THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0068

BETWEEN:

NG MIN HONG

Appellant/First Defendant

and

SOEMARLI LIE

Respondent/Claimant

SUCCESS OVERSEAS FINANCE LIMITED ("SOFL")

Third Defendant

Before:

The Hon. Mde. Vicki Ann Ellis — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C Farara — Justice of Appeal [Ag.]

Appearances:

Mr. Alain Choo-Choy, KC for the Appellant
Mr. Matthew Hardwick, Mr. Richard Evans and Dr. Alecia Johns for the Respondent

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2023: February 24;
July 28.

Commercial Appeal – Interlocutory Appeal – Disclosure – Control of documents - Unless Order - Whether the Judge was wrong to conclude that Mr. Ng had control of the relevant documents for disclosure purposes - Whether the judge's conclusion of control was based on an inference that there was an existing understanding or arrangement for Mr. Ng to have free access to the relevant documents - Whether the Judge wrongly relied on 3 specific aspects put forward by Mr. Lie as justifying the inference of an understanding or arrangement giving Mr. Ng free access to the relevant documents for the purposes of the valuation proceedings - Whether on a proper analysis and having regard to the established legal principles, those 3 aspects could not individually or cumulatively justify the said inference - Whether the Judge failed properly to consider whether there was a currently existing understanding or arrangement for Mr. Ng to have free access to the relevant documents

Mr. Soemarlie Lie ("Mr. Lie"), the respondent, brought a claim against Mr. Ng Min Hong ("Mr. Ng") for unfair prejudice in respect of the conduct of the affairs of a Territory of the Virgin Islands ("BVI") company known as Success Overseas Finance Ltd ("SOFL"). SOFL was joined as the third defendant in the proceedings below. The second defendant ("Mr. Siregar") is no longer a defendant as a result of his shares in SOFL having been acquired by Mr. Ng. The unfair prejudice claim has thus been litigated between Mr. Lie and Mr. Ng only as the respective minority (45.85%) shareholder and majority (54.15%) shareholder of SOFL.

SOFL is a BVI holding company which at all material times held shares in an Indonesian holding company called PT Pancadaya Perkasa ("PT PDP"), which in turn owns or holds a majority shareholding in five other Indonesian subsidiary companies operating in the palm oil industry in Indonesia. These five subsidiaries are respectively known as PT PEU, PT APMR, PT BMML, PT MMMA and PT SANR (together with PT PDP, the "PT PDP Group").

By 2020, following a number of transactions which Mr. Lie claimed to amount to unfairly prejudicial conduct of the affairs of SOFL by Mr. Ng, the shareholding of PT PDP was essentially owned as follows:

(i) about 49.6% owned by an Indonesian company known as PT Grahaidea Selarassindo ("PT Grahaidea"), which is itself owned by each of Mr. Ng and his brother in equal shares;
(ii) about 48.92% owned by another Indonesian company known as PT Karya Purna Wahana ("PT KPW"), which is itself owned by the family of Madam Karlinah, one of the original founder shareholders of the PT PDP Group and the wife of Indonesia's former 4th Vice-President; and
(iii) about 1.38% owned by PT PDP itself. Thus, Mr. Ng is, by himself, only a minority indirect shareholder of PT PDP through PT Grahaidea.

In a written judgment handed down on 25th October 2021 (the "Main Judgment") the Judge determined that Mr. Lie's complaints of unfair prejudice were made out and ordered that Mr. Ng should buy out Mr. Lie's shareholding in SOFL on terms to be determined by the Court. The Main Judgment is currently under appeal to the BVI Court of Appeal. Meanwhile, at a hearing of consequential matters on 31st March 2022, the Judge gave further directions, as set out in the 31st March 2022 Order ("the Directions Order"), regarding the basis upon which Mr. Lie's shares in SOFL should be valued. This was aimed at determining the precise timetable of the valuation proceedings.

The Judge rejected Mr. Ng's request for disclosure by 20th June 2022 and ordered that the disclosure date should be 6th June 2022 (as contended for by Mr. Lie) with the result that it was this date that was contained in the Directions Order. The Directions Order *inter alia* provided for the standard disclosure of 20 categories of documents ("the Documents") in advance of a 7-day valuation hearing ("the Valuation Proceedings").

On 7th June 2022, a day after Mr. Ng had failed to produce any disclosure pursuant to the Directions Order, Mr. Ng issued an application for an extension of time (the "Extension Application") from 6th June 2022 to 5th December 2022. The Extension Application made no reference to any difficulties in obtaining consent from shareholders. In his ex-tempore

judgment given on 20th June 2022 ("the June Judgment") the Judge dismissed Mr. Ng's Extension Application. The learned Judge also adjourned Mr. Lie's cross-application for an unless order with a timetable for adducing further evidence.

On 14th November 2022 at the hearing of the application for the Unless Order the Judge accepted that Mr. Ng had 'practical control' of the Documents such that he was in breach of the Directions Order and on 14th November 2022 he ordered that unless Mr. Ng disclose the Documents by 4 pm on 2nd December 2022, he be debarred from defending the Valuation Proceedings.

Dissatisfied with the decision of the learned Judge, Mr. Ng now seeks, by this appeal, to overturn the judgment and Unless Order of 14th November 2022. The Notice of Appeal identifies 3 grounds of appeal and the issues arising therefrom are: i.) Whether the Judge was wrong to conclude that Mr. Ng had control of the relevant documents for disclosure purposes and whether the judge's conclusion of control was based on an inference that there was an existing understanding or arrangement for Mr. Ng to have free access to the relevant documents ii) Whether the Judge wrongly relied on 3 specific aspects put forward by Mr. Lie as justifying the inference of an understanding or arrangement giving Mr. Ng free access to the relevant documents for the purposes of the valuation proceedings and whether on a proper analysis and having regard to the established legal principles, those 3 aspects could not individually or cumulatively justify the said inference – which was in any event negated by the evidence before the Judge; iii) Whether the Judge failed properly to consider whether there was a currently existing understanding or arrangement for Mr. Ng to have free access to the relevant documents and whether the evidence before him supported a finding of an existing understanding or arrangement for free access.

Held: dismissing the appeal, affirming the judgment and order of the court below and awarding costs to the Respondents to be assessed, if not agreed by the parties within 21 days of this judgment that:

1. The aim of disclosure in civil litigation is to ensure that all the parties to a civil claim are aware of all the documents that have a bearing on the claim. The duty of disclosure in litigation arises under Part 28 of the Civil Procedure Rules 2000 ("CPR") which prescribes the appropriate basis for the disclosure of documents. The key factors which must be borne in mind by a judge contemplating an order for disclosure are "relevance" and "control". A document is liable to be disclosed if it is directly relevant to the issues that would arise for determination at trial and it arises if the party with control of the document intends to rely on it or if it tends to adversely affect that party's case; or if it tends to support another party's case. In this appeal, the question of relevance is not in issue. Instead, the issue of "control" is the gravamen of this appeal and the starting point must be CPR Part 28.2.

   Rule 28.2 of the **Civil Procedure Rules 2000** applied.

2. In determining whether a "control arrangement" exists, a court is required to undertake a careful analysis of the practical evidence for the existence of an arrangement. It is not sufficient for a litigant, parent company or its subsidiary to merely assert that no arrangement exists or existed. A court must undertake a

careful analysis of the practical arrangements in order to ascertain whether documents are within the control of the disclosing party. It is equally important that the court undertake a careful analysis of the practical evidence advanced to refute the contention of practical control. In determining whether documents held by one person are under the practical control of another (where there is no enforceable right of access) the relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship, what is relevant is whether there is an arrangement or understanding that the holder of the document will have made the relevant documents available for disclosure and inspection.

Ikana Holdings S. De R. L et al v Putney Capital Management Ltd. BVIHCMAP2021/0027 (delivered 24th January 2022, unreported) followed; **Schlumberger Holdings Ltd v Electromagnetic Geoservices AS** [2008] EWHC 56 (Pat) considered; **Lonrho Ltd v Shell Petroleum Co Ltd (No. 1)** [1980] 1 WLR 627 considered; **Ardila Investments v ENRC** [2015] EWHC 3761 (Comm) applied; **Pipia v BGEO Group Ltd (formerly known as BGEO Group Plc)** [2020] EWHC 402 (Comm) applied; **Various Airfinance Leasing Companies and others v Saudi Arabian Airlines Corporation** [2022] 1 WLR 1027 applied; **Berkeley Square Holdings Limited v Lancer Property Asset Management Ltd & Others** [2021] EWCA Civ 551.

3. Where a litigant fails to comply with an order for disclosure and advances that he/she did not have the requisite *control* over the relevant documents, which were held by a third party (who objects or does not consent to disclose the same), and should not therefore be required to give disclosure of those documents, the court is entitled to undertake a careful analysis of such assertion and the actual arrangements between the third party and the litigating party in order to ascertain whether documents held by the subsidiary are within the control of the litigating party. The appellant contended there is no existing understanding or arrangement which would afford the appellant free access to the documents in question. The Judge however accepted each of the three bases as submitted by the respondent for justifying the inference that there was in existence an understanding or arrangement between Mr. Ng and the PT PDP Group companies/shareholders entitling him to unfettered access to the PT PDP Group documents for the purposes of the Valuation Proceedings. It is therefore clear that the learned Judge rejected the appellant's contention that he engaged in bona fide efforts to obtain the consent of the PT DPD companies/shareholders. The Judge found that there was sufficient evidence from which he could infer that there was an arrangement or understanding that the appellant had free access to the documents. In doing so he would have considered the cumulative effect of the matters advanced by the appellant and arrived at a determination which would, in part have been informed by his earlier findings (in the Main Judgment). In treating with these matters, he would have had to arrive at a conclusion as to the genuineness and plausibility and weight. Accordingly, the Judge did not err in his consideration of the issues that were before him, nor in his approach to the application. There is therefore no basis on which this Court should legitimately interfere with the Judge's finding.

4. The Judge's significant involvement in, and the impressions formed over the course of this protracted litigation between these parties cannot be ignored. The learned Judge would have formed a considered view as to who was in control of the subsidiaries. It is not disputed that the judge has for some 4 ½ years, presided over every aspect of this claim and has been immersed in this complex dispute acquiring a thorough knowledge of the facts and parties. The appellant's contention that the Judge was not entitled to come to his findings of fact cannot be sustained. Applying the appropriate appellate restraint, this Court is satisfied that rather than relying on any one factor as decisive, the learned Judge pulled the relevant circumstantial strands together which he then bound together to arrive at his factual findings. It is clear that the Judge would be certainly more familiar with the details of the case than this appellate court. Guided by the principles governing appellate restraint, this Court is satisfied that the learned Judge's findings of fact, whether primary or by evaluation of the evidence, should be respected and that this Court should only interfere if it is determined that the learned Judge erred in principle.

   Fage UK Ltd. and another v Chobani UK Ltd. and another [2014] EWCA Civ 5 applied; **Dolcie Christian (In her capacity as Executor of the Estate of Sydney Christian, QC) v King's Casino Limited** ANUHCVAP2018/0030 (delivered 26th March 2020, unreported) followed; **Group Seven Ltd. (a company incorporated under the laws of Malta v Notable Services LLP** [2019] EWCA Civ 614 applied; **Biogen Inc v Medeva Plc** [1997] RPC 1 applied.

5. It has generally been accepted that the wholesale adoption of counsel's submissions by a judge is not offensive. The adoption of one party's submissions by a judge is one method of providing adequate reasons. While this may not be the choice of every judge, it is impossible to say that it necessarily falls short of the judicial duty to provide reasons.

   English v. Emery Reimbold & Strick Ltd. 2002] EWCA Civ 605 applied; **James and others v. Surf Road Nominees Pty. Ltd and others** 2004] NSWCA 475 (AustLII) applied.

JUDGMENT

[1] **ELLIS JA:** Before the Court is an interlocutory appeal in which the appellant, Mr. Ng Min Hong ("Mr. Ng") appeals against the decision and order of the High Court Judge, (the "Judge"), dated 14th November 2022, by which the Judge ordered *inter alia* that: (1) Mr. Ng had been in breach of an order dated 31st March 2022 to give standard disclosure (the "31st March 2022 Order"), and (2) if by 4 p.m. on 2nd December 2022 Mr. Ng failed to give standard disclosure of certain categories of

documents relevant to the valuation of certain shares, he would be barred from defending the valuation stage of the proceedings below (the "Unless Order").

Background

[2] The background to the Unless Order is a claim brought by Mr. Soemarli Lie ("Mr. Lie"), the respondent, against Mr. Ng for unfair prejudice in respect of the conduct of the affairs of a Territory of the Virgin Islands ("BVI") company known as Success Overseas Finance Ltd ("SOFL"). SOFL was joined as the third defendant in the proceedings below. The second defendant ("Mr. Siregar") is no longer a defendant as a result of his shares in SOFL having been acquired by Mr. Ng. The unfair prejudice claim has thus been litigated between Mr. Lie and Mr. Ng only as the respective minority (45.85%) shareholder and majority (54.15%) shareholder of SOFL.

[3] SOFL is a BVI holding company which at all material times held shares in an Indonesian holding company called PT Pancadaya Perkasa ("PT PDP"), which in turn owns or holds a majority shareholding in five other Indonesian subsidiary companies operating in the palm oil industry in Indonesia. These five subsidiaries are respectively known as PT PEU, PT APMR, PT BMML, PT MMMA and PT SANR (together with PT PDP, the "PT PDP Group").

[4] By 2020, following a number of transactions which Mr. Lie claimed to amount to unfairly prejudicial conduct of the affairs of SOFL by Mr. Ng, the shareholding of PT PDP was essentially owned as follows:

(iv) about 49.6% owned by an Indonesian company known as PT Grahaidea Selarassindo ("PT Grahaidea"), which is itself owned by Mr. Ng and his brother in equal shares;

(v) about 48.92% owned by another Indonesian company known as PT Karya Purna Wahana ("PT KPW"), which is itself owned by the family of Madam Karlinah, one of the original founder shareholders of the PT PDP Group and the wife of Indonesia's former 4th Vice-President; and

(vi) about 1.38% owned by PT PDP itself. Thus, Mr. Ng is, by himself, only a minority indirect shareholder of PT PDP through PT Grahaidea.

In a written judgment handed down on 25th October 2021 (the "Main Judgment") the Judge determined that Mr. Lie's complaints of unfair prejudice were made out and ordered that Mr. Ng should buy out Mr. Lie's shareholding in SOFL on terms to be determined by the Court. The Main Judgment followed (1) the 3-week trial of this matter in October 2020; (2) the filing of over 350 pages of written closing submissions on 22nd February 2021; (3) two days of oral submissions on 4th and 5th March 2021; and (4) the filing by the parties of an 87 page "Joint Note" on 23rd July 2021, which was incorporated in full into the Main Judgment. The Main Judgment is currently under appeal to the BVI Court of Appeal.

[5] Meanwhile, at a hearing of consequential matters on 31st March 2022, the Judge gave further directions, as set out in the 31st March 2022 Order ("the Directions Order"), regarding the basis upon which Mr. Lie's shares in SOFL should be valued. This was aimed at determining the precise timetable of the valuation proceedings.

[6] The Judge rejected Mr. Ng's request for disclosure by 20th June 2022 and ordered that the disclosure date should be 6th June 2022 (as contended for by Mr. Lie) with the result that it was this date that was contained in the Directions Order. The Directions Order *inter alia* provided for the standard disclosure of 20 categories of documents ("the Documents") in advance of a 7-day valuation hearing ("the Valuation Proceedings"). In particular, paragraphs 5 and 6 of the 31st March 2022 Order provided as follows:

> "5. The parties … shall give standard disclosure of all documents which are directly relevant to determining the fair value of the Shares as at the Valuation Date, including (but not limited to) the categories of documents listed in the Schedule to this Order. For the avoidance of doubt, the parties' duty of disclosure in this regard is limited to documents which are or have been in their respective control as described in CPR 28.2.
> 6. The parties shall give standard disclosure on the following terms:
> a. Each party shall by 4 p.m. on 6 June 2022 give standard disclosure by list of hard copy documents.

> b. Each party shall by 4 p.m. on 6 June 2022 give standard disclosure by list of electronic documents. …"

[7] On 7th June 2022, a day after Mr. Ng had failed to produce any disclosure pursuant to the Directions Order, Mr. Ng issued an application for an extension of time (the "Extension Application") from 6th June 2022 to 5th December 2022. The Extension Application made no reference to any difficulties in obtaining consent from shareholders.

[8] In his ex-tempore judgment given on 20th June 2022 ("the June Judgment") the Judge dismissed Mr. Ng's Extension Application in short order observing that:

> "….it appears to me to be breathtaking hubris on the part of Mr Ng to have come before the Court on previous occasions, given dates when he could comply by disclosure for standard disclosure. He is then subject to a date of 6th June for disclosure…And he waited until a day after…the 7th of June to apply for an extension. And then when you read the affidavit in support of that application for an extension there's not a jot or tittle of an apology, there's not a jot or tittle of an explanation as to why that date of the 6th of June has not been complied with or proven difficult…"

[9] The learned Judge also adjourned Mr. Lie's cross-application for an unless order with a timetable for adducing further evidence. Counsel for the appellant submitted that the application for the unless order was made in the context of a dispute between Mr. Lie and Mr. Ng as to whether Mr. Ng could properly be regarded as being in control of the categories of documents listed in the Schedule to the Directions Order. The Judge accepted that Mr. Ng had 'practical control' of the Documents such that he was in breach of the Directions Order and on 14th November 2022 he ordered that unless Mr. Ng disclose the Documents by 4 pm on 2nd December 2022, he be debarred from defending the Valuation Proceedings.

[10] From the affidavit evidence filed in support of the Unless Order Application by John Dawson (Mr. Lie's expert) sworn on 15th July 2022 and 10th November 2022, as well as Mr. Lie's skeleton argument and submissions developed in the course of the 14th November 2022 hearing, the respondent submitted that the following was clear:

(i) the Unless Order Application came at a critical juncture in these proceedings. Over 7 months after comprehensive directions were given for the purpose of the Valuation Proceedings, Mr. Ng's failure (until 48 hours ago before the filing of the skeletons) to disclose a single document pursuant to the Directions Order meant that no progress whatsoever has been made in the Valuation Proceedings;

(ii) Mr. Lie's valuation expert, Mr. John Dawson (appointed over 7 months ago) has confirmed that without disclosure by Mr. Ng of the Documents 'it will not be possible to provide this Court with a considered, complete and accurate expert report';

(iii) it was imperative that standard disclosure (in particular of the Documents) took place without any further delay so that substantive work on valuation could (at last) commence.

(iv) Mr. Ng had willfully failed to comply with the Directions Order. In particular it was clear from Annex A to the 7th November 2022 letter that (1) whilst the key valuation evidence certainly existed; (2) disclosure of the same was being refused on the blanket basis 'not approved';

(v) the Court should reject the reasons given by Mr. Ng for such failure to disclose, consistent with the Judge's regularly expressed concern (most recently reflected in the June Judgment) that Mr. Ng resorts to 'manipulations. and 'fictions' 'to pretend he doesn't actually have any ability to provide documents'.

[11] Mr. Ng on the other hand relied upon the 15th July 2022 affidavit of Yan Chng which exhibited an opinion letter dated 15th July 2022 from the Indonesian law firm, Dentons HPRP, provided to Mr. Ng's BVI legal representatives ("the Dentons Opinion"); the 8th November 2022 second affidavit of Nicholas Lee and Mr. Ng's 8th November 2022 6th Supplemental List of Document. The essence of the Dentons

Opinion was that Mr. Ng (1) 'does not have the direct right to possession' of the Documents as an indirect shareholder of PT PDP; (2) 'does not have the right to inspect or take copies of and to possession of or to use of'; and (3) cannot use any Documents that are already 'in his physical possession' without approval in a general meeting of shareholders.

[12] Counsel for the appellant submitted that the Documents essentially comprise documents belonging to PT PDP and its five Indonesian subsidiaries (the "PT PDP Group Documents"). In light of the fact that none of PT PDP or its five subsidiaries was a party to the BVI proceedings, the appellant contends that it was common ground before the Judge that, as a matter of Indonesian law (as set out in the Dentons Opinion) and notwithstanding Mr. Ng's position as a director and indirect shareholder of PT PDP (Mr. Ng being a 50% shareholder in PT Grahaidea, which in turn owns about 49.6% of the share capital of PT PDP) that:

(i) Mr. Ng does not have the legal right to possession of the PT PDP Group Documents for the purposes of the valuation exercise in the BVI proceedings;

(ii) Mr. Ng as a director and indirect shareholder of the PT PDP Group companies does not have the legal right to inspect and take copies of and to possession of or to use the PT PDP Group Documents for the purposes of the BVI proceedings;

(iii) Mr. Ng can only disclose and use any PT PDP Group Documents that are already in his physical possession (or that he may be able to access) in his capacity as a director of the PT PDP Group companies for the purposes of the BVI proceedings with the consent of the shareholders of the PT PDP Group companies; and

(iv) If Mr. Ng were to inspect and take copies of or take possession of or otherwise use the PT PDP Group Documents without the consent of PT PDP Group companies, in particular without the consent of the

general meeting of shareholders of the PT PDP Group companies, Mr. Ng would be acting in breach of fiduciary duty to the PT PDP Group companies and would be personally liable for any losses caused to those companies as a result of his actions; and in addition, he may incur criminal liability.

[13] Applying the Dentons Opinion, the appellant submitted that there was no question of Mr. Ng having a right to inspect or take copies or having a right to obtain possession of the PT PDP Documents or copies thereof. Nor was it alleged on Mr. Lie's behalf that Mr. Ng was already in physical possession of such documents (he is and was not); and even if he was, it was in any event accepted by Mr. Lie that under Indonesian law he could only use and disclose those documents for the purposes of proceedings to which none of PT PDP or its subsidiaries was a party if the shareholders of PT PDP consented to such use and disclosure.

[14] Mr. Ng now seeks, by this appeal, to overturn the judgment of 14th November 2022 and the Unless Order. The Notice of Appeal identifies 3 grounds of appeal as developed in Mr. Ng's skeleton argument filed on his behalf by counsel. In summary, Mr. Ng contends:

i. Ground 1 - that the Judge's conclusion that Mr. Ng had control of the relevant documents for disclosure purposes was at the heart of his decision that Mr. Ng had failed to give disclosure in breach of the 31st March 2022 Order and that he should be subjected to the Unless Order. This conclusion of control was in turn based on an inference (which Mr. Lie had invited the Judge to draw) that there was an existing understanding or arrangement for Mr. Ng to have free access to the relevant documents for use in these proceedings. Mr. Ng's case, however, is that an inference was wholly unjustified on the evidence before the Judge. In particular:

(a) The inference was not supported by any evidence and was directly contradicted by the evidence before the Judge, in

particular, the several letters evidencing the explicit refusal of those in control of the relevant documents under Indonesian law to consent to Mr. Ng having free access to those documents; and

(b) The Judge's conclusion that Mr. Ng had control of the relevant documents was therefore not supported by any evidence or was based on a misunderstanding of the evidence before him; alternatively, it was a decision that no reasonable judge could have reached on the evidence before him.

ii. Ground 2: that the Judge wrongly relied on 3 specific aspects put forward by Mr. Lie as justifying the inference of an understanding or arrangement giving Mr. Ng free access to the relevant documents for the purposes of the valuation proceedings. On a proper analysis and having regard to the established legal principles, those 3 aspects could not individually or cumulatively justify the said inference – which was in any event negated by the evidence before the Judge.

iii. Ground 3: that the Judge failed properly to consider whether there was a currently existing understanding or arrangement for Mr. Ng to have free access to the relevant documents and whether the evidence before him supported a finding of an existing understanding or arrangement for free access.

The parties submissions
The appellant's submissions

[15] Under ground 1, the appellant contends that the evidence before the Judge showed clearly and overwhelmingly that PT PDP and its shareholders (in particular, PT Grahaidea as a 49.6% shareholder of PT PDP and PT KPW as a 48.92% shareholder of PT PDP) expressly did not consent to Mr. Ng having free access to the PT PDP Group Documents for the purposes of the BVI proceedings, in particular, the Valuation Proceedings. Indeed, counsel for the appellant pointed out

that historically, in the context of the liability stage of the proceedings, the PT PDP shareholders had made it clear that they were not willing to grant Mr. Ng free access to the documents of the PT PDP Group companies.[1] The reason for the shareholders' stance was that they considered that Mr. Lie had been guilty of misconduct during the period of his participation in the management of the PT PDP Group and caused substantial losses to the group.

[16] Counsel argued that this is not the occasion to assess the merits or otherwise of the shareholders' reasoning in this regard, rather, what matters is that their refusal to consent to Mr. Ng's free access to the documents of the PT PDP Group companies was clearly spelt out. Counsel also pointed out that more recently, in the context of the Valuation Proceedings, the PT PDP shareholders made clear in correspondence with Carey Olsen on Mr. Ng's behalf on 5th and 13th July 2022 that, in the absence of further detailed consideration and discussion between the shareholders, they were not willing to grant Mr. Ng free access to the PT PDP Group Documents and that the collective permission of the shareholders was required in order for Mr. Ng to have such access and use of the documents in the Valuation Proceedings.

[17] The indication is that the shareholders expressed concern about what they considered to have been Mr. Lie's historic misconduct within the PT PDP Group and the potential misuse of information by Mr. Lie in light of his involvement in other competing palm oil businesses in Indonesia. Further, in a letter dated 7th November 2022, the PT PDP shareholders indicated that they were only willing to give Mr. Ng access to some but not all of the PT PDP Group Documents sought by Mr. Lie. Specifically, the shareholders indicated that certain of the documents requested by Mr. Lie either did not exist or were not approved for disclosure, and reiterated the concerns they had previously expressed about PT PDP Group Documents being made available to Mr. Lie. Again, counsel for the appellant submitted that the validity of the shareholders' expressed concerns is beside the point; what matters is that

[1] See the correspondences dated 2nd and 8th April 2020.

they explicitly refused to grant Mr. Ng access to the PT PDP Group Documents, save for those limited classes of documents which were expressly identified in Attachment A to their 7th November 2022 letter.

[18] In light of this uncontroverted evidence, counsel submitted that it is plain and obvious that there is and was no existing understanding or arrangement for Mr. Ng to have free access to all of the PT PDP Group Documents for the purposes of the valuation proceedings. On the contrary, there were express and repeated objections by the PT PDP shareholders to Mr. Ng having such free access. Counsel further submitted that it is impossible to see on what basis the Judge could properly have reached the diametrically opposite conclusion, namely, that there was an understanding or arrangement between Mr. Ng and the PT PDP shareholders for Mr. Ng to have free access to the PT PDP Group Documents for the purpose of the Valuation Proceedings.

[19] Counsel therefore concluded that the Judge was plainly wrong to have found a current agreement for practical access and that none of the shareholders will have any real objection to him deploying the information. And in so far as the Judge proceeded to disregard the PT PDP shareholders' objections to Mr. Ng having free access to the PT PDP Group Documents on the basis that those objections were a charade and that he did not believe that the shareholders' lack of approval was genuine, counsel submitted that the Judge had no rational grounds for such a view and reached a conclusion that no reasonable judge could have reached having regard to the evidence before him. He further submitted that the Judge's notion of a charade is inconsistent with the Indonesian law context, pursuant to which the PT PDP shareholders are entitled to consent or refuse to consent to Mr. Ng having free access to the documents of the PT PDP Group. Their lack of consent is evidence of and fully consistent with the exercise of their rights under Indonesian law.

[20] In ground 2 of the appeal, the appellant challenges the 3 specific aspects relied upon by Mr. Lie in support of the inference that there was an existing understanding

or arrangement for Mr. Ng to have such free access to the PT PDP Group Documents. He asserted that those three aspects (whether individually or cumulatively) were not capable of supporting the alleged inference and the Judge was wrong to conclude that they did. First, as regards the Judge's finding in the Main Judgment that 'Mr. Ng is currently the sole director of PT PDP' *and* '[t]hus, through PT PDP, Mr. Ng has exclusive control over the Business', counsel for the appellant submitted that It is well established that corporate control is a relevant, but not decisive, factor when considering whether there is an understanding or arrangement for free access to the documents held by a third party (be it a subsidiary or other third party). In that regard, counsel relied on the reasoning in **Ikana Holdings, S. De R.L et al v Putney Capital Management Ltd.**[2]

[21] Counsel further argued that in light of the undisputed Indonesian law evidence before the Judge, the mere fact that Mr. Ng was the sole director of PT PDP did not in any event justify the conclusion that he had free access to the documents of the PT PDP Group for the purposes of his personal litigation against Mr. Lie. On the contrary, as the Dentons Opinion made clear, his status as director and the documentary access that he enjoys in his capacity as such does not mean that he has a right of free access to the PT PDP Group Documents for the purposes of his personal litigation against Mr. Lie. In the specific statutory context, the potential relevance of control over the business as a basis for inferring an understanding or arrangement for free access is much diminished; and none of the Judge's findings of corporate control by Mr. Ng in his capacity as sole director of PT PDP obviated the need for him to obtain the PT PDP shareholders' consent to his free access to the PT PDP Group Documents for the purposes of the BVI proceedings or changed the simple fact that the PT PDP shareholders had refused such access.

[22] In these premises, counsel submitted that the Judge was plainly wrong to hold that all it would take is Mr. Ng's fiat to furnish those documents and that the absence of approval by the PT PDP shareholders was not genuine. The Judge not only failed

[2] BVIHCMAP2021/0027 (delivered 24th January 2022, unreported) at paragraphs [15]-[29].

to have regard to the legal principle that corporate control in running the affairs of a company is not to be equated with an entitlement to free access to the documents of the company in question for one's private purpose (as distinct from the company's purpose) but he also disregarded the undisputed Indonesian law evidence that made it an essential pre-condition of Mr. Ng's ability to have free access to the PT PDP Group Documents that the PT PDP shareholders should have specifically consented to such access – which consent was only forthcoming to the limited extent set out in the PT PDP shareholders' letter dated 7th November 2022.

[23] Counsel further argued that the Judge's unsubstantiated doubt as to the genuineness of the PT PDP shareholders' refusal to consent to Mr. Ng having free access to the PT PDP Group Documents for the purposes of the BVI proceedings appears to betray the Judge's view that those shareholders, if they really wanted to, could consent to Mr. Ng having free access to the PT PDP Group Documents. The true test of control in this context is not whether the shareholders could consent, but whether they in fact do (and they clearly do not).

[24] Counsel further argued that the Judge's finding that Mr. Ng has the power to demand that the PT PDP Group produce documents at his whim is also inconsistent with what has previously transpired in these proceedings. He pointed to the well-documented evidence that Mr. Ng himself was previously denied access to documents by the PT PDP Group that would have bolstered his counter-claim at the liability proceedings. As a result of the shareholders refusing to permit disclosure, Mr. Ng was not able to properly particularise what the court below described as the 'Palm Shells Allegation' (i.e. that Mr. Lie sold palm fruit shells and misappropriated the proceeds thereof without the consent of PT PDP's management).

[25] The learned Judge ultimately rejected the Palm Shells Allegation on the basis of lack of documentary evidence from Mr. Ng observing that Mr. Ng's inability to procure documents from PT PDP to support his counter-claim 'found no sympathy with [him]'. However, counsel for the appellant submitted that it is important that note

that the Judge had accepted in the Main Judgment that Mr. Ng could not produce documents on demand (even when there was a discernible benefit to him), but this was a fact which the Judge disregarded in the context of Mr. Lie's application for the Unless Order.

[26] With regard to Mr. Lie's reliance on the fact that Mr. Ng was able to obtain access to a handful of documents relating (principally) to work orders, counsel for the appellant submitted that these isolated instances of Mr. Ng having been able to produce a few documents belonging to PT PDP Group companies (primarily documentation relating to work orders) back in October 2020 at the time of the liability trial, do not begin to justify an inference that there is an understanding or arrangement as at 2022 (over 2 years later) that Mr. Ng can continue to have free access to PT PDP Group Documents for the purposes of the valuation proceedings.

[27] Counsel for the appellant pointed out that Mr. Ng's position before the Judge (as orally relayed by Mr. Ng's counsel on instructions) was that the handful of documents in question were obtained from the relevant PT PDP Group companies at Mr. Ng's oral request. In the premises, he submitted that Mr. Ng's production of those isolated documents in October 2020 could not reasonably support the inference of an understanding or arrangement between Mr. Ng and the PT PDP shareholders that Mr. Ng had free access to all documents of the PT PDP Group for the purposes of these proceedings. He further argued that it is trite law that '[s]uch cooperation as there may been (sic) in the past as to compliance with specific requests … does not amount to evidence' of an understanding or arrangement for free access because it:

> "does not indicate that [the party alleged to have control] would be entitled to send its solicitors into [the third party's] premises and to insist on searching [the third party's] computers, applying the kind of word search terms and insisting on production of the computers of various individuals which would be necessary in order to enable that to be done."[3]

[3] See Males J in Ardila Investments NV v ENRC NV & Anor [2015] EWHC 3761 (Comm) at paragraph [21].

Instead, the arrangement or understanding for free access must be one under which 'the holder of the documents will search for relevant documents or make documents available to be searched'.

[28] Moreover, counsel submitted as per Males J in **Ardila Investments NV v ENRC NV & Anor**[4] that:

> "… the mere fact that a party to litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent."

[29] The appellant therefore asserted that the limited historic production of documents could not of itself support the inference that there continued to be such an understanding or arrangement as at November 2022 – especially in light of the PT PDP shareholders' letters of 13th July 2022 and 7th November 2022 as earlier described, which specifically evidence their refusal to consent to Mr. Ng's free access to PT PDP Group Documents. Counsel argued that the extended concept of control requires proof of an understanding or arrangement for free access to the third party's documents which continues to be in existence at the time when disclosure is supposed to be given and he relied on the dicta in **Schlumberger Holdings Ltd v Electromagnetic Geoservices ASA**[5] and **Ardila Investments NV v ENRC NV & Anor**[6] as well as the learning in **Documentary Evidence by Charles Hollander KC ("Hollander").**[7]

[30] Thirdly and finally, in relation to Mr. Lie's vague assertion of 'murky conduct' on Mr. Ng's part in resisting the disclosure sought by Mr. Lie, counsel submitted that there is nothing murky in Mr. Ng's point that he does not control the documents of the PT PDP Group; he clearly does not, as evidenced by the Dentons Opinion.

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[4] Ibid.
[5] [2008] EWHC 56 (Pat) at paragraph [21].
[6] [2015] EWHC 3761 (Comm) at paragraph [10].
[7] Documentary Evidence, Charles Hollander KC, 14th Edition, Sweet & Maxwell, 2021 paragraph 9-022.

[31] Counsel noted that Mr. Lie's notion of 'murky conduct' is based on the coining of this phrase in **Hollander**, at paragraph 9-23. However, he submitted that the learned author did not put forward that phrase as a substitute for the legal test of whether there is a proven and existing understanding or arrangement for free access to the third party's documents. Counsel further argued that in the particular circumstances of this case, a vague appeal to 'murky conduct' does not provide a proper basis for inferring any existing understanding or arrangement between Mr. Ng and the PT PDP Group companies or shareholders that Mr. Ng can have free access to the PT PDP Group Documents for the purposes of the valuation proceedings.

[32] Counsel concluded that in ruling as he did, the Judge failed to consider the criminal sanctions that the Dentons Opinion cautioned would befall Mr. Ng if he were to disclose PT PDP Group Documents in these proceedings without the consent of the PT PDP Shareholders. Counsel concluded that the Judge was clearly not alive to the very real consequences that would follow an Unless Order even though the Dentons Opinion was placed as undisputed evidence of Indonesian law before him.

[33] In ground 3, the appellant contends that there is no basis whatsoever upon which the Judge could have found that Mr. Ng has control of the PT PDP Group Documents for the purposes of the valuation proceedings. Counsel for the appellant submitted that even if in reliance upon the narrow historic disclosure the Judge was justified in inferring an understanding or arrangement for Mr. Lie to have free access to the documents of the PT PDP Group, he failed to ask himself the question whether it was reasonable to infer that such an understanding or arrangement continued to subsist as at November 2022 for the purposes of the Valuation Proceedings.

[34] Counsel for the appellant reiterated that the extended concept of control requires proof of the third party's continuing consent to free access on the part of the party alleged to have control of the third party's documents – that is, consent which is extant as at the date when disclosure is to be given. He submitted that on the

present facts, whatever may have been the position in October 2020 in respect of the handful of PT PDP Group Documents which Mr. Ng was able to obtain upon oral request from PT PDP for the purposes of the liability trial, it is clear from the PT PDP shareholders' letters dated 13th July 2022 and 7th November 2022 [that they do not (or no longer) consent to Mr. Ng having free access to the documents of the PT PDP Group for the purposes of the valuation proceedings. Where, as per the Dentons Opinion, the PT PDP shareholders are entitled to withhold their consent in this connection, it therefore follows that there is no existing consent, understanding or arrangement for Mr. Ng to have free access to the PT PDP Group Documents.

The respondent's submissions

[35] This appeal was robustly defended by the respondent who noted that while the notice of appeal identifies 3 grounds of appeal on proper analysis, the 3 grounds are not separate and discrete but overlap substantially. According to counsel for the respondent there is one overarching issue: whether the Judge was 'plainly wrong' to find as a fact that Mr. Ng had 'practical control' of the documents for the purpose of rule 28.2 (2) of the **Civil Procedure Rules 2000** ("CPR") duty of disclosure. Nevertheless, counsel addressed the grounds of appeal *in seriatim*.

[36] In respect of ground 1, counsel for the respondent submitted that the real point being made by the appellant in ground 1 is that there was evidence that 'contradicted' the claimed 'understanding/arrangement' – in the form of the correspondence to and from the PT PDP shareholders. However, counsel for the respondent submitted that the problem with ground 1 is that whilst referring to an 'absence' or 'misunderstanding' of evidence, the appellant's case does not refer to any of the '3 relevant strands of evidence' actually identified in support of Mr. Lie's 'practical control' argument. Counsel submitted that this ground of appeal is misleading in its claim that the Judge inferred an 'understanding/arrangement' for free access 'based on an absence' of evidence because there was important documentary evidence (to which the Judge was carefully taken) of free access to PT PDP Group documents.

[37] Counsel submitted that the learned Judge would have been reminded of the identity of the PT PDP shareholders – in circumstances where 1.48% of the shares was owned by PT PDP itself, there were just 2 relevant shareholders: Grahaidea with 49.6% (Grahaidea was the jointly owned company of Mr. Ng and his brother Mr. Ng Ming Hwie and the vehicle to which Mr. Ng transferred his PT PDP shares in SOFL pursuant to the 2017 Disposition); and PT KPW with 48.92% (his was the company of Madam Karlinah of which one Mr. Iqbal Rahim Willis was said to have signing rights). Accordingly, there were just 3 human individuals for Mr. Ng (even notionally) to consult, namely:

(i) Mr. Ng Min Hwie: who is Mr. Ng's younger brother and who the Judge found as a fact acted as Mr. Ng's nominee director in SOFL. Mr. Hwie gave no evidence at trial.

(ii) Madam Karlinah: Mr. Ng had claimed in cross-examination that it was she that had blocked the payment of the FY 2015 dividend to SOFL. However, this claim was emphatically rejected by the Judge, who found that it was Mr. Ng alone that had blocked the dividend. She also gave no evidence at trial.

(iii) Mr. Iqbal Rahim Willis: he gave no evidence at trial and was a character of so little consequence that he did not even feature in the Main Judgment.

[38] Counsel then went on to consider the several pieces of correspondence relied upon by the parties including the so-called 'raft' of formal letters sent two weeks after the 20th June 2022 hearing, ostensibly asking PT PDP's shareholders for consent to disclose the Documents. Counsel argued that the correspondence and these observations were the bedrock of the submission made to the Judge that the claimed attempts to seek shareholder consent were a mere "charade" on the part of Mr. Ng. In coming to the conclusion that '[i]t's a complete charade here, and it's merely there to create the appearance of a process when, in fact, all it takes in

Mr Ng's fiat and those documents can come out'. The learned judge relied on Counsel for the respondent's analysis of the correspondence. That analysis *inter alia* pointed out that there was no evidence at all from Mr. Ng as to "discussions" with the PT PDP shareholders, for the good reason that there had not been any such 'discussions' between him and his brother and Mr. Willis; it was equally obvious (consistent with Mr. Ng's obstructive stance throughout the proceedings) that Mr. Ng was implacably opposed to the disclosure of anything that would assist in a proper assessment of the value of the business; and whilst the essence of the Dentons Opinion was that Mr. Ng did 'not have the direct right to possession' of the documents without approval in a general meeting of shareholders, as 49.6% shareholder of PT PDP (and with the 1.38% balance owned by PT PDP itself) Grahaidea's vote in favour of disclosure would have constituted more than 50% of "the number of votes cast". Accordingly, counsel submitted that it was (and always had been) in the power of Mr. Ng to consent to disclosure of the documents.

[39] Counsel for the respondent therefore concluded that the appellant's argument does not attempt to engage with the observations made to (and accepted by) the Judge in relation to (1) the identity of the shareholders and signatories (most obviously the fact that Mr. Ng was purportedly seeking consent from himself and his own brother); (2) the absence of any evidence from Mr. Ng as to the fact or nature of the alleged 'discussions' with the shareholders; and (3) the requisite voting percentage (more than 50% of 'votes cast'). He further submitted that the appellant's arguments fail to grapple with the 'charade' argument accepted by the Judge and are made prior to any consideration of the 3 strands of evidence upon which the Judge reached his conclusion of an 'understanding/arrangement'.

[40] Counsel for the respondent further argued that the appellant cannot sensibly claim that the Judge 'reached a conclusion that no reasonable judge could have reached having regard to the evidence before him'. Counsel highlighted the extent to which the Judge was 'immersed in the evidence in a way that an appeal court cannot replicate'. He argued that the 14th November 2022 Hearing was not an isolated,

paper-based hearing. Instead, it followed a 3-week trial and 5 days of cross-examination of Mr. Ng in which the question of Mr. Ng's conduct and motives had been centrally in issue.

[41] Time and again, the Judge found, on the totality of the evidence at trial, that Mr. Ng's claims were a "contrived and convenient fiction". Moreover, in the course of the 20th June 2022 hearing (5 months prior to the Hearing) the Judge had expressed a similar concern in relation to Mr. Ng's attitude to documents and his tendency to resort to "manipulation" and "fictions" "to pretend he doesn't actually have any ability to provide documents", even stating that Mr. Ng's excuses at trial for not providing disclosure "are the merest technical fig leaves intended to manipulate and control the disclosure that Mr. Ng does not want to give". Counsel argued that this was the contextual background to the Judge's finding that the correspondence – centrally involving Mr. Ng's jointly owned company Grahaidea and his nominee younger brother – was a mere "charade".

[42] The appellant's claim 'that no reasonable judge could have reached having regard to the evidence before him' fails to take any account of the Judge's 'total familiarity' with, and 'far deeper' 'insight' into, the facts of this case and the role played by Grahaidea and Mr. Ng's brother. The reality was that the 'charade' in respect of the correspondence was entirely in line with the other 'fictions' orchestrated by Mr. Ng in respect of the Unfair Prejudice Allegations – and there was an abundance of evidence upon which the Judge could and did make that finding.

[43] With regard to ground 2, the respondent again asserts that the appellant has misconstrued the learned Judge's ruling. Taking no issue with the Court's findings in **Ikana Holdings**, counsel submitted that nowhere in the Judgment did the Judge state or suggest that "corporate control" was to be "equated with an entitlement to free access". On the contrary, it is perfectly clear that it was conceded up front that "corporate control" was "one relevant and important factor but is not in itself decisive" and the Judge agreed with this.

[44] Counsel submitted that the Judge quite properly, and in accordance with **Ikana Holdings**, relied upon his own findings at trial as to Mr. Ng's corporate "control" in respect of PT PDP as one relevant (but not decisive) factor in respect of "practical control". Informing such finding was the evidence of Ms. Mary Stewart who pointed to:

(i) The fact that on Wednesday 7th October 2020, the day before the start of the trial, Ms Shah of Carey Olsen Singapore LLP (acting for Mr Ng) wrote to Conyers (at 12.39) stating "our client intends to disclose the following additional documents". The email attached (1) 8 documents comprising: an APMR Register of Work Orders in English and Indonesian; an APMR Work Order in English and Indonesian; an APMR Work Agreement in English and Indonesian; and an APMR payment of government levy in English and Indonesian ("the 7th October Documents"); and (2) Mr. Ng's Third Supplemental List of Documents, dated 7th October 2022.

(ii) On Thursday 15th October 2020, 7 days after the commencement of the trial, Ms. Chng of Carey Olsen Singapore LLP wrote to Conyers BVI (at 5.48am) (1) attaching 11 further documents, comprising: 3 maps of palm oil plantations; a PT APMR Register of Work Orders in Indonesian and English for 2012 [V2/6B/396-398]; and three PT PEU Registers of Work Orders in Indonesian and English for 2013 and 2014 ("the 15th October Documents"); and (2) promising the filing of Mr. Ng's 5th Supplemental List of Documents (which was filed later on the same date).

[45] Ms. Stewart noted that these documents were produced on the eve of and in the course of trial in an attempt by Mr. Ng to advance his case in respect of his key IDR2bn Allegation and that:

> "…Notably, no letters of request (seeking shareholder consent from the shareholders of the relevant Indonesian companies) was ever produced or mentioned by NMH in respect of the above documents disclosed on 7 October 2020 and 15 October 2020…"

Ms. Stewart also noted that "contrary to what is said at paragraph 19 of Chng 1 (that uncovering and extracting physical documents will likely take some time), it is evident that NMH was able to (i) extract (ii) convert into electronic format and (iii) translate, a number of historical documents of PT APMR and PT PEU dating back as far as 2012 at relatively short notice in advancement of his own case during the liability trial."

[46] Noting the curious timing of the disclosure (NMH was able to (i) extract (ii) convert into electronic format and (iii) translate, a number of historical documents of PT APMR and PT PEU dating back as far as 2012 at relatively short notice in advancement of his own case during the liability trial.), Counsel for the respondent submitted that Mr. Ng was able to and did disclose the 7th and 15th October 2015 Documents: (1) in an attempt to advance one of his key misconduct allegations; (2) on short notice; and (3) without any reference to any need to seek the consent of PT APMR or PT PEU. He further noted that the fact that both Mr. Ng's 3rd Supplemental List of and 5th Supplemental List of Documents referred to (and did no distinguish between) "physical possession" a "right to possession" and a "right to inspect or take copies". Counsel concluded that it was clear that Mr. Ng had free and immediate access to these PT APMR and PT PEU documents and that there was no need to write formal letters of request and await a response.

[47] Relying on the ratio in **Berkeley Square Holdings Limited v Lancer Property Asset Management Ltd & Others**[8] at paragraph [46], counsel for the respondent submitted that the existence of an arrangement or understanding may be inferred from the surrounding circumstances. He argued that evidence of past access to documents in the same proceedings is a highly relevant factor to which a judge can clearly have regard. Counsel further submitted that the Judge would have drawn on his familiarity with the facts of the Claim, explaining that in respect of a company "being controlled by one person as is the case here" (by contrast with "vast international conglomerates" of the likes of Lonrho and Shell) it was "highly artificial

[8] [2021] EWCA Civ 551.

and unreal" to search for "actual evidence of such an agreement". Counsel argued that this was an entirely permissible, and well-reasoned, observation – and squarely in line with the principle that the existence of the arrangement/understanding "may be inferred". It was therefore open to the Judge to have found that there was such an arrangement/understanding explaining "I am under no illusion whatsoever that Mr. Ng can produce these documents".

[48] Counsel noted that in his response to this contention, the appellant has sought to downplay the importance of the 7th and 15th October Documents describing them as a "handful of documents relating (principally) to work orders" which it portrays as "isolated instances of Mr. Ng having been able to produce a few documents belonging to the PT PDP Group companies…back in October 2020". However, Counsel argued that the court should not ignore the relevant context which reveals that when Mr. Ng wanted to advance his own case he was able to produce physical (non-electronic) Indonesian language PT PEU / PT APMR books and ledgers (dating back to 2012) without difficulty or delay. Counsel further discounted the appellant's assertion that these documents were "obtained from the relevant PT PDP Group companies at Mr. Ng's oral request". Counsel pointed out that there was no evidence to support this assertion which was in any event flatly contradicted by Mr. Ng's signed 3rd and 5th Supplemental List of Documents which refer expressly to a 'right to possession' and a 'right to inspect or take copies'; Moreover, Counsel submitted that the appellant has failed to engage with the straightforward point from **Berkely Square v Lancer** that '[e]vidence of past access to documents in the same proceedings is a highly relevant factor'. He concluded that the Judge was certainly entitled to find that this evidence of past access to important documents in the same proceedings (taken together with the other two strands of evidence) permitted the inference of an arrangement/understanding.

[49] Turning finally to the Judge's reliance on Mr. Ng's 'Murky conduct' Counsel agreed that the phrase "murky" "conduct" was coined in the legal text **Documentary Evidence** and is not put forward as a substitute for the legal test. However, he

submitted that Hollander is the leading textbook on documentary evidence, routinely relied upon before the English and BVI Courts. He posited that the adjective "murky" accurately describes the sort of conduct where the Courts have found "practical control" (e.g. the "suspicious" behaviour of the trustees in **North Shore Ventures v Anstead Holdings Inc**).[9]

[50] Counsel submitted that applying these principles; it was difficult to contemplate a more obvious case of "murky" conduct on the part of a litigant resisting disclosure. Counsel pointed to the learned Judge's observation that "my view at the trial was that such excuses are the merest technical fig leaves intended to manipulate and control the disclosure that Mr Ng does not want to give". In arriving at this conclusion Counsel submitted that the Judge drew on his familiarity with the evidence and the findings of fact that he had already made at trial.

[51] The appellant claims that "a vague appeal to "murky conduct" does not provide a proper basis for inferring any existing understanding or arrangement". However, Counsel for the respondent submitted that there was no "vague appeal". Instead, the reference was firmly anchored in the existing findings of the Judge as to the lengths that Mr Ng was prepared to go to avoid disclosure. Further he noted that the appeal to "murky conduct" was only the final of the 3 strands of evidence identified in support of the "practical control" argument. Counsel argued that this is precisely the sort of case and conduct where the Court can and should infer an existing arrangement/understanding.

[52] Finally, Counsel also discounted the appellant's reliance on the Dentons Opinion, contending that it is an expert report which says nothing about either (1) Mr. Ng's conduct in the course of the trial; or (2) the issue of "practical control".

[53] In regard to ground 3, counsel for the respondent submitted that during the hearing before the Judge, it was common ground that the arrangement/understanding must

[9] [2012] EWCA Civ 11.

be an existing one. Counsel pointed out that the detailed exposition of the legal principles set out in legal submissions made this clear. Counsel noted that the Judge referred expressly to '*the existence of a current agreement*' and found (in the present tense that) 'I am under no illusion whatsoever that Mr. Ng can produce these documents" and that "All it takes is Mr Ng's fiat and these documents can come out'. Counsel therefore concluded that there is no basis for Mr. Ng's assertion that the Judge disregarded this requirement.

Analysis and discussion

[54] In treating the appellant's grounds of appeal, it is critical that the appropriate appellate approach be applied. This is because the grounds essentially challenge findings of fact made by the Judge. In that regard, I am guided by the dictum in **Fage UK Ltd and another v Chobani UK Ltd. and another**.[10] At paragraph [114] Lewison LJ reiterates the following well-known principles:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

[10] [2014] EWCA Civ 5].

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

[55] Similar statements describing the appropriate appellate approach have been applied in numerous cases from this Court.[11]

[56] Counsel for the respondent has submitted that this appeal challenges findings of fact made by the Judge who had (and has) unrivalled knowledge of the claim and familiarity with the evidence filed in support and in defence of it. According to counsel, the advantage of the trial judge extends beyond having seen and heard witnesses and he relied on the judgment in **Group Seven Ltd. (a company incorporated under the laws of Malta) v Notable Services LLP** [12] in which the English Court of Appeal quoted and relied upon the following extract (paragraphs [41 and 43]) from the judgment of Leggatt LJ in **JSC BTA Bank v Ablyazov and another:**[13]

> "41. **Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate.** As it was put in the majority judgment of the Supreme Court of Canada in *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted by Lord Reed JSC in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 33): "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole." In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:
>
> > "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight

[11] See Dolcie Christian (In her capacity as Executor of the Estate of Sydney Christian, QC) v King's Casino Limited ANUHCVAP2018/0030 (delivered 26th March 2020, unreported); Khouly Construction and Engineering Limited v Edmond Mansoor ANUHCVAP2020/0023 (formerly ANUHCVAP2019/0009) (delivered 15th April 2021, unreported); Arricano Real Estate Plc v Stockman Interhold SA BVIHCMAP2021/0009 (delivered 8th February 2022, unreported).
[12] [2019] EWCA Civ 614 at paragraph [23]; and see Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 57710).
[13] [2018] EWCA Civ 1176.

> gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

See *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 4). Furthermore, not every detail of the relevant evidence need or can be captured in the reasons given by the judge. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

"[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

43. For these reasons **the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is "plainly wrong":** see e.g. *McGraddie v McGraddie*, [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, **what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion "cannot reasonably be explained or justified"** (ibid). As Lord Reed also stated in the *Henderson* case (at para 62):

> "It does not matter, with whatever degree of certainty that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached."

Another formulation of the test, which has also been approved at the highest level, is that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293, para 129 (Mance LJ) approved in *Assicurazioni Generali SvA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, para 17 (Clarke LJ) and by the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46." (Emphasis added)

[57] I am satisfied that this reflects the correct appellate approach. I am further satisfied that this appellate restraint extends also to a judge's evaluation of the significance of factual findings or the inferences to be drawn from them. An appellate court must be cognisant not only of the nature of the decision but how much it would be dependent upon an advantage possessed by the judge, whether from a thorough immersion in all angles of the case or from first-hand experience of the testing of the evidence. It is however equally clear that no first-instance judgment is altogether immune from appeal. Where a decision is shown to be wrong or to result from a serious procedural error, or where it is clear that decision is 'plainly wrong', it is the duty of the appeal court to say so.

[58] Applying these principles, I will now turn to the issues which arise on this appeal.

General - The duty to disclose

[59] Any analysis of the grounds of appeal herein must commence with a discussion of the general principles governing disclosure in civil litigation, the ultimate aim of which is to ensure that all the parties to a civil claim are aware of all the documents that have a bearing on the claim. The duty of disclosure in litigation arises under CPR Part 28 which prescribes the appropriate basis for the disclosure of documents. The key factors which must be borne in mind by a judge contemplating an order for disclosure are "*relevance*" and "*control*". A document is liable to be disclosed if it is directly relevant to the issues that would arise for determination at trial and it arises if the party with control of the document intends to rely on it or if it tends to adversely affect that party's case; or if it tends to support another party's case.

[60] In this appeal, the question of relevance is not in issue. Instead, the appellant contends that the question of control was at the heart of the Judge's determination that Mr. Ng had failed to give disclosure in breach of the 31st March Order and that he should be subjected to the Unless Order. The issue of "control" is therefore the

gravamen of this appeal and the starting point must be CPR Part 28.2 which provides that:

> "28.2 (1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.
> (2) For this purpose a party has or has had control of a document if –
> (a) it is or was in the physical possession of the party;
> (b) the party has or has had a right to inspect or take copies of it; or
> (c) the party has or has had a right to possession of it."

[61] Mr. Ng contends that the requested documents are not in his possession or control. He asserts that the documents which are the subject of this disclosure order are in the possession of or under the control of PT PDP. Although Mr. Ng agrees that the PT PDP shareholders have afforded him limited consent to access to some of the PT PDP Group documents, he states categorically that they have expressly refused to consent to him having free access to the PT PDP Group Documents for the purposes of the BVI proceedings (in particular, the valuation proceedings). This is made evident from the several pieces of correspondence relied upon by the appellant and which were heavily referenced during this appeal.

[62] The respondent on the other hand contends that notwithstanding this unequivocal documentary evidence, there was sufficient material from which the Judge could have found as a fact that there was an understanding or arrangement between the respondents on the one hand, and PT PDP on the other, that the respondent had free access to the documents, and this was sufficient for the Judge to find that the respondent had control of the documents within the meaning of CPR 28.2.

[63] What is clear is that the proceedings in the court below were robustly contested before the Judge who has been largely seised of the litigation thus far. It is not disputed that the judge has for some 4 ½ years, presided over every aspect of this claim and has been immersed in this complex dispute acquiring a thorough knowledge of the facts and parties.

[64] The chronological context of this bifurcated litigation is particularly pertinent. The orders which are the subject of this appeal follow a lengthy trial on liability which resulted in a written judgment[14] issued in October 2021. While it is clear that there was no oral evidence which would have informed the case management of the valuation proceedings, the learned judge would have had an opportunity over the course of the liability trial to have observed the parties and their witnesses during their oral examination. Indeed, the Judge's 145 paged judgment on liability is replete with his observations in this regard.[15]

[65] Not surprisingly, the 3-week trial on liability spawned further hearings aimed at arriving at appropriate case management directions of the Valuation Proceedings. The Directions Order followed a 1 ½ day hearing on 9th and 10th March 2022 and eventually led to yet further hearing on 31st March 2022 for the purposes of determining the precise timetable of the Valuation Proceedings. The appellant's failure to meet the prescribed deadline date for disclosure (6th June 2022) led to the Extension Application (filed after the prescribed deadline) which resulted in the Judge's ex tempore judgment given on 20th June 2022 which was heavily critical of the appellant's evidence in support. There followed the Unless Order Application and the 14th November 2022 hearing which eventually led to a further ex-tempore judgment and Unless Order which are the subject of this appeal.

[66] Immersed in the proceedings as he would have been, it is clear that the Judge would be certainly more familiar with the details of the case than this appellate court. Guided by the principles governing appellate restraint, I am satisfied that the learned Judge's findings of fact, whether primary or by evaluation of the evidence, should be respected and that this court should only interfere if it is determined that the learned Judge erred in principle.

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[14] BVIHC(Com) 2020/147 (formerly BVIHCM 2018/0114) (delivered 25th October 2021, unreported).
[15] In particular, the Judge concluded that Mr. Ng was "a self-serving witness and not one upon whose testimony the Court could rely".

[67] There is no detailed written judgment which explains the reasoning of the Judge, instead he delivered ex-tempore reasons shortly after hearing oral submissions by counsel which made it clear that the learned Judge was clearly persuaded by the arguments advanced on behalf of the respondent. At page 165 of the Transcript of proceedings, the trial judge made it plain that, save for a minor issue concerning the contents of the list of documents and the content of the actual documents,'[f]or all the other reasons, I agree entirely, and I adopt the reasons that Mr. Hardwick has given. So, his application succeeds'.

[68] It has generally been accepted that the wholesale adoption of the counsel's submissions is not offensive. See: **English v. Emery Reimbold & Strick Ltd.**[16] Indeed, in 2006, a British tribunal, applying **Emery**, explained that 'there is nothing to prevent a Tribunal from adopting the arguments advanced on behalf of one of the parties if it accepts those arguments and has nothing to add to them'.[17] That position has been adopted in Australia, where in **James and others v. Surf Road Nominees Pty. Ltd and others**[18] it was held that '[a]doption of one party's submissions by a judge . . . is one method of providing adequate reasons', adding that '[i]t may not be the choice of every judge but it is impossible to say that it necessarily . . . falls short of the judicial duty to provide reasons'.

[69] It follows that treating with the learned judge's reasoning in this appeal requires that this Court consider the submissions advanced by the respondent. In that regard, it is clear that Counsel for the respondent's arguments were thorough and that he carried out a careful evaluation of the evidence, and analysed the law relating to applications for disclosure under CPR 28.2.

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[16] [2002] EWCA Civ 605, [2002] 3 All ER 385.

[17] Meadowstone (Derbyshire) Ltd. v. Kirk and another, 2006 WL 690588 (U.K. Employment Appeal Tribunal), at para. 21.

[18] [2004] NSWCA 475 (AustLII), at para. 168 and see: In Fletcher Construction Australia Ltd. v. Lines MacFarlane & Marshall Pty. Ltd. (No. 2), [2002] VSCA 189, [2002] 6 V.R. 1, at para. 163, the Victorian Supreme Court of Appeal, reviewing a trial judgment for adequacy, remarked that "[a] careful examination of the reasons for judgment shows that the judge adopted [the plaintiff's] closing submissions almost in their entirety." But it did not set the judgment aside for copying alone.

[70] The learned Judge would certainly have appreciated that a party's duty of disclosure is limited to documents in "its control".[19] The judge would have also fully appreciated that the operating factual context here involved a corporate group structure, and that the relevant documents may be held by companies, which are not named parties to the claim. Central to the dispute between the Parties therefore was whether Mr. Ng had practical control of the Documents for disclosure purposes. The Respondent contended that the Appellant did have practical control and he would have relied extensively on a line of authorities in support of this submission. That line of authorities would have dealt with the issue of practical control in the context where documents held by either a parent company or subsidiary within a corporate structure. That discourse would have commenced with the dictum in **Lonrho Ltd v Shell Petroleum Co Ltd (No. 1)**[20] which made clear that control will arise in one of the following circumstances:

> (I) Where there is an existing arrangement or understanding…that in practice provides the parent with a right of access to documents held by its subsidiary.
>
> (ii) Where the parent company has a presently enforceable legal right to obtain the documents from its subsidiary.

[71] Counsel for the respondent would have also cited the decision of Floyd J in **Schlumberger Holdings Ltd v Electromagnetic Geoservices AS**[21] which clarified the circumstances in which a parent/holding company could be required to disclose documents belonging to its subsidiary in the following terms:

> "I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation…But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the cooperation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that position may change? Because

[19] CPR 28.2(1) as amplified at CPR 28.2(2).
[20] [1980] 1 WLR 627.
[21] [2008] EWHC 56 (Pat).

> that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant…My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation…"

[72] The judgment in the case of **Ardila Investments v ENRC**[22] is also particularly relevant. In that case, the claimant Ardila, sought disclosure of documents held by two subsidiaries, Bamin and Pedra Cinza, of the defendant parent company, ENRC. After setting out the relevant case law, including **Schlumberger Holdings Ltd v Electromagnetic Geoservices AS** and the **Lonrho v Shell** case, Males J, as he was then, concluded as follows:

> "10. It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access.
>
> …
>
> 13. The position can, therefore, be summarised for present purposes in this way. First, it remains the position that a parent company does not merely by virtue of being a 100 parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.
>
> 14. Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

[22] [2015] EWHC 3761 (Comm).

[73] I can take no issue with this statement of the legal principle. It reflects the consistent approach taken by courts in England and in the Eastern Caribbean.[23] In fact as recently as 2020, the English High Court in **Pipia v BGEO Group Ltd (formerly known as BGEO Group Plc)**[24] provided further helpful guidance on control for the purposes of the civil procedure rules governing disclosure. In that case, the claimant sought documents held by BGEO's subsidiaries and argued that there was a "control arrangement" (evidenced in letters between BGEO and those subsidiaries). BGEO resisted, arguing that no such arrangement existed or, to the extent it did, it had been terminated. The English court analysed the arguments and considered there to be three elements to determining whether a "control arrangement" exists. At paragraph 50 -51 of the judgment the court observed that:

> " 50. A true analysis is that there are three elements to the question whether a third party's documents, or particular such documents or classes of such documents, are within the 'control' of a party so as to be within the scope of its disclosure obligations in English civil litigation, by virtue of some standing consent given by the third party to the disclosing party in respect of its (the third party's) documents that falls short of an enforceable contract:
>
> i) firstly, the scope (subject matter) of the consent – the documents or types of document covered by the consent;
>
> ii) secondly, the type of consent – how, under the consent given, the disclosing party will get hold of those documents (e.g. by looking through documents for itself and taking copies if it wishes, or by having documents located and sent (or copied) to it, or by having documents located and sent (or copied) to it to the extent they match some further (review) criteria);
>
> iii) thirdly, the quality of the consent – whether it involves free and unfettered access to the documents covered, of which (or copies of which) the party will get hold in that way."
>
> 51. These elements are distinct in concept; and the question of control is concerned only with the third element, the quality of the consent. The scope of the consent will define the documents over which the disclosing party has control by virtue of the consent (if it is of the right quality), so that its

[23] Ikana Holdings S De R. L. and another v Putney Capital Management Ltd. and others BVIHCMAP2021/0027 (delivered 24th January 2022, unreported).
[24] [2020] EWHC 402 (Comm).

> disclosure obligations extend to those documents. The type of consent will affect what the disclosing party can be expected and required to do so as to discharge any disclosure obligation to conduct a search for those documents (again, if the consent is of such a quality as to confer control)."

[74] The English Court also helpfully considered the relevant legal authorities which address the question of whether a control arrangement exists. These are the very authorities referenced to the learned Judge in submissions on both sides and by which he is deemed to be guided.[25] They demonstrate the Court's wide discretion and its approach to require extensive disclosure of documents.

[75] It is also noted in the authorities that it is not sufficient generally to show simply a close legal or commercial relationship. Something more (some specific and compelling evidence) is necessary. Further, there is a need to show that there is a standing or continuing practical arrangement.[26] At paragraph 21 of **Various Airfinance Leasing Companies and others v Saudi Arabian Airlines Corporation**[27] the English court put the position in the following terms:

> "Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of the party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access ... However, **in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement ...**" (Emphasis added)

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[25] Schlumberger Holdings Ltd v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat); Lonrho v Shell; Ardila Investments v ENRC [2015] EWHC 3761 (Comm).
[26] Berkeley Square Holdings and others v Lancer Property Asset Management Ltd and others [2021] EWHC 849 (Ch) at 46.
[27] [2022] 1 WLR 1027.

[76] While these decisions relate to a parent company obtaining documents from a subsidiary, in my judgment the principles could equally apply to a situation where the control arrangement is alleged to be between the shareholder of a parent company and the subsidiary company. Indeed, in **Berkeley Square Holdings v Lancer Property Asset Management,** the English Court would have made it clear that in determining whether documents held by one person are under the practical control of another (where there is no enforceable right of access) the relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship, what is relevant is whether there is an arrangement or understanding that the holder of the document will make the relevant documents available for disclosure and inspection.

[77] In the court below, the appellant contended there is no existing understanding or arrangement which would afford the appellant free access to the documents in question. The respondent disagreed and he contended that there was evidence before the Judge which enabled an inference to be drawn that there was an existing understanding or arrangement between Mr. Ng and the PT PDP Group companies that enabled Mr. Ng to have free access to those companies' documents for the purposes of the BVI proceedings, including the valuation stage. The respondent contended that the existence of an arrangement or understanding may be inferred from all of the surrounding circumstances and he advanced that the following three specific matters would have informed the Judge's decision:

(i) The Judge's finding in the Main Judgment that as sole director of PT PDP Mr. Ng has exclusive control over the business of the PT PDP Group.

(ii) The fact that in connection with the earlier trial of issues of liability in October 2020, Mr. Ng was able to adduce certain documents belonging to PT PDP Group companies shortly before and after commencement of the liability trial.

(iii) The suggestion that there had been "murky conduct" on Mr. Ng's part in resisting disclosure when he "really controls the business".

[78] From the transcript, it appears that the Judge accepted each of the three bases as justifying the inference that there was in existence an understanding or arrangement between Mr. Ng and the PT PDP Group companies/shareholders entitling him to unfettered access to the PT PDP Group documents for the purposes of the Valuation Proceedings.

[79] The appellant has described this reasoning as flawed in multiple respects. At the core of his challenge is the contention that the Judge's finding that "understanding /arrangement for free access" is "based on an absence and/or misunderstanding of the evidence and/or contradicted by the evidence. He contends that the Judge ignored the evidence which plainly showed that PT PDP and its shareholders expressly did not consent to Mr. Ng having free access to the PT PDP Group Documents for the purposes of the BVI proceedings, in particular, the Valuation Proceedings.

[80] Counsel for the appellant would have taken the Judge through several pieces of correspondence which he submitted, disclosing that PT PDP shareholders had consistently refused to consent to Mr. Ng's free access to the documents of the PT PDP Group, as evidenced by their correspondence of April 2020 and had repeatedly articulated their reasons (good or bad) for not wishing to afford Mr. Ng's free access to those documents for the purposes of the proceedings. Counsel would have also referenced the Denton Legal opinion which would have made clear that the appellant's status as director and the documentary access that he enjoys in his capacity as such does not mean that he has a right of free access to the PT PDP Group Documents for the purposes of his personal litigation against Mr. Lie.

[81] Moreover, the appellant also contended that the Judge failed to consider the criminal sanctions that the Dentons' Opinion (which contained undisputed evidence of

Indonesian law) cautioned would befall Mr. Ng if he were to disclose PT PDP Group Documents without the consent of the PT PDP Shareholders. He argued that the judge would have further ignored the fact that the PT PDP shareholders are entitled to refuse to consent to Mr. Ng having free access to the documents of the PT PDP Group. Indeed, their lack of consent is evidence of and fully consistent with the exercise of their rights under Indonesian law. Counsel submitted that when considered in the context of Indonesian law, the potential relevance of control over the business as a basis for inferring an understanding or arrangement for free access would be much diminished.

[82] Having reviewed the thorough submissions advanced by both sides before the learned judge and his ex-tempore reasons set out at page 166 – 168 of the Transcript, I am satisfied that the Judge would have been fully seised of the appellant's case advanced in defence of the Unless Order Application. I have no doubt that the learned Judge would have been well aware that at the core of appellant's case was positive and unequivocal evidence that "contradicted" the claimed "understanding/arrangement" – in the form of the correspondence to and from the PT PDP shareholders and positive and unequivocal expert evidence to the effect that the appellant does not have the direct right to possession of the Documents as an indirect shareholder of PT PDP and does not have the right to possess, inspect or take copies or to use the same without approval in a general meeting of shareholders. Despite this, at page 166 of the transcript, the learned Judge made the following critical observation:

> "I am under no illusion whatsoever that Mr. Ng can produce these documents and that none of the other shareholders would have any real objection to him deploying the information."

[83] In determining whether a "control arrangement" exists, a court is required to undertake a careful analysis of the practical evidence for the existence of an arrangement. A court must therefore undertake a careful analysis of the practical arrangements in order to ascertain whether documents are within the control of the disclosing party. Conversely, the relevant case law by which this Judge would have

been guided would have made it clear that it is not sufficient for a litigant, parent company or its subsidiary to merely assert that no arrangement exists or existed. It is therefore equally important that the court undertake a careful analysis of the practical evidence advanced to refute the contention of practical control.

[84] What is clear is that far from ignoring the correspondence which was so heavily relied upon by the appellant, the learned Judge formed a considered view as to their authenticity and import. That view reflects the respondent's contention that the alleged attempts to seek shareholder consent revealed in this correspondence were a mere "charade" or fiction on the part of Mr. Ng. Firstly, Counsel for the respondent highlighted the identity of the PT DPD shareholders who would ostensibly be withholding their consent making it plain that there were just 2 relevant shareholders: Grahaidea (49.6%) which is jointly owned by the appellant and his brother and PT KPW (48.92%) a company owned by Madam Karlinah (with Mr. Iqbal Rahim Willis having signing rights). It follows that Mr. Ng would purportedly be seeking consent from himself and his brother.

[85] Counsel for the respondent submitted that there was no truth to the contention that Mr. Ng had made persistent efforts to obtain consent from the shareholders as there was no actual evidence of any such discussions between the appellant and his brother or Mr. Willis or indeed of any effort expended to have such discussions. Counsel posited that rather than personally explain his genuine and substantial difficulties, he instead relied on his attorney who exhibited formal legal letters to his brother when it is unfathomable that he would choose to speak to his younger sibling through the formal channel of lawyers.

[86] Counsel for the respondent would have also contended that (consistent with his obstructive stance throughout the proceedings) Mr. Ng had absolutely no desire to produce to Mr. Lie anything that will assist the valuers in understanding the value of the business. During the course of the liability trial, the learned Judge had clearly

formed the view of Mr. Ng's conduct and the veracity of his testimony causing him to conclude at paragraph 245 of Main Judgment:

> "Mr. Ng was, in my respectful judgment, a self-serving witness and not one upon whose testimony the Court could rely. It was also plain from Mr. Ng's performance in the witness box that he harboured considerable animosity and bitterness towards Mr. Lie and that Mr. Ng was not wont to bridle the transport of his passions as far as Mr. Lie is concerned. Whilst I can understand that Mr. Ng might have found some relief in expressing himself during his testimony with sharpened words in relation to Mr. Lie, this did not reflect well upon him as a witness and was revealing of Mr. Ng's attitude towards Mr. Lie."

[87] Counsel then invited the court to reject the contention that there have been bona fide attempts by Mr. Ng to secure shareholder consent. It was an invitation which the learned Judge took up, concluding as follows:

> "So — and I entirely follow what Mr. Hardwick has said about this carefully set piece of charade created with formal requests made in long detailed lawyers' letters and then answered with reasons. I entirely accept what he says. It's a complete charade here, and it's merely there to create the appearance of a process when, in fact, all it takes is Mr. Ng's fiat and those documents can come out. I'm utterly convinced of that."[28]

[88] It is therefore clear that the learned Judge rejected the appellant's contention that he engaged in bona fide efforts to obtain the consent of the PT DPD shareholders. He accordingly concluded that it was (and always had been) in the power of Mr. Ng to consent to disclosure of the Documents,

> "Mr. Choo-Choy assumes there would be no further disclosure. Well, I'm afraid I don't accept that assumption. There can be further disclosure if Mr. Ng wants there to be. If he doesn't' want there to be, he's going to have to live with the consequences of a debarring order."

[89] Counsel for the appellant has submitted that the Judge was not entitled to come to his findings of fact and he has invited the Court to set these aside. However, it is clear that he faces a high hurdle. As Lord Hoffmann explained in **Biogen Inc v Medeva Plc,**[29]

[28] Pg. 166 lines 19-25 and pg. 167 lines 1-2, transcript of proceedings 14th November 2022
[29] [1997] RPC 1 at paragraph [45].

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

[90] In this appeal, I cannot ignore the Judge's significant involvement in, and the impressions formed over the course of this protracted litigation between these parties. It is clear that the learned Judge would have formed a considered view as to who was actually in control of these subsidiaries. It is not disputed that during the course of the liability trial, the Judge had the evidence of Ms. Stewart to the effect that:

> "…Mr. Ng is currently the sole director of PT PDP. Thus, through PT PDP, Mr. Ng has exclusive control over the Business. PT PDP is where the value of the enterprise converges. Moreover, since he controls the majority shareholding in SOFL, Mr. Ng has power to influence and ultimately replace the sole director of SOFL should that director not do Mr. Ng's bidding.
>
> …the business reality of the facts of the case is that Mr. Ng used his positions of control in SOFL and PT PDP to deprive Mr. Lie, of the value of his membership interest in SOFL. That was both unfair and prejudicial to Mr. Lie.
>
> The reality was that Mr. Ng was the person who controlled what happened in the business. I do not accept that Mr. Ng's Brother, Mr. Achmad, or anyone else was a primary decision maker as Mr. Ng has suggested.
>
> …Mr. Achmad was a mere nominee (following in the line of nominee directors, Lion, Regula and Mr. Ng's Brother); and in any event (2) Mr. Ng as sole director of PT PPP and controller of SOFL knew better than anyone the financial position of SOFL."

[91] The learned Judge was clearly persuaded by this evidence and in his Main Judgment he determined at paragraphs [7], [243], [262], [263], [278]:

> "[7] Mr. Ng owns 54.15% of the issued share capital of SOFL. Mr. Lie has 45.85%. SOFL currently has a single director, a person chosen and nominated by Mr. Ng, one Mr. Daud Achmad ('Mr. Achmad'). SOFL in turn

> originally (after the re-structuring) held around 63% of the issued share capital in an Indonesian company called PT PDP. PT PDP held and still holds the shares in five Indonesian subsidiaries, which are operating companies. Mr. Ng is currently the sole director of PT PDP. Thus, through PT PDP, Mr. Ng has exclusive control over the Business. PT PDP is where the value of the enterprise converges. Moreover, since he controls the majority shareholding in SOFL, Mr. Ng has power to influence and ultimately replace the sole director of SOFL should that director not do Mr. Ng's bidding.
>
> …
>
> [243] For the most part, I broadly accept the Claimant's submissions. Whilst the First Defendant's learned Queen's Counsel very ably sought to capitalise upon fine legal differences between corporate and individual legal personalities and differing capacities, the business reality of the facts of the case is that Mr. Ng used his positions of control in SOFL and PT PDP to deprive Mr. Lie, of the value of his membership interest in SOFL. That was both unfair and prejudicial to Mr. Lie.
>
> …
>
> [262] …In the circumstances of this case, as Mr. Hardwick, for Mr. Lie, has submitted, the business reality is that the conduct of the affairs of PT PDP in failing to recommend and/or pay a dividend was equally the conduct of the affairs of SOFL. He argued that any attempt by Mr. Ng and/or his Counsel to compartmentalise these dividend decisions is entirely artificial. I agree.
>
> [263] The reality was that Mr. Ng was the person who controlled what happened in the business. I do not accept that Mr. Ng's Brother, Mr. Achmad, or anyone else was a primary decision maker as Mr. Ng has suggested."
>
> [278] Mr. Hardwick contends, and I accept, that the reality is that (1) Mr. Achmad was a mere nominee (following in the line of nominee directors, Lion, Regula and Mr. Ng's Brother); and in any event (2) Mr. Ng as sole director of PT PDP and controller of SOFL knew better than anyone the financial position of SOFL."

[92] I am satisfied that the Judge could in the context of the Unless Order Application take into account and weigh his findings in the Main Judgment as to the appellant's "control" in respect of PT DPD as a relevant factor to be weighed in the balance in assessing the veracity of the representations contained in the correspondence which the appellant submits set out unequivocal evidence that "contradicted" the claimed "understanding/arrangement". The learned Judge's conclusions would

have been reached after he would have benefitted from a thorough analysis of the relevant legal authorities and he distinguished the same in the following terms:

> "…in relation to the existence of a current agreement for access, practical access to documents, what I think the cases amply show is that the Court has to look at context of the particular companies in question. If one is blinkeredly looking for some kind of oral or written agreement or course of dealing, then, of course, one might not find it, particularly if, really, the Company is being controlled by one person, as is the case here.
>
> There is a world of difference, for example, between, let's say in the case of Lonrho and Shell. Everybody knows Lonrho and Shell are vast international conglomerates spanning many countries and locations, and indeed levels of management and in which case, of course you might want to, have to look for some kind of an agreement, **but where you have, essentially, a business which is controlled by one person, then it is highly artificial and unreal to have to go looking for actual evidence of such an agreement."**[30] Emphasis added

[93] Counsel for the appellant has during this appeal sought to elevate these findings, representing that the Judge failed to have regard to the legal principle that "corporate control" is not to be equated with an entitlement to free access. However, I am not satisfied that this is an accurate reflection of the Judge's deliberations and decision. Contrary to what is represented by the appellant, it is *not at all* apparent that Judge suggested or determined that the "corporate control" was without more to be "equated with an entitlement to free access". The Judge clearly had the benefit of legal submissions to the effect that the appellant's control of the business was not decisive of the issue but was instead advanced as *a* relevant factor for the court's determination as to whether there was an "understanding or arrangement" for the appellant's "free access" to the Documents.

[94] This approach was comprehensively endorsed by this Court in **Ikana Holdings** where, at paragraph at [15], Webster JA explained:

> "…there is a distinction, which is not disputed, **between control in the corporate sense of a parent company's control over its subsidiary, and control by** a parent company of documents in the possession of its subsidiary. The former control is not decisive when considering an

[30] p 165 lines 21-25 and p 166 lines 1-14 transcript of proceedings dated 14th November 2022.

> application for specific disclosure under part 28 of the CPR, but is one of the factors that the court can consider in determining whether there is an understanding or arrangement for free access to the documents in the subsidiary. Control in the latter sense of access to the documents in possession of the subsidiary can and often does amount to control within the meaning of CPR 28.2 and gives the court a discretion whether to order disclosure of the subsidiary's documents…"

[95] It is apparent that the learned Judge agreed with the respondent's view of the correspondence evidencing the shareholders' lack of consent. In my judgment, these submissions presented a reasoned basis upon which the Judge was invited to reject the claim that this correspondence represented bona fide (but failed) attempts by Mr. Ng to secure shareholder consent to the disclosure. No doubt this evidence and this analysis would have also gone some way to informing the learned Judge's finding that the PT DPD shareholders' purported refusal to consent to the disclosure was a fiction.

[96] It is in this context that the Dentons' Opinion would have to be weighed. That opinion made clear that Mr. Ng does not have the direct right to possession of the documents as an indirect shareholder of PT DPD and cannot use any documents which may already be in his possession without the consent and approval of the shareholders. The Dentons' Opinion stated:

> "In this case, if the Client inspects and takes copies of or takes possession of or uses the documents specified in the Schedule without the consent of PT PDP Group, specifically the GMS, and this action is proven to have caused losses to the company, then the Client will be held fully personally liable for the company's losses. Besides that, it is known that the party to BVI Litigation is the Client as an individual and not PT PDP Group companies. So, by doing that action the Client would also be deemed to be acting not for the best of the interest of PT PDP Group companies. Because of this, the Client as the director of PT PDP Group companies could potentially be dismissed by the GMS and personally exposed to legal proceeding by PT PDP Group companies and their shareholders, whether through a lawsuit filed by PT PDP Group companies or their shareholder(s) or by the filing of criminal charges against the Client."[31]

[31] See the Dentons Opinion at page 48 of Bundle of Documents for appeal Vol 2.

However, the absence of an enforceable legal right to obtain the documents is clearly not conclusive.

[97] Further, it may well be that under Indonesian law, the PT PDP shareholders are entitled to refuse to consent to Mr. Ng having free access to the documents of the PT PDP Group and it may also be that their lack of consent is fully consistent with the exercise of their rights under Indonesian law. However, that opinion could not assist the Court in assessing the plausibility of the correspondence relied upon by the appellant. That assessment would have had to be carried out by the Judge who would have had unrivalled knowledge of the claim and familiarity with the relevant witnesses and their evidence. The learned Judge was clearly not persuaded that this correspondence was conclusive and he gave little weight to the same. I am not satisfied that the Judge erred in his overall approach and consideration of the evidence and there is no basis for this Court to legitimately interfere with the Judge's finding.

[98] Counsel for the respondent has submitted that when considered in the context of Indonesian law, the potential relevance of control over the business as a basis for inferring an understanding or arrangement for free access would be much diminished. However, the essence of that expert opinion was that Mr. Ng did "not have the direct right to possession" of the Documents without approval in a general meeting of shareholders. It is contended that 50% of the number of votes cast is the requisite threshold. Again, the Judge is presumed to have accepted the respondent's view of the import of that expert evidence. He submitted that as 49.6% shareholder of PT PDP (and with the 1.38% balance owned by PT PDP itself) Grahaidea's vote in favour of disclosure would have constituted more than 50% of "the number of votes cast". Accordingly, the respondent would have submitted that it was (and always had been) in the power of Mr. Ng to consent to disclosure of the Documents and again the Judge appears to have accepted this submission.

[99] At paragraphs 6.5 and 9 of his skeleton arguments in the court below, the respondent stated:

> "6.5 the Court can and should reject the reason now given by Mr Ng for such failure to disclose (in particular that the Documents are not within his control within the meaning of CPR 28.2(2)) consistent with the Court's regularly expressed concern (as most recently reflected in the June Judgement) that:
>
> 6.5.1. Mr Ng "…really controls the business…" and "…my view at the trial was that such excuses are the merest technical fig leaves intended to manipulate and control the disclosure that Mr Ng does not want to give…" (Judgment/p.44, .5-10 [AB/22/729]); and
> 6.5.2. Mr Ng resorts to "manipulation" and "fictions" '…to pretend he doesn't actually have any ability to provide documents…'
> …
>
> 9. The answer to Mr Ng's predictable reliance on further Indonesian expert evidence is found in the well-established body of English and BVI case law in relation to the concept of "practical control". There is compelling evidence that when it suited Mr Ng's interests in the course of the trial, Mr Ng had no difficulty in swiftly adducing (and translating) historic documents (dating back to 2012) from PT PDP and the Indonesian Operating Companies, in support of Mr Ng's misconduct allegations. In these circumstances the Court can certainly infer that there is an arrangement or understanding that permits Mr Ng to adduce the Documents."

[100] I am not satisfied that the Judge would not have appreciated that in the operating factual context here, control must be demonstrated by sufficient evidence showing that there is an agreement for the disclosing party to have free access to the documents belonging to the subsidiary PT PDP, or an arrangement or understanding for the disclosing party to have such access. It is also clear that the learned Judge appreciated that the existence of an arrangement or understanding may be inferred from the surrounding circumstances and that evidence of past access to the subsidiary's documents in the same proceedings is a highly relevant factor. The learned Judge would have drawn on this further thread to support his conclusions. In this case, the Respondent would have advanced compelling evidence that when it suited Mr. Ng's interests in the course of the trial, Mr. Ng had no difficulty in adducing relevant documents from the PT PDP Group companies.

[101] The Judge would have been taken to the affidavit evidence of Ms. Stewart who would have two separate occasions (7th October 2020 and 15th October 2020) when Mr. Ng would have disclosed documents when "…Notably, no letters of request (seeking shareholder consent from the shareholders of the relevant Indonesian companies) was ever produced or mentioned by NMH in respect of the above documents disclosed on 7 October 2020 and 15 October 2020…".

[102] Further compounding his suspicions, Ms. Stewart went on to note that *"Further, contrary to what is said at paragraph 19 of Chng 1 (that uncovering and extracting physical documents will likely take some time), it is evident that NMH was able to (i) extract (ii) convert into electronic format and (iii) translate, a number of historical documents of PT APMR and PT PEU dating back as far as 2012 at relatively short notice in advancement of his own case during the liability trial*."

[103] Counsel for the respondent would have submitted that Mr. Ng was able to and did disclose these Documents: (1) in an attempt to advance one of his key misconduct allegations; (2) on short notice; and (3) without any reference to any need to seek the consent of PT APMR or PT PEU and he submitted that this demonstrated that Mr. Ng had free and immediate access to these PT APMR and PT PEU documents. There was no need to write formal letters of request and await a response.

[104] Counsel for the appellant has discounted this evidence pointing out that the documents in question relate principally to work orders obtained from the relevant PT DPD Group of companies further to Mr. Ng's oral request and reflect isolated instances when the appellant would have been able to secure consent to access. I agree that it is most certainly the case that compliance with a particular request for assistance is not, of itself, sufficient to establish the existence of such an arrangement or understanding. At paragraph [17] of the judgment in **Ardila,** Males J expressed the distinction in the following terms;

> "It is one thing to undertake specific obligations of that nature, it is quite another to permit free range through the documents, including those held

electronically, of the subsidiary company, potentially extending much more widely."

[105] It follows that when determining the issue of control, a judge is required to undertake a fact-focused analysis centered on determining the practical reality of the relevant arrangement or understanding between the party and the other entity or individual who holds documents. In this appeal, the respondent would have submitted that Mr. Ng was able to and did disclose the 7th and 15th October 2015 Documents: (1) in an attempt to advance one of his key misconduct allegations; (2) on short notice; and (3) without any reference to any need to seek the consent of PT APMR or PT PEU. Given the distinctly formal and involved processes which the appellant would have asserted were necessary in order to obtain the consent of the shareholders, it is not surprising that the timing of these past disclosures would be viewed with suspicion. In my judgment, given the totality of his findings, it was open to the learned Judge to accept that submission and to go further and infer that the previous disclosures were sufficient to raise the inference of an arrangement or understanding for general access.

[106] It is apparent that the learned Judge would have formed a view of the appellant's conduct during the course of the litigation and more particularly in regard to his disclosure obligations. This less than complimentary view was summarized in the Main judgment in the following terms: '*my view at the trial was that such excuses are the merest technical fig leaves intended to manipulate and control the disclosure that Mr. Ng does not want to give'*.

[107] Counsel for the respondent has submitted that the Judge was entitled to take that view given his familiarity with the evidence and the finding of fact made in the Main Judgment and he relied on the following excerpt of Hollander:[32]

> *"…in practice allegations of practical control are made in cases where the conduct of the party declining to produce documents of the affiliate is*

[32] Documentary Evidence, Charles Hollander KC, 14th Edition, Sweet & Maxwell 2021 at Chapter 9-23.

otherwise murky and the allegation of practical control is usually based on inference (and perhaps an allegation that the party can produce documents of its affiliate when it suits him to do so)…"

[108] According to Counsel for the respondent, the adjective "murky" accurately describes the sort of conduct where the courts have found "practical control". But there are other synonyms. In **North Shore Ventures** for example the court referenced the "suspicious" behaviour of the trustees.

[109] Counsel for the respondent submitted that it was difficult to contemplate a more obvious case of "murky" conduct on the part of a litigant resisting disclosure. However, no doubt in recognition of the fact that the phrase "murky conduct" was coined by academic writers, he agreed that it cannot serve as a substitute for the legal test. Instead, the appeal to "murky conduct" was only the final of the 3 strands of evidence identified in support of the "practical control" argument. Counsel submitted that this is precisely the sort of case and conduct where the Court can and should infer an existing arrangement/understanding.

[110] The Judge clearly agreed with these submissions. However, this finding has been heavily criticised by the appellant. First, he contends that the respondent's notion of "murky conduct" is based on the coining of this phrase in Documentary Evidence **Hollander**, but the author did not put forward that phrase as a substitute for the legal test of whether there is a proven and existing understanding or arrangement for free access to the third party's documents. Moreover, in the particular circumstances of this case, counsel submitted that the vague appeal to "murky conduct" does not provide a proper basis for inferring any existing understanding or arrangement between Mr. Ng and the PT PDP Group companies or shareholders that Mr. Ng can have free access to the PT PDP Group Documents for the purposes of the Valuation Proceedings.

[111] Secondly, Counsel for the appellant submitted that there is nothing murky in Mr. Ng's contention that he does not control the documents of the PT PDP Group.

Accordingly, to counsel, the appellant clearly does not, as is evidenced by the Dentons Opinion.

[112] Having reviewed the relevant excerpt from **Hollander,** I agree that the author did not intend to suggest that phrase as a substitute or supplement for the legal test of whether there is a proven and existing understanding or arrangement for free access to the third party's documents. Rather, the author was simply alluding to the common milieu in which issues of practical control of documents arise.

[113] I would also venture to say that in and of itself murky conduct would not provide a proper basis for a finding of practical control. However, where a litigant fails to comply with an order for disclosure and advances that he/she did not have the requisite *control* over the relevant documents, which were held by a third party (who objects or does not consent to disclose the same), and should not therefore be required to give disclosure of those documents, the court is entitled to undertake a careful analysis of such assertion and the actual arrangements between the third party and the litigating party in order to ascertain whether documents held by the subsidiary are within the control of the litigating party.

[114] In this case, such analysis would have been conducted by a Judge who not only managed the litigation between these parties but had conduct of the trial on liability and who would have formed impressions which no doubt anchored his findings regarding the lengths that Mr. Ng was prepared to go to avoid disclosure. The Judge would then have been entitled to apply these findings in conducting his analysis.

[115] Ultimately, where following a genuine request made by a litigating party, the third party (who is in actual possession of the material) refuses to comply, that serves as prima facie evidence that there was no standing arrangement for documents to be provided by the third party. However, that is assuming a genuine exchange not

concocted to present a false picture to the court.[33] In this case, this is precisely what was contended by the respondent and it is clear that the learned judge agreed.

[116] The learned Judge was similarly not persuaded by the Dentons' Opinion and for the reasons already indicated I am not satisfied that this finding was unwarranted. The Dentons' Opinion may well have addressed the relevant legal and legislative framework, but it could not properly assist the court with the nuanced analysis in determining whether it was possible to infer an existing understanding or arrangement between Mr. Ng and the PT PDP Group companies or shareholders that Mr. Ng can have free access to the PT PDP Group Documents for the purposes of the Valuation Proceedings.

[117] The expert opinion, however, went further. At paragraph D1 of the Dentons' Opinion the author opined that:

> "The Client as a Director of PT PDP Group companies could be held personally liable if it were proven that by fault or negligence he caused losses for the Company by his action of inspecting and taking copies of or taking possession of or using the documents specified in the Schedule without the consent of the shareholders of PT PDP Group…
> …the Client as the director of PT PDP Group companies could potentially be dismissed by the GMS and personally exposed to legal proceeding by PT PDP Group companies and their shareholders, whether through a lawsuit filed by PT PDP Group companies or their shareholder(s) or by the filing of criminal charges against the Client."

[118] Counsel for the appellant argued that the Judge's ruling is indicative of the fact that he failed to consider the criminal sanctions that the Dentons' Opinion cautioned would befall Mr. Ng if he were to disclose PT PDP Group Documents in these proceedings without the consent of the PT PDP Shareholders. He submitted that the Judge was not alive to the very real consequences that would

[33] Pipia v BGEO Group Ltd (formerly known as BGEO Group plc) [2020] 1 WLR 2582 at paragraph [37].

follow an Unless Order even though the Dentons' Opinion was placed as undisputed evidence of Indonesian law before him.

[119] Clearly, that submission is expressed in much more categorical and robust terms than was actually set out in the Opinion. In any event, it is apparent that the possibility of criminal sanction alluded to in the Dentons' Opinion and relied on by the appellant, would have carried little to no weight in the face of the Judge's unequivocal findings. The learned Judge would have considered all the circumstances of the case and would have determined that the Documents were under the practical control of Mr. Ng as a matter of factual reality. On the evidence, the Judge was clearly satisfied that there was an understanding or arrangement that afforded Mr. Ng ongoing access to the Documents of the PT PDP Group. Moreover, the Judge was clearly satisfied that notwithstanding the corporate arrangements, the business reality is that it is Mr. Ng who is ultimately in control so that 'all it takes is Mr. Ng's fiat and those documents can come out'. The possibility of criminal sanctions would therefore simply not engage.

[120] Having thoroughly considered the learned judge's ex-tempore reasons, I am ultimately satisfied that rather than relying on any one factor as decisive, the learned Judge pulled relevant circumstantial strands together which he then bound together to arrive at his factual findings. Moreover, having considered and applied the relevant authorities, I am not satisfied that the Judge erred in his overall approach and consideration of the issues and there is no basis for this Court to legitimately interfere with the Judge's finding.

Ground 3

[121] Finally, there can be no doubt that the relevant legal authorities make it clear that the arrangement /understanding must be an existing current one and certainly it does not appear that this legal principle was in any dispute in the court below. The judge would have had before him several authorities which clearly prescribed this uncontroversial principle.

[122] The appellant has submitted that the Judge wrongfully disregarded the requirement that the purported arrangement/understanding "*must be continuing in existence as the date that disclosure is sought*." Counsel for the appellant submitted that even if the judge relied upon the narrow historic disclosure contended by the respondent and he was justified in inferring an understanding or arrangement for Mr. Lie to have free access to the documents of the PT PDP Group, the judge failed to ask himself the question whether it was reasonable to infer that such an understanding or arrangement continued to subsist as at November 2022 for the purposes of the valuation proceedings.

[123] In this regard, Counsel submitted that whatever may have been the position in October 2020 in respect of the handful of PT PDP Group Documents which Mr. Ng was able to obtain upon oral request from PT PDP for the purposes of the liability trial, it is clear from the PT PDP shareholders' letters dated 13th July 2022 and 7th November 2022 that they do not (or no longer) consent to Mr. Ng having free access to the documents of the PT PDP Group for the purposes of the valuation proceedings. It follows that there is no existing consent, understanding or arrangement for Mr. Ng to have free access to the PT PDP Group Documents and no basis upon which the Judge could have found that Mr. Ng has control of the PT PDP Group Documents for the purposes of the valuation proceedings.

[124] Having reviewed the transcript of the proceedings and the Judge's ex tempore reasons, I am not satisfied that this ground of appeal carries any merit. The appellant's submission is premised on the judge's purported failure to ask himself the question whether it was reasonable to infer that such an understanding or arrangement continued to subsist as at November 2022 for the purposes of the valuation proceedings and indeed there is no such explicit self-inquiry reflected in the transcript. However, it is clear that the Judge referred expressly to "*the existence of a current agreement*" [V1/3/ (lines 21-22)] and found (in the present tense) that *"I am under no illusion whatsoever that Mr. Ng can produce these*

documents" [V1/3/467 (lines 15-16] and later that; "*All it takes is Mr. Ng's fiat and these documents can come out*" [V1/3/468-469 (line 25-2)].

[125] I am in no doubt that informed by his view of the genuineness of Correspondence, the Judge would have determined that it was not at all clear that the shareholders "do not (or no longer) consent to Mr. Ng having free access". Logically, the Judge would have therefore determined that not only was there a historic arrangement/understanding by which Mr. Ng would have had free access to the Documents but that there was no cogent or reliable evidence presented which would have suggested that the prior understanding/arrangement for free access on the part of the party alleged to have control of Documents – would not have been extant as at the date when disclosure was to be given. For the reasons already indicated, I am not satisfied that the Judge erred in his overall approach and consideration of the issues and there is no basis for this Court to legitimately interfere with the Judge's finding.

Conclusion

[126] The matrix in this appeal takes it outside the norm. The Judge in the court below clearly accepted that the appellant had "practical control" of the Documents such that his breach of his obligations for disclosure prescribed by the Directions order warranted the Unless Order. The judge's finding of fact as to "practical control" is alleged to be plainly wrong and at the core of this contention is the appellant's critique of the Judge's decision to disregard the PT PDP shareholders' express objections to Mr. Ng having free access to the PT PDP Group Documents on the basis that those objections were a charade and that he did not believe that the shareholders' lack of approval and refusal to consent to access was genuine. The appellant similarly takes issue with the Judge's decision to accord little weight to the unequivocal expert opinion proffered.

[127] The appellant contended that the Judge had no rational grounds for his view and reached a conclusion that no reasonable judge could have reached having regard

to the evidence before him. Applying the appropriate appellate restraint, I am unable to agree with that submission as it would require this Court to ignore the extensive management which this Judge has had in this litigation, the opportunities afforded by the heavily contested 3-week trial on liability and the explicit findings sent out in his Main Judgment. It is clear that the Judge would have had a holistic perspective which this Court would not, and which would warrant the application of the appropriate appellate restraint.

[128] Ultimately, the Judge found that there was sufficient evidence from which he could infer that there was an arrangement or understanding that the appellant had free access to the Documents. In doing so he would have considered the cumulative effect of the matters advanced by the appellant and arrived at a determination which would, in part have been informed by his earlier findings (in the Main Judgment). In treating with these matters, he would have had to arrive at a conclusion as to the genuineness and plausibility and weight. Having considered the evidence, the judgment, the written and oral submissions of counsel, I am not satisfied that the Judge erred in his consideration of the issues that were before him, nor in his approach to the application. There is therefore no basis on which this Court should legitimately interfere with the Judge's finding.

[129] Accordingly, I would make the following orders:

(i) The appeal is dismissed.

(ii) The judgment and order of the court below is affirmed.

(iii) The Respondents will have their costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar