanted the trial to

proceed, immediately following the hearing on 13 May 2024, the Defendants caused Cayman Hammer to make an emergency application to the US Bankruptcy Court on 14 May 2024 for a declaration that the automatic stay prevented the trial before me from going ahead and that Florida Hammer should be ordered not to progress the Cayman proceedings without obtaining sanction from the US Bankruptcy Court. Florida Hammer opposed the motion, and it was refused by the US Bankruptcy Court insofar as it requested that the Cayman proceedings should be subject to the automatic stay. As Mr McPherson pointed out in his submissions, this conduct was a breach of my order by the Defendants and probably a contempt of the Cayman court.

57. Finally of relevance, on 23 May 2024 the Defendants filed a notice of appeal against my order dated 13 May 2024. Again, there was no application to me or to the Court of Appeal for a stay of any part of my order; nor was there a second application by the Defendants to adjourn the trial.

G. The consequences of the procedure adopted

58. The originating summons procedure is intended to be used in cases which do not involve significant factual dispute. The preparation for the hearing of an originating summons is streamlined. The plaintiff must file and serve evidence in support of the originating summons within 14 days of the defendant acknowledging service, the defendant has 28 days to file and serve evidence in response, and the plaintiff must file any evidence in response within a further 14 days. There is no discovery process (unless the court specifically orders it). The court will consider to what extent there may be a factual dispute and whether the originating summons can be disposed of on the affidavit evidence alone, or whether some cross-examination on the affidavits or oral evidence may be required. It is not unusual for the matter to proceed to a final hearing without any oral evidence.
59. Florida Cayman made the tactical decision to proceed by way of originating summons to take advantage of the speedier route to disposal that I have described rather than proceeding by way of a writ action, albeit I expect that the matter did not reach a trial as quickly as Florida Hammer was hoping. The three issues that Mr McPherson identifies, as summarised in paragraph 34 above, are not before the court precisely because they would raise the kinds of factual issues that would require discovery, oral evidence and cross-examination, and would make the originating summons procedure inappropriate.

60. Mr McPherson points out that, because the parties have not been required to give discovery, the documents before the court for the trial comprise only those documents that each party has selected and exhibited to affidavits. In other words, the documents before the court are a subset of the universe of relevant documents that would normally be available.
61. A consequence of this is that there are gaps in the documentary evidence. Florida Cayman has requested production of a number of documents by the Defendants which appear to be relevant, but the Defendants have not provided them. Mr McPherson submits that the documentary picture is sufficiently clear to enable me to determine the issues before me, but insofar as there are gaps, he invites me to find that:
- 61.1 it has always been open to the Defendants to fill those gaps (since one or more of the Defendants has had responsibility for record-keeping at all material times); and
- 61.2 I should draw appropriate adverse inferences against the Defendants in respect of any missing documents.
62. The Defendants have sworn affidavits and exhibited a large number of documents in support of their case. They were apparently fully intending to contest the trial of this matter when it was listed before me in April 2024 until they were obliged to change their representation. At the hearing of the application on 5 April 2024, all parties indicated that the case was ready for trial. The Defendants were also seemingly ready to go to trial on the evidence they had filed at all relevant times until 22 May 2024, when the debaring order took effect.
63. I therefore infer that, whilst the documentary evidence may omit documents that may be unhelpful or damaging to the Defendants' case, the Defendants have put into evidence the most persuasive documentary evidence to support their case. In other words, it is unlikely that there are documents available, which are not before me, that would make the Defendants' case stronger than it currently appears. I agree with Mr McPherson that it has always been open to the Defendants to fill any gaps in the contemporaneous documentary record. However, I have not found it necessary to draw adverse inferences against the Defendants on the basis of their failure to make additional documents available, except in one limited respect.

H. The consequences of the Defendants' procedural default

64. The consequence of the Defendants' failure to make the payment on account of costs that I ordered on 13 May 2024 is that they are now debarred from defending the claim against them and from advancing their counterclaim.
65. Mr McPherson draws my attention to the English case of *Time Travel (UK) Limited v Pakistan International Airlines Corp* [2019] EWHC 3732 (Ch), which was approved by the English Court of Appeal in *Hirachand v Hirachand* [2021] EWCA Civ 1498; [2022] 1 WLR 1162 and which has been applied and commented upon in a number of subsequent English cases.
66. I am not aware of any Cayman Islands authority on the effect of a debarring order on the ability of a party to participate in a trial. I therefore set out below my own formulation of the approach that should be taken, based upon *Time Travel (UK) Limited* and the later English cases, which I consider are useful guidance as to the approach to be taken in the Cayman Islands. For this purpose, I refer to the party against whom the debarring order has been made as the defendant, even though debarring orders are equally available against plaintiffs.
- 66.1 A debarring order is an important sanction available to the court in the exercise of its case management powers, and an important method of ensuring that the court's case management orders are respected. As such, defendants should not normally be allowed to escape from the consequences of a debarring order.
- 66.2 The effect of a debarring order depends upon its specific terms, which must be carefully considered and construed in a restrictive way.
- 66.3 Where an order debars a defendant from defending a particular proceeding, this should mean what it says: the defendant should not be permitted to participate in the trial in a way which undermines the debarring order or permits the defendant to escape its effect. Thus, the defendant should not be allowed to defend the claim in the normal way, for example by adducing evidence, cross-examining witnesses or making submissions.
- 66.4 The corollary is that the defendant should be permitted to participate in ways that do not conflict with the scope of the debarring order or undermine its purpose. Where the debarring order prevents defending the claim, it should not prevent the defendant from proposing textual corrections to the judgment or identifying errors. The defendant should also be permitted to

address the court on the form of order, after the substantive decision on the trial has been made, and on costs.

66.5 Even where a debaring order has been made, the court has a narrow residual discretion to permit a debarred defendant to take part in the trial in the interests of justice. This might include permitting the defendant to make some limited submissions, for example to correct errors of law (whether of the plaintiff or the court). It might even extend to some limited cross-examination, although that is likely to be very unusual.

66.6 Where a debaring order has the effect of preventing a defendant from participating in a trial, the position does not then go by default. The plaintiff must still demonstrate at trial to the satisfaction of the court that it is entitled to the relief sought.

66.7 A debaring order, or an order striking out the defence, does not mean that the court has to ignore the defence. It can still be considered by the court for the purposes of understanding the parties' positions and pleaded cases, and to understand the issues that require determination. The court could hear from counsel for the debarred defendant to obtain assistance for the benefit of the court in understanding the nature and extent of the relevant claim or defence.

67. So, in practical terms, the debaring order means that at trial the Defendants:

67.1 are not permitted to cross-examine Florida Hammer's witnesses;

67.2 are not permitted to present any evidence to support their case; and

67.3 are not entitled to make submissions to the court on the merits or substance of the issues raised by the Amended Originating Summons or the Re-Amended Counterclaim.

I. The materials before the court

68. The relevant materials before the court comprise:

68.1 the pleadings, namely:

(a) Florida Hammer's Amended Originating Summons dated 25 May 2023, and

(b) the Defendants' Re-Amended Defence and Counterclaim dated 7 August 2023;

68.2 the interlocutory summonses, judgments and orders, including transcripts of certain hearings;

68.3 written evidence from factual witnesses, as follows:

- (a) four affidavits sworn by Viktor
- (b) an affidavit sworn by Mr Fraser
- (c) an affidavit sworn by Mr Sansone, and an Evidence Act notice in respect of the same
- (d) three affidavits sworn by Mr Alfano
- (e) an affidavit sworn by Mr Barton
- (f) an affidavit sworn by Mr Alexander
- (g) an affidavit sworn by Misty
- (h) an affidavit sworn by Cline Glidden of Ogier, who were Michael's long-standing Cayman Islands attorneys-at-law
- (i) an affidavit sworn by James Bergstrom of Ogier
- (j) certain additional affidavits sworn by attorneys involved, mainly dealing with exhibiting certain documents to put them into evidence or interlocutory matters;

68.4 evidence from expert witnesses, in the form of:

- (a) an expert report of Kelly L Hellmuth (with Appendices A-D) dated 15 September 2023 relied upon by Florida Hammer; and
- (b) an expert report of Professor Steven Davidoff Solomon dated 19 September 2023 obtained by the Defendants;

68.5 a correspondence bundle; and

68.6 an exhibits bundle comprising just short of 2,050 pages.

69. In addition to the documentary materials, Viktor and Mr Fraser gave oral evidence in person, and Ms Hellmuth, Florida Hammer's expert on US law, gave oral evidence by video link. As result of the debarring order, there was no cross-examination of Viktor, Mr Fraser or Ms Hellmuth.

70. I am satisfied that Viktor and Mr Fraser were both honest witnesses, aiming to assist the court with their best recollections of events. I have no reason to doubt the veracity of their evidence.

71. I formed the view that Ms Hellmuth is a knowledgeable expert on California and Florida law relating to non-profit corporations and able to speak to the issues raised in this case. I accept her evidence except in relation to one point concerning notice of meetings, and the effect of the internal management rule where notice is given to a company secretary who then fails to inform the company's board. However, in the event, this is not material to the outcome in this case.
72. With that introduction to the evidence, I can now summarise the relevant facts and set out my factual findings.
73. As indicated earlier in this judgment, the Defendants have been debarred from taking part in the trial and have therefore not adduced any live evidence to support their case; none of the witnesses has been cross-examined; and the documentary evidence is incomplete as a result of the nature of the proceedings and the Defendants' failures to respond to document requests made by Florida Hammer.
74. However, the Defendants were given the opportunity to participate in these proceedings and did so until 22 May 2024. To the extent that my findings of fact may be based upon an incomplete documentary picture and unchallenged evidence, that is a result of the Defendants' decision not to continue to participate thereafter.

J. The relevant facts

J.1 Preliminaries

75. Cayman Hammer was founded by California Hammer as founding member on 22 June 1995. Cayman Hammer's Articles of Association include:

"2. The number of members with which the Company proposes to be registered is one but the number of members may be increased by Special Resolution."

There is no suggestion before me that this provision was ever changed in the period before 2017 and there is no evidence that it was changed thereafter.

76. Cayman Hammer's Articles provide in Articles 19 and 20 that there shall be one ordinary general meeting of the members in each calendar year and that all other members' meetings shall be

extraordinary general meetings, and that there shall be at least one directors' meeting (in the Cayman Islands) in each calendar year.

J.2 2017

77. During 2017:

77.1 Michael and Misty moved back to live in the Cayman Islands;

77.2 Michael and Misty married in the Cayman Islands; and

77.3 the prospect of winding down California Hammer and transferring its assets to Cayman Hammer was being discussed by California Hammer's board of directors.

78. On 4 December 2017, Mr Barton prepared a memorandum for California Hammer's board of directors discussing the options for either (i) a transfer of California Hammer's assets to Cayman Hammer followed by the termination of California Hammer, or (ii) a transfer of California Hammer's assets to Cayman Hammer without any termination of California Hammer. It is likely that this memorandum was prepared for and reviewed by California Hammer's board of directors in advance of or at the board meeting that took place that day.

79. The minutes of California Hammer's board meeting on 4 December 2017 record that Mr Barton called into the meeting by telephone. The minutes record that the board members acknowledged that they had received and reviewed a copy of "*The Armand Hammer Foundation Agreement Merger*". However, there is no record in the minutes of any resolution to approve the merger agreement, nor of any discussion at the board meeting of Mr Barton's memorandum. The minutes were signed by Michael as chairman and by Mr Alexander as secretary.

80. The documents in evidence include an unexecuted form of "*Agreement for Merger*" between California Hammer and Cayman Hammer, which was stated to be effective as of 31 December 2017. It is likely that this is the "*The Armand Hammer Foundation Agreement Merger*" referred to in the minutes of the board meeting.

81. There is no minute before me of any corresponding meeting of Cayman Hammer's member or board of directors considering any proposed merger.

82. On 8 December 2017, Mr Barton wrote to California Hammer’s board of directors to provide an update on the status of the “*proposed merger of [California Hammer] and [Cayman Hammer] which the board approved at our recently concluded meeting.*” Mr Barton recommended that an asset transfer was preferable to a merger of the two foundations. He identified the need for a special board meeting to consider and approve the documentation. He indicated that he intended to continue to work on the documentation and process, with a view to the asset transfer taking place in the first quarter of 2018.
83. I do not see the basis for Mr Barton’s statement that a merger of California Hammer and Cayman Hammer had been approved by California Hammer’s board: as mentioned above, there is no such approval recorded in the minutes of the board meeting.
84. In any event, Mr Barton’s email indicates that the idea of a merger and the form of “*Agreement for Merger*” were both superseded by his recommendation to proceed instead by way of an asset transfer.

J.3 2018

85. Contrary to the intent stated in Mr Barton’s email of 8 December 2017, there are no documents before me that demonstrate that the proposed transfer of assets from California Hammer to Cayman Hammer was progressed during 2018.
86. The next board meeting of California Hammer’s directors took place on 18 December 2018. The content of the reports by various sub-committees, as recorded in the minutes, makes clear that there were no intermediate meetings of the board. There is no reference in the minutes to any discussion of a merger with Cayman Hammer or an asset transfer from California Hammer to Cayman Hammer, except that the minutes record that California Hammer had made a grant or loan to Cayman Hammer of US \$1.8 million. The minutes were again signed by Michael as chairman and by Mr Alexander as secretary. I have not seen any minutes of a corresponding meeting of Cayman Hammer’s member and/or directors.
87. In his oral evidence, Viktor said that he recalled seeing an email during 2018 indicating that the proposal would no longer happen, although he could not recall the precise words used. Mr Fraser did

not recall any discussion about a merger or asset transfer taking place in 2017 and did not recall why it did not proceed.

88. I find as a fact that any intention of California Hammer's directors to proceed with a merger between California Hammer and Cayman Hammer or to transfer California Hammer's assets to Cayman Hammer had run into the sand during 2018.

J.4 2019

89. The position is the same for 2019: there are no documents before me that demonstrate any active consideration or progress with any proposed merger of California Hammer with Cayman Hammer or transfer of assets from California Hammer to Cayman Hammer (other than routine grants or loans from California Hammer to Cayman Hammer in the ordinary course of their charitable work).

90. The minutes of California Hammer's board meeting on 18 December 2019 record as the first item of business that the minutes of the meeting held on 18 December 2018 were approved. Along with the content of the reports from sub-committees, this makes plain that this was the first board meeting in 2019. The minutes do not include any reference to progressing any proposed merger or asset transfer between California Hammer and Cayman Hammer. The minutes were once more signed by Michael as chairman and by Mr Alexander as secretary. And once again, I have not seen any minutes of a corresponding meeting of Cayman Hammer's member and/or directors.

J.5 2020

91. It appears that during 2020, the idea of re-domiciling California Hammer to Florida originated and was developed. In advance of California Hammer's board meeting set for 18 November 2020, a board pack was circulated. One of the agenda items was a proposal for reincorporation in Florida, through a plan of merger, to be effective from 31 December 2020. It was noted that Mr Barton was to speak to this, along with Mr Randy Sterns, a Florida attorney. The board papers included:

91.1 draft Articles of Incorporation of Florida Hammer;

91.2 draft Bylaws of Florida Hammer;

91.3 a draft Organisational Written Action of Initial Board of Florida Hammer, intended to take the place of a meeting of Florida Hammer's initial directors and to authorise the actions specified

in the document, including the appointment of a board of directors and adoption of certain policies;

- 91.4 draft resolutions of California Hammer's and Florida Hammer's boards approving the intended merger between California Hammer and Florida Hammer as being in California Hammer's and Florida Hammer's best interests, with Florida Hammer being the surviving corporation following the merger;
- 91.5 draft Articles of Merger between California Hammer and Florida Hammer;
- 91.6 a draft Certificate of Approval of Agreement of Merger to be given by Michael and Mr Alexander on behalf of California Hammer as president and secretary;
- 91.7 a draft Officer's Certificate of Agreement of Merger to be given on behalf of Florida Hammer by its president and secretary; and
- 91.8 a draft Agreement and Plan of Merger.

92. California Hammer's board meeting took place on 18 November 2020.

- 92.1 The minutes record that the first item of business was approval of the minutes of the meeting held on 18 December 2019. Once again, this and the content of the reports from sub-committees, make plain that this was the first meeting of California Hammer's board in 2020.
- 92.2 The minute regarding the proposed "reincorporation in Florida" recorded the following explanation for the proposal:

"... It was noted that with Michael Hammer having moved out of California and no officers or directors currently living in California, it made little sense to continue California as the Foundation's legal situs. The Foundation has established an office in Pompano Beach, Florida, which was just recently opened and where all official Foundation correspondence and business will be conducted. This Florida location works great for Mr Hammer since his primary residence has become the Cayman Islands and Florida is a natural and efficient location for him to travel back to the United States for the work of the Foundation, substantially reducing travel time and costs. ..."

Notably, there is no suggestion that the merger between California Hammer and Florida Hammer was intended to be the first step in a process of eventually merging with Cayman Hammer. Instead, the opening of the office in Pompano Beach, and the reference to carrying out business there indicates that it was intended to be a properly operational situs for Florida Hammer. The underlying justification for the merger and re-domicile in Florida also makes

objective sense, namely that it would save travel time and costs and would be much more convenient for Michael.

92.3 The minutes record that the merger proposal and the necessary documents regarding Florida Hammer and the merger were unanimously approved by the board, and Mr Barton and Mr Sterns were authorised to file all documents necessary to proceed. The minutes were again signed by Michael as chairman and Mr Alexander as secretary.

93. Michael signed the Agreement and Plan of Merger on 18 November 2020 as president of California Hammer and again as president of Florida Hammer.

94. To facilitate the merger, Florida Hammer was incorporated in Florida on 30 November 2020.

95. On 29 December 2020, Michael signed the Articles of Merger on behalf of California Hammer and Mr Alexander signed on behalf of Florida Hammer.

J.6 2021

96. It appears that there was an unanticipated delay in being able to complete the merger between California Hammer and Florida Hammer due to the Attorney General's Office in California raising some queries. Mr Barton and Mr Sterns prepared a memorandum for California Hammer's board of directors dated 10 May 2021, setting out a detailed chronology of the steps taken up to that date to progress the merger. They recommended updating and re-signing some of the merger documents.

97. On 17 May 2021, Michael and Mr Alexander signed a replacement Certificate of Approval of Agreement of Merger on behalf of California Hammer; a replacement Officer's Certificate of Agreement of Merger for Florida Hammer; and an Agreement of Merger signed on behalf of both California Hammer and Florida Hammer.

98. The merger between California Hammer and Florida Hammer finally completed on 25 June 2021. It is common ground between Florida Hammer and the Defendants that California Hammer immediately ceased to exist as a corporation upon completion of the merger.

99. During November 2021, Michael was diagnosed with glioblastoma, an aggressive form of brain tumour with a poor prognosis for long term survival.

J.7 February – April 2022

100. On 9 February 2022, Michael executed a lengthy and detailed durable power of attorney in favour of Mr Alfano, with Mr Barton and Misty as successors if needed.

101. On 12 April 2022, Michael signed a Unanimous Written Consent of the Board of Directors and the Sole Member in respect of Cayman Hammer. The purpose of the resolution was to appoint Mr Alfano as Cayman Hammer's Treasurer. The resolution was signed by Michael in his personal capacity as a director of Cayman Hammer, and again as president of Samuel I Ltd, which was the other director of Cayman Hammer. He then signed the resolution a third time on behalf of Florida Hammer (as its president), as the sole member of Cayman Hammer.

102. The first meeting of Florida Hammer's board of directors took place on 25 April 2022.

102.1 The minutes record that Michael attended the meeting but moved that Mr Alexander be elected chairman. The meeting was therefore conducted by Mr Alexander. At Michael's request, Misty was appointed as a director, and Michael's previous appointment of Mr Alfano as treasurer of Florida Hammer was noted (the appointment document is not in evidence before me). As a result of Misty's addition, Florida Hammer's board of directors thereafter comprised Michael, Viktor, Mr Fraser, Mr Sansone, Mr Alexander and Misty.

102.2 Notably, the minutes record that the next item of business addressed was "*to approve the minutes of the annual meeting of the Board held November 18, 2020.*" That meeting was in fact a meeting of California Hammer's board of directors, not Florida Hammer's board. However, the failure of Florida Hammer's board to make any distinction between California Hammer and Florida Hammer is entirely consistent with the intention that there was to be a seamless transition from California Hammer to Florida Hammer.

102.3 Finally, of relevance, the minutes recorded the merger between California Hammer and Florida Hammer, and the delay caused by the California Attorney General's Office. No mention was made of any proposal for a further merger between Florida Hammer and Cayman Hammer.

J.8 July – August 2022

103. On 6 July 2022, Viktor wrote by email to the members of Florida Hammer’s board indicating that some issues had been drawn to his attention by Florida Hammer’s non-profit partners and requesting a board meeting for late August 2022. He proposed 24 August 2022 for the meeting. Viktor stated that he would send a calendar invitation, Zoom link and agenda once the date and time had been confirmed. Mr Alexander suggested 17 August 2022 instead, which appears to have been agreed.

104. However, as I now explain, the plans for the board meeting were derailed.

104.1 On Sunday 7 August 2022, Mr Barton emailed the directors of Florida Hammer asking to be notified of any matters to be included on the agenda. Mr Barton indicated that he had already received agenda items from Mr Sansone and Mr Alexander.

104.2 This email prompted a response from Viktor later the same day indicating that, given Michael’s condition at that time, Viktor was prepared to chair the meeting and had been collaborating with board members and the support staff to prepare for the meeting. He indicated that he was planning to send out an agenda later that week and was happy to collaborate with Mr Barton on this and would send a Zoom link for the meeting itself. Viktor requested that Mr Alfano provide a package of financial statements for the year to date in advance of the meeting, to allow time for review.

104.3 Mr Barton sent a surprisingly terse response, simply stating:

“Rex was elected acting chairman at the last meeting Viktor.”

104.4 Viktor replied that his understanding was that Mr Alexander had been appointed as chairman for the meeting, not chairman in perpetuity to replace Michael. Viktor referred to section 5.18 of Florida Hammer’s bylaws, which he said indicate that if the chairman is unable to chair a meeting, the board can vote to appoint a temporary chairman for that particular meeting.

104.5 Mr Barton responded the following morning that Mr Alexander was appointed acting chairman, not as a replacement for Michael as chairman, and would be the acting chairman for all meetings. However, he indicated that he would add this as the first item on the agenda for discussion at the board meeting.

104.6 I interpose here that section 5.18 of Florida Hammer’s bylaws provides that:

“Section 5.18 Conduct of Meetings. Meetings of the Board shall be presided over by the chairman, or the President, or if the President and chairman are each absent, by the Vice President (if any) or, in the absence of each of these persons, by a chairman of the meeting chosen by a majority of the directors present at the meeting. ...”

Some of Florida Hammer’s other bylaws also address the roles of the president and chairman, and the conduct of meetings. The interpretation of Florida Hammer’s bylaws is a matter of Florida law, and I caveat my views accordingly. However, the bylaws do not appear to me to cater for the idea of an acting chairman for all meetings where the chairman is still in post. Thus, to the extent that it may be relevant, my view is that Mr Alexander was appointed chairman for the meeting of Florida Hammer’s board on 25 April 2022 only. If Florida Hammer’s president and chairman were absent from meetings or were present but unwilling or unable to chair them, then the election of a chairman was something to be determined at the commencement of each such meeting.

104.7 On Thursday 11 August 2022, Mr Barton circulated the agenda for Florida Hammer’s board meeting. He indicated that supporting documents would be provided over the weekend, to allow time to review them before the meeting.

104.8 Starting on 11 August 2022, Mr Alfano circulated certain documents relating to Florida Hammer’s financial transactions, but not a list of payments to independent contractors, which Viktor requested.

104.9 On 12 August 2022, Viktor proposed postponing the meeting until the requested financial information had been provided, but his request was rejected. Mr Alexander said that the meeting could not be cancelled without unanimous consent of the directors.

104.10 On 17 August 2022, the day of the intended board meeting, Nelson Mullins, attorneys-at-law for Viktor, Mr Fraser and Mr Sansone, wrote to Mr Barton to inform him that they would not attend the board meeting. Nelson Mullins complained that Viktor’s, Mr Fraser’s and Mr Sansone’s repeated requests for information regarding Florida Hammer had not been complied with, so they would refuse to attend any board meetings until they were provided with the requested information. Nelson Mullins pointed out that without the attendance of Viktor, Mr Fraser and Mr Sansone, the meeting was inquorate, and that no business could be transacted.

105. In parallel with this, on 16 August 2022 Viktor and Dru made a surprise visit to see Michael at his home with Misty in California. Whilst Viktor says that it was not his intention to discuss the

management and future of the foundations, Dru brought it up and it is clear from the contents of Viktor and Misty's affidavits that the visit quickly became rancorous.

106. On 19 August 2022, Bush Ross, attorneys, wrote stating that they had been instructed on behalf of Michael, Misty and Florida Hammer, and demanded that Viktor and Dru cease and desist from communicating with Michael, his healthcare providers and Misty. In addition, they demanded that Viktor cease representing that he had authority to speak on behalf of Florida Hammer, they put forward an explanation why Viktor's requests for financial information could not be complied with within the time frame available, and they asked that Viktor, Mr Fraser and Mr Sansone identify any other outstanding requests that they needed to have answered.
107. From this point onwards until 20 November 2022, Florida Hammer's board was effectively deadlocked. Without Viktor, Mr Fraser and Mr Sansone, the board was inquorate and could not transact any business. Following Michael's death on 20 November 2022, Viktor, Mr Fraser and Mr Sansone constituted a majority of the members of the board, and so were in effective control of Florida Hammer.

J.9 September 2022

108. There was a flurry of activity on 16 September 2022 regarding Samuel I Ltd:

108.1 Michael appointed Mr Alexander as his alternate and proxy director of Cayman Hammer for all meetings and matters and for unlimited duration. Strangely, there are two versions of this document in evidence:

- (a) a version apparently signed by Michael personally; and
- (b) a version signed by Mr Alfano as Michael's attorney, presumably pursuant to the durable power of attorney that Michael had signed in his favour on 9 February 2022.

Many of the other corporate documents in evidence are digitally signed, but both of these (and most of the other documents on this date) appear to have wet-ink signatures which potentially raises a question mark over their authenticity and timing. In the absence of cross-examination of Mr Alexander and Mr Alfano, this was not explored before me, and I make no finding on it.

- 108.2 Michael, as sole director of Samuel I Ltd, signed a resolution appointing Mr Alfano as Samuel I Ltd's president in place of Michael.

108.3 Michael constituted the Michael Armand Hammer Trust, with Mr Alfano as trustee of the trust and Mr Alexander and Mr Barton as witnesses to the deed of trust. The trust assets initially comprised US \$100.

108.4 Michael then assigned his beneficial interest in the shares in Samuel I Ltd to Mr Alfano as trustee of the Michael Armand Hammer Trust. Again, there are two versions of this document in evidence:

- (a) a version signed as assignor by Mr Alfano as Michael's attorney pursuant to the durable power of attorney, which also then appears to bear Michael's signature below that; and
- (b) a version entitled "restated assignment of shares" dated as of 16 September 2022, but apparently signed at a later date – this version is formatted differently and signed by Mr Alfano alone as Michael's attorney.

108.5 An ordinary general meeting of Samuel I Ltd took place. The minutes record that Michael, Mr Alfano, Misty, Mr Alexander and Mr Barton were in attendance (despite the last three having no role within Samuel I Ltd). The minutes record the transactions outlined above regarding the transfer of the shares in Samuel I Ltd to Mr Alfano as trustee of the Michael Armand Hammer Trust, and then record resolutions proposed, seconded and carried by Mr Alfano to appoint himself as sole director, president, secretary and treasurer of Samuel I Ltd.

108.6 The upshot of this was that Mr Alfano was effectively in control of Samuel I Ltd in place of Michael.

109. Also on 16 September 2022:

109.1 Mr Alexander and Mr Alfano on behalf of Cayman Hammer's board of directors signed a unanimous written consent recognising and accepting Mr Alexander as proxy and alternate for Michael as a director, and recognising Mr Alfano as the representative of Samuel I Ltd.

109.2 A meeting of Cayman Hammer's board of directors took place in Los Angeles. The minutes dated 16 September 2022 record:

- (a) the attendance of Michael, Mr Alfano, Mr Alexander, Misty (described as a guest) and Mr Barton;
- (b) the recognition of the appointments of Mr Alexander as alternate and proxy for Michael and Mr Alfano as Samuel I Ltd's representative;

- (c) the approval of minutes of certain previous directors' meetings and Mr Alfano's appointment as treasurer dated April 2022; and
- (d) the appointment of Misty as president and chairman, Mr Alexander as vice-president and secretary and Mr Alfano as treasurer.

110. On 21 September 2022, Mr Alexander completed a certificate in respect of Cayman Hammer, confirming that its directors were himself and Samuel I Ltd (with Mr Alfano as Samuel I Ltd's president), and that its officers were Misty (president and chairman), Mr Alexander (secretary and vice president) and Mr Alfano (treasurer). Of particular significance, Mr Alexander certified that Cayman Hammer's sole member was "*The Armand Hammer Foundation*", which at this time could only have been a reference to Florida Hammer.

J.10 October 2022

111. Developments accelerated during October 2022, commencing with another flurry of activity on 19 October 2022.

112. First, Misty, Mr Alexander, Mr Alfano and Mr Katofsky applied to Cayman Hammer to become members. Copies of the emails from Misty and Mr Alexander are in the evidence before me, copies of the applications by Mr Alfano and Mr Katofsky are not.

112.1 Mr Alexander's email sent to Mr Barton on 19 October 2022 stated that it was "*my express desire to serve as a member of [Cayman Hammer] with all rights, privileges and responsibilities that come with that membership.*" Mr Barton forwarded that email to Mr Alfano, Mr Katofsky and Mr Sterns, among others, describing it as "*his formal written request to become a member.*"

112.2 Misty's application by email was sent the same day. The wording of her request was identical to Mr Alexander's email, suggesting that they were both using language provided to them, although no such email or document has been disclosed or exhibited.

112.3 In addition, the copy of Misty's email before me shows that it included an attached document entitled "*Hammer International Foundation Directors Written Consent to Appoint Members October 2022 Final.docx*". It seems likely that this was a copy of the document described in the following paragraph.

113. Secondly, Mr Alexander and Mr Alfano, as directors of Cayman Hammer, signed a unanimous written consent of the board of directors on 19 October 2022 recording that:

113.1 Misty, Mr Alexander, Mr Alfano and Mr Katofsky had all applied by email to become members of Cayman Hammer;

113.2 Cayman Hammer’s directors had “*the right*” pursuant to Article 9 of Cayman Hammer’s Articles of Association to appoint members, with or without requiring a contribution to Cayman Hammer from them; and

113.3 Cayman Hammer’s board of directors resolved to accept Misty, Mr Alexander, Mr Alfano and Mr Katofsky as members of Cayman Hammer “*with all rights, privileges and responsibilities of members as set forth in the Articles of Association of [Cayman Hammer].*”

114. There are three difficulties with this:

114.1 First, there does not appear to have been any resolution proposed or passed to increase Cayman Hammer’s permitted membership above one member. It appears that Misty, Mr Alexander, Mr Alfano and Mr Katofsky either overlooked or ignored that limitation in Article 2 of Cayman Hammer’s Articles of Association.

114.2 Secondly, Mr McPherson disputes that Cayman Hammer’s directors had the power to accept requests for membership without the agreement of the existing member. I consider this issue later in this judgment.

114.3 Thirdly, the consent does not record what voting rights Misty, Mr Alexander, Mr Alfano or Mr Katofsky were given. It is not implicit in their appointment that they should have such rights – Article 9 refers to agreement of “*what (if any) voting rights such member shall have in the Company.*” It therefore does not follow from the reference in the minutes to Misty, Mr Alexander, Mr Alfano or Mr Katofsky having “*all rights, privileges and responsibilities of members as set forth in the Articles of Association of [Cayman Hammer]*” that they had any voting rights. In my judgment, in the absence of any record that they were given such rights, they did not have any.

115. On 26 October 2022, Mr Alexander wrote to Florida Hammer’s board of directors on Florida Hammer’s headed paper stating:

“... we have debts of approximately US \$750,000 that we cannot pay without taking huge additional losses in the market by selling securities. It is fiscally irresponsible to do so or make additional donations to any charity until we solve our own financial issues and make sure we can satisfy our debts. We are working on solutions to minimize damage to the Foundation and will report at our next scheduled meeting.”

116. Notwithstanding Mr Alexander’s statement to Florida Hammer’s board that Florida Hammer had debts of US \$750,000, on 27 October 2022:

116.1 Mr Alexander as chairman and Mr Alfano as treasurer executed a form of Quitclaim Deed on behalf of Florida Hammer purporting to transfer title to the Carpinteria Property from Florida Hammer to Cayman Hammer.

116.2 Mr Alexander as acting chairman of Florida Hammer and Misty as President of Cayman Hammer executed an Art Transfer Agreement to transfer 32 listed art works from Florida Hammer to Cayman Hammer. The form of Agreement recorded that it was:

“Based upon the merger of [Florida Hammer] into [Cayman Hammer], with [Cayman Hammer] being the surviving entity ...”

117. Mr McPherson described this as the first stage of the Defendants’ asset stripping of Florida Hammer in favour of Cayman Hammer. It is difficult to see how these transactions, which had the effect of removing approximately US \$80 million of Florida Hammer’s assets (based on the Defendants’ own case that these assets had a combined value of approximately US \$80 million, see paragraph 10 above), can be reconciled with Mr Alexander’s email of the previous day.

118. Also on 27 October 2022, Mr Alfano wrote by email to Ogier, who had been Michael’s long-standing Cayman Islands attorneys-at-law, to introduce them to Mr Sterns. Mr Alfano said:

“... I’d like to introduce you to Randy Sterns at Bush Ross, PA, who is working on a merger that was approved by the [Florida Hammer] Board. ... I trust that you can work together to complete the filings in Cayman. ...”

It appears that Mr Alfano believed that Ogier were also attorneys-at-law for Cayman Hammer. As indicated later in this judgment, Ogier did not share that view.

119. Ogier and Mr Sterns exchanged emails, with Ogier asking for some background information and Mr Sterns indicating that he wished to accomplish this (*semble* the merger, rather than the meeting) by 1 November 2022.

120. I cannot see the basis for Mr Alfano's statement that the merger was approved by Florida Hammer's board of directors. The minutes of Florida Hammer's board meeting on 25 April 2022 did not record any discussion of any merger, let alone resolve to approve such a merger: see paragraph 102 above. There had not been any further meeting of Florida Hammer's board because the meeting proposed by Viktor for August 2022 had not proceeded, and the board had become deadlocked. I have to conclude that Mr Alfano's statement was untrue. Moreover, I cannot see how he could have thought it was true.

121. Mr Sterns sent various documents for review by Ogier, which he said:

"... will implement the Merger Agreement which was approved in 2017, put on hold, and then put into action with a two-step strategy of merging with a Florida entity, then eventually merging with [Cayman Hammer] as the surviving entity."

122. Again, on the basis of the documentary evidence I have set out up to this point, I cannot see any justification for Mr Sterns' statement in his email to Ogier:

122.1 There was no merger agreement approved in 2017.

122.2 What was being considered in 2017 in preference to a merger was a possible asset transfer between California Hammer and Cayman Hammer.

122.3 There is no evidence that any merger agreed in 2017 was put on hold. Instead, the absence of any reference to such a merger and Viktor and Mr Fraser's oral evidence persuades me that it was simply dropped.

122.4 There is no support in the evidence before me for there ever having been a "two-step strategy" up to this point, involving a merger between California Hammer and Florida Hammer, and then a merger between Florida Hammer and Cayman Hammer.

I have to conclude that Mr Sterns' statement was untrue. Given the apparent level of his involvement in the merger between California Hammer and Florida Hammer, and with Cayman Hammer over the period from 2020 onwards, I conclude that he is likely to have known that this statement was untrue when he made it.

123. On 28 October 2022 Mr Sterns sent Ogier "*drafts of the merger docs for the Fla entity*". These included:

123.1 draft Articles of Merger, with Cayman Hammer as the surviving corporation and Florida Hammer as the merging corporation, to be signed by Misty as Cayman Hammer's president and by Mr Alexander as chairman of Florida Hammer; and

123.2 a draft Plan of Merger between Florida Hammer and Cayman Hammer, to be signed by Mr Alexander as chairman of Florida Hammer's board and by Misty as Cayman Hammer's president and stated to be effective "as of December 31, 2017". The draft recorded in the recitals:

"WHEREAS, the parties entered into a Merger Agreement effective as of December 31, 2017 pursuant to which [Florida Hammer] with merge with [Cayman Hammer] with [Cayman Hammer] as the surviving corporation of the merger ...

WHEREAS, the voting members of [Cayman Hammer] have approved the Merger and Plan of Merger;

WHEREAS, [California Hammer] delayed implementation of the consolidation of the two public charities into a single public charity until [California Hammer] could move its operations to the State of Florida and complete a merger of the California public benefit corporation with a newly-formed Florida not for profit corporation with the Florida not for profit corporation constituting the surviving corporate entity;

WHEREAS, [Florida Hammer] has never terminated the Merger Agreement and has moved forward with its plan to combine the operations of the two public charities with [Cayman Hammer] continuing the operations and charitable activities of the combined corporate entities ..."

124. I do not know who prepared the draft Plan of Merger, but it is likely to be Mr Sterns since his firm was acting for Cayman Hammer and the proposed merger was intended to proceed under Florida law. It is clear that Ogier did not prepare it, otherwise there would be no need for Mr Sterns to forward the draft to them.

125. There are a number of issues with the recitals in the draft Plan of Merger set out above:

125.1 There was no merger agreement entered into in or about 2017: see paragraphs 83 and 84 above.

It follows that there was no merger agreement to be terminated or left in place.

125.2 Florida Hammer had not entered into any merger agreement in 2017 as it was not incorporated until 30 November 2020.

125.3 There is no evidence before me that supports the statement that California Hammer had delayed consolidation with Cayman Hammer until California Hammer could move its operations to Florida. The conclusion to be drawn from the various minutes that I have described is that there was a proposal for a merger or asset transfer from California Hammer to Cayman Hammer in

December 2017 that did not proceed. In late 2020 a proposal that California Hammer's operations move to Florida via a merger with Florida Hammer was approved. This was for Michael's convenience: see paragraph 92.2 above. There was no suggestion at that time that there was to be a second merger between Florida Hammer and Cayman Hammer.

125.4 Florida Hammer had not moved forward with any plan to combine the operations of Florida Hammer with Cayman Hammer. There was no discussion of this at Florida Hammer's April 2022 board meeting, the August 2022 board meeting did not proceed, and Florida Hammer's board was deadlocked thereafter.

125.5 Similarly, there is no record that I have seen of any discussion of a merger of Florida Hammer with Cayman Hammer at any of Cayman Hammer's board meetings up to this point.

Accordingly, these recitals in the draft Plan of Merger appear to me to be false.

126. On 31 October 2022, Ogier met with Mr Sterns via a Teams meeting to discuss the proposed merger. The evidence on the attendees is a little thin, but on 1 November 2022, Mr Barton wrote to Ogier by email apologising that he had not been able to make the call. He stressed that the transaction was time sensitive and that they wished "*to complete the merger documentation within the next week or so if possible.*" No reason was given for the urgency. One inference that could be drawn is that the urgency related to Michael's deteriorating health, and a desire on the part of the Defendants to complete the transaction before he died.

J.11 November 2022

127. On 1 November 2022, Mr Alexander as chairman of Florida Hammer and Misty as president and chairman of Cayman Hammer, signed a Bill of Sale and Assignment to transfer the contents of the Carpinteria Property to Cayman Hammer for US \$10.00. There was a suggestion on behalf of the Defendants in some of the documents in the bundle that the majority of the contents formed part of Michael's estate and were therefore not part of California Hammer's or Florida Hammer's assets. Against this, Viktor told me in his oral evidence, and I accept, that the Carpinteria Property had been the main office for California Hammer for many years. It was also where all of the artwork, memorabilia and items relating to Viktor's great grandfather and his work were stored and maintained, when not on loan to museums. This continued to be its function after the merger between

California Hammer and Florida Hammer. In the circumstances, it seems inherently implausible that the value of the contents was in fact US \$10.00.

128. The fact that the transfers of the Carpinteria Property, its contents and the art collection from Florida Hammer to Cayman Hammer were effectively *gratis* may be explicable if they were part of a genuine reorganisation and restructuring of Florida Hammer and Cayman Hammer. However, there is no evidence before me of any consideration in 2022 of the tax or regulatory implications of the asset transfers or of the proposed merger between Florida Hammer and Cayman Hammer. Given that ownership of the assets was being moved outside the United States to the Cayman Islands, I would expect that the parties would wish to consider whether there was a resulting tax liability or any regulatory issues, and the US IRS would be very likely to take a keen interest in the transactions. In contrast, in respect of the proposed asset transfer in 2017 and the merger of California Hammer with Florida Hammer in 2020/2021 professional advisers were involved to deal with the accounting, tax and regulatory issues that arose as a result. For example, Mr Barton's memos in 2017 and 2018 refer to the involvement of and advice obtained from CPAs.
129. It may be that the Defendants, if they had participated in this trial, would have produced documentation to demonstrate that they obtained advice in 2022 on the tax and regulatory implications of the intended merger between Florida Hammer and Cayman Hammer. However, this does not seem very likely given the complete absence of any reference to or consideration of such advice in any of Cayman Hammer's board meetings before or after this time. I regret to say that the overall impression generated supports Mr McPherson's characterisation of events as being a scheme to strip Florida Hammer of its assets and to get them under the control of the Defendants, rather than being a properly thought-out reorganisation of Florida Hammer and Cayman Hammer for legitimate business purposes.
130. Also on 1 November 2022, the members and directors of Cayman Hammer held an EGM. The minutes record:
- 130.1 the director attendees were Mr Alfano (on behalf of Samuel I Ltd), Mr Alexander as Michael's proxy and alternate, and Mr Alexander in his own right;
- 130.2 the member attendees were Mr Alexander, Mr Katofsky, Mr Alfano, Misty and Florida Hammer through the attendance of Mr Alexander as Florida Hammer's acting chairman;

130.3 other attendees were Mr Barton and Mr Sterns;

130.4 the appointment of Misty as president and chairman, of Mr Alexander as vice-president and secretary and of Mr Alfano as treasurer by Cayman Hammer's directors was ratified by the members;

130.5 under the heading "*previous minutes and consents*",

"UPON MOTION MADE, SECONDED AND UNANIMOUSLY APPROVED OR RATIFIED, the following were accepted: ... (viii) Hammer International Unanimous Written Consent of the Board of Directors dated October 16, 2022.

The Chairman announced that the appointment of additional Members of October 16, 2022 has now been fully ratified without dissent by any Directors or Member."

which is problematic, given that the two applications for membership that are in evidence were made in emails sent by Misty and Mr Alexander on 19 October 2022 – see paragraph 112 above – so any written consent of the board to that membership could not properly have been signed on 16 October 2022; and

130.6 the members took it in turns as members to elect the Defendants as directors of Cayman Hammer (excluding Mr Kyte and Mr Menzel, who were appointed in February 2023). This was said to be:

"... to provide diversity, oversight and accountability for the affairs of [Cayman Hammer]."

131. The minutes record that the effect of these elections was that there were three directorships vacant, which would be filled by Viktor, Mr Fraser and Mr Sansone following the merger between Florida Hammer and Cayman Hammer. However, as Mr McPherson pointed out in argument, as a result of these appointments, Cayman Hammer's board was forever stacked against Viktor, Mr Fraser and Mr Sansone.

132. Importantly, the minutes of the EGM of Cayman Hammer's directors and members then addressed the question of a merger between Florida Hammer and Cayman Hammer. The minutes record:

"MERGER WITH ARMAND HAMMER FOUNDATION

The next item of business was to review the merger that had previously been approved wherein Armand Hammer Foundation would be merged with [Cayman Hammer] and [Cayman Hammer] would be the surviving entity.

Randy Sterns, legal counsel with Bush Ross, provided copies of all of the previous documentation approved by both organizations. He explained why the merger had been delayed to allow [California Hammer], a California non-profit, to be merged into [Florida Hammer], a Florida non-profit; such merger has finally been completed. He also provided copies of the implementing

documents to be filed in Florida including a plan of merger consistent with prior actions taken by both Foundations. He indicated that we would also need to file a merger action in the Cayman Islands and that process had been initiated with the Ogier law firm.

UPON MOTION MADE, SECONDED AND UNANIMOUSLY APPROVED, it was agreed to (i) move forward with the merger plan pursuant to the original approvals and to file all actions necessary with the State of Florida and in the Cayman Islands to complete the merger and authorize the transfer of assets from [Florida Hammer] to [Cayman Hammer] necessary to facilitate the merger, and (ii) that the following Officers be authorized to execute any and all merger documents and transfer documents of any kind or nature to facilitate the transfer of all assets to [Cayman Hammer] from [Florida Hammer] and to facilitate the merger.

- Misty Hammer President and Chairman
- Rex Alexander Vice-President, Secretary
- Mark Alfano Treasurer

UPON MOTION MADE, SECONDED AND UNANIMOUSLY APPROVED, the following resolutions were adopted to facilitate the transfer of assets and completion of the merger:

NOW THEREFORE, BE IT RESOLVED, that the famous Hammer art collection be accepted and transferred from [Florida Hammer] to [Cayman Hammer];

RESOLVED FURTHER, that all art, memorabilia, collectibles, records, books, computers, software, hardware, furniture, intangibles, intellectual property, fixtures and leasehold improvements located at 3501 Via Real, Carpenteria, California and such other assets used in the operation of [Florida Hammer] be accepted and transferred from [Florida Hammer] to [Cayman Hammer];

RESOLVED FURTHER, that the real estate at 3501 Villa Real, Carpenteria, California be transferred from [Florida Hammer] to [Cayman Hammer];

RESOLVED FURTHER, that any interest in real estate in the Grand Caymans be transferred from [Florida Hammer] to [Cayman Hammer] by transfer of [Florida Hammer] interests in Remmah 77, Ltd. or as otherwise determined;

RESOLVED FURTHER, that the marketable securities of [Florida Hammer] at The Aegis Group, Morgan Stanley (the "Aegis Group"), be transferred in-kind and or be liquidated to new investment advisors in the name of [Florida Hammer] or [Cayman Hammer] with the timing on this action to be taken not later than the final merger approvals;

RESOLVED FURTHER, that each and every decision, contract, act and commitment of each Officer of this Foundation within the scope of his or her employment or position and for and on behalf of this Foundation to accomplish the merger and asset transfers, including those which are not otherwise expressly set forth above, taken prior to this meeting are hereby ratified, confirmed and approved; and

RESOLVED FURTHER, that the Officers of the Foundation be, and each of them hereby is, authorized and directed to take or cause to be taken all such further actions and to execute and deliver or cause to be executed and delivered all such other instruments and documents in the name and on behalf of the Foundation and to pay all such fees and expenses as they shall deem necessary, proper or advisable in order to carry out fully the intent of the described merger and asset transfers."

133. Similarly to my conclusions on Mr Alfano's email to Ogier and the draft documents circulated to Ogier by Mr Sterns on 28 October 2022, there are many aspects of this minute which I conclude are untrue, based on the evidence before me:

133.1 No merger of California Hammer with Cayman Hammer or of Florida Hammer with Cayman Hammer had “*previously been approved.*”

133.2 No “*previous documentation*” had been approved by California Hammer, Florida Hammer or Cayman Hammer.

133.3 There was no delay of an intended merger between California Hammer and Cayman Hammer to allow California Hammer to merge with Florida Hammer first.

133.4 The transfers of the art collection and the Carpinteria Property that were purportedly approved on 1 November 2022 had already taken place – I assume in the Defendants’ favour for this purpose that the bill of sale for the contents of the Carpinteria Property mentioned in paragraph 127 above was signed after the EGM.

133.5 The plan of merger was not “*consistent with*” prior actions of California Hammer, Florida Hammer and Cayman Hammer because, as stated, there had been no prior actions of any of them towards the goal of a merger between California Hammer or Florida Hammer with Cayman Hammer.

Moreover, I do not understand how any of the attendees at the EGM could truthfully have believed that these statements were accurate.

134. Following the meeting with Ogier on 31 October 2022, Ogier wrote by email to Mr Barton and Mr Sterns on 2 November 2022.

134.1 Ogier pointed out that Cayman Hammer’s member was still recorded on the register of members as Armand Hammer Foundation, with an address in Texas. Ogier noted the merger between California Hammer and Florida Hammer and queried whether Cayman Hammer’s register needed to be updated to show Florida Hammer as the sole member.

134.2 Ogier then questioned whether Cayman Hammer had a duly authorised board of directors. Ogier said:

“Given Michael's health situation, [Cayman Hammer] is in a position currently where there are questions around whether it has a duly authorised board of directors. We are on notice that Michael has not been fit to carry out his duties or exercise his powers on the board of directors for some time.

In these circumstances, the Sole Member should take steps to appoint directors to the board of [Cayman Hammer] so that the powers of the directors set out in the Articles can be validly exercised. There is a distinction to be made here between officers (such as a president, vice-president, treasurer or secretary) and appointed directors. As a matter of

corporate governance, the directors owe an ongoing duty to the company; certain powers (under the Articles and under the Companies Act) are exercisable only by directors.

I understand from our conversation with Randy on Friday that one of the terms of proposed merger of [Cayman Hammer] and [Florida Hammer] is that the directors of [Florida Hammer] will be appointed as (additional) directors of [Cayman Hammer]. It would therefore seem appropriate to appoint those directors to the board of [Cayman Hammer] now, subject to that being resolved by the Sole Member.”

134.3 Ogier provided some advice as to the mechanism in Cayman Hammer’s Articles regarding appointment of directors, and then continued:

“If the Sole Member does not act to ensure that the [Cayman Hammer] Board has a duly authorised director or directors, it is difficult to see how [Cayman Hammer] will be able to enter into the necessary agreements to complete the proposed merger. This may make those actions taken susceptible to challenge.

I understand that US counsel for the Sole Member would typically draft resolutions for that corporation, but if you would like our assistance with drafting a written resolution for the Sole Member in its capacity as member of [Cayman Hammer] to implement the above recommendations, we would be happy to assist.”

135. Ogier’s email prompted a response from Mr Barton on 2 November 2022. He stated that Cayman Hammer had already addressed the necessary appointments of directors, officers and members of Cayman Hammer, had held an EGM of the directors and members of Cayman Hammer on 1 November 2022 to handle “*various legal and business matters*” and requested that Ogier update the registers. Mr Barton went on to say:

“Finally, this will also confirm we request you do not discuss our corporate matters with directors of [Florida Hammer] who do not represent a quorum, are not officers and have no authority to act for [Florida Hammer]. We consider all of the [Cayman Hammer] matters to be protected by attorney client privileged communication.”

Later the same day, Mr Barton sent Ogier a copy of the draft minutes of Cayman Hammer’s EGM held on 1 November 2022.

136. The correspondence with Mr Barton clearly caused concern within Ogier. Mr Bergstrom, who was the supervising partner, states in his affidavit that this was both because of the nature of the material changes to the various Hammer entities which were sought to be achieved and because none of the correspondence was from or was copied to Michael. Mr Barton’s email of 2 November 2022 appears to have been the last straw as far as Ogier were concerned. On 4 November 2022, Mr Bergstrom wrote to Mr Barton and Mr Alfano stating:

“We have considered your recent emails requesting assistance with matters relating to the ownership and control of [Cayman Hammer].

... Our firm's engagement is to act for Mr Michael Hammer. We may only take instructions from a principal who has full capacity. It has been some time since we have been able to take instructions from Mr Hammer directly and we have noted that email correspondence no longer seems to have Mr Hammer on copy. At present, it does not appear to us that Mr Hammer is able to provide us with his instructions.

...

In relation to [Cayman Hammer], the office of a director automatically becomes vacated where a director becomes of unsound mind. ... It is therefore our view that there is a high possibility that the appointment of Mr Rex Alexander as an alternate director was not invalid³ or will have become invalid at the time that Mr Hammer's office as a director was vacated due to his condition. Subsequent actions taken by the board of [Cayman Hammer] may also be subject to challenge.

The registered office of [Cayman Hammer] is maintained by Ogier Global (Cayman) Ltd (Ogier Global) The current facts require that in respect of the ongoing maintenance of [Cayman Hammer], Ogier Global will only take instructions from the sole member, The Armand Hammer Foundation of 1100 Louisiana, Suite 1800, Houston TX 77002, United States (the Foundation). As the Foundation has a board of directors, Ogier Global would need to see resolutions passed by the relevant majority under its constitutional documents supporting any instruction.”

At the same time, Mr Bergstrom instructed his staff not to do any further work until Ogier's instructions were verified.

137. On 5 November 2022, Mr Barton, writing on his professional headed paper as “outside general counsel” for Florida Hammer and Cayman Hammer, notified Ogier that their engagement by Florida Hammer and Cayman Hammer was “terminated immediately”. Mr Barton instructed Ogier to prepare all files for collection by a new firm the following week.
138. On 10 November 2022, Mr Bergstrom wrote by email to the directors of Florida Hammer (other than Michael), i.e. Misty, Viktor, Mr Fraser, Mr Alexander, and Mr Sansone. He attached a copy of Mr Barton's letter of 5 November 2022. He noted that Ogier as attorneys were engaged by Michael, but not by Cayman Hammer; that Ogier Global, a separate entity, was responsible for maintaining Cayman Hammer's registered office; and that Florida Hammer was Cayman Hammer's sole member. Mr Bergstrom continued:

“In the past, Ogier Global has taken its instructions from Mr Hammer on behalf of [Cayman Hammer]. We have recently received requests from others purporting to act on behalf of Mr Hammer and/or [Cayman Hammer] that would require changes to be made to the corporate registers of [Cayman Hammer]. There is some concern on our part that certain purported changes may not have been duly authorised, given Mr Hammer's health situation. We have raised this with the individuals purporting to instruct us on Mr Hammer's behalf and the attached letter was sent in response.”

³ This should obviously read “not valid”

For [Cayman Hammer] to maintain its registration as a Cayman Islands company, Ogier Global will need to be able to take instructions to proceed with routine maintenance items, such as payment of annual fees and filing of annual returns. We understand that [Cayman Hammer] may also need to undergo changes to its board that need to be reflected in the corporate registers. We would therefore seek clarification from you, as the board of the sole member of [Cayman Hammer], as to who is authorised to give these instructions. We would suggest that this should be confirmed by a resolution of the directors of [Florida Hammer] and a copy of this resolution provided to Ogier Global for the records of [Cayman Hammer]. ...”

139. This was the first intimation to Viktor, Mr Fraser and Mr Sansone that the Defendants were seeking to make corporate changes to Cayman Hammer. On 14 November 2022, Nelson Mullins (acting for Viktor, Mr Fraser and Mr Sansone) wrote to Mr Katofsky as follows:

“I represent half of the board members of [Florida Hammer], the sole member of [Cayman Hammer]. They are Viktor Hammer, Jim Fraser and Pete Sansone. It has come to our attention that you are representing [Cayman Hammer] and that you have been claiming that a new board and officers have been selected for [Cayman Hammer]. Please provide me under what authority a new board was allegedly selected.”

140. Mr Katofsky responded the same day, stating:

“Your 3 individual clients have no standing to inquire. Have a wonderful day.”

141. As Mr McPherson suggested in argument, one would expect that Mr Katofsky would want to reply explaining the basis for the authority, what had been done and why it was all in order. The fact that he chose not to do so naturally stirred Viktor, Mr Fraser and Mr Sansone’s suspicions that something very untoward was happening.

142. In the meantime, on 11 November 2022, Mr Alexander signed another certificate (as secretary of Cayman Hammer) listing the directors and officers of Cayman Hammer, and its members, in which he included Florida Hammer.

143. On Sunday 20 November 2022 Michael died.

144. On Monday 21 November 2022, Viktor, Mr Fraser and Mr Sansone gave notice by email of a special meeting of Florida Hammer’s board of directors to take place by Teams on Friday 25 November 2022 (email sent by Mr Love of Nelson Mullins on their behalf late in the evening of 21 November 2022). The notice indicated that the purposes of the meeting included removing Mr Alexander and Mr Alfano as directors and officers and electing new directors and officers. Mr McPherson described this in his submissions as Viktor, Mr Fraser and Mr Sansone engaging in “self-help” on Florida Hammer’s

behalf, in contrast to the Defendants' characterisation of it as a conspiracy to improperly or unlawfully seize control of Cayman Hammer.

145. A copy of the minutes of the meeting on 25 November 2022 is included in the documents before me. However:

145.1 Mr Banker of Bush Ross attorneys wrote to Mr Love on 25 November 2022 complaining that insufficient notice of the special meeting had been given and asserting that no action could be taken at the meeting. Mr Banker did not indicate by whom he was instructed. Mr Banker did not respond to Mr Love's request for confirmation of who he represented.

145.2 Mr Love responded that the meeting had already taken place by the time of Mr Banker's email, that Mr Banker's contentions regarding notice were rejected, and that Misty, Mr Alexander and Mr Alfano were simply trying to delay the inevitable. Nevertheless, to address Mr Banker's complaints, Mr Love demanded that Mr Alexander (or the current secretary of Florida Hammer) convene a special meeting of Florida Hammer's directors on 28 November 2022. The purposes of the meeting were to be the same as for the meeting held on 25 November 2022.

146. Mr Alexander failed to convene the requested meeting, so Viktor, Mr Fraser and Mr Sansone proceeded to hold a second special meeting on 28 November 2022. The minutes of that meeting recite the background to the first and second special meetings and, so far as relevant, then record that:

146.1 Misty, Mr Alexander and Mr Alfano were removed as directors of Florida Hammer;

146.2 Mr Alexander and Mr Alfano were removed as officers of Florida Hammer;

146.3 Viktor was elected chairman of the board and president, Mr Sansone was elected treasurer and Mr Fraser was elected secretary;

146.4 Viktor should be California Hammer's sole member; and

146.5 The engagements of Mr Barton and Mr Banker's law firms by Florida Hammer were terminated.

J.12 December 2022

147. On 7 December 2022, Florida Hammer commenced proceedings against Mr Alexander, Misty, Mr Alfano and others in California, seeking a temporary restraining order (“TRO”) and preliminary injunction prohibiting the Defendants from interfering with Florida Hammer or its property and requiring them to return all artworks and other property of Florida Hammer, among other things. The application for a TRO was decided in Florida Hammer’s favour on 27 December 2022.

J.13 January 2023

148. In response to Florida Hammer’s application for a preliminary injunction filed in the California proceedings on 30 December 2022, Mr Alexander, Mr Barton, Mr Alfano and Mr Katofsky made declarations under penalty of perjury on 4 January 2023 putting forward the case that California Hammer and Cayman Hammer had agreed to merge in 2017 and that the process since then had been long and complicated, and was varied to proceed by way of a merger between California Hammer and Florida Hammer and then a merger between Florida Hammer and Cayman Hammer. Mr Katofsky, in particular, made some notable statements:

“1. ... I make this Declaration based upon my personal knowledge, and if asked to testify, I could and would competently testify as to the facts stated below.

2. In 2017, by unanimous vote (five (5) votes to zero (0)), the Board of Directors of Plaintiff, [Florida Hammer]⁴ approved the Merger of [California Hammer] and [Cayman Hammer] (“Merger”). As contemplated by the Merger, [California Hammer] would merge into [Cayman Hammer], with [Cayman Hammer] as the surviving entity registered and incorporated in the Cayman Islands. The votes included those made by Viktor Hammer, Jim Fraser and Pete Sansone, three of the Board members of [California Hammer]. Attached hereto as Exhibit “1” is a true and correct copy of the Agreement of Merger dated December 21, 2017.”

Assuming that Mr Katofsky was referring to California Hammer’s board meeting on 4 December 2017 (and there is no evidence before me of any other board meeting of California Hammer’s board or of any meetings of Cayman Hammer’s member and board during 2017), I pause here to note that:

148.1 The minutes do not record Mr Katofsky as being present at the meeting, and he did not indicate the source for his statements in his declaration. It does not appear to me, based on the minutes of the meeting, that Mr Katofsky was in fact able to give any evidence about the voting from his “personal knowledge”, as he asserted.

⁴ Mr Katofsky made no distinction between California Hammer and Florida Hammer, and it appears that he was happy to treat them as being interchangeable

148.2 Mr Katofsky did not exhibit a copy of the minutes to support his assertions. This is most likely because he knew that the minutes did not do so.

148.3 The minutes do not record any vote on the question of a merger of California Hammer with Cayman Hammer – see paragraph 79 above.

148.4 In fact, as discussed in paragraph 81 above, on 8 December 2017, Mr Barton recommended proceeding by way of an asset transfer instead of a merger.

149. Mr Katofsky continued in his declaration:

“3. ... Pursuant to the law of the Cayman Islands, [Florida Hammer] must first be completely devoid of any assets prior to the occurrence of the Merger. See Cayman Islands Companies Act, §237(2)(g) (2021 Revision).”

Again, Mr Katofsky does not indicate the source for this statement, however, it is patently wrong. Section 237(2)(g) of the Companies Act (2021 Revision) provides as follows:

“(2) Where the surviving or consolidated company is to be a company existing under this Law, in addition to compliance by each constituent company incorporated under this Law with section 233(3) to (10) the Registrar is required to be satisfied in respect of any constituent overseas company that —

...

(g) the constituent overseas company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction;”

Section 237(2)(g) does not say anything at all about the merging company’s assets, it simply requires the Registrar of Companies in the Cayman Islands to be satisfied before allowing the merger to proceed that the overseas company merging into the Cayman company will cease to exist under its local law. I am not aware of any provision in the Cayman Islands Companies Act that requires the merging company to have divested itself of its assets before doing so. To the contrary, section 232 of the Act defines “merger” as:

*“... the merging of two or more constituent companies and **the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;**” (emphasis added)*

This makes clear that the assumption in the statute is that the merging company will take its assets and liabilities with it, and that they will become property of the surviving company. The numerous cases in the Cayman Islands where dissenters to such mergers ask the court to determine the fair value of their shares also demonstrate that Mr Katofsky’s statement is wrong – the value of each of those dissenter’s shares in the company in question would always be nil if the company had to divest itself of all assets before being permitted to merge.

150. On 25 January 2023, Mr Alexander, Misty and Mr Alfano stipulated in the California proceedings that they accepted that they were no longer directors of Florida Hammer and, as a result, the California proceedings were dismissed without prejudice on the basis that Florida Hammer had obtained the relief it sought.

151. On 27 January 2023, Mr Katofsky wrote to a California-based title insurer and a mortgage broker by email, with the address of the Carpinteria Property as the subject line, saying:

“Doing a refi on the above property with Mike Goldstein in a hurry. Probably a 7 day deal. It’s a first TD.

Owner is [Cayman Hammer]. You filed the recent deed for me as an accommodation (attached).

Can you coordinate with Mike and get this rolling please?”

152. Mr McPherson commented that it is a mystery why Cayman Hammer, as a charitable foundation, should need to borrow US \$5 million. I agree and floated that question at the hearing of the adjournment application on 5 April 2024. Mr McPherson said in opening the trial that the Chief Justice had also asked that question at the directions hearing in December 2023. As a result of the Defendants being debarred from advancing their case and not attending for cross-examination, this question was not answered.

J.14 February 2023 onwards

153. On 3 February 2023, Cayman Hammer held another EGM of the members and board of directors. The minutes record that four of the five members were present, and list them as Mr Alexander, Mr Katofsky, Mr Alfano and Misty. It appears therefore that the Defendants still recognised Florida Hammer as being the fifth member of Cayman Hammer at this time.

154. The minutes record that, amongst other things, the attendees voted:

154.1 to appoint Mr Menzel and Mr Kyte as additional directors;

154.2 to accept Samuel I Ltd’s resignation as a director;

154.3 to approve the obtaining of a US \$5 million loan secured against the Carpinteria Property, at an interest rate of 9.5% over 36-60 months, and that Mr Katofsky or any other officer was authorised to execute all necessary documents to complete the loan; and

154.4 to approve proceeding with a loan to be secured against the art collection at the discretion of Mr Alfano and that he or any other officer was authorised to execute all necessary documents to complete the loan.

Again, no explanation has been put forward by the Defendants in these proceedings to explain why these loans were needed by Cayman Hammer to further its charitable objectives.

155. On 17 February 2023, Florida Hammer commenced the second proceedings in California, against Cayman Hammer, and on 22 February 2023 applied *ex parte* for a TRO against Cayman Hammer, which the court granted in part on 1 March 2023, and renewed as a preliminary injunction on 20 March 2023 following an *inter partes* hearing on 7 March 2023.

156. On 29 March 2023, Viktor, Mr Fraser and Mr Sansone, as Florida Hammer's board of directors, signed two documents recording unanimous directors' resolutions of Florida Hammer, in each case as Cayman Hammer's sole member:

156.1 The first set of resolutions was to resolve to remove (so far as their appointments were ever valid) Mr Katofsky, Mr Alexander, Mr Alfano, Misty, Samuel I Ltd and Ms Park as directors of Cayman Hammer, and Mr Alexander, Mr Alfano and Misty as officers of Cayman Hammer, and to record that Mr Katofsky, Mr Alexander, Mr Alfano and Misty were not and were never validly appointed as members of Cayman Hammer, and to confirm that they were never given voting power as members of Cayman Hammer.

156.2 The second set of resolutions was that Cayman Hammer would appoint Viktor, Mr Fraser and Mr Sansone as the only members of Cayman Hammer's board of directors.

157. On 12 April 2023 Cayman Hammer's Register of Directors and Officers was updated to record the removal of Samuel I Ltd, and Mr Alfano, and the appointments of Viktor, Mr Fraser and Mr Sansone (the appointments of Mr Katofsky, Mr Alexander, Misty and Ms Park were never registered).

158. On 4 May 2023, Florida Hammer commenced the current proceedings against Cayman Hammer, which are before me.

159. On 28 June 2023, Mr Alfano and Mr Katofsky held a board meeting of Cayman Hammer's directors, recorded as comprising Samuel I Ltd as sole director. Mr Alfano representing Samuel I Ltd resolved

to accept applications for membership of Cayman Hammer “with full voting rights” pursuant to Article 9 of Cayman Hammer’s Articles of Association from Misty, Mr Katofsky, Mr Alexander, Mr Alfano and Ms Park. There are no copies of any such applications in the evidence before me, unless this is intended to relate back to the applications made on 19 October 2022. The minutes were signed by Mr Alfano and witnessed by Mr Katofsky.

160. However, this was of no effect because Mr Alexander, Mr Alfano, Mr Katofsky and Misty had resolved to accept Samuel I Ltd’s resignation as a director of Cayman Hammer on 3 February 2023 – see paragraph 154.2 above.

161. Finally, on 5 July 2023, Mr Alfano as trustee of the Michael Armand Hammer Trust signed a unanimous shareholder resolution in respect of Samuel I Ltd resolving to appoint Mr Alfano as sole director of Samuel I Ltd, to ratify all previous actions taken by Mr Alfano as director or president of Samuel I Ltd and to record his position on Samuel I Ltd’s register of directors. The resolution was signed by Mr Alfano and witnessed by Mr Katofsky.

162. I now turn to address the issues for determination, namely:

162.1 Who should be recorded as Cayman Hammer’s member(s) on its Register of Members?

162.2 Who should be recorded as Cayman Hammer’s directors on its Register of Directors and Officers?

K. Who should be recorded as Cayman Hammer’s member(s) on its Register of Members?

K.1 The scope of the dispute

163. The most recent copy of Cayman Hammer’s Register of Members before me (dated 14 April 2023) records “*The Armand Hammer Foundation*” as being the sole member, with an address in Houston, Texas. The entry is dated 23 June 1995 and is clearly a reference to California Hammer.

164. It has been common ground between Florida Hammer and the Defendants throughout these proceedings that this Register entry is incorrect because California Hammer no longer exists, following its merger with Florida Hammer on 25 June 2021.

165. The first question is therefore whether Florida Hammer has, in effect, succeeded to California Hammer's membership of Cayman Hammer as a result of their merger.
166. The Agreement and Plan of Merger between California Hammer and Florida Hammer dated 18 November 2020 by which the merger was achieved includes a provision that the agreement is to be governed by and construed in accordance with US, California and Florida laws. This issue therefore involves a question of US law, namely what is the legal effect under US, California and Florida laws of the merger agreement between California Hammer and Florida Hammer in terms of the transfer of California Hammer's property to Florida Hammer?
167. Ultimately, there is little real difference between Ms Kelly L Hellmuth, the US law expert instructed by Florida Hammer, and Professor Steven Solomon, instructed by the Defendants. Both experts consider that the effect of a merger, either under California law or Florida law, is to bring the existence of the disappearing corporation to an end and to transfer the assets of the disappearing corporation to the surviving corporation. However, they disagree on whether, as a matter of law, the assets that were transferred included California Hammer's membership interest in Cayman Hammer. In addition, Professor Solomon suggests that where the merger would affect existing rights of a third party, protected by an anti-assignment provision, then any transfer of assets will not be effective without the consent of the third party.
168. Ms Hellmuth states that in order to answer the membership interest question, the courts of California and in Florida would take into account Cayman Islands law on the nature of the membership interest being considered, and whether a transfer of that membership interest would be permitted or prohibited under Cayman Islands law. Essentially, if such a transfer was prohibited under Cayman Islands law, then the courts of California and in Florida would be likely to respect that position and would not treat the transfer as having occurred.
169. The second question is, if membership of Cayman Hammer was transferred to Florida Hammer, what voting rights did Florida Hammer have? This is a question of Cayman Islands law.
170. The third question is whether the appointment of Misty, Mr Alexander, Mr Alfano and Mr Katofsky as members of Cayman Hammer on 19 October 2022 was effective.

K.2 The relevant California and Florida laws applicable to a corporate merger

171. The California Corporations Code for non-profit corporations addresses the consequences of a merger at §6020 as follows:

“(a) Upon merger pursuant to this chapter the separate existences of the disappearing parties to the merger cease and the surviving party to the merger shall succeed, without other transfer, to all the rights and property of each of the disappearing parties to the merger and shall be subject to all the debts and liabilities of each and trust obligations upon the property of a disappearing party in the same manner as if incurred by the surviving party to the merger.

(b) All rights of creditors and all liens and trusts upon or arising from the property of each of the constituent corporations and other parties to the merger shall be preserved unimpaired, provided that the liens and trust obligations upon property of a disappearing party shall be limited to the property affected thereby immediately prior to the time the merger is effective.

(c) Any action or proceeding pending by or against any disappearing corporation or other party to the merger may be prosecuted to judgment, which shall bind the surviving party to the merger, or the surviving party to the merger may be proceeded against or substituted in its place.”

172. Thus, the surviving corporation to a merger under California law succeeds to “*all the rights and property*” of the disappearing corporation by operation of law, without the need for any other document of transfer. Ms Hellmuth confirms that the California courts have adopted the plain meaning of “*all*”, so that there are no exceptions to the property and rights which transfer.

173. Ms Hellmuth underscores the breadth of effect of this provision by reference to §6022 of the Code, which clarifies that even a bequest, devise, gift or grant which names the disappearing corporation as the recipient, and which takes effect after the merger, inures to the surviving corporation.

174. Ms Hellmuth concedes that the courts in California do not always recognise membership interests in a non-profit corporation as being an interest in property, and she provides a reference to *California Dental Assn. v American Dental Assn.* 23 Cal.3d 346, 590 P.2d 401 (Cal. 1979), but she states that such a membership interest would nevertheless clearly fall into the category of “*rights*” referenced in §6020. To make good this point, she relies on California Corporations Code §5057, which states:

“A membership refers to the rights a member has pursuant to a corporation’s articles, bylaws, and this division.”

and the Model Nonprofit Corporation Act, 4th Ed., §102, which defines “membership” as meaning

“the rights and any obligations of a member in a domestic or foreign nonprofit corporation.”

175. Ms Hellmuth indicates that the same result obtains in Florida. Section 617.1106 (Effect of Merger) of the Florida Statutes provides that, for a Florida non-profit corporation:

“When a merger becomes effective:

- (1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;*
- (2) The title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;*
- (3) The surviving corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each corporation party to the merger;*
- (4) Any claim existing or action or proceeding pending by or against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation which ceased existence;*
- (5) Neither the rights of creditors nor any liens upon the property of any corporation party to the merger shall be impaired by such merger;*
- (6) The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger; and*
- (7) Members of each corporation which is a party to the merger, other than the surviving corporation, are entitled only to the rights, if any, provided in the articles of merger.”*

176. She refers to *In re Williams’ Estate*, 59 So.2d 13, 17 (Fla. 1952) as confirmation that there are no exceptions under Florida law to the automatic vesting of all real estate and other property or interests therein in the surviving corporation. Ms Hellmuth also refers to §617.07401(1) of the Florida Statutes, governing derivative actions by members, as clearly contemplating that a membership in a non-profit corporation is a right that may transfer by operation of law. This is because, in addressing the right to bring a derivative action, the section states:

*“[a] person may not commence a proceeding in the right of a domestic or foreign corporation unless the person was a member of the corporation when the transaction complained of occurred or unless the person **became a member through transfer by operation of law** from one who was a member at that time.”* (emphasis added by Ms Hellmuth)

K.3 The effect of the merger between California Hammer and Florida Hammer on assets and rights

177. The Agreement and Plan of Merger between California Hammer (defined as the Merging Corporation) and Florida Hammer (defined as the Surviving Corporation) dated 18 November 2020 included the following relevant provisions:

“1.7 Surviving Corporation. The Surviving Corporation shall possess and retain all rights, privileges, immunities, powers, contract rights and interest in all assets and property of every description of the Merging Corporation, including leases, agreements, arrangements and licenses. The rights, privileges, immunities, powers, franchises and authority of a public as well as private nature of the Merging Corporation shall be vested in the Surviving Corporation without further act or deed. ... To that end, Merging Corporation agrees to transfer all rights,

title and interest in the assets of the Merging Corporation to Surviving Foundation on the Effective Date of the Merger without further act or deed.

1.8 Obligations. All obligations belonging to the Merging Corporation shall be vested in the Surviving Corporation and following the Merger, the Surviving Corporation shall be responsible for all liabilities and obligations of the Merging Corporation without further deed or action by the Surviving Corporation. ... Neither the rights or claims of any creditor nor any lien upon the assets of the Merging Corporation shall be impaired by the Merger.

...

5.1 Conditions to Merging Corporation's Obligation to Close. The obligations of Merging Corporation to consummate the Merger shall be subject to the satisfaction or waiver (where permissible), at or prior to the Effective Date, of the following conditions:

(a) No Prohibition. There not being in effect any law, order, decree or injunction of any court or agency of competent jurisdiction that restrains, enjoins or otherwise prohibits or makes illegal consummation of the Merger or which could be reasonably expected to result in a material diminution of the benefits of the transaction to the parties hereto, and there shall not be pending or threatened on the Effective Date any action or proceeding which could reasonably be expected to result in the enactment or issuance of any such law, order, decree or injunction.

(b) Third Party Consents. All consents or approvals of all persons required for the consummation of the Merger, including consents and approvals as may be required under applicable state law, shall have been obtained and shall be in full force and effect, unless the failure to obtain any such consent or approval is not reasonably likely to have, individually or in the aggregate, a material adverse effect on the Merger. Notice of the Merger shall be filed with the California Attorney General at least twenty (20) days prior to the filing of the Articles of Merger with the Florida Secretary of State and California Secretary of State."

The Agreement and Plan of Merger was signed by Michael on behalf of California Hammer and again by him on behalf of Florida Hammer.

178. It therefore appears that it was the common intention of California Hammer and Florida Hammer that all rights, privileges, powers and interest in property of California Hammer should transfer to Florida Hammer, which is apt to include California Hammer's membership interest in Cayman Hammer. The contrary position, namely that California Hammer's membership interest should remain behind with California Hammer and then immediately be lost as a result of the termination of California Hammer's existence, would be so contrary to Michael's previous coordination of California Hammer and Cayman Hammer and their interrelationship, and is so unlikely to have been Michael's intention, that it can be summarily dismissed.

179. Ms Hellmuth considers that the effect under California and Florida law of the Agreement and Plan of Merger was to transfer all of California Hammer's rights to Florida Hammer, subject to her assumption that such a transfer of a membership interest by operation of law is permissible under Cayman Hammer's Articles and under Cayman Islands law.

180. However, before leaving the topic of California and Florida law, Ms Hellmuth explains the effect of the merger on California Hammer, and as a result highlights the different meaning of “dissolution” of a company under California and Florida law compared with Cayman Islands law.

180.1 Under both California and Florida law, the disappearing company immediately ceases to have a separate legal existence upon the merger becoming effective: see California Corporations Code §6020(a) and Florida Statutes §617.1106(1), both set out above.

180.2 Ms Hellmuth explains, however, that when a non-profit corporation is dissolved under California law as part of a liquidation, whether voluntarily or compulsorily, it continues in existence for the purpose of winding up its affairs, and only finally ceases to exist once it has done so and files a certificate of dissolution.

180.3 Similarly, under Florida law, a non-profit corporation must file articles of dissolution, whereupon the corporation is dissolved but continues its corporate existence in order to wind up and liquidate its affairs. The name of the corporation becomes available for use by another company after 120 days, whether or not the winding up has been completed.

Thus, under both California and Florida law, the corporation may continue to exist after “dissolution” for the purpose of winding up its affairs.

181. This is different from the concept of dissolution under the law of the Cayman Islands, which means the legal death of the company in question.

K.4 *What is the nature of a membership interest in Cayman Hammer under Cayman Islands law?*

182. I can deal with this topic fairly shortly. Unlike a company with shares, members of a company incorporated under section 80 of the Companies Act do not have ownership rights because the profits of the company cannot be distributed to them – any surplus on a winding-up must be paid to another organisation with similar purposes, rather than to the members. In addition to this being a statutory requirement, Cayman Hammer includes an express provision to this effect in its Memorandum of Association. Nevertheless, it is abundantly clear from the Companies Act and from Cayman Hammer’s Memorandum and Articles of Association that the members have the right to control and guide the overall direction of Cayman Hammer. This comes from the allocation of rights and powers between members and directors, the division of business between ordinary business and special business, and the right of the members to vote on such business. Thus, membership of Cayman

Hammer carries with it a number of rights, privileges and at least one liability. More specifically, these can be summarised as follows:

182.1 A member may have a right to vote at meetings of the members. California Hammer had such a right as founding member.

182.2 A member has the right to a certificate under seal confirming their membership and voting entitlement: Article 15.

182.3 A member's right to vote is exercisable at the annual general meeting of the members and also at any extraordinary general meetings: Article 19.

182.4 A member has the right to convene an extraordinary general meeting if there are insufficient directors in the Cayman Islands capable of forming a quorum: Article 21.

182.5 The members have a separate right at any time to requisition an extraordinary general meeting and, if the directors fail to convene the extraordinary general meeting within 21 days, to convene the extraordinary general meeting themselves: Article 21.

182.6 The members have a right to receive at least 7 days' notice of all general meetings, including details of the nature of any special business, and the power to agree to shorter notice being given: Article 22.

182.7 All business at any extraordinary general meeting is deemed to be special business, except for certain identified kinds of routine business, including the election of directors and officers in place of those retiring: Article 27.

182.8 No business can be transacted at any members' meeting unless there is a quorum of members present: Article 28. So, the members have the right to attend, and the meeting cannot proceed in the absence of a quorum of members.

182.9 Where there is only one member, the member has the right to transact business by written resolution instead of at a meeting: Article 28. The same applies where there is more than one member if they all sign a written resolution: Article 43.

182.10 If a quorum of members is not present at a meeting, the directors are not authorised to take over and conduct the meeting themselves. Instead, the meeting is dissolved, if convened on a members' requisition, or adjourned for a week if convened for any other reason. If there is still no quorum of members present at the adjourned meeting, it may proceed on the basis

that the members present are treated as being a quorum: Articles 28 and 29. The reference to “*members present*” in my judgment implies that the meeting still cannot proceed if there are no members present.

182.11 If Cayman Hammer does not have a chairman, or if the chairman fails to attend a meeting or is unwilling to act as chairman, the members have the right to appoint one of the members as chairman of the meeting: Article 30.

182.12 The members, in effect, have a veto right over any proposed adjournment of a meeting and also the right to require an adjournment: Article 31.

182.13 The members may amend, repeal, add to or replace the Articles of Association, provided that they pass a special resolution (i.e. requiring a 67% majority): Article 45, Article 3 and section 60 of the Companies Act.

182.14 The members have the right to appoint the directors: Article 47.

182.15 The members have the right to fix the directors’ remuneration: Article 48.

182.16 The members have the right to remove a managing director and the right to appoint and remove officers of the company, such rights being coextensive with the directors’ rights to do so: Articles 53 and 54.

182.17 Finally of relevance, the members have the right to determine that accounts shall be prepared and laid before the members in general meeting, and to require such accounts to be audited: Article 91.

182.18 Then, so far as liabilities are concerned:

- (a) Article 9 of Cayman Hammer’s Articles of Association requires any incoming member to contribute such funds or assets to Cayman Hammer as the directors require.
- (b) Clause 9 of Cayman Hammer’s Memorandum of Association provides that the members are liable to contribute CI \$1.00 if Cayman Hammer is wound up whilst they are a member or within 12 months after they cease to be a member. Whilst this is a trivial sum in the context of the assets of Cayman Hammer, Ms Hellmuth confirms in her expert evidence that the courts of California and Florida do not apply a *de minimis* rule and would treat this as being a real and relevant liability.

183. By contrast to the members, a director is not required to be a member of Cayman Hammer. Articles 46-60 of Cayman Hammer’s Articles of Association set out the powers of directors. These deal with the day-to-day operation of the company, but they do not enable the directors to make the “big picture” decisions on Cayman Hammer’s purposes and operation.
184. The above makes clear, in my judgment, that the members of Cayman Hammer have a bundle of rights as a result of that membership with a real value in respect of the governance and control of Cayman Hammer, and a potential liability as well.
185. In reaching this conclusion, I note the force in Mr McPherson’s “jury point” that when Misty, Mr Alexander, Mr Alfano and Mr Katofsky were appointed members of Cayman Hammer on 19 October 2022, the minutes expressly recorded that they would have “*all rights, privileges and responsibilities of members as set forth in the Articles of Association of [Cayman Hammer]*”: see paragraph 113.3 above, however I do not need to rely on it.

K.5 *Is a membership interest in Cayman Hammer transferable?*

186. The answer to this is undoubtedly yes. Section 33 of the Companies Act expressly states that a share or other interest of a member in a company is transferrable if expressly or impliedly permitted by the Articles of Association. Cayman Hammer’s Articles include a provision in Article 15, which pre-supposes and implies that membership is transferrable:

“15. Any person becoming entitled to a membership in consequence of the dissolution, death or bankruptcy of a member shall upon such evidence being produced as may from time to time be properly required by the Directors, have the right either to be registered as a member in place of the dissolved, deceased or bankrupt member.”

K.6 *Is there the equivalent of an anti-assignment provision?*

187. Professor Solomon suggests that under California and Florida law, a transfer of California Hammer’s membership interest to Florida Hammer upon their merger would not be effective if there is an anti-assignment provision in Cayman Hammer’s Articles of Association. However, there is none. His point therefore does not impact the outcome in this case.

K.7 Is there consent to the transfer?

188. Professor Solomon's view is that consent to the transfer is required. Ms Hellmuth disagrees unless there is a relevant anti-assignment provision. Mr McPherson's position was that whether or not consent is needed, I should infer it from the facts that:

188.1 the Agreement and Plan of Merger dated 18 November 2020 included in clause 5.1 (quoted above) conditions that:

- (a) there was no legal prohibition or impediment on the merger proceeding; and
- (b) all necessary consents and approvals were obtained;

188.2 Michael signed the Agreement and Plan of Merger on 18 November 2020 on behalf of California Hammer and again on behalf of Florida Hammer, and must be taken to have intended that any necessary consent or approval on behalf of both of them was given in compliance with clause 5.1;

188.3 Michael signed replacement documents relating to the merger on 17 May 2021 on behalf of both California Hammer and Florida Hammer; and

188.4 Michael signed a form of unanimous consent to the appointment of Mr Alfano as treasurer of Cayman Hammer on 12 April 2022: first as a director of Cayman Hammer in his own right; secondly as the director of Samuel I Ltd; and most significantly, as president of Florida Hammer, which was described as "sole member" of Cayman Hammer, confirming his intention that Florida Hammer should receive California Hammer's membership interest in Cayman Hammer following the merger.

189. Accordingly, I find that, to the extent that consent of California Hammer or Cayman Hammer to the transfer of California Hammer's membership interest in Cayman Hammer was required, it was given by Cayman Hammer through Michael.

K.8 Was it the intention that Florida Hammer should merge with Cayman Hammer?

190. I am entirely satisfied that it was not Michael's intention in 2017 or in 2020/21 that California Hammer or Florida Hammer should merge with Cayman Hammer. I have already discussed the position regarding 2017 and do not repeat my conclusions. As regards 2020/21, I consider that the terms of the Agreement and Plan of Merger dated 18 November 2020 demonstrate a genuine intention

that Florida Hammer would have a *bona fide* operational function to continue California Hammer's aims and programs. The Agreement and Plan of Merger included the following provisions, which make this clear:

"WHEREAS, the Surviving Corporation is a not-for-profit corporation incorporated under the laws of the State of Florida that will continue the operations, charitable activities, funding grants and charitable mission of the Merging Corporation from its offices in the State of Florida once the plan of merger has been implemented;

...

WHEREAS, the Merging Corporation has moved its offices to the State of Florida, and its employees, staffing, and operations have been moved to the State of Florida and will continue to carry out the charitable mission and programs of the Merging Corporation without duplicate staffing, accounting and professional expenses, tax reporting and operating inefficiencies otherwise resulting from multiple offices in two different jurisdiction;

...

1.4 Purpose of Surviving Corporation. The purpose of the Surviving Corporation ... generally includes carrying on the charitable and educational promotion of the arts, and not for profit mission of the combined Merging Corporation and Surviving Foundation.

...

1.11 Continuing Programs. As of the Effective Date, the Surviving Corporation shall continue to carry out the activities and operations of the Merging Corporation pursuant to this Merger Agreement and its governing documents."

191. In addition, I note that Florida Hammer had taken offices and hired staff. Mr McPherson also relied on the fact that Florida Hammer continue to make grants and loans, maintained an investment portfolio and prepared accounts, all of which are consistent with Florida Hammer having a genuine operational role and inconsistent with Florida Hammer simply being a staging post on the way to a merger with Cayman Hammer.

K.9 Conclusion on transfer of California Hammer's membership interest in Cayman Hammer

192. In light of the discussion above, and having regard to the expert evidence on California and Florida law regarding mergers of non-profit corporations, I find that California Hammer's membership interest in Cayman Hammer transferred to Florida Hammer upon the completion of the merger between the two companies, as a matter of US law. As a result, with effect from 21 June 2021, Florida Hammer became the sole member of Cayman Hammer.

193. It is pertinent to note that on 21 September 2022, Mr Alexander certified that Cayman Hammer's sole member was Florida Hammer: see paragraph 110 above, and on 11 November 2022 he certified that Florida Hammer was one of Cayman Hammer's members: see paragraph 142 above.

194. I agree with Mr McPherson’s point that, if this were not the effect of the merger, then Cayman Hammer would be in a situation where it had no members at all and would be unable to function. Section 5 of the Companies Act presumes that there must be at least one member to form a company. Mr McPherson has been unable to find any authority confirming the ability of a corporation to continue to operate without any members. More importantly, Mr McPherson submits that Cayman Hammer’s Articles of Association are consistent with the need for there to be at least one member at all times, and that numerous provisions in the Articles simply do not work without there being a member, due to the limitations on the powers of the directors. His argument, which I accept, is that a construction of the legislation and Cayman Hammer’s Articles that has the result that Cayman Hammer has no members is not a viable business interpretation.
195. Alternatively, if I am wrong that California Hammer’s membership interest in Cayman Hammer transferred to Florida Hammer as a matter of California or Florida law as part of the merger, then I conclude that Florida Hammer was still entitled to be registered as Cayman Hammer’s member in place of California Hammer. This is because California Hammer immediately ceased to exist as a consequence of its merger with Florida Hammer, which is equivalent to “dissolution” as understood in Cayman Islands law.

195.1 As noted above, Article 15 of Cayman Hammer’s Articles of Association provides:

“15. Any person becoming entitled to a membership in consequence of the dissolution, death or bankruptcy of a member shall upon such evidence being produced as may from time to time be properly required by the Directors, have the right either to be registered as a member in place of the dissolved, deceased or bankrupt member.”

195.2 Dissolution as understood in the law of the Cayman Islands (which is the governing law of Cayman Hammer’s Articles of Association) means corporate death – it is the end stage of a winding-up of the company’s business, when the company ceases to exist. This is different from the meaning of “dissolution” under California and Florida law, as discussed at paragraphs 167 and 180 above, and is more closely analogous to the effect of merger on the disappearing company, namely the immediate cessation of legal existence.

195.3 In my judgment, it is therefore appropriate to treat the immediate termination of California Hammer’s existence upon the merger as being equivalent to dissolution, as comprehended in Article 16 of Cayman Hammer’s Articles, with a consequent transfer of California Hammer’s membership interest in Cayman Hammer to Florida Hammer by operation of that Article. The

result is that Florida Hammer therefore inherited all the advantages to which California Hammer was entitled immediately before the merger.

K.10 What rights could Florida Hammer exercise regarding Cayman Hammer?

196. The particular issue here is whether Florida Hammer could exercise its right to vote at meetings of Cayman Hammer. Article 16 of Cayman Hammer's Articles of Association provides:

"16. A person becoming entitled to a membership by reason of the dissolution, death or bankruptcy of the holder shall be entitled to the same advantages to which he would be entitled if he were the registered member except that he shall not, before being registered as a member be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the Company. Provided always that the Directors may at any time give notice requiring any such person to elect either to be registered himself as a member or to transfer the membership to a third party."

197. Insofar as California Hammer's voting right is considered to have transferred to Florida Hammer as a result of dissolution or its equivalent, Article 16 prohibits Florida Hammer from exercising that right to vote until Cayman Hammer's Register of Members has been updated to record Florida Hammer as being its member. Mr McPherson accepted this in argument.

198. However, if the transfer is considered to occur upon the merger as a matter of US law, then the transfer arguably occurred for a reason other than those specified in Article 16. It could be said as a result that all rights were transferred from California Hammer to Florida Hammer, including California Hammer's ability to exercise its voting right as a member of Cayman Hammer.

199. However, my conclusion is that such a construction would be contrary to the purpose of Article 16 of Cayman Hammer's Articles, which in my view is to provide certainty for those responsible for corporate governance of Cayman Hammer so that they know who is entitled to vote and who is not. In my judgment, whenever there is a transmission of the membership interest, of whatever nature, Article 16 has effect to prevent the new member from exercising rights at any meeting until the new member has been recorded on Cayman Hammer's Register of Members. This achieves certainty for those charged with corporate governance and is consistent with the other provisions in Cayman Hammer's Articles addressing the use of record dates for determining the membership entitled to vote at meetings.

200. Thus, whilst Florida Hammer became Cayman Hammer's sole member on 25 June 2021, and was entitled to be registered in that capacity, it did not have power to vote at meetings of Cayman Hammer's members nor did it have power to make written resolutions because its membership of Cayman Hammer was yet not registered.

K.11 Were the appointments of Mr Alexander, Mr Alfano and Mr Katofsky as members of Cayman Hammer on 19 October 2022 effective?

201. There are three reasons why, in my judgment, the appointments of Misty, Mr Alexander, Mr Alfano and Mr Katofsky as members of Cayman Hammer on 19 October 2022 were not effective or were not effective to give them voting power.

202. The first reason is that California Hammer was (and still is) only permitted to have one member. Article 2 of Cayman Hammer's Articles of Association is in the following terms:

"2. The number of members with which the Company proposes to be registered is one but the number of members may be increased by Special Resolution."

At all times prior to 25 June 2021 that member was California Hammer. At all times from 25 June 2021 onwards, that member was Florida Hammer.

203. There is no evidence that any special resolution to increase the number of members has ever been passed. The *inter partes* correspondence in the trial bundle includes letters where the Defendants were asked to produce copies of any such resolution, but they did not do so. I infer that there is no such resolution – if there were, then the Defendants would surely have wished to rely on it to support their case and would have exhibited it in evidence. Accordingly, any attempt to appoint members additional to Florida Hammer's existing sole membership was *ultra vires* and therefore invalid.

204. The second reason is that Florida Hammer's consent to the appointments, as Cayman Hammer's member, was not obtained. Articles 9 and 14 provide:

"9. Each person who desires to be a member of the Company shall make such written application to the Directors as the Directors shall require from time to time. Each member shall contribute to the Company such funds or other assets (if any) as the Directors shall require when approving an application for membership in the Company and, with the prior approval of all of the other members, the Directors and the new member shall agree what (if any) voting rights such member shall have in the Company.

...

14. The Directors may, in their absolute discretion and without assigning any reason therefor, decline to accept any application for membership.”

205. At first blush, “*with the prior approval of all of the other members*” in Article 9 appears to qualify the phrase “*the Directors and the new member shall agree what (if any) voting rights such member shall have in the Company*” rather than applying more widely. I was therefore initially sceptical of Mr McPherson’s argument that Articles 9 and 14 should be construed as requiring the agreement of the existing members not just to the new members’ voting rights, but to their application to become a member more generally.

206. Mr McPherson puts forward the following arguments, assuming at all times that a resolution to increase the number of members has been validly passed:

206.1 Article 14 is an express provision giving the directors absolute discretion to decline to accept any application for membership. If Article 9 were to be interpreted as giving the directors power to approve an application for membership without reference to the existing members, then Article 14 would be completely redundant, because the power to approve a membership plainly includes the right to refuse to approve membership. The existence of Article 14 is an indication that Article 9 does not and is not intended to give the directors such a power.

206.2 Secondly, the distribution of powers and responsibilities between the members and the directors in Cayman Hammer’s Articles is quite clear. The directors’ powers are limited to day-to-day operational management of the business, and subject to the oversight of the members. If Article 9 gave the directors power to appoint new members without reference to the existing members, then the directors could effectively appoint new members willy-nilly up to the permitted number of members, so that the existing members’ oversight would become meaningless. This would drive a coach and horses through the dual structure of directors being subject to the oversight of the members, and therefore cannot be the intention.

206.3 Thirdly, if the directors were to have general power to appoint new members, that would have the result that as soon as the initial sole member votes to increase the number of members above two, it would immediately risk a complete loss of control of Cayman Hammer going forward. This is because the directors would have the right under Article 14 to refuse to admit new members proposed by the initial member and the power to appoint new members of their own choice under Article 9, without reference to the initial member. The new members would thereafter be a majority and always able to out-vote the initial member.

207. Mr McPherson therefore argues that, however one looks at it, construing Article 9 as giving the directors unrestricted power to appoint new members undermines the entire division of powers and responsibilities, and the structure, and cannot have been the intention when Cayman Hammer was incorporated. Instead, Mr McPherson argues that construing the Articles in a commercial way, to avoid the loss of control issues identified above, one has to conclude that an application for membership must be made to the directors, who have an absolute right of veto under Article 14, but the corollary is that the directors do not have an unfettered right to accept new members without the approval of the existing members.
208. As a straw in the wind, I note that the minutes of the meeting on 1 November 2022 at which the appointments were confirmed, recorded that there was no “dissent by any Directors or Member”, suggesting that the Defendants themselves considered at the time that approval of the appointments by the existing member was required.
209. I agree with Mr McPherson that the intention of the parties, when Cayman Hammer’s Articles were created and as determined by the overall structure of the Articles, was for members to have oversight over the directors, it was not to enable the directors to wrest that oversight and control away from the members. Accordingly, I conclude that “*with the prior approval of all of the other members*” in Article 9 must be read as applying not just to the determination of what voting rights the new member will have, but more widely to whether the application for membership should be accepted, i.e. the directors cannot appoint new members without the approval of the existing members of Cayman Hammer.
210. The third reason that Misty, Mr Alexander, Mr Alfano and Mr Katofsky did not get voting power is that, if Cayman Hammer’s permitted membership was increased above one by a special resolution that is not in evidence, and if my construction of Article 9 is wrong, then even on the more limited construction of Article 9, the new members’ voting rights, if any, still needed to be agreed by the directors and the new members and approved by the existing member, namely Florida Hammer, and they were not.

L. Consequences for the status of corporate actions

211. It follows from my conclusions above, namely that the purported appointments of Misty, Mr Alexander, Mr Alfano and Mr Katofsky as members were ineffective and that, in any event, none of them had any voting rights, that all of the corporate actions that depend on their membership of Cayman Hammer and ability to pass resolutions fall away.
212. Starting in November 2022, the purported votes of Cayman Hammer's members at the meeting on 1 November 2022 were invalid because Misty, Mr Alexander, Mr Alfano and Mr Katofsky were permitted to vote when they were not members.
213. In particular, the sequential votes on 1 November 2022 to appoint the various Defendants as directors of Cayman Hammer (other than Mr Kyte and Mr Menzel) were invalid, and the appointments are ineffective.
214. The other resolutions purportedly passed by Cayman Hammer's directors and members on 1 November 2022 are also ineffective. This includes the resolutions:
- 214.1 to recognise the appointments of Misty, Mr Alexander and Mr Alfano as president and chairman, vice-president and secretary, and treasurer respectively;
 - 214.2 to approve Misty's employment and benefits package;
 - 214.3 to approve Mr Alfano's authority to hire services from third parties;
 - 214.4 to proceed with the merger between Florida Hammer and Cayman Hammer;
 - 214.5 to transfer the art collection from Florida Hammer to Cayman Hammer;
 - 214.6 to transfer the Carpinteria Property from Florida Hammer to Cayman Hammer;
 - 214.7 to transfer the contents of the Carpinteria Property used in the operation of Florida Hammer from Florida Hammer to Cayman Hammer;
 - 214.8 to transfer the real property in the Cayman Islands and shares in Remmah 77 Ltd owned by Florida Hammer from Florida Hammer to Cayman Hammer; and
 - 214.9 to transfer the investments held by Florida Hammer to Cayman Hammer.

215. In addition, to the extent that Mr Alexander purported to vote in favour of any resolutions on behalf of Florida Hammer, he could not properly do so and those purported votes are invalid.

215.1 I accept Mr McPherson's argument that Mr Alexander did not have any actual authority to vote on Florida Hammer's behalf – Florida Hammer's board was still deadlocked at that time and there had not been any meeting nor any resolutions passed by Florida Hammer since 25 April 2022.

215.2 I also accept Mr McPherson's argument that Mr Alexander did not have ostensible authority to vote on behalf of Florida Hammer, in particular because the other attendees at Cayman Hammer's board meeting, or a large majority of them, must have known that Florida Hammer's board was deadlocked and had not authorised Mr Alexander to exercise its voting rights. Mr McPherson prayed in aid of this submission the fact that Mr Barton wrote to Ogier on 2 November 2022 instructing them not to disclose any information to Florida Hammer's board, which he said demonstrates that the Defendants must have known that what they were doing was unauthorised by and was being done behind Florida Hammer's back. I agree.

216. The purported meeting of Cayman Hammer's members and board of directors on 3 February 2023 was not properly constituted, with the result that no business was validly conducted.

217. In particular, the following resolutions are invalid and ineffective:

217.1 recognition of the appointments of Misty, Mr Alexander and Mr Alfano as president and chairman, vice-president and secretary, and treasurer respectively;

217.2 the appointments of Mr Kyte and Mr Menzel as additional directors;

217.3 the alteration of "majority vote" to mean more than 70%;

217.4 the approval of the loan to be secured on the Carpinteria Property;

217.5 the approval of the loan to be secured on the art collection;

217.6 the approval of a 10-year term for Misty, Mr Alexander and Mr Alfano as directors of Cayman Hammer; and

217.7 the approval of indemnification of Misty, Mr Alexander and Mr Alfano (and other directors and officers) by Cayman Hammer in respect of the claims brought against them by Florida Hammer.

218. As a result of the invalidity of the purported appointments, my conclusion is that Samuel I Ltd remained as California Hammer's sole director following Michael's death on 22 November 2022. On or shortly before 3 February 2023, Samuel I Ltd resigned as a director of Cayman Hammer – the resignation document is not in the evidence before me, but the minutes of Cayman Hammer's meeting on 3 February 2023 purported to note and approve Samuel I Ltd's resignation. Whilst I have concluded that the actions taken on behalf of Cayman Hammer by the other purported directors of Cayman Hammer are invalid, it does not follow that Mr Alfano's action on behalf of Samuel I Ltd in tendering its resignation was invalid. The defects impacting Cayman Hammer do not extend to the validity of Samuel I Ltd's actions. Thus, I consider that Samuel I Ltd's resignation as a director of California Hammer was effective, and from about 3 February 2023 onwards, Cayman Hammer did not have any validly appointed directors.

219. However, because of the Defendants' continued failure to register Florida Hammer as Cayman Hammer's sole member, Florida Hammer did not have voting power. I therefore consider that the resolutions passed by Florida Hammer on 29 March 2023 to remove the Defendants as directors and officers of Cayman Hammer and to appoint Viktor, Mr Fraser and Mr Sansone as Cayman Hammer's directors were ineffective at that time. This is of no real significance regarding the removal of the Defendants, since they were not validly appointed in the first place (save for Samuel I Ltd, which had resigned on or about 3 February 2023), but it is potentially significant as regards the purported appointment of Viktor, Mr Fraser and Mr Sansone.

M. Rectification and Declarations

M.1 Rectification of Cayman Hammer's Register of Members – the law

220. The statutory power to rectify a company's Register of Members is contained in section 46 of the Companies Act, and is in the following terms:

“46. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register ... “

221. Mr McPherson directed my attention to several Cayman Islands cases concerning the application of s.46 as well as the foundation in English law and a more recent English authority also considering the approach to be taken.

222. I start with Project Panther Limited v Comerica Bank and Trust N.A. 2018 (2) CILR 543, where Smellie CJ's summary of the applicable principles included this:

"17. ... The principles applicable to an application for rectification ... are manifold and well-established as a matter of English (Cayman) law. In summary, and as far as relevant to the present application, they may be summarized as follows:

...

- *The court's power to order rectification is discretionary.*
- *The power to remove the name of a person which is entered on the register of members "without sufficient cause" has been widely construed. The jurisdiction to order rectification is not restricted to cases where a person has been entered on the register improperly, but extends to all cases where the entry was without sufficient cause.*
- *In other words, it is not necessary for the applicant to show any deliberate wrongful act or fault by the company—it is sufficient to show that the register of members is incorrect because an entry has been omitted or made in error.*
- *When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what proper reasons the applicant has to call for its interposition and the purpose for which relief is sought. In short, as s.46 explicitly recognizes, it should have regard to the 'justice of the case.'*
- *Where the court orders the removal of a person's name from the register of members on an application for rectification of the register on the basis that the person has never been a member of the company, the order may operate retrospectively and not just from the date of the order."*

223. The main question in this case is when the power to rectify should be exercised with retroactive effect and whether I should do so in this case. Mr McPherson relied on In Re Sussex Brick Company [1904] Ch 598. Having found as a fact that the names of certain members had been omitted from the company's register, the Court of Appeal considered the question as to retrospective effect of any rectification. Vaughan Williams LJ said at 605:

"Now, in this case there can be no doubt but that the names of these gentlemen ought to have been on the register at a date earlier than the time of the holding of the meetings in relation to the reconstruction of this company. Under those circumstances, when one looks at Nation's Case, which was a decision by Lord Romilly M.R., there can be no doubt that that is an authority for the proposition that when it is right that an order for rectification should be made—whether the order be for rectification by taking a name off the register or by putting a name on—the Court may make an order, not only that the right name shall be put on or taken off, as the case may be, but that the register shall be treated as if the name had been on or off at the time it ought in fact to have been on or off."

He continued at the bottom of page 606 and onwards:

“I have only to add this, that I do not mean for a moment to suggest that any one is entitled to such an order ex debito justitiae; it is a matter in the discretion of the judge, and there might be cases in which the judge, although he considered such an order essential to completely establishing the rights of the applicant, might refuse to do so because he thought it would work injustice to other members of the company. If I thought here that such an order would work injustice to other persons, especially to persons who are not in any way bound by the mistake of the company, I should feel considerable hesitation in making the order; but in the present case there is no evidence before us that any injustice will be caused at all. It has been suggested that if we make the order asked for we shall invalidate the resolutions, because the meetings will not have been properly called; and other suggestions of a similar kind were made in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to these two gentlemen ... without doing any injustice to any one else.”

Stirling LJ added at 608:

“But then after that there arises a point which requires serious consideration. The application of the appellants here is, in substance, that the registration be made nunc pro tunc. Now, when an order of that sort is made the court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by s.35 is not imperative. All it says is that the court ‘may’ in a proper case make an order for rectification. Therefore the court has full discretion to deal with every particular case which comes before it in such a way as may do complete justice; but in the present case I fail to see that any injustice can be done if the alteration is made as asked.”

And Cozens-Hardy LJ said at 610:

“Then we have authority going back to the very early days of the Companies Act, 1862, that an order under section 35 for rectification of the register ‘may’ not ‘must’ be made having a retrospective effect; that is, may be made in a proper case and imposing such conditions as the court thinks necessary to protect the rights of any third persons; but in a case like the present, where there has been no serious suggestion of any ill result or any unjust consequence which would follow from dating the registration of the transfers as on the dates on which they ought to have been registered, I can see no ground for imposing any condition whatever.”

224. These statements therefore indicate that one of the factors to be considered when considering an application for retroactive rectification is what would be the consequences, if any, for third parties?

225. *Re Sussex Brick Co* remains good law in England and Wales, as demonstrated by the judgment of Briggs J (as he then was) in *Bryan v Arpan and others* [2007] EWHC 1660 (Ch), where he said:

*“10. I turn to the relevant law. It is common ground that the court can grant rectification of a company's Register of Members with retrospective effect. The leading authority to which I was referred on that question is *Re Sussex Brick Co* [1904] 1 Ch 598, 73 LJ Ch 308, 11 Mans 66, a decision of the Court of Appeal. It is plain from the judgment of the Court of Appeal that although rectification of the Company's Register of Members was a statutory remedy, even in 1904 the jurisdiction to rectify was discretionary, and was exercised on broadly the same principles as the well-known equitable remedy. Where ordered with retrospective effect the document rectified, in this case the company's Register of Members, is to be treated as if it had been in its form as*

rectified for all purposes as from the date specified, save to the extent that the court may direct otherwise, for example, for the protection of third parties.”

226. The English approach exemplified by these cases was adopted and applied by the Court of Appeal in *Ebanks v Waterfront Developments Ltd* (unreported, 21 June 2018), and on the facts of that case, whilst an order with retroactive effect was made, the Court of Appeal limited its effect so that it did not adversely impact third parties.

M.2 Declarations as to Cayman Hammer’s directors – the law

227. There is no statutory power to rectify a company’s register of directors corresponding to section 46 of the Companies Act. Mr McPherson therefore invites me to make declarations as to who were and who were not directors of Cayman Hammer from time to time.

228. The considerations to take into account were summarised as follows by Parker J in *Re Global-IP: Cayman Bronzelink Holdings Limited v Global-IP Cayman* 2021 (1) CILR 228 at 235-6 (citations omitted):

“(a) The court has a wide discretion when deciding whether to grant declaratory relief. The court needs to determine whether justice to the parties would be served and whether the declaration would serve a useful purpose.

(b) The court should also ask itself whether declaratory relief is the most effective way of resolving the issues raised and should consider the other options available to resolve the issue.

(c) The court is willing in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties.”

M.3 Decision on rectification of Cayman Hammer’s Register of Members

229. For the reasons I have set out in detail earlier in this judgment, I consider that Florida Hammer was entitled to be registered as Cayman Hammer’s sole member at all times from 25 June 2021 onwards. There are two likely reasons why it was not:

229.1 The first is that it was an oversight by those responsible for Cayman Hammer’s corporate governance. Until the current dispute arose, those within Cayman Hammer treated California Hammer and Florida Hammer as being the same entity, and treated Florida Hammer as being Cayman Hammer’s sole member or a member: for example, see Mr Alexander’s certifications dated 21 September 2022 (paragraph 110 above) and 11 November 2022 (paragraph 142 above), and the references in Cayman Hammer’s minutes to Florida Hammer’s presence as a

member. It is therefore likely that they simply failed to apply their minds to the fact that California Hammer and Florida Hammer are separate legal entities.

229.2 The second reason is simply lack of attention by those involved in the day-to-day operation of Cayman Hammer, in failing to inform Ogier Global of the change. That this is a credible explanation is demonstrated by the apparent failure of the Defendants to take any steps to update Cayman Hammer's Register of Directors after their own purported appointments on 1 November 2022.

230. In principle, therefore, it seems to me to be appropriate to make an order for rectification of Cayman Hammer's Register of Members to record its membership, and to do so with effect from 25 June 2021 to reflect the justice of the case. There is no evidence before me of any potential prejudice to any third party as a result of backdating the registration of Florida Hammer, other than to the Defendants themselves. However, so far as they are concerned, their conduct, as I have set out in some detail during the course of this judgment, plainly points away from the court having any sympathy for any adverse effect upon them.

231. As a result of the Defendants being debarred from defending the claim, I have not heard argument on whether the effect of retroactively rectifying Cayman Hammer's Register of Members will also be retroactively to give Florida Hammer voting power, and hence to validate its purported resolution dated 29 March 2023 to appoint Viktor, Mr Fraser and Mr Sansone as Cayman Hammer's directors. However, the discussion in the cases set out earlier tends to suggest that this will be the result, and that seems to me to meet the justice of the case.

M.4 Decision on declarations regarding Cayman Hammer's directors

232. Florida Hammer seeks declarations that, with effect from 29 March 2023, Viktor, Mr Fraser and Mr Sansone, until his death, were Cayman Hammer's directors and that the Defendants (apart from Samuel I Ltd) have never been Cayman Hammer's directors. Applying *Bronzelink Holdings*, Mr McPherson contends, firstly that justice to the parties would be served because it would be confirmation from the court with jurisdiction over Cayman Hammer, and effectively a determination between Viktor and Mr Fraser on one side and the Defendants on the other, as to who is entitled to control Cayman Hammer as its directors; and secondly that a declaration would be the most effective way of resolving the issue because there is no other apparent way to do so.

233. I accept Mr McPherson's submission that it is appropriate to make declarations in this case and, for the reasons I have already covered in some detail, to make them in the terms sought by Mr McPherson.

N. Summary of findings

234. In summary, for the reasons set out in detail in this judgment, my findings are as follows:

234.1 There was no decision to merge California Hammer into Cayman Hammer in 2017.

234.2 There was never an intention to achieve a merger of California Hammer with Cayman Hammer by way of a two-stage process involving Florida Hammer. To the contrary, Florida Hammer was intended to be a fully operational entity, continuing the work and aims of California Hammer. The sole reason for the merger between California Hammer and Florida Hammer was to shift the centre of operations from California to Florida for Michael's personal convenience.

234.3 California Hammer is incorrectly referenced on Cayman Hammer's Register of Members.

234.4 Cayman Hammer's Register of Members should be rectified to record Florida Hammer as being its sole member with effect from 25 June 2021.

234.5 As a result of the retroactive effect of rectification of Cayman Hammer's Register of Members, Florida Hammer should therefore be treated as Cayman Hammer's sole registered member for all purposes from 25 June 2021, including the exercise of the voting right that was formerly one of California Hammer's membership rights.

234.6 The result of this is that Florida Hammer's resolution dated 29 March 2023 to appoint Viktor, Mr Fraser and Mr Sansone as directors of Cayman Hammer should retroactively be treated as effective, and I declare that Viktor and Mr Fraser are therefore Cayman Hammer's current directors (following the death of Mr Sansone in late 2023) and are entitled to be so registered.

234.7 The purported appointments of Misty, Mr Alexander, Mr Alfano and Mr Katofsky as members of Cayman Hammer on 19 October 2022 (and any subsequent attempts to appoint them or to ratify their appointments retrospectively) are invalid.

234.8 The purported appointments of the Defendants (other than Samuel I Ltd) as directors of Cayman Hammer on 1 November 2022 and 3 February 2023 (and any subsequent attempts to appoint them or to ratify their appointments retrospectively) are invalid.

234.9 Samuel I Ltd resigned as a director of Cayman Hammer on or shortly before 3 February 2023, and Cayman Hammer's Register of Directors should be corrected to reflect this.

235. On this basis I set out the answers to the issues for trial formulated by Mr McPherson:

235.1 *Who should be recorded as Cayman Hammer's member(s) on its Register of Members?* The answer is Florida Hammer, with its membership being effective as of 25 June 2021. Cayman Hammer's Register of Members should be rectified to reflect this.

235.2 *Who should be recorded as Cayman Hammer's directors on its the Register of Directors and Officers?* The answer is that Viktor and Mr Fraser should be recorded as Cayman Hammer's current directors (and Mr Sansone recorded as a director from 29 March 2023 until his death).

236. I have not dealt with Florida Hammer's application that its costs of these proceedings should be paid by the Defendants personally on the indemnity basis. Notwithstanding the debarring order, this is a matter on which the Defendants should be allowed to make submissions.

237. Within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on those points within 21 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 14 August 2024



THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT