EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC(Com) 2020/147 (formerly BVIHCM 2018/0114)

BETWEEN:

[1] SOEMARLI LIE

Claimant

and

[1] NG MIN HONG
[2] SUCCESS OVERSEAS FINANCE LIMITED

Defendants

Appearances:

Mr. Matthew Hardwick, QC, with him Mr. Richard Evans and Dr. Alecia Johns for the Claimant
Mr. Alain Choo-Choy, QC, with him Mr. James Noble and Ms. Monique Hansen for the First Defendant

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2020: October 8, 9, 13, 14, 15, 16, 19, 20, 21, 22, 27, 28;
2021: March 4, 5, 22;
October 25.

JUDGMENT

[1] **WALLBANK, J. (Ag.)**: This is the judgment of the Court on the trial of this action.

INTRODUCTION

[2] By these proceedings, the Claimant ('**Mr. Lie**') seeks unfair prejudice relief pursuant to Section 184I of the BVI Business Companies Act, 2004[1] (the '**Act**'), against the First Defendant ('**Mr. Ng**'), in

[1] No. 16 of 2004.

relation to the conduct of the affairs of the Third Defendant, Success Overseas Finance Limited ('**SOFL**'), a company incorporated in this Territory ('BVI'). Emir Siregar ('**Mr. Siregar**'), formerly the Second Defendant, transferred his shareholding in SOFL to Mr. Ng on 8th September 2016: when this was discovered by Mr. Lie, the Claim against Mr. Siregar was discontinued.

Outline Summary

[3] In brief summary, Mr. Lie is a minority shareholder in SOFL. Mr. Ng owns a majority shareholding in SOFL, which he previously held directly between 8th September 2016 and 13th September 2019. Since 13th September 2019, Mr. Ng's shareholding in SOFL has been held via a nominee, Mr. Wong Yong Fei ('**Mr. Fei**').

[4] Mr. Lie used to be a palm oil plantation contractor in Indonesia. In around 1988, Mr. Lie entered the palm oil production business. He established a joint venture with Mr. Ng's father Mr. Aleh Wiyono ('Mr. Wiyono'), who was a distant family member. Mr. Lie claims, and Mr. Ng denies, that the basis of the relationship was a partnership, in which both Mr. Lie and Mr. Wiyono expected to be and were involved in the management of what Mr. Lie refers to as 'the Business', with both Mr. Lie and Mr. Wiyono having full access to all financial and operational records.

[5] Mr. Wiyono had a son, Mr. Ng. Mr. Ng entered the Business in around 1990. He was given a position with the title of 'Commissioner', which Mr. Lie says was a purely supervisory position. Two years later, Mr. Wiyono passed away. His son, Mr. Ng, inherited Mr. Wiyono's shareholding. Mr. Lie agreed that Mr. Ng would also accede to his late father's position in the Business as Chief Executive Officer.

[6] Between 1992 and 1998 relations between Mr. Lie and Mr. Ng continued as they had been between Mr. Lie and Mr. Wiyono. In 1998 they discussed a restructuring in light of economic turmoil then afflicting Indonesia. It was Mr. Ng who initiated this. The structure as we have it before the Court today eventually grew out of this.

[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.

[8] Relations between Mr. Ng and Mr. Lie broke down in or about November 2015. Up to that point, Mr. Lie had been a director of PT PDP, but was then either sacked or he resigned (versions differ).

[9] Until 1st January 2016, Mr. Lie held an executive role in SOFL. With effect from 1st January 2016, Mr. Lie retired from that role, whilst retaining his shareholding. This followed certain health issues as well as a disagreement with Mr. Ng about whether the Business should be floated by way of an Initial Public Offering ('IPO'). Mr. Ng was strongly in favour, but Mr. Lie did not support this course.

[10] Mr. Lie alleges that the entire value of the Business has since effectively been diverted away from Mr. Lie to Mr. Ng through a series of transactions, each of which were deliberately orchestrated by Mr. Ng to this end, leaving Mr. Lie's shareholding in SOFL completely worthless.

[11] The first such transaction that Mr. Lie complains of is this. In around July 2017, a number of SOFL's shares in PT PDP were disposed of by SOFL to an entity called PT Grahaidea Selarassindo ('Grahaidea'), reducing SOFL's shareholding in PT PDP from around 63% to around 29%. Grahaidea is owned as to 50% each by Mr. Ng and his brother, Mr. Ng Ming Hwie. Mr. Lie complains that this transfer was contrary to section 175 of the Act, in that it effected a disposal of around 54% of SOFL's shareholding in PT PDP, which Mr. Lie contends required the approval of the members of SOFL, himself included, which Mr. Ng did not obtain. Mr. Lie contends that this type of conduct is typical of Mr. Ng's cavalier disregard towards Mr. Lie's rights and interests and as such that it adds an important contextual insight into Mr. Ng's motives.

[12] Then, on or about 18th September 2018, PT PDP carried out a rights issue in the form of an amendment to its Articles of Association to increase its authorized and issued share capital. Following the rights issue, Grahaidea's shareholding in PT PDP was increased very significantly, as did that of another shareholder. SOFL's shareholding however remained the same. SOFL did not acquire any additional shares in PT PDP following the rights issue. This left SOFL with a negligible 1.38% shareholding in PT PDP.

[13] Thirdly, on or about 16th September 2019, SOFL disposed of its shares in PT PDP to PT PDP itself. This reduced SOFL's shareholding in PT PDP to 0%, and with it, the entire value of Mr. Lie's shareholding in SOFL.

[14] Mr. Lie alleges that by reason of Mr. Ng's position as sole director of PT PDP and his interest in Grahaidea and his control over SOFL, it is reasonable to infer that Mr. Ng caused, suffered, and/or permitted these transactions thereby causing unfair prejudice to Mr. Lie in his capacity as a member of SOFL.

[15] Mr. Lie has other complaints:

(1) SOFL refused and/or failed to pay Mr. Lie dividends, contrary to a long-established practice of the business of SOFL. In this regard, Mr. Lie contends that he received dividends consistently every year up until and including 2014. For 2015 and 2016, however, Mr. Lie did not receive a dividend. Mr. Lie avers that SOFL did declare a dividend for 2015, but it was not paid to him. Mr. Lie claims that he has been unfairly prejudiced as a member by reason of this departure from the long-established practice and the withholding of his share of the 2015 dividend, and, if it transpires that others indeed received dividends in 2016, 2017 and 2018, then he would also have been unfairly prejudiced thereby. The 2015 dividends that were resolved to be paid amounted to approximately US$9million. That followed many years of high figure dividends being declared and paid. Now, suddenly, shortly after the relationship breakdown, the dividends dried up. Mr. Lie argues that that was no coincidence. He argues that in reality Mr. Ng had decided not to have the dividends paid in order to deprive Mr. Lie of the portion of them that would otherwise be due to him.

(2) SOFL and Mr. Ng have refused to provide information to Mr. Lie. The information withheld has included documents that Mr. Lie is entitled to see as a shareholder, pursuant to section 100(2) of the Act, being SOFL's register of directors, register of members and copies of all resolutions and minutes of meetings of members of SOFL. Mr. Lie claims a right to see information both as a member of SOFL and by dint of the partnership he alleges existed.

[16] Mr. Ng denies Mr. Lie's complaints.

[17] Mr. Ng, for his part, brings complaints under several heads of alleged wrongdoing on the part of Mr. Lie. Mr. Ng. alleges that Mr. Lie:

(1) misappropriated funds from a corporate bank account;
(2) misappropriated proceeds of sale of used palm kernels;
(3) caused significant loss and damage by purchasing uncertified seedlings;
(4) diverted a corporate opportunity by secretly negotiating the purchase of two palm oil plantation owning companies while he was still a director of PT PDP;
(5) secretly owned and operated two palm oil plantation companies in competition with PT PDP;
(6) poached staff away from PT PDP's business.

[18] Mr. Lie denies Mr. Ng's complaints.

Particular Summary

[19] Turning to specific details: prior to July 2017, SOFL owned 3,789,473 shares (amounting to nearly 63.16% of the shareholding) in an Indonesian holding company incorporated in February 1988 and originally named PT Panca Daya Utama but subsequently renamed PT Panca Daya Perkasa ('**PT PDP**'). In turn, PT PDP owned and continues to own controlling shareholdings in the following subsidiaries, which are the operating companies in a palm oil production business in Indonesia:

(1) 85% of the shares in an Indonesian company called PT Padasa Enam Utama ('**PT PEU**') which was incorporated in June 2004 and operates a plantation in Sumatra – the other

(15%) shareholder of PT PEU being an Indonesian government entity formerly known as PT Perkebunan VI ('**PTP 6**'), but which was subsequently consolidated with other Indonesian entities to become PT Perkebunan Nusantara IV ('**PTPN 4**');

(2) 99.99% of the shares in an Indonesian company called PT Alam Permai Makmur Raya ('**PT APMR**') which was incorporated in June 2004 and operates a plantation and a palm oil factory in East Kalimantan;

(3) 99.99% of the shares in an Indonesian company called PT Bumi Mulia Makmur Lestari ('**PT BMML**') which was incorporated in June 2004 and operates a plantation in East Kalimantan;

(4) 99.99% of the shares in an Indonesian company called PT Multi Makmur Mitra Alam ('**PT MMMA**') which was incorporated in August 2004 and operates a plantation and a palm oil factory in East Kalimantan; and

(5) 99.99% of the shares in an Indonesian company called PT Sinar Alam Niaga Raya ('**PT SANR**') which was incorporated in August 2004 and operates a plantation in East Kalimantan.

[20] Mr. Lie defines this palm oil production business as '**the Business**', arguing that '**the Business**' provides a helpful shorthand reference to the palm oil production business which is the subject of this Claim. Mr. Ng does not accept this definition as he claims that it creates confusion between the affairs of SOFL and the affairs of other companies within the PT PDP group.

[21] The latter four companies (PT APMR, PT BMML, PT MMMA, and PT SANR) have conveniently been referred to as the '**East Kalimantan Companies**'. Together with PT PEU, they are collectively referred to as the '**Indonesian Operating Companies**', to distinguish them from PT PDP's role as the Indonesian holding company.

[22] Until September 2016, both Mr. Lie and Mr. Ng were 45.85% shareholders in SOFL but, following Mr. Ng's acquisition on or about 8th September 2016 of Mr. Siregar's 8.3% shareholding in SOFL,

Mr. Ng became a 54.15% (i.e. majority) shareholder of SOFL. Thereafter, Mr. Ng and Mr. Lie have been the only shareholders of SOFL (save for Mr. Fei who became Mr. Ng's nominee shareholder in September 2019), with Mr. Lie continuing to hold a minority shareholding of 45.85%.

[23] In these proceedings Mr. Lie alleges 5 grounds of unfairly prejudicial conduct ('**the Unfair Prejudice Allegations'**):

(1) an alleged wrongful failure to supply requested company documents (and requested information in relation to the 2017 Disposition and the 2019 Disposition as defined below) to Mr. Lie contrary to Mr. Lie's (alleged) expectation of full access to all financial and operational records of the Business, which was founded by Mr. Lie and Mr. Aleh Wiyono ('**Mr. Wiyono**'), Mr. Ng's father, ('**the Information Complaint'**). In particular Mr. Lie alleges that at the level of SOFL there was a quasi-partnership between Mr. Lie and Mr. Ng ('**the Quasi-Partnership Allegation'**);

(2) an alleged wrongful failure to pay dividends to Mr. Lie in his capacity as a shareholder of SOFL in respect of the financial years 2015 to 2018 (**'the Non-Payment of Dividends'**);

(3) an alleged wrongful disposition in June 2017 of the majority of SOFL's shareholding (namely 2,052,631 of the 3,789,473 shares held by SOFL) in PT PDP without consultation with or consent from Mr. Lie ('**the 2017 Disposition**') by transferring the same to PT Grahaidea Selarassindo (**'Grahaidea'**) (a company owned by Mr. Ng and his brother). The 2017 Disposition reduced SOFL's shareholding in PT PDP from 63.16% to 28.94%;

(4) an alleged wrongful failure to participate in a rights issue by PT PDP in September 2018 ('**the 2018 Rights Issue**') pursuant to which Grahaidea acquired over 60 million additional shares in PT PDP and as a result of which SOFL's percentage shareholding in PT PDP was further reduced from 28.94% to 1.38%; and

(5) an alleged wrongful disposal of SOFL's remaining shares in PT PDP to PT PDP itself in September 2019 ('**the 2019 Disposition**'), thereby reducing SOFL's shareholding in PT PDP to 0%.

[24] The relief sought by Mr. Lie is an order that Mr. Ng purchase all of Mr. Lie's shares in SOFL at a price to be determined by the Court in such manner as the Court shall think fit and:

(1) without any discount to reflect the fact that Mr. Lie's shareholding in SOFL represents a 45.85% minority of the issued share capital of SOFL;

(2) on the basis of a sale between a willing vendor and a willing purchaser, acting at arm's length, of the entire issued share capital of SOFL; and

(3) on the basis of the value of SOFL before the 2017 Disposition, the 2018 Rights Issue, and the 2019 Disposition (that is, as if those events had not occurred).

[25] Mr. Ng denies the Quasi-Partnership Allegation and the Unfair Prejudice Allegations.

[26] On the Quasi-Partnership Allegation, Mr. Ng strongly denies this allegation, which he also submits is not supported by evidence. In the first place, it is Mr. Ng's case that no such joint venture or quasi-partnership existed between Mr. Wiyono and Mr. Lie, not least because the business of PT PDP was established without Mr. Lie having any management role in PT PDP and by a number of other founders and strategic shareholders who are not alleged by Mr. Lie to have been party to the alleged joint venture or quasi-partnership arrangement. Further, even if a relationship of quasi-partnership had existed between Mr. Wiyono and Mr. Lie, Mr. Ng firmly denies that there was any such relationship between himself and Mr. Lie. Mr. Ng further contends that the Quasi-Partnership Allegation is particularly unsustainable at the time of the alleged unfair prejudice over the period 2017 to 2019 in light of (1) Mr. Lie's voluntary withdrawal from the active management of the Indonesian Operating Companies on 23rd November 2015, (2) the lawful termination of Mr. Lie's directorship of PT PDP on 17th December 2015 by the general meeting of shareholders of PT PDP, and (3) Mr. Lie's decision from around June 2015 to acquire, manage and grow his own palm oil

plantations and factories rather than concentrate on the management and growth of the PT PDP group.

[27] As for the Unfair Prejudice Allegations, Mr. Ng argues as follows:

(1) The Information Complaint is trivial and therefore unsustainable as a ground of unfair prejudice since the requested information was already known to Mr. Lie or had been received by him during the disclosure process, Mr. Lie had not demonstrated any prejudice as a result of his delayed receipt of information or documents, and the purpose of Mr. Lie's information and document requests was not to enable him to discharge any management duties within the PT PDP group but to enable the pursuit of his private interests at a time when he was no longer participating in the management of the PT PDP group.

(2) The Non-Payment of Dividends was true to the extent that no dividends had been paid out to Mr. Lie; however, this was simply because SOFL had itself not received any dividends from PT PDP for subsequent distribution to its shareholders (that is, including Mr. Ng himself) during the financial years 2015 to 2018.

(3) The 2017 Disposition was carried out in the context of the Indonesian Tax Amnesty Programme, further to which Mr. Ng repatriated his economic interests in PT PDP (as held through SOFL), to Grahaidea in order to take advantage of the tax amnesty. In any event, if there was any prejudice to Mr. Lie as a result of the transfer to Grahaidea, the real cause of it was not the transfer of the PT PDP shares to Grahaidea, but Mr. Ng's failure to transfer all of his shares in SOFL to Mr. Lie following the transfer of Mr. Ng's entire economic interest in PT PDP to Grahaidea. However, that failure was not a failure on the part of SOFL or in the conduct of SOFL's affairs, but a failure on the part of Mr. Ng in his capacity as the holder of shares in SOFL. Such a failure cannot, as a matter of law, give rise to any unfair prejudice within the meaning of Section 184I. Furthermore, even if none of SOFL's shareholding in PT PDP had been transferred to Grahaidea, the overwhelming bulk of that shareholding would have been diluted to a minimal stake anyhow as a result of SOFL's non-participation in the

2018 Rights Issue, which is the real and predominant cause of the prejudice complained of by Mr. Lie.

(4) As to the 2018 Rights Issue, SOFL was given the opportunity to participate in the 2018 Rights Issue, but had declined to do so as it did not have the funds to do so. The consequential dilution of SOFL's shareholding in PT PDP was not unfair in circumstances where it did not have the funds to subscribe for new shares in PT PDP in order to prevent such dilution. There could not therefore be unfair prejudice within the meaning of section 184I of the Act on that ground.

[28] With regard to the 2019 Disposition, there is very little evidence about the circumstances and terms of that transaction, or the rationale for it. The Court does not presently have the requisite information to make a finding of unfair prejudice on this ground. If unfair prejudice has occurred, it is restricted to that transaction.

[29] It is further submitted on Mr. Ng's behalf that even if the Court were to find that some unfairly prejudicial conduct was established, in the just and equitable exercise of its discretion under Section 184I, the Court should refuse to grant the relief sought by reason of Mr. Lie's alleged misconduct and breaches of duty towards PT PDP and the Indonesian Operating Companies ('**the Misconduct Allegations'**) which comprise:

(1) an allegation that Mr. Lie misappropriated the funds of the Indonesian Operating Companies, in particular with respect to (1) the proceeds of sale of palm fruit shells owned by PT PEU and PT MMMA over a 15-year period between 2000 to 2015 ('**the Palm Shells Allegation**'); and (2) a specific sum of IDR 2 billion (approximately USD 154,000) withdrawn from PT APMR's bank account in May 2015 ('**the IDR 2bn Allegation**');

(2) an allegation of the negligent purchase by Mr. Lie of uncertified seedlings at discounted prices for the plantations owned by the East Kalimantan Companies, allegedly resulting in poor growth and poor production yield for those plantations and very substantial alleged

historical and on-going financial losses for the companies running into hundreds of billions of Indonesian rupiahs ('**the Seedlings Allegation**'); and

(3) allegations of the secret acquisition by Mr. Lie of palm oil factories and plantations which competed with and/or represented corporate opportunities of PT PDP and the Indonesian Operating Companies which Mr. Lie allegedly diverted to himself and his family when he was still a director of the Indonesian Operating Companies and PT PDP ('**the Competition/Diversion Allegation**').

[30] Mr. Lie denies the Misconduct Allegations, in respect of each of which he claims Mr. Ng (1) has failed to provide proper particulars; (2) has failed to provide any meaningful disclosure; and (3) addresses in just a few lines in his witness statement (and for the most part adds nothing substantive to the inadequate pleadings). Mr. Hardwick (for Mr. Lie) contends that, in any event, the Misconduct Allegations bear no immediate or necessary relation to the Unfair Prejudice Allegations and are therefore of no relevance to the relief which Mr. Lie seeks in this Claim.

[31] If and to the extent that the Court were to determine that Mr. Lie is entitled to a buy-out order, Mr. Ng contends that any buy-out valuation should (1) incorporate a minority discount for various reasons, including that there was no quasi-partnership between Mr. Lie and Mr. Ng at any relevant time, (2) strictly reflect only those matters in respect of which the Court may make a finding of unfairly prejudicial conduct under section 184I of the Act, and (3) give credit for any misappropriations established on the part of Mr. Lie.

[32] By its Case Management Conference Directions Order dated 17th September 2019, the Court ordered that the issue of liability and general form of relief claimed are to be determined in the present trial, with the issue of quantum, if a buy-out order were made in Mr. Lie's favour, being stood over for directions by the trial judge. During the course of the parties' closing submissions, however, the parties and the Court agreed that it would be sensible for the parties to have an opportunity to make more detailed and focused submissions regarding the specifics of the appropriate form of relief (for example, whether there ought to be a minority discount in the event

that a buy-out order is made) once the Court has delivered its judgment on the Quasi-Partnership Allegation, the Unfair Prejudice Allegations and the Misconduct Allegations.

BACKGROUND

[33] This section sets out, in summary (and at the risk of some repetition), the main factual background preceding the commencement of this Claim as well as key events in the procedural history. It covers the events as set out in the parties' agreed summary chronology. Where factual matters are disputed between the parties, this is stated.

[34] In 1988, Mr. Lie entered into the palm oil production business in Indonesia and together with Mr. Wiyono (Mr. Ng's father) established PT PDP, an Indonesian holding company incorporated on 26th February 1988. Mr. Wiyono owned 100 shares in PT PDP (50%); Mr. Lie owned 80 shares (40%); and Madam Soendari (a mutual friend of theirs) (**'Madam Soendari'**) owned 20 shares (10%). It is Mr. Lie's case that the Business (as initially structured through PT PDP) was established as a joint venture between him and Mr. Wiyono, with whom he shared a close friendship and familial relation. Mr. Ng denies that there was ever a joint venture or quasi-partnership between Mr. Lie and Mr. Wiyono, for various reasons. First, he disputes that there was any close friendship, much less any substantial familial relation between Mr. Lie and Mr. Wiyono. Further, Madam Soendari (as co-founder of PT PDP) paid for and was allotted a significant shareholding as she had an important role to play in relation to PT PDP with her valuable contacts and knowledge of relevant local and national government procedures as well as her husband's contacts with the Indonesian military. Mr. Ng's case is that it would be extraordinary if a quasi-partnership arrangement between only Mr. Lie and Mr. Wiyono had been entered into, to the exclusion and without the knowledge of Madam Soendari as third substantial shareholder and co-founder of PT PDP (there being no allegation by Mr. Lie that Madam Soendari was party to or knew of the alleged quasi-partnership arrangement between Mr. Lie and Mr. Wiyono). Mr. Ng's case is that the true nature of the relationship between Mr. Lie and Mr. Wiyono is accurately reflected in the various disclosed corporate documents relating to PT PDP and, subsequently, its later established subsidiaries, rather than as alleged by Mr. Lie.

[35] In December 1988 (at a time when PT PDP was still an inactive company), there were changes to the shareholding of PT PDP as follows: (i) Mr. Wiyono's shareholding reduced to 80 shares (ii) Madam Karlinah Umar Wirahadiksumah ('**Madam Karlinah**') acquired 55 shares, (iii) Mr. Lie's shareholding reduced to 35 shares, and (iv) Madam Soendari's shareholding increased to 30 shares. Madam Karlinah was a friend of Mr. Wiyono's with government contacts and the wife of Indonesia's former 4th Vice President (the late Mr. Umar Wirahadikusumah). She was appointed as 'President Commissioner' of PT PDP and, as such, had supervisory role over the directors of the company. However, she was never involved in the day-to-day management of PT PDP and was never involved at an operational level.

[36] As reflected in the Articles of Association of PT PDP, upon the incorporation of PT PDP in February 1988 and until his death in June 1992, Mr. Wiyono was the sole director of PT PDP. Mr. Lie was only appointed as commissioner of PT PDP during that time. Following Madam Karlinah's investment into PT PDP as a co-founder with Mr. Wiyono, Mr. Lie and Madam Soendari in December 1988, she became President Commissioner and senior in position on the Board of Commissioners of PT PDP to Mr. Lie's role as 'Commissioner'.

[37] At this early stage (between 1988 and 1990), PT PDP owned no plantation land and did not engage in any palm oil business. PT Perkebunan VI ('**PTP 6**'[2]) was an Indonesian government entity, which did own plantation land. The decision was taken to add the Indonesian government entity PTP 6 as an additional strategic partner. PTP 6 contributed 10,000 hectares of plantation land and the injection of this asset was structured through the incorporation (on 26th February 1990) of the new joint venture company PT PEU.

[38] A '*Joint Venture Establishment Agreement*' dated 26th February 1990 was therefore entered into between (1) Mr. Wiyono for PT PDP; (2) Mr. Daud Bastari for PTP 6; and (3) Darwin Lubis for 'Cooperative Serba Usaha Kesejahteraan Karyawan PTP VI Pabatu' ('**CKK**', an Indonesian co-operative), for the joint management of the plantations (at Teluk Dalam, Kalianta and Koto Kampar). PTP 6 was given 15% of the shares in PT PEU in return for its plantation land; PT PDP

[2] Later renamed PTPN 4.

acquired 80% of the shares in PT PEU; and CKK acquired 5% of the shares (subsequently acquired by PT PDP in 2004).

[39] As to the management of PT PEU, by agreement between the joint venture shareholders (i.e. PT PDP, PTP 6 and CKK), Mr. Wiyono and Mr. Lie were appointed the two directors and Madam Karlinah was appointed the '*Chief Commissioner*' of PT PEU. While Madam Karlinah had no involvement in the day-to-day management of PT PEU, her role as Chief Commissioner was to supervise the Board of Directors (i.e. those involved in the day-to-day management). Mr. Wiyono was the President Director and Mr. Lie's role was that of operations director. Mr. Ng was appointed as one of the corporate commissioners of PT PEU (which was his first formal role within the PT PDP group), and (together with Madam Karlinah as Chief Commissioner) had responsibility for supervising the Board of Directors.

[40] In June 1992, Omar Abdalla (Mr. Siregar's father) and Madam Kiswati joined as new shareholders of PT PDP, acquiring respectively 10 shares and 5 shares, amounting to 5% and 2.5% respectively of the share capital of PT PDP. Mr. Lie described those shareholders as 'strategic shareholders' in his witness statement for the trial.

[41] Later in June 1992, Mr. Wiyono passed away. On 5th August 1992, his then 27.5% shareholding in PT PDP was transferred to his son, Mr. Ng. On 11th August 1992, following resolutions passed by a meeting of all of the shareholders of PT PDP and chaired by Madam Karlinah, both Mr. Ng and Mr. Lie were appointed as directors of PT PDP. Between 1992 and 1998, both Mr. Lie and Mr. Ng were involved in the operation and management of PT PDP and PT PEU with full access to all financial and operational records. Mr. Lie's case is that the business of PT PDP and PT PEU operated as a joint venture as between him and Mr. Ng on the same agreed basis upon which it operated between him and Mr. Wiyono before the latter's death. In this regard, Mr. Lie alleged in his witness statement for the trial that following Mr. Ng's appointment as representative of Mr. Wiyono's heirs, Mr. Wiyono's widow and Mr. Ng's mother, Madam Tan Ka Pie (**'Madam Tan'**), had agreed with Mr. Lie that Mr. Lie and Mr. Ng run the business as partners in the same way that Mr. Lie and Mr. Wiyono had done prior to Mr. Wiyono's passing. Mr. Ng denies that there was any such agreement between Mr. Lie and his mother and avers instead that Mr. Lie's involvement in the

management of PT PDP and PT PEU and his access to all financial and operational records was by virtue of his appointment as director of those companies pursuant to the shareholders' approval of such appointment, not by virtue of any alleged agreement between him and Madam Tan.

[42] In 1995 and 1996, Mr. Ng transferred his 27.5% shareholding in PT PDP to the Indonesian company PT Majumakmur Mandirisejati ('**PT MM**') and Mr. Lie in turn transferred his 27.5% shareholding in PT PDP to the Indonesian company PT Bahana Sentramakmur ('**PT BS**').

[43] In about 2001, Mr. Lie and Mr. Ng received advice from Deutsche Bank (**'DBT'**) whereby, for tax planning and privacy reasons, they could set up a registered company in this jurisdiction ('BVI') to hold their respective shares in PT PDP (in place of the Indonesian holding companies PT MM and PT BS). Mr. Lie and Mr. Ng agreed to do so, following which Mr. Lie and Mr. Ng, as well as Mr. Siregar (who had by then inherited the shareholding of his deceased father, Omar Abdalla, and also shared the same tax planning and privacy objective as Messrs Lie and Ng), transferred their respective shareholdings in PT PDP to a newly incorporated BVI company, SOFL. On 27th August 2002, SOFL was incorporated in the BVI with the nominee director and shareholder Lion International Management Limited (**'Lion'**).

[44] On 13th November 2003, the 28.9% shareholdings owned by each of PT MM (on behalf of Mr. Ng) and PT BS (on behalf of Mr. Lie) in PT PDP were transferred to SOFL such that SOFL held 63.16% of the shares in PT PDP. Mr. Siregar also transferred his 5.26% shareholding in PT PDP to SOFL. Thereafter Mr. Lie and Mr. Ng each owned 45.85% of SOFL and Mr. Siregar owned 8.3%.

[45] With effect from 16th September 2015, Regula Limited ('**Regula**') was appointed as sole director and shareholder of SOFL in place of Lion. Like Lion before it, Regula was a nominee director and acted in accordance with the instructions of Mr. Ng or Mr. Lie. Formal Declarations of Trust dated 22nd March 2005 confirmed Regula's acknowledgment and declaration that it held 4,585 shares for each of Mr. Lie and the '*Everlast AW Trust*' (Mr. Ng's family trust). Furthermore, by a '*company proposal*' signed on 28th March 2005 DBT agreed: (1) to provide certain corporate services to Mr. Ng, Mr. Siregar and Mr. Lie as set out in Appendix A; and (2) to '*take instructions from either [Mr.*

Ng or Mr. Lie] for all matters in relation to the management of the Company and its assets' as set out in Appendix B ('**the DBT Mandate**').

[46] In 2004, there was an expansion of the operations of the Business with additional plantations and factories established in East Kalimantan, Indonesia. In June 2004, PT APMR and PT BMML were established to operate palm oil plantations in East Kalimantan (the shares were owned 99.99% by PT PDP; at the point of incorporation, Mr. Lie was appointed as director and Mr. Ng as commissioner, but thereafter Mr. Ng, Mr. Lie and Mr. Abdul Harahap (**'Mr. Harahap'**) were each appointed as a director). In August 2004, PT MMMA and PT SANR were also established to operate palm oil plantations in East Kalimantan (the shares were owned 99.99% by PT PDP; the eventual directors were similarly Mr. Ng, Mr. Lie and Mr. Harahap).

[47] Between 2004 to 2014, the operations of the PT PDP group ran relatively smoothly. Mr. Lie, based in the Medan office, acted as Operations Director (in charge of daily operations) for the Indonesian Operating Companies. Mr. Ng (as President Director) and Mr. Harahap (Commissioner) were both stationed in the Jakarta office.

[48] The breakdown in the relationship between Mr. Lie and Mr. Ng began in 2015. Prior to this, in or around 2013, the shareholders of PT PDP discussed the possibility of a public offering and the issuance of PT PDP Shares to the public through the Indonesian Stock Exchange ('**the IPO**'). At that stage, there was no shareholder consensus over the IPO proposal and the discussions did not proceed further then. On 27th April 2015, Mr. Ng, as President Director, further to Madam Karlinah's notice of 24th April 2015, wrote to Mr. Lie inviting him to attend an Extraordinary General Shareholders' Meeting (EGSM) of PT PDP on 11th May 2015 for the purpose of discussing and proceeding with the shareholders' approval of the IPO. Ahead of the EGSM, SOFL appointed Mr. Siregar as SOFL's proxy for the purposes of voting in respect of the IPO at the 11th May 2015 EGSM. Mr. Lie, however, was not in favour of the IPO proposal. On 4th May 2015, shortly before the EGSM, Mr. Lie wrote to DBT instructing them to cancel the proxy (and the proxy was duly cancelled). On 5th May 2015, Mr. Lie's Singapore solicitors (Wong Tan & Molly Lim LLC ('**WTM**')) wrote to DBT informing it of the disagreement and instructing it not to take any instructions from Mr. Ng or Mr. Siregar on any matters relating to SOFL without Mr. Lie's agreement.

[49] In view of the fact that the 11th May 2015 EGSM was not quorate, Mr. Ng sent a second EGSM invitation scheduled to take place on 21st May 2015 to approve the IPO. By letter dated 18th May 2015 Mr. Lie raised certain procedural objections to the proposed EGSM. By a further letter dated 8th June 2015, Mr. Lie wrote to PT PDP setting out his substantive objections to the IPO explaining in particular that '*finance to this date is very strong*' and that the company was being supervised by the Board of Commissioners in accordance with the Articles of Association. There is a dispute about this letter. When taken to this letter in cross-examination Mr. Ng stated repeatedly that until disclosure '*I have never received this letter*' (and identified a particular feature of the letter that did not make sense to him). Mr. Hardwick then took Mr. Ng to his own 22nd June 2015 response to that 8th June 2015 letter, which elicited Mr. Ng's response '*I don't remember*'. Mr. Hardwick identified these passages in cross-examination as a first '*red flag*', submitting that they provide very powerful evidence of the reality of Mr. Ng's attitude to truth-telling: that unless and until constrained by the contents of a particular document set before him, Mr. Ng felt entirely at liberty to say or argue anything that he felt would assist his case.

[50] On 11th May 2015, Mr. Mohammad Achiruddin Noer ('**MAN**'), on behalf of his mother, Madam Rachma (by then, an owner of 1.58% of the shares in PT PDP) also wrote to PT PDP objecting to the IPO. Further, on 18th May 2015 (1) PTPN 4 wrote objecting to the IPO on the basis that PT PEU's '*current performance is excellent*' and the introduction of new shareholders could be detrimental to its existing management; and (2) the Central Labour Union of Panamtama, Medan Office, wrote expressing certain concerns and asking the President Director of PT PEU to reconsider.

[51] In light of the divergent views, no shareholders' meeting to consider the IPO proposal could be arranged at that time. Mr. Lie does not rely on the disagreement concerning the IPO as a ground of unfair prejudice, but rather as background to the falling out between the parties. Mr. Ng claims that Mr. Lie expressed '*violent opposition*' to the IPO, stemming from an alleged desire to suppress details of his management practices and alleged breaches of duty.

[52] On 25th June 2015, DBT (through its lawyers Messrs Carey Olsen) wrote to SOFL stating that (1) they would be terminating their provision of services on account of the disagreement between the beneficial owners of SOFL; and (2) Regula would retire as nominee director of SOFL effective 9th July 2015. Upon DBT's resignation, the shares in SOFL were transferred to the personal names of Mr. Ng, Mr. Lie, and Mr. Siregar.

[53] On 8th July 2015, WTM (on behalf of Mr. Lie) wrote to Messrs Carey Olsen (for DBT) stating that no new director of SOFL should be appointed without Mr. Lie's prior written approval. On 23rd July 2015, Mr. Lie wrote to Mr. Siregar and Mr. Ng suggesting that in view of the imminent resignation of Regula as sole director of SOFL it would be sensible for each of them to select a director of SOFL (such that the new board would have 3 directors). No specific response to the letter was received.

[54] On 14th September 2015, Mr. Ng wrote to Mr. Lie stating that he wished to appoint his brother Ng Ming Hwie (**'Mr. Ng's Brother'**) as sole director of SOFL (and enclosed a written resolution to that effect, signed by Mr. Ng and Mr. Siregar as majority shareholders of SOFL). On 17th September 2015, Mr. Lie replied proposing the appointment of both (1) himself and (2) Mr. Ng's Brother as joint directors of SOFL. Mr. Lie did not oppose the appointment of Mr. Ng's Brother as a director of SOFL: his objection was to the sole directorship. However, on 23rd September 2015, Mr. Ng's Brother was appointed as sole director of SOFL. Mr. Ng informed Mr. Lie of this appointment by letter dated 28th September 2015.

[55] On 23rd November 2015, Mr. Lie voluntarily resigned as operations director of (1) PT PEU effective from 1st January 2016 and (2) the East Kalimantan Companies (PT APMR, PT BMML, PT MMMA and PT SANR) effective from 1st January 2016, ostensibly on account of his age and declining health (following his diagnosis with Ischaemic heart disease in late 2014). Mr. Lie's evidence was that his objective was to resign from his '*very active…executive role*' and to be relieved of the '*rigors of daily operational management*'.

[56] On 17th December 2015, Mr. Lie's directorship of PT PDP was terminated following an extraordinary general shareholders' meeting (EGSM) of PT PDP whereupon Mr. Ng became the sole director of PT PDP and has remained sole director at all material times thereafter. Mr. Lie

maintains that his termination from PT PDP's directorship was without just cause (although again this termination is not pleaded as a ground of unfair prejudice but as part of the relevant factual background). Mr. Ng's case is that Mr. Lie's position as director of PT PDP was lawfully terminated at the 17th December 2015 EGSM.

[57] On 9th May 2016, PT PEU declared a dividend for the Financial Year 2015 and the sum of IDR 212.5 billion (approximately USD 18 million) was paid to PT PDP as the 85% shareholder of PT PEU. On 25th July 2016, PT PDP in turn declared a dividend of IDR 200 billion for the Financial Year 2015 to its then shareholders as follows: (1) Madam Karlinah: IDR 67.3 billion; (2) SOFL: IDR 126.32 billion; (3) Mr. Harahap: IDR 3.16 billion; and (4) Mr. Noer: IDR 3.16 billion. However, Mr. Lie did not then receive his 45.85% entitlement of SOFL's IDR 126.32 billion dividend. As a result, Mr. Lie claims that he telephoned Mr. Ng about this in July 2016 and further that his wife sent text messages to Mr. Ng regarding the unpaid dividends between August and September 2016. On 13th September 2016, Mr. Lie wrote to Mr. Ng's Brother (in his capacity as director of SOFL) noting that he had not received a dividend following PT PDP's AGSM on 25th July 2016. No response was received. On 25th October 2016, Mr. Lie again wrote to Mr. Ng and his brother regarding the unpaid dividends. Again, Mr. Lie says that he received no response, and his account was not challenged in cross-examination.

[58] In March 2017, Mr. Lie instructed Messrs Conyers to write to SOFL requesting copies of SOFL's corporate records and for documentation relevant to the 2014 dividend distribution. Messrs Conyers wrote to SOFL by letters dated 3rd and 29th March 2017 and again on 4th May 2017 after no response was received. Meanwhile, in Indonesia, on 18th April 2017 Mr. Lie filed a police report against Mr. Ng in respect of his unpaid dividend for the Financial Year 2015. In July 2017, there was an unsuccessful police mediation between Mr. Lie and Mr. Ng. Mr. Lie states that the police ultimately terminated the complaint on the basis that the unpaid dividend did not constitute a criminal matter. On 13th June 2017, one Mr. Muhamed Ismet Nasrudin (**'Mr. Muhamed'**), filed a police report on behalf of PT APMR, accusing Mr. Lie of embezzling IDR 2 billion from PT APMR (the initial criminal complaint which formed the basis of the IDR 2bn Allegation).

[59] On 14th July 2017, the 2017 Disposition took place whereby SOFL disposed of the majority of its shares in PT PDP (2,052,631 of 3,789,473) by transferring the same to Grahaidea (which is jointly owned by Mr. Ng and Mr. Ng's Brother). By virtue of the 2017 Disposition, SOFL's shareholding in PT PDP reduced from 63.13% to 28.94%. Mr. Lie states that he became aware of the 2017 Disposition on or around 19th September 2017 upon a review of PT PDP's publicly available company profile. On 24th November 2017, Messrs Conyers (acting for Mr. Lie) wrote to SOFL again requesting SOFL's register of members and directors and copies of all resolutions as well as details concerning the 2017 Disposition. On 4th December 2017, Messrs Wither KhattarWong (acting for SOFL) responded stating that SOFL was not in a position to disclose any financial records of the company given that SOFL (together with PT PDP) was under special audit to address the alleged abuse and misappropriation of funds by Mr. Lie during his tenure as Operations Director of certain subsidiaries of PT PDP.

[60] On 19th February 2018, Mr. Achmad was appointed as the sole director of SOFL in place of Mr. Ng's Brother following the passing of a director's resolution by Mr. Ng's Brother in accordance with SOFL's Articles of Association. As of the trial, Mr. Achmad remains the sole *de jure* director of SOFL (although he has not provided any evidence in these proceedings). On 16th April 2018, Messrs Conyers sent a 13-page letter before action to Mr. Ng and Mr. Siregar detailing Mr. Lie's allegations of unfair prejudice. On 12th July 2018, this Claim was issued. On 18th September 2018, two months after the claim was issued, PT PDP carried out the 2018 Rights Issue pursuant to which Grahaidea acquired over 60 million additional shares in PT PDP. SOFL did not participate in the 2018 Rights Issue, resulting in its percentage shareholding in PT PDP being reduced from 28.94% to 1.38%. On 16th May 2019, Mr. Lie filed an Amended Statement of Claim in order to plead the 2018 Rights Issue as an additional ground of unfair prejudice.

[61] In June 2019, Mr. Lie issued a Request for Further Information in respect of Mr. Ng's Amended Defence (and in particular in relation to the Misconduct Allegations) ('**the June 2019 RFI**'). Dissatisfied with Mr. Ng's response thereto, Mr. Lie issued an application in respect of the same on 4th September 2019. This application was heard before Farara J (Ag.) on 9th October 2019. In a judgment dated 11th October 2019, Farara J ordered that Mr. Ng provide further responses to the

June 2019 RFI, including in respect of a number of the Misconduct Allegations ('**the RFI Judgment'**). Mr. Ng provided these further responses on 1st November 2019.

[62] By its Case Management Conference Directions Order dated 17th September 2019 ('the CMC Order'), the Court ordered that the issue of liability and general form of relief was to be determined at trial, with the issue of quantum (if a buy-out order were made in Mr. Lie's favour) to be stood over for directions by the trial judge. The Court ordered further that SOFL was to provide disclosure (as well as Mr. Lie and Mr. Ng) by way of exchange of lists of documents on or before 6th December 2019. Mr. Lie and Mr. Ng exchanged lists of documents on 6th December 2019. However, SOFL has never complied with any of its disclosure obligations in the CMC Order and has not engaged in these proceedings at all.

[63] On 27th January 2020, Messrs Conyers (for Mr. Lie) first learned that on or about 16th September 2019, SOFL had disposed of its remaining 1,736,842 shares in PT PDP to PT PDP itself (the 2019 Disposition). On 28th January 2020, Messrs Conyers wrote to Messrs Withers (Mr. Ng's then BVI legal practitioners) requesting details in respect of the 2019 Disposition. By letter in response dated 30th January 2020, Messrs Withers suggested that Mr. Lie approach Mr. Achmad (SOFL's sole director) for such information. Mr. Lie subsequently issued a Request for Further Information ('RFI') in respect of the 2019 Disposition on 10th February 2020 ('**the 2019 Disposition RFI**'). Mr. Ng's position remained that the 2019 Disposition was not then an issue in dispute in the proceedings and could not therefore be the subject of an RFI. Mr. Lie filed a Re-Amended Statement of Claim on 10th June 2020 (with the leave of the Court) which pleads the 2019 Disposition as an additional ground of unfair prejudice. Mr. Ng in turn filed his Re-Amended Defence on 19th June 2020.

[64] On 11th March 2020, Mr. Lie issued a specific disclosure application which was heard on 22nd April 2020. Judgment on the specific disclosure application was handed down on 21st July 2020 ('**the Specific Disclosure Judgment**'). Mr. Ng filed a Supplemental List of Documents on 10th August 2020 pursuant to the Specific Disclosure Judgment.

[65] On 11th September 2020, Mr. Ng issued an application for leave to amend his Re-Amended Defence and to serve a Re-Re-Amended Defence and Counterclaim ('**the Amendment**

Application'). The Amendment Application sought leave to challenge, for the first time, a number of transactions set out in Permata Bank Account statements disclosed by Mr. Lie in December 2019 ('**the Permata Statements**'). The draft counterclaim sought relief requiring Mr. Lie to account for each of the transactions in the Permata Account. Additionally, the counterclaim sought to challenge 7 withdrawals contained in the Permata Statements on specific dates between 2013 and 2015 ('**the 7 Payments**'). The Amendment Application came before the Court at the pre-trial review on 16th September 2020. I dismissed the Amendment Application with costs on the basis that it was too late and too close before trial to be introducing what appeared to be further alleged misappropriations on the basis of bank statements which were disclosed in December 2019 (some nine months prior to the Amendment Application). At a further hearing on 28th September 2020, I gave further directions to trial including the terms of the revised trial timetable.

ISSUES TO BE DETERMINED

[66] In light of the above, the following issues (and sub-issues) fall to be determined in this claim (each of which is dealt with in turn below):

(1) *Issue 1: the alleged quasi-partnership arrangement & Information Complaint*: The Claimant formulates this issue as follows: (1) whether there was an agreement/arrangement between (a) Mr. Lie and Mr. Wiyono; and subsequently (b) Mr. Lie and Mr. Ng in respect of the management of the Business and access to information; (2) whether any agreement/arrangement ceased when Mr. Lie resigned from the Indonesian Operating Companies; (3) whether Mr. Ng refused to provide Mr. Lie with information concerning the affairs of SOFL in breach of the agreement/arrangement; and (4) whether that failure was unfairly prejudicial to Mr. Lie;

The First Defendant formulates the issue as follows:
Issue 1(a): (*Quasi-Partnership Allegation*: (1) whether there was a joint venture or quasi-partnership relationship agreement or arrangement as alleged between Mr. Lie and Mr. Wiyono as at the time of incorporation of PT PDP; (2) assuming such joint venture or quasi-partnership between Mr. Lie and Mr. Wiyono existed, whether it survived Mr. Wiyono's

passing and was continued as between Mr. Lie and Mr. Ng, in particular, with respect to the management of the business of the PT PDP group and access to information; and (3) assuming such joint venture or quasi-partnership existed as between Mr. Lie and Mr. Ng, whether it ceased when Mr. Lie voluntarily resigned from the Indonesian Operating Companies, ceased to be a director of PT PDP, and/or secretly negotiated the acquisition of and became involved in the development of the business of PT Palmaris Raya ('**PT Palmaris**') and PT Rendi Permata Raya ('**PT Rendi**');

Issue 1(b): the Information Complaint: assuming the Quasi-Partnership Allegation to be made out, whether Mr. Ng failed to provide Mr. Lie with information concerning the affairs of SOFL in breach of the arrangement between the parties, and whether that failure was unfairly prejudicial to Mr. Lie within the meaning of section 184I of the Act;

(2) *Issue 2: the Non-Payment of Dividends*: (1) whether dividends were paid (by the Indonesian Operating Companies to PT PDP, by PT PDP to SOFL, and by SOFL to its shareholders) for the financial years 2015 – 2018; and/or (2) whether the non-payment of dividends by PT PDP to SOFL and/or by SOFL to Mr. Lie for those financial years was unfairly prejudicial to Mr. Lie within the meaning of section 184I of the Act;

(3) *Issue 3: the 2017 Disposition*: whether the transfer of 2,052,631 (54%) of SOFL's shares in PT PDP to Grahaidea was (1) in breach of section 175 of the Act ; and/or (2) a repatriation of assets pursuant to the Indonesian Government's Tax Amnesty Programme; and/or (3) unfairly prejudicial to Mr. Lie within the meaning of section 184I of the Act;

(4) *Issue 4: the 2018 Rights Issue*: (1) whether SOFL was offered an opportunity to participate in the 2018 Rights Issue; (2) whether SOFL's non-participation therein gave rise to any unfairly prejudicial conduct on the part of SOFL, or in the conduct of the affairs of SOFL, which was unfairly prejudicial to Mr. Lie, within the meaning of section 184I of the Act;

(5) *Issue 5: the 2019 Disposition*: whether SOFL's disposal of its remaining 1,736,642 shares in PT PDP to PT PDP was (1) in breach of section 175 of the Act; and/or (2) unfairly prejudicial to Mr. Lie within the meaning of section 184I of the Act;

(6) *Issue 6: the Palm Shells Allegation*: whether Mr. Lie misappropriated the sale proceeds of palm fruit shells between 2000 and 2015;

(7) *Issue 7: the Seedlings Allegation*: whether Mr. Lie acted negligently or otherwise wrongfully in allegedly purchasing '*uncertified seedlings at discounted prices*' allegedly resulting in '*poor growth and poor production yield*' between 2009 – 2010;

(8) *Issue 8: the IDR 2bn Allegation*: whether Mr. Lie misappropriated IDR 2 billion withdrawn from PT APMR's bank account in May 2015;

(9) *Issue 9: the Competition/Diversion Allegation*: whether Mr. Lie acted with an improper competition/conflict of interest in allegedly establishing alternative competing businesses and/or diverting corporate opportunities of the business of the PT PDP group to himself and his family; and

(10) *Issue 10: relief claimed*: (1) whether Mr. Ng conducted the affairs of SOFL in any of the respects relied upon to found unfair prejudice within the meaning of section 184I of the Act; (2) whether Mr. Lie failed to come to Court with clean hands and/or ought relief to be declined by reason of Mr. Lie's own alleged misconduct and/or breaches of duty towards PT PDP and the Indonesian Operating Companies; (3) whether Mr. Lie is guilty of acquiescence or inexcusable delay in bringing the Claim; and (4) if the Court considers that Mr. Lie is entitled to an order that his shares in SOFL be purchased by Mr. Ng, the basis upon which such a purchase order should be ordered, having regard to any finding of unfair prejudice and misconduct on the part of Mr. Lie.

WITNESSES

[67] The evidential phase of the trial on liability in this matter took place between 6th and 28th October 2020. On behalf of the Claimant, the Court heard from Mr. Lie; Mr. Rudi Rangkuti (**'Mr. Rangkuti'**); Mr. Robert Saragih ('**Mr. Saragih'**); and Mr. Andy Zulmi. On behalf of the First Defendant, the Court heard from Mr. Ng and Mr. Robby Sembiring. There was no challenge to the factual evidence of Mr. Ng's further witnesses, Mr. Tusiman, Mr. Lambok Siahaan; and Mr. Alsen Manurung (and they were not called to give oral evidence on this basis). The Court also heard expert evidence from Mr. Andi Kadir (for Mr. Lie) and Mr. Ibrahim Senen (for Mr. Ng) on matters of Indonesian law. The matter subsequently reconvened for oral closing submissions on 4th – 5th March 2021.

The Claimant's Submissions

[68] In response to the Court's indication that it would assist for each party to identify key parts of the evidence on which it relied in relation to the question of which of the parties was telling the truth on certain matters, Mr. Hardwick provided a two-page document entitled '*Claimant's 'Traffic Light' Analysis of NMH/SL Evidence Re Truth-Telling*'. The document adopts a '*Traffic Light*' code of: (1) '*Amber warning*' for evidence that was claimed to cast doubt upon the reliability of Mr. Ng as a witness (either by reference to particular character traits or because they are said to disclose a carelessness / casual disregard in respect of the importance of truth-telling) (with 16 suggested pieces of evidence identified in this category); (2) '*Red flag*' for allegedly compelling evidence of Mr. Ng's dishonesty / deliberate lies (with 8 suggested pieces of evidence identified in this category); and (3) '*Green light*' for allegedly compelling evidence as to the reliability/truth of Mr. Lie's evidence (with 8 suggested pieces of evidence identified in this category). Mr. Hardwick's reasoning in respect of each of these pieces of evidence was then developed in his written and oral closing submissions.

The First Defendant's Submissions

[69] In his closing written submissions as well as in his closing oral submissions, Mr. Choo-Choy identified particular passages and documents on which he relied in support of the contrary contention that Mr. Lie's evidence was in certain respects untruthful and/or in any event inaccurate, in particular in relation to (1) the Quasi-Partnership Allegation, which he submitted to be inconsistent with the arrangements evidenced by the Articles of Association of PT PDP and the express Joint Venture Establishment Agreement dated 26th February 1990 between PT PDP, PTP 6 and CKK relating to the establishment of PT PEU, and the circumstances of the involvement of Madam Soendari and Madam Karlinah as co-founders of and strategic shareholders in PT PDP, (2) the alleged agreement with Mr. Ng and his mother following Mr. Wiyono's death, which he submitted to be a belated fabrication or wishful thinking on Mr. Lie's part at the time of (but not before) drafting his witness statement for trial; (3) Mr. Lie's evidence as to Mr. Ng's alleged awareness of Mr. Lie's substantial interest in PT Sumber Alam Makmur Sentosa ('**PT SAMS**'); (4) Mr. Lie's evidence in relation to the circumstances in which he acquired PT Palmaris and PT Rendi; and (5) Mr. Lie's evidence in relation to the IDR 2 bn Allegation and the Palm Shells Allegation. Mr. Choo-Choy also identified aspects of Mr. Lie's evidence which, until his cross-examination, had never been advanced by or on behalf of Mr. Lie despite the obvious importance of such evidence to the issues for trial.

ISSUE 1: QUASI-PARTNERSHIP ALLEGATION AND THE INFORMATION COMPLAINT

[70] In respect of each of the 10 Issues that follow, a summary of the parties' respective submissions is provided. This summary is intended to capture the parties' key arguments as contained in their respective oral and written submissions (but not every detail of every argument which covered over 350 pages of written closing submissions and occupied two days of oral closing arguments). For ease of reference, although the written submissions of the parties identify lawyers from Messrs Conyers (for Mr. Lie) and Messrs Carey Olsen (for Mr. Ng), I have referred to Mr. Hardwick and Mr. Choo-Choy, respectively, when referencing the points made.

The Claimant's Submissions

[71] It is Mr. Lie's case that, in 1988 Mr. Lie established a joint venture with Mr. Ng's father, Mr. Wiyono, for the establishment and operation of the Business. The joint venture was in the nature of a partnership in which both expected to be and were involved in the management of the Business with full access to all financial and operational records and details of the Business; and when Mr. Wiyono passed away and Mr. Ng inherited his father's shareholding in PT PDP, the relationship between Mr. Lie and Mr. Ng in connection with the Business remained as it had been between Mr. Lie and Mr. Wiyono.

[72] Mr. Lie claims that following his retirement from an executive role (in the Indonesian Operating Companies) at the end of 2015, he reasonably expected that he would continue to receive pertinent information concerning SOFL's affairs; yet Mr. Ng refused to supply him with requested information in respect of SOFL's affairs. The requested information includes Mr. Lie's repeated requests in 2017 for copies of the register of members and register of directors of SOFL as well as subsequent repeated requests for information in relation to (1) the Non-Payment of Dividends (2) the 2017 Disposition (3) the 2018 Rights Issue and (4) the 2019 Disposition.

[73] Mr. Hardwick (for Mr. Lie) relies in particular on the well-known passage in **Ebrahimi v Westbourne Galleries**[3] (as approved in the House of Lords decision in **O'Neill v Phillips**[4]) in which Lord Wilberforce explained how the '*superimposition of equitable considerations*' over and above that which is laid down in a company's articles requires *'an association formed or continued on the basis of a personal relationship involving mutual confidence'* or *'an agreement, or understanding, that all, or some…of the shareholders shall participate in the conduct of the business'.* He submits that the cases have recognised understandings enforceable in equity short of actual participation in day-to-day management, including *'a right of access to company records'* (relying on **Phoenix Office Supplies v Larvin**[5]) and a *'right in equity to be consulted'* (relying on **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020) paragraph 7-50 and **Re**

[3] [1973] AC 360.
[4] [1999] 1 WLR 1092.
[5] EWCA Civ [2003] 1 BCLC.

Elgindata[6]). It is Mr. Lie's case that his right to be consulted and to be provided with information was denied by Mr. Ng in a manner which was unfairly prejudicial to him.

[74] Mr. Hardwick relies on the following in support of (1) his submission that there was a joint venture at PT PDP level which formed the building blocks for a quasi-partnership between Mr. Lie and Mr. Ng at the SOFL level; and (2) his invitation to the Court to reject Mr. Ng's assertions that the relationships between Mr. Lie and Mr. Wiyono and then Mr. Lie and Mr. Ng were merely '*commercial business*' relationships:

(1) the nature of the close relationship between Mr. Lie and Mr. Wiyono which (Mr. Hardwick contends) was amply borne out at trial by evidence of long-standing family ties, regular visits by Mr. Wiyono to see Mr. Lie's mother, and important outward signs of mutual familial respect (such as Mr. Lie's parents cleaning the '*cemeteries*' of Mr. Wiyono's parents in advance of visits – which Mr. Hardwick identifies as a compelling and authentic detail and a first '*green light*' as to the truth of Mr. Lie's evidence);

(2) that it was this bond of friendship that had resulted in Mr. Lie inviting his friend, Mr. Wiyono, to join a business opportunity in 1988 which arose out of Mr. Lie's contacts with the Indonesian government agency PTPN;

(3) Mr. Wiyono's communication to Mr. Lie of his wish that Mr. Ng should ultimately take his place in running the Business and his wish that Mr. Lie should take Mr. Ng under his wing for that purpose;

(4) the events of 1992 which confirmed Mr. Wiyono's wish, including (1) the 5th August 1992 Family Statement by which Mr. Ng inherited Mr. Wiyono's shares as the representative of the family; (2) the conversations between Madam Tan (Mr. Ng's mother) and Mr. Lie in which she asked Mr. Lie to educate her son in the Business and Mr. Lie's follow up conversation with Mr. Ng; and (3) Mr. Ng's appointment as President Director and majority shareholder of PT PDP on 11th August 1992;

[6] [1991] BCLC 959 at 986.

(5) the contemporaneous documents in respect of the 2002 restructuring which (1) resulted in Mr. Ng and Mr. Lie transferring their shareholdings in PT PDP to SOFL, and gave rise to a joint venture at SOFL level; and (2) expressly confirmed their expectations of joint participation in the DBT Mandate, which provided that (notwithstanding Mr. Siregar's 8% shareholding in SOFL) only Mr. Lie and Mr. Ng had authority to give instructions on behalf of the nominee director (Regula);

(6) the case of **Migration Solutions Holdings Ltd**[7] which provides a recent modern example of a case where the Judge (Mann J.) rejected a quasi-partnership argument upon a finding that the relationship was commercial and not personal. The close family relationships in this case between Mr. Lie and Mr. Wiyono (and subsequently between Mr. Lie and Mr. Ng) could hardly be more different.

[75] For these reasons Mr. Hardwick contends that SOFL was clearly not a mere '*commercial association*' but (applying the test of Lord Wilberforce in **Ebrahimi**) (1) SOFL was '*an association…continued on the basis of a personal relationship, involving mutual confidence*'; and (2) the underpinning '*agreement, or understanding, that…some…of the shareholders shall participate in the conduct of the business*' (which had its original foundations back in 1988) is expressly confirmed by the DBT Mandate.

[76] In response to the various arguments raised in Mr. Choo-Choy's written and oral submissions as to why there was no joint venture and no quasi-partnership agreement, Mr. Hardwick contends variously:

(1) no written agreement: there was '*no written venture or partnership agreement*' between Mr. Lie and Mr. Wiyono because there did not need to be. Mr. Lie and Mr. Wiyono were friends and cofounders. Theirs was just the sort of relationship of trust and confidence that did not need to be formally committed to paper. The different and formal joint venture at PT PEU level only reinforces the very different nature of that venture: when the Indonesian

[7] [2016] EWHC 523 (Ch).

government entity PTP 6 became a 15% shareholder of PT PEU, that did require documentation precisely because that was a commercial relationship;

(2) Madam Soendari: whilst it is correct that Madam Soendari was a third individual in the Business and it is not alleged that she was part of the joint venture / quasi partnership, as a matter of law and for the purposes of this s184I relief, the relevant quasi-partnership is at SOFL level. Certainly, the factual building blocks for the SOFL quasi-partnership have been traced back to the inception of the PT PDP business. However, for the purposes of this Claim, Mr. Lie does not need to establish a joint venture at PT PDP level: his claim relies on establishing a quasi-partnership within SOFL as a matter of BVI law;

(3) Mr. Siregar: whilst it is true that Mr. Siregar owned shares in SOFL, Fancourt J. in **Re Edwardian Group Limited**[8] made an express exception for '*a case where the shareholders that are not parties to the equitable considerations are either a very small minority or are closely connected to the quasi-partners*'. Mr. Siregar had just 8% of the shares in SOFL. The voting intentions that matter were (and were always) those of Mr. Lie and Mr. Ng (45.85% each). This was formally confirmed by the DBT Mandate which enabled only Mr. Lie and Mr. Ng to give voting instructions to the nominee director. No difficulties, practical or legal, were represented by Mr. Siregar being '*outside the ring*' of quasi-partners;

(4) PT PDP Articles of Association: as to the argument that, as a matter of Indonesian law, PT PDP's Articles of Association leave '*no room for any notion of joint venture or partnership*', again the relevant quasi-partnership is at SOFL level, as a matter of BVI law, not Indonesian law. Whether or not PT PDP was a quasi-partnership as a matter of Indonesian law is not in issue (and no party had permission to adduce expert evidence as to the Indonesian company law of unfair prejudice);

(5) SOFL's Articles of Association: as to the argument that SOFL's Articles of Association '*expressly contradict the notion of any quasi-partnership between Mr. Lie and Mr. Ng*', it is the very essence of the quasi-partnership jurisprudence that where there is the necessary

[8] [2018] EWHC 1715 (Ch) at [135].

'*association*' '*agreement*' or '*understanding*', that this can give rise to the superimposition of expectations and rights over and above the company's constitution;

(6) commissioner and director appointments: Mr. Lie's appointment as a '*commissioner*' not a '*director*' of PT PDP at the date of incorporation of PT PDP simply reflects the requirement at Article 10(1) that PT PDP must have at least one commissioner and one director;

(7) Madam Karlinah: the fact of her minority shareholding in PT PDP presents no conceptual obstacle to the factual claim that there was a '*joint venture*' between Mr. Wiyono and Mr. Lie. She was a person with contacts and influence, but she was not a manager or operator and what involvement she had certainly did not affect the reality of the joint venture agreement between Mr. Wiyono and Mr. Lie. Again, moreover, it is not alleged that there was a '*quasi-partnership arrangement*' as a matter of Indonesian law at PT PDP level: the allegation is at SOFL level – and at SOFL level Madam Karlinah had no shareholding and no managerial role;

(8) no automatic survival on death: Mr. Lie's case does not turn upon the '*automatic survival*' of a quasi-partnership at the PT PDP level between him and Mr. Wiyono. Mr. Lie's case is of a quasi-partnership with Mr. Ng at SOFL level. Moreover, the facts of **Matsuura v A&S Company Limited & Another**[9] serve to emphasise the fundamentally different nature of this case. Where (1) **Matsuura** concerned shares inherited by a long-separated wife who would then have no management involvement; and (2) Mrs. Matsuura based her case entirely on the '*quasi-partnership*' that existed between her former husband and Mr. Chu; in this case (3) Mr. Wiyono's shares were inherited by his son, Mr. Ng, precisely so that Mr. Ng could represent the family and continue with active management involvement in the family business;

(9) 1992 Agreement: whereas Mr. Ng's submissions contained a strongly worded challenge to the fact / nature of the agreement between Mr. Lie, Madam Tan and Mr. Ng (alleged at paragraph 13 of Mr. Lie's statement), Mr. Lie's evidence on this topic in fact provides a

[9] BVIHC (COM) 130 of 2015.

further demonstration of his firm independence of mind as a witness. He never merely parroted sections of a witness statement – and never sought to take refuge in his witness statement. Instead he responded (and responded consistently) in his own words and with details that were unique (cleaning the cemeteries; the repeated parental plea to *'educate*' Mr. Ng) and compelling. Mr. Lie clarified that there were in fact two relevant conversations and agreements: (1) first, upon Mr. Wiyono's death and Mr. Ng's inheritance of the shares, Madam Tan asked Mr. Lie to '*educate*' Mr. Ng; and (2) second, Mr. Lie spoke to Mr. Ng about this and agreed the joint management of the business going forward. Mr. Hardwick submits that Madam Tan's approach to Mr. Lie on this occasion is entirely consistent with Mr. Lie's detail that shortly prior to the issue of the proceedings he likewise approached Madam Tan to warn her of the impending litigation against her son (and identifies these aspects of Mr. Lie's evidence as further '*green lights*');

(10) evidence of joint venture: contrary to the repeated claim that there is '*no scintilla of any evidence to suggest that the relationship…was anything other [than] the relationship…expressly established pursuant to the terms of the articles'*, there was solid contemporaneous documentary evidence in the form of the signed DBT Mandate by which DBT agreed to '*take instructions from either SL or NMH for all matters in relation to the management of SOFL and its assets*';

(11) end of joint venture on resignation: whilst Mr. Lie did decide to resign from the Indonesian Operating Companies: (1) he certainly did not voluntarily step aside from SOFL (on the contrary his efforts to be appointed a joint director were thwarted); and (2) he did not decide to resign from PT PDP but was dismissed from PT PDP. It cannot sensibly be contended that his dismissal from PT PDP was (as claimed) '*wholly voluntary and/or fair*'; and

(12) acquisition of competing business: the claim that once Mr. Lie had left his active management he '*went full steam ahead with his acquisition of palm oil plantations and factories in competition with the PT PDP Group*' is a complete mischaracterisation of what in fact happened. Mr. Lie (following his repeated attempts to be appointed as a joint director of SOFL) was dismissed as a director. He had owned PT SAMS, a company with both a palm

oil factory and planation, for 11 years since 2004 – and Mr. Lie claims Mr. Ng was well aware of this. After his dismissal he purchased the shares in two small plantations, PT Rendi and PT Palmaris, on the West coast of Sumatra Utara Province, hundreds of kilometres from the 4 PT PEU plantations and mills. These did not and do not compete with the PT PEU plantations and mills: they were small plantations (currently in poor shape) purchased for his children to manage.

The First Defendant's Submissions

[77] Mr. Ng denies the existence of the alleged quasi-partnership and also denies the Information Complaint. Mr. Choo-Choy makes the following twelve points (as amplified during his oral closing submissions):

(1) exaggeration of closeness of personal relationships: Mr. Lie has exaggerated the extent and closeness of the personal connection between his family and Mr. Ng's family in his witness statement. Mr. Lie asserted at paragraph 8 of his witness statement that his mother was the cousin of Mr. Wiyono and that they shared the same great grandfather. Under cross-examination, however, he changed his evidence, stating that they had '*the same great, great, great-grandfather*', going back *'[m]ore or less four to five generations'*; and he further conceded that the '*Ng*' surname was a very common Chinese surname, so that persons sharing that surname would not necessarily be closely related. Furthermore, none of the familial or social connections relied upon by Mr. Lie (alleged visits by Mr. Wiyono's family to Mr. Lie's family house or the alleged cleaning of parents' or grand-parents' cemeteries in Medan) provides a firm and identifiable basis for the alleged quasi-partnership, because Lord Wilberforce's speech in **Westbourne Galleries** makes clear that the critical consideration is not merely whether there is a close relationship of trust and confidence between the relevant individuals, but whether the association between them is based on an agreement or understanding of entitlement to participate in the management of the relevant business. In this particular regard, the best contemporaneous evidence of the agreement or understanding between Mr. Wiyono and Mr. Lie as regards their entitlement to participate in

the management of PT PDP is what is set out in the notarised deed by which the company was set up and its Articles of Association laid out (see further point (3) below).

(2) relevance of Madam Soendari as an original founder: Mr. Lie and Mr. Wiyono went into the palm oil plantation business with a third individual, Madam Soendari, who had an important role to play by reason of her valuable contacts and knowledge of relevant local and national government procedures and her husband's connections with the Indonesian military and was allotted a significant shareholding. It has never been alleged by Mr. Lie, and there was no evidence to suggest, that there was any joint venture or quasi-partnership agreement between all three of them or between either Mr. Lie or Mr. Wiyono (on the one hand) and Madam Soendari (on the other hand). Yet it would have been unreal for only 2 of the 3 founders of the business to have been party to a joint venture or quasi-partnership and for the third to have been excluded from it. Furthermore, whilst it is true that the ultimate question for the Court is whether there was a quasi-partnership at SOFL level, the entire foundation of Mr. Lie's case on the facts (as set out in his pleadings and in his trial witness statement) is that the quasi-partnership at SOFL level was originally constituted at PT PDP level and much later transferred from the PT PDP level to SOFL. Mr. Lie has never put forward a case of a quasi-partnership between him and Mr. Ng that was originally constituted only when SOFL was established or when the relevant PT PDP shareholdings were transferred by him, Mr. Ng and Mr. Siregar to SOFL in November 2003 (some 15 years after the formation of the PT PDP group in 1988). Given the fundamental nature of Mr. Lie's pleaded case and evidence, therefore, it is critical to the plausibility and validity of the Quasi-Partnership Allegation at the SOFL level to understand the basis upon which PT PDP was originally established by its founders during the period February to December 1988.

(3) the Indonesian company law context: the relationship of all three individuals (Mr. Wiyono, Mr. Lie and Madam Soendari) as founding shareholders of PT PDP as the original incarnation of the business was expressly regulated by the terms of PT PDP's Articles of Association. Those Articles are a very important document in the Indonesian context, as is apparent from Articles 7-10, 15 and 21 of the Indonesian Companies Law and the evidence of Mr. Lie's Indonesian company law expert, Mr. Kadir (including his evidence that any rights

to management of an Indonesian company must be recorded in the Articles of Association of the company). Their significance was further underlined by Mr. Lie's oral evidence that (as expressly recorded in the notarised Deed of Incorporation dated 26th February 1988) all three founders appeared before an Indonesian notary who read and explained the terms of the document to them, that the terms of the intended arrangements between them were accurately reflected in the Deed, and that any matters of importance agreed between them in relation to PT PDP would have been notified to the notary and recorded in the Deed. The terms of the PT PDP Deed of Incorporation and Articles of Association (in particular Articles 1-4, 5(5), 10, 23 and 24) fundamentally contradict Mr. Lie's quasi-partnership allegation in significant respects: (1) they do not record a joint venture between Mr. Wiyono and Mr. Lie alone, rather they record the establishment of the business of PT PDP by Mr. Wiyono, Mr. Lie and Madam Soendari as the three founders and shareholders of the business, (2) they make clear that the Articles are legally binding on all shareholders, (3) they provide for the appointment, dismissal and replacement of management, i.e. the Board of Directors, to be the exclusive preserve of the general meeting of shareholders, (4) they provide that any matters not expressly regulated by the Articles are to be decided by the general meeting of shareholders, and (5) they confirm Mr. Lie's appointment as a commissioner only, i.e. as having a non-managerial role within the business of PT PDP. Furthermore, by their express terms, the Articles were expressed to be mandatory and exhaustive in their effect, thereby leaving no room for any notion of joint venture or quasi-partnership existing outside of the terms of the Articles Yet further, no shareholders' agreement or joint venture agreement was entered into between Mr. Lie, Mr. Wiyono and Madam Soendari at the time of establishment of PT PDP or at any other time – although the written Joint Venture Establishment Agreement dated 26th February 1990 was entered into in relation to PT PEU. This shows that in the Indonesian context, consistently with Mr. Kadir's evidence, when joint venture relationships are intended, they are usually recorded in the form of a written agreement collateral to the articles of association of the joint venture company. The absence of such an agreement between the founders of PT PDP strongly suggests that no such agreement was ever entered into, and no such understanding ever existed. Although quasi-partnership allegations are usually advanced in situations where the constitutional documents of the company do not record the alleged quasi-partnership arrangement, this

does not mean that the Court should ignore the specific business and legal context, and the detailed and notarised terms, in which Mr. Wiyono, Mr. Lie and Madam Soendari expressly established PT PDP. The English decision of **George v McCarthy**,[10] especially at [21]-[24], shows that where the expressly agreed terms of the parties' relationship negative the existence of a quasi-partnership, then a quasi-partnership allegation will normally fail.

(4) Mr. Lie's appointment as PT PDP commissioner only: Mr. Lie's reliance on Article 10(1) of PT PDP's Articles of Association to try and explain away why he was not given a managerial role when PT PDP was formed, is misconceived. Although PT PDP needed to have at least one director and one commissioner when incorporated, if it had been truly intended (as alleged as part of the Quasi-Partnership Allegation) that Mr. Lie had a right to participate in the management of PT PDP, he could have been appointed as a director alongside Mr. Wiyono as President Director and somebody else (whether Madam Soendari or another individual) could have been appointed as commissioner. Tellingly, even when Madam Karlinah joined as President Commissioner in December 1988, Mr. Lie remained a mere commissioner and Mr. Wiyono remained as sole director. Mr. Lie did not become a director of PT PDP until his appointment as such by the general meeting of shareholders of PT PDP in August 1992 (after Mr. Wiyono's passing).

(5) relevance of subsequent co-founders and strategic shareholders: in December 1988 Madam Karlinah acquired 55 of the 200 issued shares in PT PDP, being a significant shareholding of 27.5% which at the time was in fact larger than Mr. Lie's then shareholding of 35 shares in PT PDP; effectively, Madam Karlinah and Madam Soendari's combined shareholding at that point in time amounted to 42.5% of PT PDP's share capital – larger than either Mr. Lie's (17.5%) or Mr. Wiyono's (40%) shareholding. The notarised deed recorded that Madam Karlinah was joining the original founders and shareholders of the company in order '*to participate as the founder/shareholder and member of the Management Board of the Company, which has been fully agreed by the other founders/shareholders of the said Company*'. Mr. Lie confirmed during his oral evidence that, as the wife of the 4th Vice-President of Indonesia, Madam Karlinah had government connections and was an important

[10] [2019] EWHC 2939.

investor in the business. Although she was not appointed to a day-to-day management role, she was appointed to the supervisory role of President Commissioner, in a role superior to that of Mr. Lie as a simple commissioner. In June 1992, Omar Abdalla and Madam Kiswati acquired 10 shares and 5 shares respectively. It is not alleged by Mr. Lie that all of those strategic investors joined and thereby enlarged a pre-existing quasi-partnership between Mr. Lie and Mr. Wiyono, or that they were informed of the existence of any such quasi-partnership. Having regard to the legal principles reviewed in **Fowler v Gruber** (esp. [136]-[137]), **Re Edwardian Group** (esp. [130]-[139]), and **Re Dinglis Properties** (esp. [191] and [194]) and in particular the evidential improbability of equitable constraints coming into existence which only some shareholders are positively said to have been a party to (**Re Dinglis Properties** at [191] and [194]) and the legal consideration that what renders an informal quasi-partnership arrangement enforceable in equity is its mutuality as between the owners of the business (**Re Edwardian Goup** at [131] and [134]-[136]), it is unrealistic to suppose that a quasi-partnership arrangement between Mr. Lie and Mr. Wiyono only (if it ever existed) could have survived the arrival of all of those co-founders and strategic investors during the formative stage of PT PDP and/or that a quasi-partnership arrangement between Mr. Wiyono and Mr. Lie existed without the knowledge and to the exclusion of all such substantial shareholders of PT PDP.

(6) inconsistency of alleged quasi-partnership with actual JVA entered into: Mr. Lie's quasi-partnership is also inconsistent with the express terms of the Joint Venture Establishment Agreement dated 26th February 1990 relating to PT PEU. As Mr. Lie accepted in evidence, it was not just a question of agreement between him and Mr. Wiyono who would be involved in the management of PT PEU, as the Quasi-Partnership Allegation implies. Rather it was a matter of collective agreement between PT PDP, PTP 6 and CKK as shareholders of PT PEU who would be appointed to the management board of PT PEU. The need for such collective agreement was fundamentally inconsistent with the notion that that the business of PT PDP or any of its operating subsidiaries (such as PT PEU, its first and most significant subsidiary) was purely a joint venture between Mr. Lie and Mr. Wiyono.

(7) relevance of appointment of new PT PDP management in August 1992: the Quasi-Partnership Allegation is irreconcilable with the circumstances in which the new management of PT PDP was appointed in August 1992, following Mr. Wiyono's death. The composition of the new Board of Directors (including the fresh appointment of Mr. Lie as a director of PT PDP) and the new Board of Commissioners was unanimously determined and approved by all of the shareholders of PT PDP. As Mr. Lie acknowledged during cross-examination, the composition of the new Boards was not a matter of personal agreement between him and Mr. Ng, but for determination by the general meeting of shareholders, following the '*lobbying*' of each shareholder (as Mr. Lie described the process during his oral evidence). The described process and subsequent resolution of the general meeting of shareholders is simply inconsistent with the notion that Mr. Lie had any pre-existing entitlement to participate in the management of PT PDP, as the Quasi-Partnership Allegation implies.

(8) alleged agreement with Mr. Ng and his mother following Mr. Wiyono's death: the new story advanced by Mr. Lie for the first time in his witness statement for the trial, in order to surmount the obvious difficulty that Mr. Wiyono's death presents for his quasi-partnership argument, cannot be accepted as truthful or accurate. There is a wealth of both direct and circumstantial (contemporaneous) evidence against Mr. Lie's belated story. First, it is inconsistent with the arrangements that existed prior to Mr. Wiyono's death in that Mr. Lie had until then been a commissioner only, not a director, of PT PDP, and had not therefore had a joint managerial role within PT PDP. Secondly, it is wholly inconsistent with how the new management of PT PDP was determined and agreed on 11th August 1992 by the general meeting of shareholders of PT PDP. There is nothing in the minutes of the 11th August 1992 shareholders' meeting to indicate that it was intended that either Mr. Ng or Mr. Lie should have (let alone that either of them already had) an entrenched right to participate in the management of the company independently of the shareholders' resolution for their appointment as directors. Thirdly, it is a version of events that, prior to provision of his trial witness statement, had never before been advanced by or on behalf of Mr. Lie despite the obvious importance of the alleged agreement to the Quasi-Partnership Allegation. The alleged agreement was not mentioned on any important occasion when Mr. Lie's relationship

with PT PDP was addressed (e.g. at the PT PDP shareholders' meeting of 17th December 2015 when Mr. Lie was removed from the Board of Directors of PT PDP) or in any of the important documents in which Mr. Lie set out his quasi-partnership case for the purposes of the proceedings, namely, the Messrs Conyers' letter before action dated 16th April 2018, Mr. Lie's affidavit in support of his application for permission to serve out, his Statement of Claim and Reply (and the various amended versions of those pleadings over a 2-year period since commencement of the action). The alleged agreement with Mr. Ng's mother was first alleged at paragraph 13 of his trial witness statement, some 28 years after allegedly having been made and having never been referred to at any point in any document before the Court. When actually cross-examined about this alleged agreement, he started off by stating that there was in fact no agreement as alleged, then went on to refer to an irrelevant conversation about the relationship between Mr. Ng and his mother, and finally explained that what he had agreed with Mr. Ng's mother (as allegedly previously agreed with Mr. Wiyono) was that he would '*educate Mr. Ng*' about the palm oil plantation business so that Mr. Ng could replace his father. However, Mr. Lie's oral account of an agreement to '*educate Mr. Ng*', whatever that means, does not amount to the alleged agreement with Mr. Ng and his mother that Mr. Ng and Mr. Lie '*would run PT PDP and the Business as partners, in the same way that it operated between me and [Mr. Wiyono]*'. The reality of the matter is that there is no scintilla of any evidence to suggest that the relationship between Mr. Lie and Mr. Ng (and before him Mr. Wiyono) was anything other than the relationship or combination of relationships of co-shareholders, director and commissioner, or co-directors, expressly established pursuant to the terms of the Articles of Association of the respective companies within the PT PDP group.

(9) lack of close personal relationship between Mr. Lie and Mr. Ng: in addition to the submissions under point (1) above, Mr. Lie and Mr. Ng were never close friends, lived in different places and had no personal relationship of any meaningful kind at the time of Mr. Wiyono's death in June 1992. None of the trivial matters claimed by Mr. Lie comes anywhere near satisfying Lord Wilberforce's guidance in **Westbourne Galleries** as to the indicia of a quasi-partnership. Even if a quasi-partnership of some sort existed between Mr. Lie and Mr. Wiyono, it cannot have automatically survived Mr. Wiyono's death and

transmuted into what was then a nascent relationship between Mr. Lie and Mr. Ng. The death of one of two quasi-partners will normally bring the quasi-partnership to an end (see **Matsuura v A&S Company Limited**[11]). It is no doubt for this reason that Mr. Lie put forward the alleged quasi-partnership agreement with Mr. Ng's mother following Mr. Wiyono's passing, but his oral evidence only served to confirm that there was never any such agreement.

(10) establishment of SOFL: if, contrary to Mr. Lie's case, there was no quasi-partnership between Mr. Lie and Mr. Ng (or, before Mr. Wiyono's death, between Mr. Lie and Mr. Wiyono) at the PT PDP level, it would be extraordinary if, merely by reason of the offshore transfer of Mr. Lie's and Mr. Ng's respective shareholdings in PT PDP to a BVI vehicle some 15 years later in November 2003, a quasi-partnership should suddenly spring out of nowhere. Consistently with the absence of any quasi-partnership at PT PDP level, at the SOFL level no separate shareholders' agreement or joint venture or partnership agreement was ever concluded between the parties to evidence the alleged quasi-partnership. The DBT Mandate (under which either Mr. Ng or Mr. Lie could give instructions to DBT on behalf of SOFL) did not evidence any quasi-partnership as between Mr. Ng and Mr. Lie. There are countless examples of mandates from corporate clients to their banks or other agents authorising the latter to act on the instructions of director A or director B, but it plainly does not follow from this that there is a quasi-partnership between directors A and B. The existence and terms of the DBT Mandate merely reflected the fact that, by March 2005, Mr. Ng and Mr. Lie were (and had for some years been) directors of PT PDP and the Indonesian Operating Companies (the ultimate assets of SOFL). The DBT Mandate was not exclusively referable to the existence of a quasi-partnership agreement: it was just as consistent and referable to Mr. Ng and Mr. Lie's role as co-directors of PT PDP and the Indonesian Operating Companies. Mr. Choo-Choy referred to the important principle that, where the alleged quasi-partnership is sought to be inferred from the parties' conduct, unless the conduct in question is only explicable on the basis that the alleged quasi-partnership exists, there is no firm and identifiable evidential basis for inferring a quasi-partnership (citing **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), at paragraph 7-44).

[11] BVIHC (COM) 130 of 2015.

Further, it was submitted that the Court must not lose sight of the fact that Mr. Siregar was a significant (8.3%) shareholder of SOFL, whose father, Mr. Omar Abdalla, had been one of the strategic investors in PT PDP. There is no allegation by Mr. Lie or evidence to suggest that either Mr. Omar Abdalla or Mr. Siregar was ever a party to or informed of the alleged quasi-partnership between Mr. Lie and Mr. Wiyono, or between Mr. Lie and Mr. Ng. It is inherently improbable and legally implausible that there could have been a quasi-partnership as alleged which was undisclosed to, and which excluded, Mr. Siregar at the SOFL level. Moreover, the notion that Mr. Siregar should be considered to be the sort of '*very small minority*' shareholder whose ignorance of and exclusion from a quasi-partnership might '*perhaps*' not be fatal to the enforceability of the quasi-partnership (per Fancourt J very tentatively in **Re Edwardian Group**, at [[131] and [134]) is of no assistance to Mr. Lie's case, because (1) Mr. Siregar's 8.3% shareholding was not a very small minority shareholding, but a significant shareholding which determined the balance of majority power as between Mr. Lie and Mr. Ng as shareholders of SOFL, (2) Mr. Lie himself (at paragraph 16 of his trial witness statement) describes Mr. Siregar's shareholding as a strategic shareholding that Mr. Siregar's father had originally acquired within PT PDP, and (3) as described during Mr. Ng's oral evidence, Mr. Siregar played an independent role within the PT PDP group, having disagreed with Mr. Lie in relation to the IPO proposal, the performance of the East Kalimantan Companies, and Mr. Lie's gift of shares in the East Kalimantan Companies to Mr. Harahap and Mr Noer.

(11) relevance of Mr. Lie's withdrawal from management in November 2015: even if there was a relationship of quasi-partnership between Mr. Lie and Mr. Ng, that relationship must necessarily have come to an end with (1) the lawful appointment of Mr. Ng's Brother as sole director of SOFL on 23rd September 2015 – in this context, although Mr. Ng and Mr. Siregar refused Mr. Lie's request that he be appointed as joint sole director with Mr. Ng's Brother, Mr. Lie has never alleged that the appointment of Mr. Ng's Brother as director of SOFL in place of Regula was a ground of unfair prejudice, not least because this appointment followed Mr. Lie's own action in paralysing SOFL by cancelling the proxy granted by Regula to Mr. Siregar in connection with the proposed shareholders' meeting about the IPO proposal; (2) Mr. Lie's voluntary decision by letter dated 23rd November 2015 to resign from

the management of the Indonesian Operating Companies (effective 1st January 2016) and hence from the day-to-day management of the PT PDP group – again, it is not alleged by Mr. Lie that his resignation was or resulted from any unfairly prejudicial conduct on the part of SOFL or directed against him; and (3) the lawful termination of Mr. Lie's directorship of PT PDP by the general meeting of the shareholders of PT PDP on 17th December 2015 – here too, although he says that he was dismissed and did not voluntarily leave the PT PDP Board, Mr. Lie has acknowledged that the termination of his directorship of PT PDP did not give rise to any unfairly prejudicial conduct, and the termination was lawfully permitted under Articles 94(4)-(5) of the Indonesian Companies Law and Article 11(3) of PT PDP's Articles of Association. Given Mr. Lie's own reference to his deteriorating health in connection with his resignation from the management of the Indonesian Operating Companies and his increased interest in the pursuit of his own palm oil plantation business interests during the second half of 2015 (see point (12) below), Mr. Lie's position on the board of PT PDP had, by December 2015, become untenable anyhow. By reason of the above events (none of which themselves or alleged to give rise to any unfair prejudice), Mr. Lie and Mr. Ng were, by late December 2015, no longer involved in the joint management of SOFL, PT PDP or the Indonesian Operating Companies; and on any view therefore, no quasi-partnership arrangement between them can therefore have survived thereafter or at the time of the alleged unfair prejudice.

(12) Mr. Lie's parallel pursuit of his own plantation business: in circumstances where Mr. Lie had secretly negotiated the purchase of PT Palmaris and PT Rendi and chosen to pursue his own plantation business for his and his family's benefit, from at least June 2015 onwards (an aspect which Mr. Ng pursues as an independent ground of misconduct against Mr. Lie) it is inconceivable that Mr. Lie could sensibly be considered in equity to have simultaneously remained a quasi-partner with Mr. Ng with respect to the management of the PT PDP group).

ISSUE 2: NON-PAYMENT OF DIVIDENDS

The Claimant's Submissions

Summary

[78] Mr. Lie's case is that Mr. Ng has refused and/or failed to pay him dividends for the Financial Years 2015, 2016, 2017 and 2018. It is common ground between the parties that the only source of any dividends paid by SOFL, would have been the dividends SOFL received from PT PDP. Mr. Lie refers to SOFL's long established practice of declaring dividends to its shareholders in respect of the profits generated by the Indonesian Operating Companies and dividended up *via* PT PDP. He relies upon SOFL's board resolutions between 2007 and 2014 which evidence the declaration of dividends in substantial amounts, with his 45.85% share ranging between USD 1.7 and 7.5 million and resulting in his receipt of over USD 13m in 2013 alone.

[79] Mr. Ng's position is that SOFL did not in fact receive any dividends from PT PDP in respect of the Financial Years 2015 to 2018, and hence could not declare any dividends in favour of its shareholders as it had done in earlier years. In any event Mr. Choo-Choy submits that a complaint of unfair prejudice in respect of the affairs of SOFL cannot, without more and on the present facts, extend to a failure by PT PDP to declare or pay a dividend to SOFL.

[80] Mr. Hardwick responds that (1) in respect of the Financial Year 2015, the likely probability (consistent with Mr. Ng's recommendation at the General Shareholders Meeting (GSM) to approve the dividend and the approval of the same) is that Mr. Ng did receive his 45.85% entitlement of SOFL's distribution yet ensured that nothing was paid to Mr. Lie; (2) in respect of the Financial Years 2016 to 2018 there is clear evidence of substantial profits having been dividended up to PT PDP from PT PEU; and (3) given (a) the '*business realities*' of the very close connection between the parent SOFL and its subsidiary PT PDP; and (b) the fact that the only person with '*real influence*' in the corporate affairs of the holding company SOFL (Mr. Ng) and the sole director of the subsidiary PT PDP (Mr. Ng) was one and the same; and (c) the reality of the dispute between Mr. Lie and Mr. Ng at the material times in July 2017 and July 2018, the affairs of SOFL include / extend to the affairs of PT PDP (in either not declaring or not paying dividends).

Financial Year 2015

[81] In respect of the Financial Year 2015, for the first time Mr. Lie received no dividend at all. Mr. Hardwick notes that this was notwithstanding the fact that the minutes of a GSM of PT PDP on 25th July 2016 (of which Mr. Ng was Chairman) record (1) '*the Director's Report with regard to the dividend for Fiscal Year 2015 totalling Rp 212,500,000*' (IDR 212.5bn representing PT PDP's 85% entitlement to the underlying dividend declared by PT PEU); and (2) the decision of the GSM approving '*the dividend of Fiscal Year 2015 totalling Rp 200,000,000,000'* and setting out the precise amount to be distributed to each PT PDP shareholder, including the sum of IDR 126.32 billion (c. USD 9.6m) to SOFL (of which Mr. Lie's entitlement was approximately USD 4.4m).

[82] Mr. Lie's evidence is that in July 2016 he made a number of telephone calls to Mr. Ng about his dividend entitlement for the Financial Year 2015 and was told by Mr. Ng that he '*should continue to wait for the dividends*' because (1) Mr. Ng had not yet bought the US dollars with which to pay that dividend; and (2) was '*waiting for the exchange rate to be more favourable before exchanging the IDR into USD*'. Mr. Hardwick observes that Mr. Ng never stated nor suggested that there was no dividend to distribute; and that the fact and content of these telephone calls was not challenged in the cross-examination of Mr. Lie (despite having been clearly referenced in Mr. Lie's witness statement).

[83] Mr. Hardwick observes that, in cross-examination, Mr. Ng's response to these alleged telephone calls was (1) first to say '*I don't remember having that call*'; and (2) then (when it had become clear that he was <u>not</u> going to be shown any telephone records) to claim categorically '*I didn't have any conversation with Mr. Lie at that time or any at any time in 2016. I think that should be put on record*' (and Mr. Hardwick identifies these exchanges as an '*amber warning*' as to Mr. Ng's attitude to truth-telling).

[84] Mr. Ng then challenged the authenticity of the disclosed August to September 2016 text messages between himself and Mr. Lie's wife. On their face these text messages record Mr. Ng explaining that Mr. Lie's Financial Year 2015 dividend entitlement had not yet been transferred because '*$ has not yet been bought*'. However, in cross-examination Mr. Ng (1) would not accept that Mr. Lie's wife was pressing for an answer as to when the dividend for the Financial Year 2015 would be paid,

stating repeatedly '*I have never had any business dealings with Mr. Soemarli or Mrs. Juniar*'; (2) claimed that he merely answered '*out of politeness*' to Mr. Lie's wife's texts; and (3) responded '*Dividend for what? This is very strange*' in relation to a question about Mr. Lie's wife's further text of 27th September 2016.

[85] Mr. Hardwick submits (in support of his claim that this was '*red flag*' evidence) that (1) Mr. Ng's no '*business dealings*' claim was absurd: Mr. Lie had been Mr. Ng's business colleague since 1992 and his wife had been receiving very substantial dividends in respect of the profits of SOFL for (at least) the previous decade; (2) Mr. Ng's '*out of politeness*' response was an obvious lie: on 25th July 2016 Mr. Ng had recommended and approved a USD 4.4m dividend to Mr. Lie and here, on 3rd August 2016, was Mr. Lie's wife chasing for their whereabouts; and (3) Mr. Ng's '*Dividend for what?*' answer was dishonest and obstructive evidence on his part, well knowing that what was being discussed here was the non-payment of Mr. Lie's dividend entitlement for the Financial Year 2015.

[86] Mr. Ng also gave evidence for the first time in cross-examination that SOFL's dividend for the Financial Year 2015 was not paid to SOFL because '*later on, Mrs Karlinah actually asked me to stop payment*'. Mr. Hardwick submits that this evidence is not credible on any level in circumstances where: (1) notwithstanding the fact that this dividend had been in issue since the inception of the Claim in July 2018, this evidence emerged for the first time during cross-examination; (2) the shareholders of PT PDP, including Madam Karlinah, were unanimous in their approval of the dividend to SOFL yet Mr. Ng could not and did not attempt to explain why Madam Karlinah should have performed a sudden U-turn in deciding against the payment of a dividend of which she had just voted in favour; and (3) there was no evidence from Madam Karlinah. If Madam Karlinah really was the reason that the dividend for the Financial Year 2015 was not paid, Mr. Hardwick submits that nothing could have been simpler than for her to give evidence to that effect on Mr. Ng's behalf: Mr. Ng's failure to call her as a witness in his defence should cause the Court to view with real scepticism this new evidence; yet further (4) Madam Karlinah, as a 33.68% minority shareholder of PT PDP, had no power to countermand a properly approved resolution.

[87] For these reasons Mr. Hardwick invites the Court to reject Mr. Ng's claim that the Financial Year 2015 dividend was not made to SOFL, and to find instead that that the likely probability is that Mr. Ng received his 45.85% entitlement of SOFL's dividend yet ensured that nothing was paid to Mr. Lie.

Financial Year 2016

[88] For the financial year 2016, Mr. Ng's Director's Report, as presented to the 25th July 2017 AGSM of PT PDP for the Financial Year 2016, recorded a '*PT PEU Financial Year 2016 Dividend IDR 212,500,000,000.*'. This is exactly the same dividend amount that PT PDP had received from PT PEU for the Financial Year 2015.

[89] For the Financial Year 2015, with (1) a dividend of IDR212.5bn from PT PEU; and (2) cash reserves of IDR 84bn, Mr. Ng, as sole director of PT PDP, had recommended, and the shareholders of PT PDP had approved, a dividend of IDR 200bn to SOFL. For the Financial Year 2016 PT PDP had (1) the same IDR212.5bn dividend from PT PEU; but also (2) at IDR 165.9bn, double the IDR 84bn cash reserves of 2015; and as a consequence (3) '*Estimated Funds Available*' of IDR 378.4bn (approximately USD 28.4m). Yet the recommendation of Mr. Ng (on 25th July 2017), as sole director of PT PDP, was the payment of no dividend and that the entire sum be retained for the alleged purpose of funding 8 *'business development'* projects, with an estimated cost of IDR 1.35 trillion (c. USD 101.7m).

[90] Mr. Hardwick submits that the radically different approach of Mr. Ng in July 2017 to the question of dividend distribution to SOFL, and in respect of even larger available funds of USD 28.4m, should excite the strongest suspicion. He submits that the overwhelming probability is that these supposed '*projects*' were a mere front by which Mr. Ng sought to justify the extraordinary recommendation not to declare dividends, the real purpose of which was to ensure again that nothing was paid to Mr. Lie in that financial year. He claims that there are a number of compelling clues as why no dividend was declared including:

(1) first, the list of shareholders present for the PT PDP shareholders meeting on 25th July 2017 now included Mr. Ng and Mr. Ng's brother's company Grahaidea. This was because just 11 days before this meeting, on 14th July 2017, Mr. Ng had procured the transfer of 2,052,631 of SOFL's PT PDP shares to Grahaidea. This meant that by the time of the 25th July 2017 meeting: Mr. Ng and his brother (through their control of Grahaidea and SOFL) had the majority vote with 63.11% of PT PDP. Mr. Ng knew perfectly well that whatever he recommended as director of PT PDP he had the voting power to implement at the GSM (through his and his brother's control of Grahaidea and SOFL);

(2) second (and directly linked to the above), by the date of this shareholders' vote on 25th July 2017 (11 days after the 2017 Disposition whereby Mr. Ng had, so he claimed, '*reversed*' the transfer of the 1.7m PT PDP shares as originally transferred to SOFL in 2003), Mr. Ng's own economic interest in SOFL had dramatically shifted, such that neither Mr. Ng nor his brother had an interest in declaring a dividend a substantial portion of which would go to SOFL and therefore to Mr. Lie;

(3) third, the IDR 1.35 trillion '*funds required*' was entirely out of step with capital expenditure in previous years (over 20 times the amount of such expenditure for the Financial Year 2015);

(4) fourth, Mr. Ng's Defence never addressed this claimed justification for the retention of every dollar of the USD 28.7m funds available for the Financial Year 2016; not a single document was disclosed in relation to the alleged 8 projects; and Mr. Ng's witness statement did not even mention the PT PDP decision not to pay the Financial Year 2016 dividend (let alone make any reference to these '*projects*'). That not a word was said by Mr. Ng in his pleadings or his witness statement is another strong clue as to the untruth of the claimed justification for non-payment of a Financial Year 2016 dividend;

(5) fifth, when asked about these projects in cross-examination, Mr. Ng swiftly back-pedalled and stated that a number of these projects had not yet started; and

(6) sixth, when the above points were put to Mr. Ng in cross-examination, and in particular that Mr. Ng knew that if he recommended a dividend Mr. Lie would want his entitlement (as he had in respect to the Financial Year 2015), Mr. Ng's answers (e.g. '*that is not my opinion*', '*I do not answer to accusations*' '*that is mere speculation*') were evasive, obstructive and untruthful – and relied upon by Mr. Hardwick as a further '*red flag*'.

Financial Years 2017-2018

[91] In respect of dividends for the Financial Years 2017 and 2018, Mr. Hardwick points to Mr. Ng's failure to disclose relevant corporate documents in respect of this period, and in particular his failure to comply with the Specific Disclosure Judgment, which included an order to disclose all minutes, resolutions and directors' reports of SOFL for the period 2015 – 2018. In cross-examination Mr. Ng (1) would not accept that he had an obligation to disclose these SOFL documents (a further '*amber warning*'); and (2) claimed that his non-disclosure was based on legal advice and that he was not able to disclose documents that were not in his personal control. Mr. Hardwick submits that this is not in the least plausible and in stark and obvious contrast with Mr. Ng's disclosure (in the opening days of trial) of a flurry of new corporate material which he appeared to have obtained without difficulty.

[92] In the absence of the relevant disclosure, Mr. Lie relies upon the publicly available annual reports from the Indonesian government entity PTPN 4 (which is a 15% shareholder of PT PEU). By reference to the dividends paid by PT PEU to PTPN 4 in the financial years 2017 and 2018, PT PDP would (as Mr. Ng accepted) have received 85% of the PT PEU dividends, being IDR 297.5 billion (USD 20.8) in 2017 and IDR 229.5 billion (USD 15.8m) in 2018. Mr. Ng's witness statement does not address what happened to these very substantial dividends. It appears that PT PDP, under the sole directorship of Mr. Ng, did not declare or pay any dividends to SOFL. Mr. Hardwick points to the fact that on 12th July 2018 (the month in which the dividend for the previous year was considered at PT PDP's GSM) Mr. Lie commenced this Claim. He submits that, with the battle lines by this point in time firmly drawn, the reality was that Mr. Ng was by then (and has remained) determined to ensure that Mr. Lie should not see any part of the profits of the Business - and as sole director of PT PDP and as directing mind of SOFL has ensured that Mr. Lie has not seen any

part of that USD 15.8m dividend from PT PEU for the Financial Year 2017 (or any part of any dividend for subsequent financial years).

[93] Relying on the authority of a line of English cases including most recently **Routledge v Skerrit**,[12] Mr. Hardwick submits that directors are obliged to give genuine and regular consideration to the question of whether the company's profits should be distributed to shareholders. He submits that there is no evidence that *bona fide* decisions were made by Mr. Ng as sole director of PT PDP and/or by Mr. Ng in his capacity as the directing mind of SOFL; and that this failure to pay dividends to Mr. Lie for financial years 2015 – 2018 and/or to give genuine consideration to whether dividends should be paid was unfair and prejudicial to Mr. Lie, causing him obvious economic harm.

The First Defendant's Submissions

[94] Mr. Choo-Choy makes seven main points in response. First, he contends that Mr. Lie wrongly fails to distinguish between a failure on the part of SOFL to pay a dividend to Mr. Lie as a shareholder of SOFL, and a failure on the part of PT PDP to declare or pay dividends to SOFL as a shareholder of PT PDP. Mr. Choo-Choy notes that SOFL, as a holding company, derives its income exclusively from the dividends received by PT PDP; unless it received dividends from PT PDP, it would have nothing to distribute to its shareholders (as is consistent with the provisions of Article 128 of SOFL's Articles of Association, which states that dividends shall only be declared and paid by SOFL's directors out of surplus funds). As SOFL did not receive any dividends from PT PDP in respect of Financial Years 2015-2018, it could not have declared any dividends in favour of its shareholders for those years. As such, a complaint of unfair prejudice in respect of the affairs of SOFL cannot, without more and on the present facts, extend to a failure by PT PDP to declare or pay a dividend to SOFL.

[95] Second, he contends that Mr. Lie has in any event not pleaded any allegation of unfair prejudice by reference to any decision or action taken by the directors or shareholders of PT PDP not to pay or declare a dividend to SOFL. Mr. Lie's pleaded case is only that SOFL (controlled by Mr. Ng) has failed or refused to pay him a dividend as a shareholder of SOFL. Mr. Choo-Choy submits that the

[12] [2019] BCC 812.

Court must be particularly astute in unfair prejudice proceedings not to allow un-pleaded grounds of unfair prejudice to be silently pursued in argument (per David Richards J in **Re Coroin Ltd**[13]). He further submits that had Mr. Lie pleaded an allegation of unfair prejudice that challenged the propriety of the decision of the directors and shareholders of PT PDP not to declare or pay dividends, a much wider range of factual and Indonesian law issues would have arisen and additional evidence would have had to be called at trial to address the propriety of the decision-making at the level of PT PDP including evidence from Madam Karlinah and Indonesian law evidence regarding directors' and shareholders' duties as to the payment of dividends.

[96] Third, Mr. Choo-Choy submits that the case law relied upon by Mr. Lie, including **Routledge v Skerrit**, concerns the non-declaration or non-payment of dividends by the company in respect of which unfair prejudice is alleged when that company had distributable profits which it is able to pay to its shareholders in the form of dividends. None of that case law, however, seeks to lay down any principle that a company is required to declare or pay a dividend or to consider doing so, when (as in SOFL's case in relation to Financial Years 2015 to 2018) it has no income or profits whatsoever to enable it to make any dividend payments to its shareholders. Nor would it be rational to lay down any such principle.

[97] Fourth, Mr. Choo-Choy submits that in respect of the Financial Year 2015 dividend, although the GSM did, on 25th July 2016, approve an IDR 126.3 bn dividend to SOFL, PT PDP did not make the IDR 126.3 bn payment to SOFL because Madam Karlinah stopped the dividend payments by PT PDP to herself and SOFL. Since SOFL's dividend policy has been to declare a dividend in favour of its shareholders only if and when it receives dividends from PT PDP, SOFL has (properly and legitimately) not declared or paid any dividend to any of its shareholders for that period. Mr. Ng's evidence in this regard was that neither he nor Mr. Siregar had received dividends either from SOFL in respect of Financial Year 2015, and their position was no different from Mr. Lie's. Moreover, in respect of Mr. Lie's argument that Mr. Ng had failed in his responsibility to ensure that PT PDP paid the declared dividends to SOFL, such argument was directed towards Mr. Ng's conduct as sole director of PT PDP and was not about the conduct of affairs of SOFL. In these circumstances (1) there can be no question of the affairs of SOFL having been conducted in an

[13] [2012] EWHC 2343 (Ch), at [56].

unfairly prejudicial manner in relation to the Financial Year 2015 dividend declared but unpaid by PT PDP; and (2) it cannot be unfair for SOFL not to make payment to its shareholders of dividends that it has not received from its subsidiary, PT PDP.

[98] Fifth, Mr. Choo-Choy submits that there is simply no evidence to support Mr. Lie's speculation that PT PDP actually paid the dividend for Financial Year 2015 to SOFL. Mr. Choo-Choy submits that the circumstantial evidence strongly suggests that no such payment was in fact made following the GSM dated 25th July 2016. He relies on the following considerations: (1) Mr. Lie's and his wife's calls, text messages and letters to Mr. Lie regarding payment and the conversion of IDR into US dollars (the currency of receipt by SOFL if and when it received dividends from PT PDP) in and after July 2016 did not result in any US dollar payments to Mr. Lie, (2) by that stage, the breakdown in the relationship between Mr. Lie and the other major shareholders of PT PDP (including Mr. Ng and Madam Karlinah) was complete, so that the latter would have had every motive not to procure PT PDP to make any dividend payment to SOFL that would have benefited Mr. Lie, (3) Mr. Hardwick's own realistic acknowledgment during his oral closing submissions that '*SOFL hadn't been paid a single dollar*', which is why it could not have taken part in the 2018 Rights Issue, and (4) PT PDP's refusal in the following year to declare a dividend in respect of Financial Year 2016 – being conduct which, on Mr. Lie's own case, is of one piece with the refusal to pay the dividend in respect of Financial Year 2015.

[99] Sixth, Mr. Choo-Choy submits that in respect of the Financial Years 2016 to 2018, the evidence indicates that the overwhelming majority of the shareholders of PT PDP voted against declaring any dividends for payment by PT PDP in order to build up the resources of the PT PDP group in anticipation of a number of substantial capital-intensive projects estimated to cost over IDR 1.3 trillion over a number of years. He relies upon the minutes of the GSM of PT PDP on 25th July 2017 in respect of the Financial Year 2016 and claims, in respect of the Financial Years 2017 and 2018, that '*it seems reasonable to infer that there were no dividend declarations in those years either*'. In the context of Financial Years 2017 and 2018, Mr. Lie himself (at paragraph 284 of his written closing submissions) asserts that '*the overwhelming probability*' must be that Mr. Ng as sole director of PT PDP would neither have recommended nor approved a dividend payment to the PT PDP shareholders in order to ensure that no dividend was received by Mr. Lie. As no dividends

were declared and paid by PT PDP to SOFL, SOFL had not received any dividends from PT PDP which it could in turn pass on to its shareholders for the Financial Years 2016 to 2018 and Mr. Lie has not sought to contend to the contrary. The non-declaration, and hence non-payment, of dividends by PT PDP during the Financial Years 2016 to 2018 was conduct on the part of PT PDP which does not qualify as conduct of the affairs of SOFL for the purposes of section 184I of the Act and cannot therefore amount to unfairly prejudicial conduct falling within the section.

[100] Seventh, Mr. Choo-Choy rebuts Mr. Hardwick's contention that the conduct of the affairs of PT PDP in failing to declare or pay a dividend in favour of SOFL is to be equated with conduct of the affairs of SOFL for the purposes of section 184I for the following reasons:

(1) The failure to declare or pay dividends is plainly a failure by PT PDP because it is PT PDP that decides whether or not to declare a dividend in favour of its shareholders. The fact that this failure may be due to Mr. Ng as sole director of PT PDP, and that Mr. Ng (on Mr. Lie's case) may also be in control of or have real influence over SOFL, does not detract from the fact that the failure to declare or pay dividends is nevertheless the failure (and conduct of the affairs) of PT PDP – rather than that of SOFL. It would be nonsensical to treat such failure as being action or conduct of the affairs of SOFL, since SOFL is merely a passive non-recipient of dividends when dividends have neither been declared nor paid by PT PDP to SOFL.

(2) Whilst the relevant case law recognises that the affairs of a subsidiary are **capable** of engaging the affairs of a holding company and *vice versa*, whether this is in fact the case on particular facts depends upon a careful consideration of what relevant conduct is involved, by whom and in what capacity, whilst paying due regard to the business realities of the situation.

(3) Thus, in **Re Coroin**,[14] David Richards J observed at [628]: *'[if] the affairs of the subsidiary are being conducted in a manner which damages the subsidiary and hence the value of the holding company's interest in the subsidiary, then the omission of the directors of the holding*

[14] [2012] EWHC 2343 (Ch).

company to take steps to rectify the situation seems to me plainly capable of falling within s994(1)'. In other words, even though there may be commonality of directors between a subsidiary and a holding company, it must still be possible to identify conduct (whether in the form of relevant action or inaction) on the part of the directors of the holding company in their capacity of such that can be properly characterised as conduct of the affairs of the holding company in a relevant respect. In the example given by David Richards J, the relevant conduct is not the damage caused to the subsidiary (which relates to conduct of the affairs of the subsidiary), but the holding company's board failure to take corrective action in the face of such damage (which failure pertains to the conduct of the affairs of the holding company as the company in respect of which unfair prejudice relief is sought). The need for the particular capacity in which common directors may be acting also requires careful consideration, as the passage quoted at [629] of David Richards J's judgment makes clear: the conduct of an individual who is a director of both a parent and subsidiary is not, merely by reason of such dual directorship, to be automatically treated as conduct of the affairs of both companies. It remains necessary to consider in each case on whose behalf the conduct in question has been engaged in.

(4) The above analysis is consistent with David Richards J's quotation at [629] from **Re Neath Rugby (No. 2)**,[15] where Stanley Burnton LJ said (at [50]): *'… I am unable to see how it can be said that the affairs of Neath and of Osprey were so intermingled that all of the affairs of the latter were the affairs of the former. It would, for example, be quite irrational to suggest that Mr. Blyth, when acting as a director of Osprey, was conducting the affairs of Neath.*'

(5) It is also consistent with one of the fundamental principles underlying section 184I, namely, the need to identify relevant conduct on the part of the company in respect of which unfair prejudice is alleged. Those principles were reviewed in **Re A Company (No. 00171 of 1986)**[16] and **Re Unisoft Group (No. 3)**[17] and are not displaced by the mantra of '*business realities*' (contrary to what Mr. Hardwick appears to imply by his submissions). Nor do they

[15] [2009] 2 BCLC 427.
[16] [1987] BCLC 141.
[17] [1994] 1 BCLC 609.

cease to apply merely because the Court is faced with a two-company case involving a holding company and a subsidiary, rather than a single-company case.

(6) Mr. Lie's attempt (at paragraph 267.2 of his written closing submissions) to rely on the alleged '*immediate and necessary relation between a dividend decision at PT PDP level and a dividend decision at SOFL level*' in order to equate the failure by PT PDP to declare or pay a dividend with conduct on SOFL's part is fundamentally unsound. The fact that a failure by PT PDP to pay or declare a dividend to SOFL would necessarily disable SOFL from paying a dividend to its shareholders does not (and cannot) mean that PT PDP's failure is to be seen as conduct of the affairs of SOFL. The existence of a commercial connection between those two things does not mean that they are one and the same thing. There is no test of '*immediate and necessary relation*' as contended by Mr. Lie in this context. No such test appears in the case law dealing with when the affairs of one company may give rise to conduct of the affairs of another company. As a simple test, consider a case where a sub-contractor default would automatically put its main contractor into default towards the employer. It would be bizarre if, in such a case, the sub-contractor were held to conduct the affairs of the main contractor merely because the sub-contractor's default prevents the main contractor from honouring its obligations to the employer.

(7) The bottom line is that, when (as alleged by Mr. Lie) Mr. Ng caused PT PDP not to pay or declare a dividend to SOFL, that is plainly conduct on his part <u>in his capacity as sole director of PT PDP</u>, not SOFL.

The Claimant's responsive submissions

[101] Mr. Hardwick's answer to the sixth point (the Financial Years 2016 to 2018) has been addressed above. In response to the first, fourth and seventh points (affairs of the company), he relies on the guidance of David Richards J (now Lord Justice) in **Re Coroin Ltd**[18] who explained that the court *'will not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look at the business realities.'* He submits that the business realities in this case are that PT

[18] [2012] EWHC 2343 (Ch).

PDP is (and always has been) the key Indonesian holding company in the business; SOFL was only ever formed to move the interests of Mr. Lie and Mr. Ng in PT PDP offshore to the BVI and had and has no business other than as a holding company of PT PDP; it was perfectly obvious that SOFL would only be in a position to recommend and pay a dividend to its shareholders (including Mr. Lie) if PT PDP paid a dividend to SOFL in the first place; for every year on record until the Financial Year 2015 PT PDP had paid a dividend to SOFL and SOFL had distributed that dividend payment to its shareholders; such that the necessary effect of a failure of PT PDP to pay dividends to SOFL was that SOFL could neither recommend nor pay any dividend to its shareholders. In all these circumstances 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 argues that any attempt to compartmentalise these dividend decisions is entirely artificial.

[102] Mr. Hardwick submits that the correctness of this conclusion is reinforced by the facts that at all times material to the conduct complained of in this Claim: (1) Mr. Ng has been the 54.15% majority shareholder and only person with '*real influence*'[19] in the corporate affairs of the holding company SOFL (his brother merely being a nominee director); and (2) the 63.16% majority shareholder and sole director of the subsidiary PT PDP – the paradigm instance of an identity of management where it is correct to hold that the affairs of a holding company include the affairs of its subsidiary (**Gross v Rackind**[20] and **Coroin** at [628]).

[103] As to the second (pleading) point, Mr. Hardwick refers to paragraph 103 of the Re-Amended Reply which states Mr. Lie's reasonable expectation that if the Business produced a profit, '*such profit would be dividended, as it had consistently, over the years, to its ultimate beneficial owners*'; and to paragraph 104 which set out the profit stream over the Financial Years 2010 to 2015 from PT PEU to PT PDP and ultimately to SOFL. Mr. Hardwick submits that these pleaded facts made it clear that Mr. Lie's pleaded complaint that SOFL's majority shareholder '*failed and/or refused to pay the Claimant a dividend*' extended to the decisions and actions of the sole director (Mr. Ng) and members (Mr. Ng with majority control) of PT PDP.

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[19] See the judgment of Morritt LJ in Secretary of State for Trade and Industry v Deverell [2001] Ch 240 at 25-29 and 35.

[20] [2005] 1 WLR 3505 at [25-26] with reference to the reasoning of Phillimore J. in R v Board of Trade, Ex p St Martins Preserving Co Ltd [1965] 1 QB 603.

ISSUE 3: THE 2017 DISPOSITION

The Claimant's Submissions

[104] On or about 14th July 2017, the 2017 Disposition took place, by virtue of which Mr. Ng disposed of the majority of SOFL's shareholding in PT PDP (2,052,631 of 3,789,473 shares) by transferring to same to Grahaidea (an Indonesian company owned jointly by Mr. Ng and his brother and in which Mr. Lie has no interest). Mr. Lie's case is that the 2017 Disposition was in breach of section 175 of the Act, was an unlawful appropriation of Mr. Lie's assets and was unfairly prejudicial to him in his capacity as a shareholder of SOFL. By reason of the 2017 Disposition, SOFL's interest in its only asset (PT PDP) was reduced from 63.16% to 28.94%. In turn, Mr. Lie's economic interest in PT PDP was reduced from 28.94% to just 13.27%, which he submits was plainly unfairly prejudicial to him.

[105] Mr. Ng admits that the transfer took place, but claims that this was a repatriation of his shareholding, pursuant to the Indonesian Government's 'Tax Amnesty Programme' (the **'Tax Amnesty'**).

[106] Mr. Hardwick submits that Mr. Ng's evidence in respect of the Tax Amnesty is both contradictory and wholly unconvincing and that his unsatisfactory responses to repeated Requests for Further Information and Specific Disclosure applications related to it also cast serious doubts as to its veracity. In particular he contends that:

(1) contrary to Mr. Ng's RFI Response dated 1st November 2019 (certified with a Statement of Truth) that '*NMH made a declaration to the Indonesian Government*' pursuant to the Tax Amnesty Programme on 1st April 2017, Mr. Ng claimed at trial during cross-examination that the declaration was made by Grahaidea;

(2) contrary to his Amended Defence, which stated that the assets '*to be repatriated to Indonesia*' was '*the shareholding in PT PDP which PT MM had transferred to the company in 2003*', Mr. Ng claimed at trial that it was '*the responsibility of PT Grahaidea to confess and say okay, this is my asset that I didn't declare before'*. Mr. Hardwick submits that this

evidence at trial was plainly wrong given that the 2 million PT PDP shares did not belong to Grahaidea prior to the 2017 Disposition;

(3) Mr. Ng's claim (in response to an RFI served by Mr. Lie) that there was no tax tariff payable in respect of the 2 million PT PDP shares transferred from SOFL to Grahaidea is contrary to the entire purpose of the Tax Amnesty Programme (which was to encourage declarations and repatriations of offshore funds by introducing initially low but then increasing tax tariffs with a lowest identified tax tariff of 2%);

(4) Mr. Ng's claim that there was no need for the 2 million PT PDP shares to be handled by an approved government financial institution is contrary to the identification of a finite list of approved Indonesian 'gateways' for asset repatriation;

(5) Mr. Ng failed to provide the one document that he did identify (in his 1st November 2019 RFI Response) and was ordered to provide pursuant to the Specific Disclosure Judgment: the Tax Amnesty Declaration dated 1st April 2017 (a further '*amber warning*');

(6) the two documents which Mr. Ng eventually provided under compulsion of court order (on 10th August 2020) do not support Mr. Ng's pleaded claim that he transferred the 2 million PT PDP shares from SOFL to Grahaidea pursuant the Tax Amnesty Programme. The first was a '*Tax Amnesty Approval Letter*' dated 10th April 2017 (with no covering letter, no signature, no stamp and no manuscript writing). It was not a '*Tax Amnesty Declaration*' or any sort of declaration of funds and it was not dated 1st April 2017. It did refer to an '*Asset Declaration Letter*' but that document was never disclosed. Moreover, all of the information boxes in the document were blank. Whilst Mr. Ng claimed that the document had been redacted, the document does not identify which parts have been redacted, resulting in complete uncertainty as to whether (1) it in fact contained no valuation details about the asset for which the tax amnesty facility was apparently sought and granted; or (2) it did contain valuation details and yet (according to Mr. Ng) inexplicably no tax tariff was applied. The second document was a '*Certificate of Exemption*' related to '*Withholding Tax*'. Again, it was not a Tax Amnesty Declaration, it was dated June 2017 not 1st April 2017 and it made no mention of a tax tariff for repatriated assets or whether, when and how Mr. Ng had made a declaration for repatriation of 2m PT PDP shares; finally and in any event

(7) contrary to the clear guidance in published articles in relation to the Tax Amnesty Programme which Mr. Ng himself disclosed, Mr. Ng has not relinquished his ownership in SOFL after the alleged transfer. Mr. Ng claims at paragraph 68 of his Re-Amended Defence that the 2017 Disposition was '*designed, in effect, to reverse the transfer into the BVI corporate structure in 2003 by PT MM for no consideration*'. Yet Mr. Ng still owns 54.15% of SOFL's shares today, over 3 years later. Mr. Ng has failed to answer the question (that he was ordered to answer pursuant to the RFI Judgment) as to why he maintains an interest in SOFL after the alleged repatriation.

[107] Furthermore, Mr. Hardwick points to the chronology of events in 2017 in support of his submission that the 2017 Disposition was a deliberate act of retaliation by Mr. Ng. Three months prior to the 2017 Disposition Mr. Lie had filed a police report in Indonesia against Mr. Ng in respect of the unpaid dividend for the Financial Year 2015. In early July 2017, the police had conducted an unsuccessful mediation in respect of this unpaid dividend. The 2017 Disposition took place one week after the unsuccessful mediation and without notice to Mr. Lie.

[108] Ultimately, Mr. Hardwick submits that whether or not the 2017 Disposition was conducted under the cloak of Indonesia's Tax Amnesty Programme, it was an egregious and unlawful appropriation of Mr. Lie's beneficial interest in SOFL which had a significant '*depressive effect*' (in the language of HHJ Purle QC in **Re Sunrise Radio**) on the value of Mr. Lie's shareholding in SOFL.

The First Defendant's Submissions

[109] Mr. Choo-Choy makes four points in response. First, and in response to the claim that the 2017 Disposition was in contravention of section 175 of the Act, he admits that the details of the disposition ought to have been submitted to the members for it to be authorised by resolution and that there was 'a failure to submit the details of the 2017 Disposition to Mr. Lie'. However, Mr. Choo-Choy contends that the purpose of the submission of details is to ensure that the relevant majority of shareholders have authorised the proposed transaction; in the present case, the relevant majority is in fact Mr. Ng himself by virtue of his 54.15% shareholding in SOFL. Thus, even if Mr. Lie had been apprised of the details of the 2017 Disposition, he would not have been able to prevent the transfer to Grahaidea contrary to Mr. Ng's wishes. At worst, therefore, the 2017

Disposition was merely a 'technical contravention' of section 175(b) of the Act but not contrary to its spirit or rationale. Such breach would not in any event invalidate Mr. Ng's approval of the 2017 Disposition; nor has Mr. Lie alleged any such invalidity. By itself, this technical failure to comply with the section 175 requirements was not unfairly prejudicial to Mr. Lie since Mr. Lie would have been powerless to prevent the transfer even if given prior notice of it.

[110] Second, in respect of the Tax Amnesty, Mr. Choo-Choy submits that since Mr. Lie's case of unfair prejudice does not ultimately turn on whether the 2017 Disposition was pursuant to the Tax Amnesty, Mr. Lie's belief that the 2017 Disposition is not consistent with the same is a 'r*ed herring*'. Further, neither party has sought, nor has the Court given permission for expert Indonesian tax evidence in relation to the technicalities of the Tax Amnesty legislation. Mr. Choo-Choy in any event draws the following facts and matters to the Court's attention in respect of the Tax Amnesty, which support the view that there was a legitimate commercial rationale for the transfer to Grahaidea:

(1) The number of PT PDP shares transferred to Grahaidea was precisely the number of shares that Mr. Ng's Indonesian vehicle, PT MM, and Mr. Siregar had in November 2003 transferred to SOFL – and which, following Mr. Ng's acquisition of Mr. Siregar's shareholding in SOFL, constituted Mr. Ng's economic interest in PT PDP. Thus, the transfer of the 2,052,631 shares of PT PDP from SOFL (a BVI entity) to Grahaidea (an Indonesian company) was clearly a form of repatriation of the ownership of those shares from an offshore jurisdiction to Indonesia. Mr. Lie's contrary case theory must involve the proposition, which was never put to Mr. Ng in cross-examination, that the number of shares transferred to Grahaidea was deliberately calculated to make it appear as if it was a repatriation of the shares previously transferred to SOFL, but that this was in fact a mere pretence.

(2) Mr. Ng has disclosed a Tax Amnesty Approval Letter dated 10th April 2017 in respect of Grahaidea and a Certificate of Exemption dated June 2017 in relation to the transfer of the 2,052,631 shares to Grahaidea (in fact received from his brother, who manages Grahaidea). In circumstances where (1) Mr. Lie's 1st October 2020 Notice to Prove Documents at Trial (in respect of the same) was served out of time, and (2) his request for an extension of time for service of the Notice was denied (on the 7th day of trial), Mr. Lie was deemed to have

admitted the authenticity of these two documents pursuant to rule 28.18(1), Civil Procedure Rules 2000 ('CPR'). Accordingly, the Court must necessarily proceed on the basis that the two documents disclosed by Mr. Ng in relation to the Tax Amnesty Programme are genuine and authentic.

(3) Despite the deemed authenticity of those two documents, Mr. Ng was cross-examined at length about various aspects of the Tax Amnesty Programme and the transfer of PT PDP shares to Grahaidea in June 2017. Mr. Choo-Choy submits that the technicalities and mechanics of how the Tax Amnesty legislation worked cannot sensibly or appropriately be the subject of informed determinations by the Court in circumstances where (1) no breach of Indonesian tax amnesty law was ever pleaded by Mr. Lie and (2) the details of Indonesian tax amnesty law were not the subject of any Indonesian law expert evidence. Moreover, the 1st April 2017 Tax Amnesty Declaration was not in Mr. Ng's control because it was Grahaidea, rather than him personally, who dealt with the same.

(4) In any event, the Tax Amnesty Approval Letter dated 10th April 2017 expressly referred to the taxpayer, identified as Grahaidea, as having '*submitted the Asset Declaration Letter for the Amnesty*', thereby confirming that there was clearly some form of tax amnesty declaration or application that was made on behalf of Grahaidea prior to the issue of the Tax Amnesty Approval Letter. Mr. Lie had not requested disclosure of the 'Asset Declaration Letter' by Mr. Ng. In circumstances where Mr. Lie must, as a matter of BVI procedural law, accept the authenticity of the Tax Amnesty Approval Letter (as well as the Certificate of Exemption), it is not open to him to contend that no tax amnesty declaration or application was made to the '*Ministry of Finance of the Republic of Indonesia*' (the issuer of the Tax Amnesty Approval Letter).

(5) As to the fact that the two documents were unsigned and contained a number of blank spaces, Mr. Ng explained that (1) his understanding from Grahaidea's tax consultant was that such documents were computer-generated and issued without a manuscript signature; (2) the documents were redacted on account of confidentiality, a point overlooked by Mr. Hardwick during his cross-examination of Mr. Ng; and (3) the documents nevertheless

identified the taxpayer as Grahaidea and the subject matter or asset in respect of which tax amnesty was sought as the 2,052,631 shares of PT PDP.

(6) Mr. Lie himself has disclosed a written invitation dated 5th June 2017 from PT PDP (signed by Mr. Ng as director) to Mr. Harahap (in his capacity as PT PDP shareholder) to attend an extraordinary general shareholders' meeting on 20th June 2017 regarding '*one of the shareholders' request to Transfer Shares*' '*as part of Tax Amnesty 2016 Program*'. Since Mr. Harahap was Mr. Lie's trusted friend and colleague within the PT PDP group, the giving of notice by Mr. Ng to Mr. Harahap shows at least that there was no intention on Mr. Ng's part to conceal the proposed transfer to Grahaidea from Mr. Lie or his friends and colleagues on the board of PT PDP. It also provides corroboration for the fact that the transfer to Grahaidea was genuinely treated amongst shareholders of PT PDP as being related to the Tax Amnesty.

(7) Further and in any event, it lies ill in Mr. Lie's mouth to cast doubt on Mr. Ng's intention to repatriate his economic interest in PT PDP back to Indonesia when he (Mr. Lie) had himself explored that very possibility at the end of September 2016 as evidenced by his letter dated 30th September 2016 to the directors and shareholders of PT PDP indicating his desire to take advantage of the amnesty in relation to his equity stake in PT PDP.

[111] Third, Mr. Choo-Choy claims that since the shares transferred by SOFL to Grahaidea were, prior to the transfer, the property of SOFL, it is inaccurate of Mr. Lie to plead that the transfer '*amounted to an unlawful appropriation of the Claimant's assets*'. As majority shareholder of SOFL, Mr. Ng had approved the transaction. The transfer was therefore approved by the properly entitled and authorised organ of SOFL, and there was nothing unlawful about it.

[112] Fourth, whilst Mr. Choo-Choy accepts that Mr. Lie has suffered '*unfairness and prejudice*' by reason of the 2017 Disposition he contends that:

(1) The real source of unfairness and prejudice to Mr. Lie arose by reason of the failure of Mr. Ng to transfer his shareholding in SOFL to Mr. Lie once the 2017 Disposition had occurred. Had Mr. Ng transferred his shares in SOFL to Mr. Lie, it would not have been realistically

arguable by Mr. Lie that he was unfairly prejudiced by the transfer to Grahaidea because, in that event, he would still have been the ultimate beneficiary of 1,736,842 shares in PT PDP;

(2) The correctness of the above reasoning was acknowledged at paragraph 57 of Mr. Lie's trial witness statement, paragraph 16.51 of Mr. Lie's written opening submissions, during Mr. Hardwick's cross-examination of Mr. Ng to the effect that Mr. Ng should have relinquished his shares in SOFL in Mr. Lie's favour following the 2017 Disposition, and at paragraphs 365-366 of Mr. Lie's written closing submissions where it is contended that the transfer to Grahaidea was prejudicial in circumstances where Mr. Ng continued to own 54% of SOFL's shares;

(3) Mr. Ng's failure to transfer his SOFL's shareholding to Mr. Lie in light of the 2017 Disposition is neither conduct of the affairs of SOFL nor an act or omission of SOFL for the purposes of Section 184I. Only Mr. Ng as owner of the shares (i.e. as member) of SOFL can transfer those shares to Mr. Lie. Mr. Choo-Choy refers in particular to **Re Unisoft Group Ltd (No 3)**[21] in which Harman J noted that '*the acts of the members themselves are not acts of the company nor are they part of the conduct of the affairs of the company and cannot found a petition*';

(4) As to Mr. Lie's assertion that it makes no sense to divide the 2017 Disposition into two separate acts (i.e. the transfer of the PT PDP shares to Grahaidea and the non-transfer of Mr. Ng's shares in SOFL to Mr. Lie) and that the business reality was that there was only one act, namely, the transfer to Grahaidea, the assertion ignores two points: (1) it ignores the fact that the rationale for the transfer to Grahaidea was a transfer back to Indonesia of Mr. Ng's equity stake in PT PDP, meaning that the corollary of that transfer was his transfer of his shareholding in SOFL to Mr. Lie so that Mr. Lie would then be left with his equity stake in PT PDP – viewed from this perspective, it makes complete sense to consider the effect of both the transfer to Grahaidea and Mr. Ng's failure to transfer his shareholding in SOFL to Mr. Lie; and (2) even if the tax amnesty aspect were ignored, the fact remains that the assessment of prejudice <u>to Mr. Lie</u> (as opposed to SOFL) is not limited to consideration of

[21] [1994] 1 BCLC 609.

the residual assets held by SOFL following the transfer – the question of prejudice to Mr. Lie as a result of the transfer is a broader question, which naturally brings into play (as earlier explained) the question whether the transfer to Grahaidea has been accompanied by a transfer by Mr. Ng of his shareholding in SOFL to Mr. Lie;

(5) Further, Mr. Choo-Choy contends that the question of unfairness and prejudice in relation to the 2017 Disposition must in any event be viewed in the context of the consequences of the 2018 Rights Issue. Mr. Choo-Choy submits that even if the 2017 Disposition had not taken place, SOFL's total holding of 3,789,473 shares would have been diluted as a result of the 2018 Rights Issue to approximately 3% of the shareholding of PT PDP, such the great bulk of the prejudice to Mr. Lie has been caused by the 2018 Rights Issue and SOFL's non-participation in it, rather than the 2017 Disposition. In this context, Mr. Hardwick's suggestion that the 2018 Rights Issue cannot affect the question whether the 2017 Disposition was unfairly prejudicial because the proceedings were brought by Mr. Lie in July 2018 before the 2018 Rights Issue occurred in September 2018 is misconceived. The relevant principle, summarised in **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), at paragraph 7-18 and footnote 32, is that '*… an isolated past act or omission is sufficient to give the court jurisdiction to intervene, although the court will of course take into account in the exercise of its discretion the extent to which the prejudice relied upon by the petition is continuing …*' and '*past unfairly prejudicial conduct could no longer be relied upon because it had been overtaken by events*'. Thus, whether the conduct in question remains unfairly prejudicial in light of supervening events is a question that the Court will not turn a blind eye to, because of the flexible and discretionary nature of the Court's jurisdiction under section 184I.

The Claimant's Responsive Submissions

[113] In response to the first point (section 175), Mr. Hardwick accepts the facts of Mr. Ng's majority control of SOFL and Mr. Lie's inability to prevent the transfer. However, he contends that Mr. Ng's failure to comply with section 175 of the Act in relation to the 2017 Disposition was repeated in

relation to the 2019 Disposition. He relies upon the reasoning of HHJ Purle QC in **Sunrise Radio**[22] at [7] and [8]: Mr. Lie, even if properly notified under section 175 of the Act, may not have been able to prevent these dispositions. Nonetheless they are '*repeated default*s' in respect of the requirements of an important BVI statutory protection – and in relation to acts which have stripped SOFL of all of its assets. The repeated failure of the board of SOFL to comply with the requirements of the Act in relation to the 2017 and 2019 Dispositions are certainly such as to '*undermine trust and confidence*' in SOFL's board and '*impact…upon any realistic objective assessment of the integrity and competence of the board*' – so as to found a complaint of unfair prejudice.

[114] In response to the second point (the Tax Amnesty), Mr. Hardwick refutes the claim this is a '*red herring*' observing that it is Mr. Ng who, since June 2018, has sought to justify the transfer of around 2m of SOFL's PT PDP shares to Grahaidea by reference to the Tax Amnesty Programme. Pointing, again, to the lengthy history of Mr. Lie's attempts to understand when and how Mr. Ng made the transfer pursuant to the Tax Amnesty Programme, he (1) claims that Mr. Ng has failed to provide any proper evidence to support his claim that there was a '*repatriation*' of assets pursuant to the Tax Amnesty Programme; and (2) observes that if there was no '*repatriation*' the reality was simply a share transfer that stripped out from SOFL 54% of its assets – leaving Mr. Lie with a dramatically reduced economic interest in SOFL.

[115] In response to the third point (no misappropriation), Mr. Hardwick observes that the relevant events are well-known: the 2017 Disposition (1) reduced SOFL's shareholding in PT PDP from 3.7m shares to 1.7m shares; (2) increased the shareholding of Grahaidea, Mr. Ng's company, in PT PDP by the same 2m shares; and (3) resulted in Mr. Lie's loss (as shareholder in SOFL) of his 45% interest in the same. Thus, he submits that the unfair prejudice to Mr. Lie as a shareholder in SOFL is obvious.

[116] In response to the fourth point (real source of unfairness and prejudice), Mr. Lie responds that the distinction that Mr. Choo-Choy seeks to draw between (1) the conduct of SOFL (by the majority vote of Mr. Ng) in approving the transfer away of the 2m PT PDP shares; and (2) the failure of Mr.

[22] [2009] EWHC 2893.

Ng to transfer his 45.85% interest in SOFL to Mr. Lie, is entirely artificial. He contends that it makes no sense to attempt to divide into two separate acts (1) the SOFL share transfer, by which 2m of SOFL's PT PDP shares were transferred to Grahaidea; and (2) its immediate and necessary consequence, namely that Mr. Ng continued to be a 54% shareholder in SOFL. The business reality is that there was one act (the share transfer) with one obviously unfair result: Mr. Lie was left with a 45.85% interest in SOFL's now substantially reduced 1.7m PT PDP shares. Further, the well-established distinction between the '*acts of members*' and '*acts or conduct*' of the company cannot avail Mr. Ng in the context of a company which he controlled (as 54.15% shareholder) and directed (through the nominee directorship of his brother). The reality is that Mr. Ng was able to use the organs of SOFL to achieve a transfer that would (1) put 2m PT PDP shares out of reach of Mr. Lie; (2) maintain his majority shareholding and control of SOFL; and (3) give him a 54.15% interest in what had been Mr. Lie's 1.7m PT PDP shares.

ISSUE 4: THE 2018 RIGHTS ISSUE

The Claimant's Submissions

[117] On 18th September 2018, two months after the Claim was issued, PT PDP carried out the 2018 Rights Issue, pursuant to which Grahaidea acquired over 60 million additional shares in PT PDP. SOFL did not participate in the Rights Issue. As a result of the 2018 Rights Issue, SOFL's percentage shareholding in PT PDP reduced from 28.94% (following the 2017 Disposition) to just 1.38%. Grahaidea became the largest single shareholder with 49.6% of PT PDP.

A 'preparatory step' towards an IPO

[118] Mr. Hardwick submits that the Court should reject Mr. Ng's assertion that the 2018 Rights Issue was a '*preparatory step*' towards an IPO of PT PDP; and contends that the overwhelming likelihood is that it was a crude and deliberate act of share dilution – reducing SOFL's interest in PT PDP to a mere 1.38%. Mr. Hardwick points to:

(1) the known hostility by this point in time in September 2018 on the part of Mr. Ng towards Mr. Lie (with the issue of the Claim two months previously in July 2018);

(2) the fact of the 2017 Disposition which had reduced SOFL's interest in PT PDP from 63.13% to 28.94%;

(3) the fact that by the 2018 Rights Issue, Grahaidea (jointly owned by Mr. Ng and his brother) became the largest shareholder in PT PDP;

(4) the fact that whilst each of (1) Mohammad Achiruddin Noer (on behalf of his mother and then shareholder Madam Noer); (2) PTPN 4; (3) the management of the labour union of PT PEU's four plantations); and (4) Mr. Lie had provided reasoned written objections to an IPO, Mr. Ng had never engaged with any of these objections in 2015;

(5) the fact that the 2018 Rights Issue was a central part of Mr. Lie's claim from the moment that it was introduced by way of amendment on 16th May 2019 and Mr. Ng had every opportunity (including in responding to Mr. Lie's RFI) to develop his case as to the *bona fides* of the 2018 Rights Issue, justified by a specific commercial purpose. Instead, his approach was one of obstruction and obfuscation; and

(6) the dearth of any proper evidence that an IPO was contemplated in September 2018. Whilst Mr. Ng's witness statement asserted that '*the Rights Issue was put into effect as a preparatory step to an IPO in respect of PT PDP*' not a single document was referred to and nothing at all was said by Mr. Ng as what steps had been taken since 2015 in order to progress the 2018 Rights Issue. In fact, Mr. Ng's only evidence on this emerged late in evidence in re-examination and was not put to Mr. Lie in cross-examination. Further, with the exception of an 11th May 2017 letter from PT Galelia, there is not a single PT PDP minute, resolution or other document over the period 2016 – 2020 which corroborates Mr. Ng's claim that an IPO was genuinely intended in September 2018. Moreover, there is no document which corroborates Mr. Ng's claim that the major ongoing obstacle to the proposed IPO was a problem with '*concession certificates*' nor is there any evidence from

any of the professionals one would expect to be involved in an IPO process (such as legal counsel, accountants, specialist sector advisers).

SOFL's alleged opportunity to participate in the 2018 Rights Issue

[119] Equally, Mr. Hardwick contends that the Court should reject Mr. Ng's claim that SOFL was given an opportunity to participate in the 2018 Rights Issue. He submits that even if the 2018 Rights Issue had some commercial justification by reference to the proposed IPO, PT PDP was still bound to give proper notification to SOFL in respect of the same.

[120] Mr. Hardwick refers to Mr. Lie's June 2019 RFI seeking proper particulars of when and by whom SOFL was allegedly offered '*an opportunity*' to participate in the 2018 Rights Issue. Following an unsatisfactory response, Mr. Lie issued the RFI Application and Mr. Ng was ordered to answer this question (among others). In his 1st November 2019 RFI Response, Mr. Ng appended an EGSM invitation dated 6th August 2018 and stated SOFL '*had notice of what was proposed, and had the opportunity to participate in the Rights Issue, but did not*'. However (as observed by Mr. Lie's expert Mr Andi Kadir at paragraph 61 of his report) this 6th August 2018 notice was an invitation to the wrong meeting: it was an invitation to SOFL to attend an EGSM of PT PDP on Thursday 30th August 2018 for the purpose of approving a '*Transfer of Shares*' and was not in respect of the 2018 Rights Issue which was approved in the course of a PT PDP AGM on 18th September 2018. SOFL was never sent an invitation to the 18th September 2018 AGM.

[121] Mr. Ng's fall-back position is that '*Mr. Achmad attended the AGM on behalf of SOFL.*' However, Mr. Hardwick points out that (1) neither Mr. Ng nor SOFL have disclosed the minute of this PT PDP AGM; (2) the only document that, under compulsion of court order, Mr. Ng disclosed in respect of the AGM was an invitation to the wrong meeting; and (3) Mr. Achmad has not produced a witness statement and did not attend trial to give evidence on this important point.

[122] As to the alleged conversation between Mr. Achmad and Mr. Ng at the 18th September 2018 AGM, Mr. Hardwick contends 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.

Accordingly, Mr. Ng's claim that he had a conversation with Mr. Achmad at the claimed meeting on 18th September 2018 and which Mr. Achmad '*informed*' Mr. Ng '*verbally*' that SOFL did not have sufficient funds to participate in the 2018 Rights Issue is contrived and an obvious fiction.

[123] As to the claimed insufficiency of SOFL funds, (1) Mr. Ng's written closings submissions state that '*On the basis of a 28.9% shareholding, SOFL's pro rata entitlement would have been nearly IDR 35 billion, equivalent to nearly USD 2.4 million*'; and (2) Mr. Hardwick contends that if SOFL had received (as it should have received) its USD 4.6m portion of PT PDP's USD 16m dividend for the Financial Year 2017, SOFL would easily have been able to fund the acquisition of the same.

[124] Further, Mr. Hardwick invites the Court to draw an adverse inference in respect of the non-attendance at trial of Mr. Achmad (as developed below in the context of the 2019 Disposition).

The First Defendant's Submissions

[125] Mr. Choo-Choy accepts that the 2018 Rights Issue took place and that the prejudicial effect of SOFL's non-participation in the Rights Issue is 'indisputable', since the result has been that SOFL's percentage shareholding in PT PDP has been diluted from 28.95% (where it stood following the 2017 Disposition) to 1.38%, with the consequence that the value of Mr. Lie's 45.85% shareholding in SOFL will have been commensurately diminished. However, he submits that the question is whether the dilution of SOFL's shareholding in these circumstances is <u>unfairly</u> prejudicial as against Mr. Lie. In this regard, SOFL's non-participation in the 2018 Rights Issue was <u>not</u> unfair as against Mr. Lie given that: (1) SOFL was not legally obliged to participate in the 2018 Rights Issue and its failure to do so cannot therefore, of itself, be a ground of unfairness; (2) SOFL was unable to participate because it did not have sufficient funds to do so, thus it is impossible to see on what credible basis its non-participation in the 2018 Rights Issue could be said to be unfair; and (3) on Mr. Ng's evidence, Mr. Achmad did in fact attend the 18th September 2018 AGM on behalf of SOFL and had informed Mr. Ng (as was in fact the case) that SOFL did not have sufficient funds to subscribe for its pro rata entitlement to the newly issued shares.

[126] Mr. Choo-Choy submits that Mr. Ng's evidence in respect of the 2018 Rights Issue being a preparatory step to an IPO is substantially supported by the following evidence:

(1) the general shareholders' meeting of PT PDP on 22nd October 2013 at which Madam Karlinah raised the possibility for PT PDP to become a public company listed on the Jakarta Stock Exchange;

(2) the fact that Madam Karlinah raised the IPO issue again in April 2015, by a written notice to the PT PDP Board of Directors, which resulted in Mr. Ng, as director of PT PDP, giving notice of an extraordinary general meeting of the shareholders of the company on 11th May 2015 in respect of, *inter alia*, the approval of PT PDP's public offering on the Indonesia Stock Exchange;

(3) the fact that at a general shareholders' meeting of PT PDP on 17th December 2015, all shareholders voted unanimously in favour of the IPO proposal that was put forward by Madam Karlinah and authorised the company's Board of Directors to co-ordinate the IPO process; and

(4) the fact that PT PDP thereafter engaged a firm of financial advisers called PT Galelia in order to investigate and report on the appropriate capital structure of the company. PT Galelia concluded by letter dated 11th May 2017 that the proposed new capital in cash should be at least IDR 120 billion in order to fulfil the minimum stock exchange listing requirements: and the IDR 120 billion increase in share capital which was effected pursuant to the 2018 Rights Issue was precisely the amount of top-up capital that was recommended by PT Galelia as the minimum required capital to qualify PT PDP for public listing.

[127] Mr. Choo-Choy rejects the allegation that SOFL's non-participation in the 2018 Rights Issue was effectively orchestrated by Mr. Ng. He submits as follows:

(1) The history of the IPO proposal (as explained above) shows that there was a clear and genuine link between the development of that proposal and the increase in the paid-up capital of PT PDP by IDR 120 billion pursuant to the 2018 Rights Issue.

(2) Whilst Mr. Ng has not disclosed the minutes of the shareholders' meeting on 18th September 2018, those minutes are PT PDP's document, not Mr. Ng's. He was required by the Court's judgment of 21st July 2020 only to disclose PT PDP documents in his personal control. In the absence of PT PDP's consent, he was under no obligation to disclose the minutes of the 18th September 2018 meeting.

(3) There was clear and reliable documentary evidence anyhow that the 2018 Rights Issue was approved and effected at the 18th September 2018 meeting because the transaction was formally recorded in the PT PDP company profile which identifies the notarial deed dated 18th September 2018 by which the 2018 Rights Issue was effected.

(4) There is no evidence to contradict Mr. Ng's testimony that Mr. Achmad attended the 18th September 2018 meeting and informed him that SOFL did not have sufficient funds to participate in the rights issue. Mr. Ng's evidence is inherently plausible. When Mr. Ng's Brother was SOFL's director, he attended shareholders' meetings on SOFL's behalf. It makes sense therefore that following Mr. Achmad's replacement of Mr. Ng's Brother as SOFL's director, he would have attended shareholders' meetings of PT PDP on SOFL's behalf. In any event, on Mr. Lie's own case that Mr. Ng was the real directing mind and will of SOFL, SOFL clearly had notice of the 2018 Rights Issue through Mr. Ng. The real issue is as to whether SOFL had an opportunity to participate in the rights issue and whether its non-participation was unfair to Mr. Lie in circumstances where it did not have the funds to do so.

(5) Furthermore, it is entirely plausible that Mr. Achmad would have told Mr. Ng that SOFL did not have the funds to take up its *pro rata* entitlement in newly issued shares of PT PDP because SOFL had not received any dividends from PT PDP after 2015 and it was therefore true that SOFL did not have the funds to subscribe for its pro rata entitlement. There is no

evidence that SOFL had enough of its own funds to subscribe for its *pro rata* entitlement. Nor did Mr. Hardwick put to Mr. Ng that SOFL had its own funds to do so. Rather, he suggested to Mr. Ng that SOFL's lack of funds could have been cured by Mr. Ng if as sole director of PT PDP Mr. Ng had caused PT PDP to pay the relevant share of dividends to SOFL following PT PDP's receipt of dividends from its subsidiary, PT PEU. Self-evidently, however, a failure on the part of Mr. Ng (or the other shareholders of PT PDP) to procure a declaration and payment of dividends in SOFL's favour is not conduct of the affairs of SOFL, but conduct of the affairs of PT PDP which falls entirely outside the scope of section 184I.

[128] Furthermore, Mr. Choo-Choy submits that the 2018 Rights Issue itself – in the form of the amendment of PT PDP's Articles of Association in order to increase the authorised and issued share capital of the company – is plainly an act of PT PDP, not of SOFL. It cannot therefore, of itself, give rise to any unfairly prejudicial conduct on the part of SOFL, or in the conduct of the affairs of SOFL, for the purposes of section 184I. It is no doubt in recognition of this point that it is not expressly pleaded by Mr. Lie that the 2018 Rights Issue itself was unfairly prejudicial conduct. Rather, the focus of the unfair prejudice complaint is on SOFL's failure to participate in the 2018 Rights Issue.

[129] Mr. Choo-Choy also rejects the submission (which was made for the first time in Mr. Lie's written opening submissions) that the 2018 Rights Issue did not comply with Indonesian law requirements and raises five points in answer:

(1) it is a departure from Mr. Lie's pleaded case in his Re-Amended Statement of Claim which stated that '*it is unclear to him whether or not Indonesian law requirements relating to pre-emption rights were complied with by PT PDP*';

(2) this un-pleaded point is not supported by Mr. Lie's own Indonesian law expert. Mr. Kadir explains that even if SOFL did not receive notice of the shareholders' meeting on 18th September 2018, the resolution of the shareholders' meeting would remain valid if (as was the case, according to Mr. Ng's evidence) all shareholders with voting rights were present or represented in the GMS and the resolutions were unanimously approved;

(3) the 2018 Rights Issue was effected by notarised deed and it is most unlikely that a notary would have permitted the transaction to go ahead and the Articles of Association amended unless all applicable Indonesian law requirements had been satisfied;

(4) in so far as the allegedly unfulfilled requirement of Indonesian law was the absence of a notice of the 18th September 2018 shareholders' meeting from PT PDP to SOFL (and/or absence of newspaper advertisements of that meeting), these are all failures on the part of PT PDP, not SOFL. Accordingly, they do not constitute conduct of the affairs of SOFL and cannot therefore be relevant to Mr. Lie's complaint under section 184I (and there is in any event no pleading of unfair prejudice based on the absence of such notice to SOFL); and

(5) it is relevant to consider what Mr. Lie's case is as to the effect of the alleged failure to comply with Indonesian law requirements. If it was legally effective, then the issue is simply whether SOFL's non-participation in it was unfairly prejudicial conduct of the affairs of SOFL and the question of compliance with Indonesian law requirements is a red herring. On the other hand, if the 2018 Rights Issue was legally ineffective (i.e. null and void), then SOFL cannot have been prejudiced by it or lack of participation in it.

ISSUE 5: THE 2019 DISPOSITION

The Claimant's Submissions

[130] On or about 16th September 2019 (the day before the CMC), the 2019 Disposition took place by virtue of which SOFL disposed of its remaining 1,736,842 shares in PT PDP to PT PDP itself. Mr. Lie claims that the 2019 Disposition was in breach of section 175 of the Act and a final act of unlawful appropriation which was unfairly prejudicial to Mr. Lie. He alleges that Mr. Ng's failure to supply requested information on the transaction (both in response to Conyers 28th January 2020 letter and the 2019 Disposition RFI) was also unfair.

[131] In respect of Mr. Ng's failure to provide particulars on the 2019 Disposition, Mr. Lie relies upon the relevant chronology. On 28th January 2020, the day after Mr. Lie discovered the 2019 Disposition,

Messrs Conyers immediately wrote to Messrs Withers with an urgent request to explain the 2019 Disposition and in particular to (1) identify precisely when and by what means the 2019 Disposition had taken place; (2) confirm that by the reason of the 2019 Disposition SOFL's shareholding in PT PDP was now reduced to 0%; (3) explain the reason for the 2019 Disposition, clarifying in particular whether it was Mr. Ng's case that the 2019 Disposition also constituted a repatriation of assets to Indonesia pursuant to the Indonesian Tax Amnesty Programme; (4) state what consideration (if any) SOFL had received in respect of the 2019 Disposition; (5) explain whether Mr. Ng accepted that Section 175 of the Act applied to the 2019 Disposition; and if yes (6) explain how the statutory requirements had been complied with. By letter dated 30th January 2020, Messrs Withers declined to provide any answers and suggested that Mr. Achmad be approached directly for information. This led to Mr. Lie's formal 2019 Disposition RFI dated 10th February 2020. Mr. Ng declined to answer that RFI (on the basis that the 2019 Disposition was not a '*matter which was in dispute in the proceedings*') and also did not address the 2019 Disposition in any meaningful detail in his Re-Amended Defence filed on 19th June 2020.

[132] Mr. Hardwick submits that Messrs Withers' suggestion that Mr. Lie should write to Mr. Achmad for details on the 2019 Disposition was purely obstructive given SOFL's lack of engagement in the proceedings. It was put to Mr. Ng in cross-examination that Messrs Conyers had written 18 letters to SOFL in this matter since 23rd July 2018 and that all went unanswered. Mr. Ng claimed not to know about this. Put to him that Mr. Achmad was just a nominee, Mr. Ng's response was to demand the production of a '*nominee agreement*'.

[133] Mr. Hardwick submits that the Court should reject Mr. Ng's evidence in his witness statement that the 2019 Disposition '*was a commercial decision taken by the board of SOFL, for which I had no knowledge or input*'. Mr. Hardwick points in particular to the passage in cross-examination on this point in which Ng maintained that he knew nothing about this 2019 Disposition (*Q. You cannot really tell this Court, Mr. Ng, that you still know nothing about this? A. I can tell you that because that is exactly how it is*). Mr. Hardwick identifies this passage as another '*red flag*' and claims that Mr. Ng's evidence in this respect was entirely incredible: the 2019 Disposition was a key new issue in this case which came to particular prominence with the re-amendments in June 2020. If there were any truth in the claim that Mr. Achmad were a real director, any litigant in Mr. Ng's position

would have taken urgent steps to attempt to ascertain what had happened. The fact that Mr. Ng claims that he did not even attempt to, reveals again the obvious truth that following the 2017 Disposition and the 2018 Rights Issue this was the final act by which Mr. Ng eliminated any remaining value in Mr. Lie's 45% SOFL shareholding.

The First Defendant's Submissions

[134] Mr. Choo-Choy submits that there is '*little evidence in relation to this transaction, save that it happened*'. He observes that Mr. Lie's only pleaded complaint in this regard – beyond the general assertion of unfair prejudice – is that the transfer to PT PDP '*amounted to a further unlawful appropriation of the Claimant's assets by the Majority*'. He contends, however, that the transferred shares were not Mr. Lie's property: they were the property of SOFL, subject to the powers of disposition of SOFL's board of directors.

[135] He contends that Mr. Achmad is not a witness in these proceedings and in the absence of evidence to the contrary, it is '*to be presumed that, as sole director of SOFL, he must have approved of the transfer of shares to PT PDP and must have been satisfied that it was appropriate to do so*', and that it is for Mr. Lie to prove otherwise.

[136] Mr. Choo-Choy admits that the 2019 Disposition was in technical breach of section 175 of the Act. However, he contends that the mere absence of notification to or authority from Mr. Lie is not a ground of invalidity of the transaction nor of unfair prejudice.

[137] He concludes that given the lack of evidence surrounding the transaction, the allegation of unfair prejudice cannot be made out. He adds that if the allegation were made out, it can only be with respect to those 1,736,842 shares of PT PDP.

Claimant's adverse inferences submission

[138] Mr. Hardwick challenges the claim '*that it is to be presumed'* that Mr. Achmad approved the transfer and was satisfied that the same was appropriate. He submits that there is no basis for any such

presumption. He points out that the rationale, legality and fairness of the 2019 Disposition has been in issue since 28th January 2020 and that Mr. Ng had every opportunity to adduce evidence, including from Mr. Achmad, regarding the transaction.

[139] Further, Mr. Hardwick relies on the well-established decision of the English Court of Appeal in **Wisniewski v Central Manchester Health Authority**[23] which established that in certain circumstances '*a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action*', provided that there is '*a case to answer on that issue*'.

[140] Mr. Hardwick submits that in this case there is the clearest '*case to answer*' in respect of the 2019 Disposition and the unfair prejudice thereby caused to Mr. Lie: there is compelling evidence that, following the 2017 Disposition and the 2018 Rights Issue, it was the final act of asset appropriation that has left Mr. Lie as the 45.85% owner of a shell company with no assets. In Mr. Hardwick's submission, if Mr. Achmad was satisfied that the 2019 Disposition was '*appropriate*' Mr. Ng could and should have called Mr. Achmad to supply evidence to that effect. He submits that in the unexplained absence of Mr. Achmad (coupled with a complete failure to disclose any relevant documents) the Court can and should draw the adverse inference that, on the contrary, there was nothing '*commercial*' or '*appropriate*' about the 2019 Disposition at all.

ISSUE 6: THE PALM SHELLS ALLEGATION

The Claimant's Submissions

[141] Mr. Hardwick submits that the Palm Shells Allegation is a serious allegation of theft and dishonesty which has never been properly particularised in accordance with the well-known requirement that a party alleging dishonesty must clearly plead the facts, matters, and circumstances relied on to show dishonesty (see e.g. **Three Rivers District Council v The Governor et al No. 3**[24] at [51-53] and [183-190]). He submits further that the new iteration of this allegation at trial, namely the

[23] [1998] PIQR P324.
[24] [2003] 2 AC 1.

challenges to entries in the Permata Statements, is an opportunistic and unpleaded challenge which is not properly in issue given the Court's clear ruling on Mr. Ng's last minute Amendment Application (which has not been appealed).

The procedural chronology of the Palms Shells Allegation

[142] In his written submissions, Mr. Hardwick recounts the procedural chronology in relation to the Palm Shells Allegation and the various requests for further information and specific disclosure in respect of the same which he submits were never adequately addressed. In particular he submits that:

(1) Mr. Ng failed to adequately answer Mr. Lie's June 2019 RFI which required him to identify the sale of palm fruit shells relied upon for the years 2000 to 2015 and to provide particulars of all facts and matters relied upon. Mr. Ng's August 2019 RFI Response stated simply that Mr. Lie '*knows exactly which palm fruit shells are being referred to*' and claimed that the palm fruit shells '*were taken from PT PEU/ PT MMMA and neither they nor their proceeds were ever accounted for*';

(2) following this entirely inadequate response, Mr. Lie filed the RFI Application applying for an order that Mr. Ng provide proper particulars of this allegation. In response to this application, Mr. Ng provided 37 pages of spreadsheets concerning sales of palm fruit shells sales for the years 2013 to 2015. However, this omitted to provide any sales information for the period 2000 to 2012 and in any event nothing in this document shed any light on the basis of the misappropriation case against him. When taken to these spreadsheets in cross-examination, Mr. Ng claimed that '*internal accounting people*' sought to reconcile those figures with '*the money that was paid*'. However, Mr. Hardwick observes that (1) the '*internal accounting*' material has never been disclosed in these proceedings (2) none of the '*accounting people*' gave evidence and (3) none of this was addressed in Mr. Ng's witness statement, leaving the alleged failure to account entirely unexplained;

(3) Mr. Lie's RFI Application was heard on 9th October 2019. In the RFI Judgment, Farara J (1) agreed to make an order for further information in respect of the '*wholly unparticularised*'

'*allegation of dishonesty*'; but (2) declined to make an order for further information in respect of shell sales for the period 2000 – 2012, reasoning that this would *'either be cured during discovery or may not be relied upon as a basis of this pleaded allegation of dishonesty'*. In fact, this absence of evidence never was '*cured*' by standard disclosure, or otherwise;

(4) in Mr. Ng's 1st November 2019 RFI Response, he stated (again) that '*the proceeds of sale of those shells were not recorded in the accounts of PT PEU and PT MMMA*'. This prompted a CPR 28.16 request from Mr. Lie (by Messrs Conyers' letter of 6th November 2019) requesting copies of the accounts of PT PEU and PT MMMA mentioned by Mr. Ng. No response was received. Asked about these accounts in cross-examination, Mr. Ng's entirely unsatisfactory explanation for failing to produce the same was that '*the money didn't go into any of the accounts, that is why it wasn't provided*' and '*how can we prove something that doesn't have anything deposited into that account*';

(5) Mr. Ng produced his List of Documents dated 6th December 2019. Under the heading '*Sale of Palm Fruit Shells*' Mr. Ng disclosed just 4 documents. Again, he did not disclose a single accounting document for PT PEU and PT MMMA claiming that '*It is actually company information. It would be a violation for me to disclose something that is not related to the, what do you call it, to the subject or to the topic*';

(6) it was in these circumstances that on 11th March 2020, Mr. Lie applied for specific disclosure of, *inter alia*, '*schedules detailing sale of palm fruit shells for the years 2000 – 2012*'. In the Specific Disclosure Judgment (handed down on 29th July 2020), this Court found that *'To the extent that NMH desires to persist with his allegations that SL sold palm fruit shells and failed to account for the proceeds, he will have to produce relevant documents. I agree with the Claimant that the one-page list of information disclosed by NMH in this category does not provide adequate details. If this is all NMH has to show by way of relevant documents for this part of his case, then it is at serious risk of failure.'* In respect of Mr. Ng' submission that the documents are difficult to access, this Court held *'These submissions find no sympathy with me. This part of the matter is his claim. It is his responsibility both to particularize it (so that his opponent can know what the case is he has to answer) and to lay the direct*

evidence concerning it fairly and fully on the table. It does not sit well for a claimant to bring a claim and then complain that it would cost him too much to have proper conduct of it or that he cannot get the papers because someone else controls them. He should have looked into such matters before bringing the claim';

(7) on 10th August 2020, Mr. Ng produced a Supplemental List of Documents pursuant to that judgment identifying 4 additional documents. However no further relevant documents were produced in relation to this Palm Shells Allegation;

(8) in spite of Mr. Ng's failure to produce any new documents in respect of the Palm Shells Allegation, one month before trial Mr. Ng issued the Amendment Application, seeking (1) to challenge the 7 Payments in the Permata Account and (2) an account '*for each of the transactions in and out of the Permata Account*' (notwithstanding that there were 431 transactions in respect of 23 payees over a 29 month period). The Amendment Application was dismissed by this Court on 16th September 2020;

(9) notwithstanding that the Amendment Application was dismissed, the Permata Account continued to be the subject of sustained challenge by Mr. Choo-Choy in his written submissions (both opening and closing) and cross-examination of Mr. Lie.

Mr. Ng's case

[143] Mr. Hardwick submits that even after trial the Palm Shells Allegation remains opaque in the extreme and contends that:

(1) it is still unclear whether Mr. Ng pursues any case in respect of the years 2000 to 2008 and 2010 to 2012. There is no indication in respect of the quantum of the claim in relation to the years 2009 and 2013 to 2015;

(2) as to the nature of the claim, Mr. Ng's written opening and closing submissions claim that '*there is no record of the sale proceeds in their records, nor (so far as he is aware) were any*

sale proceeds received by PT PEU (or PT MMMA). This is corroborated by Mr. Sembiring'. Yet Mr. Sembiring, in his remarkably short and uninformative 11 line witness statement, asserted merely that he had '*found that there was a difference in the sales of about 49,000,000 kg approximately IRD 27bn that was not recorded in the books of PT PEU*' and '*was also not deposited in a PT PEU Bank account (Bank Mandiri)*';

(3) moreover (1) the 7 delivery orders exhibited to Mr. Sembiring's witness statement comprise a total of only 1.8 million kg of shells, not 49 million kg; (2) the '*books of PT PEU*' mentioned by Mr. Sembiring were not exhibited and have not been disclosed by Mr. Ng; and (3) Mr. Ng never disclosed (and Mr. Sembiring did not exhibit) PT PEU's bank statements. In fact, Mr. Ng's document 85 (described as a '*List of Transactions of the sale of palm fruit shells from 2013 to 2015*') reveals (in the final right-hand column under 'Bank') that in respect of every one of these sales of palm fruit shells, payments were made into PT PEU's Bank Mandiri Account.

Permata Account: palm shell credits

[144] Mr. Hardwick's closing written submissions identify 13 deposits of the sale proceeds of palm shells in to the Permata Account during the period 11th July 2013 to 23rd February 2015 in the total sum of IDR 2.864bn (cUSD 220,595). On this basis he contends that Mr. Lie's witness evidence that there were '*repeated entries for the proceeds of palm fruit shells*' into this Permata Account was clearly correct – and that this evidence of the deposit of proceeds of palm fruit shells should have been the end of the analysis of this bank account.

[145] Furthermore, he submits that it is clear from Mr. Ng's own evidence that he knew of, and was instrumental in establishing, Mr. Lie's Power of Attorney in respect of the Permata Account: paragraph 52 of Mr. Ng's witness statement explained that he had granted Mr. Lie a Power of Attorney to operate the bank account in Medan because '*at that point in time, it made business sense, as I was based in Jakarta whilst [Mr. Lie] was based in Medan*'.

[146] However, in examination-in-chief, Mr. Ng raised an important change that he wished to make to paragraph 52 of his witness statement: instead of that paragraph reading that '*Over time, however, I had forgotten about the existence of this bank account until late 2015*' he stated that it should read '*I was unaware of the existence of the bank account until late 2015*' – explaining that *'actually I didn't know about the bank account, not that I had forgotten'*.

[147] Mr. Hardwick submits that Mr. Ng's new claim that he was '*unaware of*' and '*didn't know about*' the Permata Bank account until 2015 was both obviously wrong and untruthful. Mr. Ng had signed the account opening form on 16th November 2005 and clearly was aware of the '*existence of the bank account*' back in 2005 – having explained precisely why the bank account was opened in his own witness statement. His evidence on this point at trial was nonsensical (and a further '*red flag*' in respect of Mr. Ng's lack of credibility as a witness).

The Permata Account challenge

[148] Mr. Hardwick submits that the probability is that in view of the obvious weakness of the Palm Shells Allegation, Mr. Ng's focus changed to an opportunistic and wide-ranging attack on the evidence (namely the Permata Account) submitted by Mr. Lie to demonstrate palm shell deposit payments.

[149] Mr. Hardwick's primary position is that the Permata Account challenge should be rejected *in limine,* and that the Court should not be drawn into ruling on the 7 Payments (or the expanded 10 payments challenged in Mr Choo Choy's written opening) (together '**the Payments**'), for the very same reason that the Amendment Application was rejected. He observes that:

(1) first, the challenge to the Payments was an entirely new line of attack to the inadequate Palm Shells Allegation, focusing not on the PT PEU or PT MMMA's accounts but on the legitimacy of certain cash withdrawals which had never been identified in the extensive pleadings;

(2) second, the challenge arose out of the Permata Statements disclosed on 6th December 2019, a full 6 months before the latest round of pleadings in June 2020;

(3) third, as a result of the absence of any pleaded challenge, none of the Payments were the subject of disclosure; and

(4) fourth, for the same reason there was no witness evidence in respect of the Payment, raising a particularly acute problem in relation to Mr. Lie's wife (who did not give evidence). Mr. Hardwick says that it is intolerable (and wrong) that allegations of theft should be raised and adjudicated upon in the absence of an alleged principal wrongdoer.

[150] Nevertheless, Mr. Hardwick addresses the substance of the Permata Account challenge and makes the following points:

(1) Mr. Lie's evidence in cross-examination as to his wife's '*top up*' payments into the Permata Account was entirely borne out by the evidence. Mr. Hardwick identifies the 8 instances between 17th June 2014 and 24th July 2014 when Mr. Lie's wife made deposits in to the Permata Account: on every occasion the credit balance in the Permata Account was low or very low (ranging between USD 2,200 and USD 13,500 – by contrast with the healthy balance, usually in excess of USD 160,000, through 2013). Mr. Hardwick identifies this as another '*green light*' indication as to the reliability/truth of Mr. Lie's evidence;

(2) there are 9 debits from the Permata Account to Mr. Ng himself between 28th June 2013 and 11th February 2014, totalling IDR 4,397,350,000 (c USD 350,000). This is very similar in quantum to the 10 payments to Mr. Lie and his wife (c USD 330,000) which are challenged by Mr. Ng. It is extraordinary that Mr. Ng levels a very serious allegation of that theft against Mr. Lie and his wife in circumstances where a very similar amount was received by Mr. Ng from the same Permata Account. When faced in cross-examination with the multiple deposits he received from the Permata Account, Mr. Ng responded with a number of further unpleaded allegations of identity theft, money laundering and additional cash withdrawals, including the claim that an IDR 1.1bn credit to the Danamon Bank in Mr. Ng's name on 16th July 2017 was a sum which Mr. Lie had asked Mr. Ng to withdraw and give to him. Mr. Hardwick (1) observes that although some 2 days were spent in evidence exploring the IDR

2bn allegedly stolen by Mr. Lie in relation to the palm mill, this alleged theft of a further IDR 1.1bn did not even feature on Mr. Ng's list of challenged payments; and (2) contends that this is another critical warning sign that Mr. Ng's evidence simply cannot be trusted (which he identifies as a further '*amber warning*');

(3) as to the 7 Payments, three of these payments were in respect of sums paid to Mr. Rangkuti by Mr. Lie's wife. These sums were for various services provided by Mr. Rangkuti in respect of PT APMR and PT PEU. Payment receipts which referenced the services provided were disclosed by Mr. Lie. In respect of the other 4 payments to Mr. Lie's wife, these totalled IDR 2,943,620,000 which Mr. Hardwick notes is a very close match for Mr. Lie's wife's 8 top up payments into the account totalling IDR 2,893,600,000 (a discrepancy of only IDR 50,020,000 / USD 3,587) – and a further '*green light*';

(4) Mr. Lie's evidence at trial in respect of the social and charitable payments from the Permata Account was also entirely borne out by 8 identified debits to that account. Here again, answers given by Mr. Lie in cross-examination on key disputed material were fully backed by contemporaneous documentary material – providing another key signpost as to the honesty of Mr. Lie (identified by Mr. Hardwick as a further '*green light*'), and making it abundantly clear that the Permata Account was anything but a nefarious vehicle for criminal money laundering;

(5) in respect of Mr. Ng's additional challenge (over and above the 7 Payments) to the sum of IDR 306m paid to '*Elvi*', Mr. Lie's evidence was that (1) she was a psychologist retained by Mr. Ng and his second wife and Madam Karlinah; and (2) the payment was for her professional services, attending Jakarta 7 to 8 times for a week to 10 days each time for which she was paid IDR 306m (c. USD 26,000). Mr. Ng claimed that '*Elvi*' was the daughter of the therapist and that she was '*probably*' Mr. Lie's mistress. This allegation (which was entirely untrue) was never put to Mr. Lie in cross-examination (and was equally intolerable as an allegation never raised with Ms Elvi / her daughter – and another '*amber warning*');

(6) lastly, the very fact that Mr. Lie was content to disclose the Permata Statements in unredacted form (another '*green light*') is a yet further indication that this account is just as Mr. Lie claimed it to be: a modest and somewhat underfunded bank account in Medan into which palm shell proceeds were paid from time to time and which was used for various *ad hoc* community based payments and permit payments.

The First Defendant's Submissions

[151] Mr. Choo-Choy submits that there is no opacity in Mr. Ng's case in this connection. It is common ground that palm fruit shells were a by-product of the production of palm oil by PT PEU and PT MMMA and that shells were sold to third parties who could use it as fuel and/or for road hardening. It is also common ground that those sales occurred at least during the years 2013 to 2015, but there is an issue as to whether such sales occurred before 2013. Mr. Ng's evidence is that they occurred during the period 2000 to 2015, whereas Mr. Lie's evidence is that they only occurred between 2013 and 2015. There is however no explanation from Mr. Lie as to why such sales would only have started in 2013, and Mr. Ng has provided a list of transactions (dated 7th December 2015 and signed by PT PEU's plant manager at the Kalianta Dua plantation) showing deliveries and sales of palm fruit shells between 2009 and 2015. During his oral evidence, Mr. Lie agreed that he had no reason to believe that this list was inaccurate, appearing therefore to concede that sales of palm fruit shells did occur prior to 2013.

[152] Focusing on those sales during the period 2013 to 2015, it is clear from the disclosed delivery orders, which were signed by Mr. Lie, that Mr. Lie was directly involved in the sales to third parties, which he confirmed during his oral evidence. Mr. Choo-Choy submits that the total value of palm fruit shell sales for that period in respect of the plantations of PT PEU amounted to nearly IDR 27 billion (as summarised in a letter dated 30th May 2017 disclosed by Mr. Ng from an Indonesian law firm, Messrs Luhut Marihot Parulian Pangaribun).

[153] Whilst there is a dispute between the parties as to precisely how much the sales of palm fruit shells generated and how much of it was allegedly diverted by Mr. Lie, there is clear acceptance by Mr. Lie that the proceeds of at least some of those sales were paid into the Permata Account. Mr. Lie's

response to the claim of misappropriation of the proceeds of sales through the Permata Account is that that account and the transactions in it were all known to and approved by Mr. Ng. Consequently, Mr. Choo-Choy submits that there are essentially two main issues in respect of the Palm Shells Allegation: (1) whether the transactions conducted by Mr. Lie from the Permata Account were known to Mr. Ng or otherwise to the Board of Directors of PT PEU, and (2) if they were not, whether certain transactions amounted to misappropriations by Mr. Lie (for his or his wife's benefit or to their order) of the proceeds of sales of palm fruit shells paid into the account.

Mr. Ng's alleged knowledge of the Permata Account transactions

[154] In respect of whether Mr. Ng had knowledge of the transactions, Mr. Choo-Choy submits that the preponderance of evidence suggests that he did not. In particular he submits that:

(1) The fact that the Permata Account was opened in Mr. Ng's name a very long time ago in 2005 does not mean that he had knowledge of the transactions going through it. Mr. Lie accepts that he was given a Power of Attorney over the account from the outset in 2005;

(2) Mr. Ng gave incontrovertible evidence that he did not fill in the account opening form for the Permata Account, on the basis that his birthday is incorrectly stated on the form;

(3) The account statements were sent to Mr. Lie's office in Medan, not to Mr. Ng in Jakarta. The client contact address for the bank was that of Mr. Lie and not Mr. Ng;

(4) Mr. Lie has not adduced any independent evidence to corroborate his assertion that Mr. Ng had knowledge of the detail of the Permata Account transactions and approved of all of those transactions. Apart from the account opening form and Power of Attorney, which do not concern specific transactions, he has not produced any document evidencing instructions from Mr. Ng or communications between him and Mr. Ng in relation to any transaction on the account. In circumstances where the account has been established since 2005, Mr. Choo-Choy submits that it is remarkable that no such documents exist or are

available to Mr. Lie if what he says about Mr. Ng's knowledge of the account and transactions going through it is correct;

(5) Mr. Lie gave a constantly evolving and unreliable account during his oral evidence in an attempt to pin knowledge of the account and underlying transactions on Mr. Ng. First, he suggested that he had sent the account statements to Mr. Ng. When pressed on this, he changed his story by stating that he would give copies to Mr. Ng on his visits to Jakarta every 2 weeks (which does not make sense since the statements were monthly statements). Later on in his evidence, he asserted that he '*sometimes*' made the statements available to PT PEU's auditors;

(6) Mr. Lie's account of the purpose for which the account was to be operated was internally inconsistent (starting by confirming that the account was used for '*the purposes of the business*' of '*PT PEU, but sometimes also for the East Kalimantan companies*' but later agreeing with the Court's characterisation that '*there are expenditures that cannot be officially recorded into PT PEU's account*' and that it was an '*off balance sheet account*');

(7) Mr. Lie's assertion in his trial witness statement that the purpose of the account was for expenditure for the '*non-technical interests of the Business*' led to questions of him in cross-examination as to what he meant by that expression. This resulted in his description of an entire assortment of purposes underlying the numerous transactions on the account, with the overall implication being that he was essentially entitled to operate the account as he saw fit;

(8) The notion that Mr. Ng had knowledge of (1) the diversity of purposes for which transactions were concluded under Mr. Lie's control, and (2) the sheer number of transactions passing through the account (including large numbers of cash in / cash out transactions resembling a money laundering operation), is simply implausible. It is a notion that should not be accepted without proper corroboration, which Mr. Lie has not provided.

Alleged misappropriations by Mr. Lie from the Permata Account

[155] In respect of the second issue as to whether Mr. Lie misappropriated funds from the Permata Account, Mr. Choo-Choy claims that the Permata Statements show a significant number of cash withdrawals the purpose of which is unknown and adding up to a total of approximately IDR 11.5 billion (about USD 775,000 at prevailing exchange rates). More specifically, the statements evidence a significant number of cash withdrawals in favour of Mr. Lie or his wife ('**Juniar Tunggal**') or daughter or to his order. He identifies 8 payments between 20th August 2013 and 18th May 2015 which total IDR 4,581,760,000 (approximately USD 320,000).

[156] Mr. Choo-Choy submits that Mr. Lie has not provided any satisfactory explanation for those payments, which (save in the case of a payment to '*Elvi*' '*FROM MR SOEMARLI*') are all expressed to be for his or his family's personal benefit. He contends that Mr. Lie's suggestion that these were repayments of earlier loans from his wife to PT PEU is utterly implausible given that there would be no need for a highly profitable company such as PT PEU (making profits of hundreds of billions of IDR every year) to borrow a few hundred million IDR from Mr. Lie's wife.

[157] Furthermore, Mr. Lie's suggestion that the alleged loans from his wife to PT PEU were in the nature of '*top up*' payments to increase the account balance does not address the problem of why PT PEU allegedly had to borrow relatively modest amounts from Mr. Lie's wife for the purposes of its business. The explanation on behalf of Mr. Lie that his wife was making the alleged top up payments at a time when she and Mr. Lie had received hefty dividend pay-outs and felt able to lend to PT PEU was not credible at all: it was PT PEU that was the ultimate source of those dividends and it was wholly unlikely that PT PEU would have declared and paid dividends only then to borrow back a small fraction of them from Mr. Lie's wife. Nor did it make any sense for the Permata Account to be topped up as alleged only for cash amounts of the same or larger magnitude to be withdrawn from the account literally on the same day (as they were).

[158] Mr. Choo-Choy therefore invites the Court to conclude that there is no justification at all for these withdrawals from the Permata Account (including the '*Elvi*' payment) and invites the Court to

conclude that Mr. Lie unlawfully misappropriated the sums in question for his and his family's personal benefit.

ISSUE 7: THE SEEDLINGS ALLEGATION

The Claimant's Submissions

[159] Mr. Ng alleges that Mr. Lie purchased uncertified seedlings at a discounted price which resulted in '*poor growth and a poor production yield*' causing losses of approximately IDR 250 billion. Mr. Hardwick submits that this Seedlings Allegation is a hopelessly inadequately particularised allegation of serious negligence. For example, whilst Mr. Ng's Defence and Amended Defence claimed that the '*uncertified seedlings*' were purchased in '*2004-2006*', Mr. Ng's Re-Amended Defence dated 19th June 2020 claimed that the seedlings were in fact purchased in '*2009-2010*'. However, Mr. Ng's witness statement for trial, which was not corrected in examination-in-chief, reverted to the 2004-2006 date range. With respect to the quantum of alleged losses, Mr. Ng's pleaded case refers to losses of '*approximately IDR 250 billion*', while a purported '*breakdown*' of losses provided in response to Mr. Lie's June 2019 RFI includes a total figure of IDR 759 billion (over 3 times the pleaded IDR 250bn figure). Yet further, having never identified the '*uncertified seedlings*' referred to in any version of his defence, Mr. Ng's witness statement challenged the authenticity of 23 PT London Sumatra certificates (the **'23 Certificates'**) without any expert evidence and relying solely on a single letter from an entity called '*Sumatra Bioscience*' dated 17th July 2019 ('**the Bioscience Letter**').

[160] In respect of the unpleaded allegation that the 23 Certificates were counterfeit, Mr. Hardwick submits that no explanation has ever been given as to what precisely the term '*counterfeit*' meant and whether this was different to or additional to the pleaded claim that the seedlings were '*uncertified*'. Equally Mr. Ng has never explained the basis of his authenticity challenge or articulated a claim that (for example) the 23 Certificates had been fraudulently created; or fraudulently altered; or that the signatures had been forged.

[161] Mr. Hardwick observes, moreover, that each of the 23 Certificates identifies the Bhalias Research Station and is signed and stamped by (1) '*Head Seed Production Section*' (either Banda Ardiansyah or Ahmad Faisal); (2) '*Manager BLRS*' (Umi Seriawati or M Kohar); and (3) '*Deputy Head of Research*' (Yayan Mulyana) – and yet none of these individuals was called by Mr. Ng to give evidence.

[162] Mr. Hardwick notes that no expert evidence as to the authenticity of the 23 Certificates was adduced, nor was permission for the same ever sought by Mr. Ng. The Bioscience Letter, signed by one Muhammad Husaini '*Seed Sales Officer*', states that the 23 Certificates were '*never released*' by PT London Sumatra. However, Mr Husaini was not called as a witness and did not give evidence at trial in order to explain this letter. Moreover, the Bioscience Letter does not state that the 23 Certificates were 'counterfeit' – a point which when put to Mr. Ng in cross-examination elicited his response: '*because they haven't had the chance to analyse whether it is counterfeit or not, so that's why definitely they wouldn't say it is counterfeit or not*'.

[163] Mr. Hardwick submits that the hopelessness of the Seedlings Allegation is further underscored by the parallel lawsuit brought in Medan by PT PDP against Mr. Lie on 25th September 2019 ('**the Medan Seedlings Claim**'), which was rejected in its entirety by the Medan District Court (a decision later upheld by the High Court of Medan). In its verdict on 23rd March 2020 the Medan District Court found that Mr. Lie '*has been able to prove his response pleadings*' to the effect that he did not purchase *'fake sprouts'* and that the plantations *'were producing well and had already been profitable'*. Mr. Hardwick also points out that in that case PT PDP had claimed '*total material and immaterial losses*' of IDR3,799,520,197,500 (cUSD 259m) – some 15 times larger than the pleaded US$17m losses in this Claim even though it arises out of the same 23 Certificates (another '*amber warning*'). He submits that the Medan Seedlings Claim was an *in terrorem* claim issued (on 25th September 2019) just a week after the CMC in this Claim (17th September 2019) in a blatant attempt to see off this Claim.

[164] Mr. Hardwick also refers to the evidence of Mr. Saragih, who was the Coordinator of the East Kalimantan plantations. Mr. Saragih's evidence was that at the material time, each of the East Kalimantan plantations had both a Plantation Manager (with a Head Assistant) and a Nursery

Assistant, who was in charge of receiving, examining and selecting seedlings. Further, every delivery of seedlings came in wrapped boxes with labels containing information as to origin, amount, type and delivery date. His evidence was that every seedling accepted during that period had a BLRS label which stood for 'Bah Lias Research Station' whilst fake seedlings would have had no such label. Mr. Saragih's evidence was that for the 2009-2010 period approximately 69,000 seedlings were planted and grew perfectly such that in 2015 these seedlings had produced a '*great output*'. Mr. Hardwick submits that there is clear contemporaneous evidence of this in the form of the '*Recapitulation of Budget and Realized Production of the East Kalimantan Plantations until 31 December 2015*'. He notes that while Mr. Ng protested that in respect of the origin of this document '*I don't think this table was provided by me or by myself*' Mr. Ng confirmed that he had no rival production figures.

[165] Mr. Lie refutes Mr. Ng's claim that these allegedly '*uncertified seedlings*' will continue to cause future losses. Mr. Lie's evidence is that future production depends upon the ongoing care and maintenance of the plantations, which is the responsibility of the current management of the East Kalimantan Companies. Mr. Lie relies on contemporaneous documentary evidence which he says reveals that there are current problems with the management and maintenance of the plantations. In particular, Mr. Robert Saragih wrote a letter to Mr. Lie dated 7th November 2017 which detailed neglect and delays in harvesting, weeding and tending. Moreover, Mr. Lie refutes Mr. Ng's suggestion that this letter was written to give Mr. Lie evidence for these proceedings. Mr. Hardwick notes that the letter was sent 10 months prior to the commencement of the Claim, and in any event it was no part of Mr. Lie's case that Mr. Ng had mismanaged the East Kalimantan plantations.

[166] In fact, when taken to a particular photograph that Mr. Saragih had explained had been taken by him in the East Kalimantan plantations in August 2017, Mr. Ng stated categorically that the tree was '*not ours*'. Mr. Hardwick points out (1) that the East Kalimantan plantations had c25,000 ha of palm trees at the time and that there was no reasoned basis for this claim (which was reiterated in answer to further questions from the Court) and (2) submits that this once again demonstrated Mr. Ng's propensity to give categorical answers without any evidential basis (another '*amber warning*').

[167] On the question of quantum, Mr. Hardwick submits that the sole document relied on by Mr. Ng is a '*Simulation of Losses*' first provided by Mr. Ng in September 2019 in response to Mr. Lie's RFI yet this simulation: (1) does not mention the years to which it relates; (2) gives no indication of who created it, when and how; (3) does not explain what is meant by '*uncertified*' or '*counterfeit*' seedlings; and (4) is based on 4 key assumptions (as to productivity; Crude Palm Oil yield, Palm Kernel yield and profit margin), none of which was supported by expert evidence adduced at trial.

[168] Mr. Hardwick further submits that insofar as Mr. Ng seeks to rely on the letter dated 25th November 2019 from Dr. Suroso Rahutomo of the Indonesian Oil Palm Research Institute in support of the productivity assumption (1) Mr. Ng does not have permission to adduce expert evidence from Dr. Suroso; and in any event the letter (2) does not explain the terms '*illegitimate*' and '*legitimate*' '*plant material*'; (3) makes no reference to the 23 Certificates or any BMML seedlings; and (4) does not address the other 3 assumptions.

[169] Mr. Hardwick concludes that the Seedlings Allegation is yet further evidence of the entirely improper approach to this litigation taken by Mr. Ng in an attempt to apply improper pressure on Mr. Lie. He notes that in any event it is an allegation (stretching back over 10 years) which has absolutely no connection (let alone the requisite '*necessary*' connection) with the relief claimed by Mr. Lie in these proceedings.

The First Defendant's Submissions

[170] Mr. Choo-Choy submits that in respect of the Seedlings Allegation there are two main issues: (1) whether there is evidence of any negligence on Mr. Lie's part in respect of the purchase of uncertified (or incorrectly certified) seedlings, and (2) whether, as alleged by Mr. Ng, the use of such seedlings has resulted and will continue to result in poor growth and poor production yield for the next 25 years and ultimately cause substantial losses estimated by Mr. Ng at approximately IDR 759 billion.

[171] As to question (2), Mr. Choo-Choy accepts that, given the particular focus of these proceedings on the elements of section 184I and having regard to the limited evidence before the Court (and

specifically in the absence of expert evidence on loss quantification), it is not realistic to expect the Court to make any findings on the merits as to loss. However, he submits that the Court can reach a conclusion on question (1) on the basis of the evidence before it and if it were to find that Mr. Lie had been at fault, it would be open to the Court to take such fault into account when determining how to exercise its discretion to grant relief under section 184I.

[172] Mr. Choo-Choy submits that the key evidence which bears on question (1) can be summarised in 4 points:

(1) First, Mr. Lie accepted in oral evidence that he purchased seedlings at a discounted price. This acceptance is consistent with the fact that Mr. Lie's defence to the Medan Seedlings Claim did not deny that Mr. Lie had purchased seedlings for a heavily discounted average price of IDR 4,350 instead of IDR 11,272;

(2) Second, the absence of valid certification has been confirmed by Lonsum and cannot really be gainsaid. During his oral submissions, Mr. Choo-Choy stressed that the Bioscience Letter clearly identified the 23 certificates allegedly originating from Lonsum and confirmed that those certificates had not been released (i.e. produced) by Lonsum. He further pointed out, by reference to the sample certificates reviewed during Mr. Ng's oral evidence, that a genuine certificate contained the words '*This certificate certifies that*' across the middle of the certificate, whereas a counterfeit certificate did not contain those words. This pattern was observable in relation to all certificates confirmed in the Bioscience Letter as not having been issued by Lonsum. This chronic textual discrepancy between genuine certificates and the counterfeit certificates reinforced the confirmation contained in the Bioscience Letter;

(3) Third, the Indonesian Oil Palm Research Institute's formal confirmation that the productivity of uncertified (illegitimate) seedlings is only about 50% that of certified (legitimate) seedlings is not contradicted before the Court; and

(4) Fourth, whilst Mr. Lie has maintained in the face of the above that the seedlings he purchased '*were very good*', the hard fact remains that the profitability of the East

Kalimantan Companies, which all used the seedlings purchased by Mr. Lie in 2009 on behalf of PT BMML, has remained very poor (loss-making) over subsequent years, as evidenced by the minutes of general shareholders' meetings of the East Kalimantan companies on 9th April 2012, 16th April 2013, and 15th April 2014.

[173] Mr. Choo-Choy contends that in light of the above, the Court can and should find (1) that it was negligent of Mr. Lie to have purchased seedlings for a heavily discounted price, which would obviously have been more likely to be of worse quality; (2) that it is more likely than not that the poor quality of the seedlings has been the cause of the East Kalimantan Companies' poor financial performance for many years; and (3) that such harmful conduct can be taken into account when determining what relief, if any, should be granted in Mr. Lie's favour.

[174] Mr. Choo-Choy submits that the judgments in the Medan Seedlings Claim, which rejected PT PDP's claims of negligence against Mr. Lie, are not binding on Mr. Ng or this Court. He submits too that, irrespective of the strict position as a matter of Indonesian law, if the Court were to find that Mr. Lie was responsible for the purchase of uncertified seedlings and that this has caused and/or is likely to cause substantial loss to PT BMML, then this is a matter which the Court would be entitled to put in the balance, together with all other discretionary factors, when determining whether to grant Mr. Lie any relief under section 184I.

Claimant's Responsive submissions

[175] Mr. Hardwick responds to the 4 points as follows:

(1) first, the fact that Mr. Lie was (in respect of the Indonesian Operating Companies' 25,000 ha of plantation land in East Kalimantan) in a position to take advantage of some sort of discount on the seedlings is entirely unremarkable and certainly no evidence of negligence;

(2) second, it is wrong to claim that Lonsum have confirmed the absence of valid certification: neither Lonsum nor the author of the Bioscience Letter (Mr. Husaini) nor any of the 6 counter signatories to the 23 Certificates have given evidence;

(3) third, the Indonesian Oil Palm Research Institute has not given expert or any evidence (and in event their reference to '*uncertified*' seedlings begs the very factual question in issue); and

(4) fourth, the question of the profitability of the East Kalimantan Companies (which engages the whole complex composite picture of sales, costs, financing) is something quite different to the pleaded allegations of '*poor growth and poor production yield*' of the seedlings, as to which Mr. Ng's evidence drew a complete blank.

ISSUE 8: THE IDR 2BN ALLEGATION

The Claimant's Submissions

[176] Mr. Ng claims that on 4th May 2015, Mr. Lie wrongfully withdrew the sum of IDR 2bn (approximately USD 150,000) from PT APMR's bank account and that this sum was misappropriated by Mr. Lie for his own benefit. Mr. Lie's case is that his withdrawal of the IDR 2 billion (1) was used in connection with PT APMR's application for a palm oil construction permit, specifically for the payment to the consultant Mr. Rangkuti for his services in assisting with the acquisition of the permit; and (2) was recorded in the financial books and records of PT APMR (as accepted by its board of directors).

[177] Mr. Lie's position is that on 5th March 2015, he engaged Mr. Rangkuti to act as a consultant in obtaining PT APMR's construction permit in Panajam Paser Utara Regency, East Kalimantan Provence. Mr. Rangkuti's fee, as stated in the APMR Work Order Agreement dated 5th March 2015, was IDR 2bn. On 4th May 2015, Mr. Lie withdrew this amount from the PT APMR bank account for the purpose of paying Mr. Rangkuti. This expenditure was recorded in PT APMR's financial records and in addition Mr. Rangkuti signed a payment receipt on 6th May 2015, having been paid in cash in Singaporean dollars (as requested). Mr. Rangkuti was successful in obtaining the construction permit for PT APMR: the permit was granted on 28th January 2016.

[178] Mr. Hardwick submits that Mr. Ng's theft case is entirely implausible: an allegation of an elaborate conspiracy in which Mr. Lie stole the IDR 2bn and thereafter set about trying to create a story

around the event by producing false documents. To the contrary, Mr. Hardwick submits that the contemporaneous documents, as well as the evidence elicited at trial, points firmly in support of Mr. Lie's version of events being more plausible. He makes 4 main points:

[179] First, specific examples emerged at trial of PT APMR's previous engagements of Mr. Rangkuti in respect of similar services. In response to a belated request (during cross examination) for Mr. Rangkuti to produce further work orders, on 13th October 2020 Mr. Rangkuti produced 4 additional work order agreements dated 11th March 2014, 19th November 2013, 12th April 2013 and 25th October 2012. The work orders dated 11th March 2014 and 19th November 2013 were both supported by payment receipts to Mr. Rangkuti, which had been separately disclosed by Mr. Lie on 2nd October 2020 in response to Mr. Ng's Permata Account allegation (and the Permata Account records the same payments). Further, in respect of the 12th April 2013 work order, it was Mr. Rangkuti's evidence that Mr. Ng had himself been involved in payment of the agreed IDR 3 billion as well as an additional IDR 200m (following consultation with Mr. Lie who was in Tokyo at the time). Mr. Lie corroborated this version of events in his evidence. Mr. Ng, however, denied this version of events, taking the position that Mr. Rangkuti's and Mr. Lie's evidence on the work orders were false.

[180] Second, Mr. Lie's evidence as to the palm oil construction permit is supported by (1) the fact that prior to 2015 only PT MMMA had a mill (to which PT BMML and PT SANR had access but PT APMR did not) such that the acquisition of a permit to construct a palm oil mill for PT APMR was important and likely to bring in substantial additional profit for PT APMR; and (2) the evidence of Mr. Saragih (at the time a senior Coordinator at PT APMR and the applicant for the palm oil permit), who explained that whilst he had secured the permit for the PT MMMA mill, that had been prior to the introduction of an '*integrated licensing*' system. By March 2015, the process had become more complex and Mr. Lie therefore retained the services of Mr. Rangkuti for the purposes of procuring the permit. Mr. Saragih's evidence was that Mr. Rangkuti assisted him in dealing with the Indonesian government and providing legal advice.

[181] Third, the allegation that Mr. Lie stole this IDR 2 billion and that (in the words of Mr. Ng) he and Mr. Rangkuti set out about '*trying to wrap a story around the event by making up all these false documents to make it look real*' is entirely implausible on account of the following additional factors:

(1) Mr. Ng has never attempted to articulate any sort of motive for Mr. Lie's theft of IDR 2bn (approximately USD 150,000). The Court has seen the size of dividends received by Mr. Lie in 2013 (USD 13m) and 2014 (USD 6m). These huge profit sums dwarf this USD 150,000 – and many times over. In fact, when asked about financial need in re-examination Mr. Lie looked non-plussed;

(2) the allegation appears to be that Mr. Rangkuti, Mr. Lie and Mr. Saragih (and possibly others) conspired by way of the production of '*false documents*', to create a paper trail that concealed the reality that Mr. Lie had stolen the IDR2bn. However at least 4 (possibly 5) other people are named in the documents. The question, as ever with such a widely drawn conspiracy, is <u>why</u> would any of Mr. Rangkuti and/or 'Linda' (the PT APMR cashier) and/or Mr. Johni Cuaca (the Finance Manager) and/or Ma Fong Yang (Linda's supervisor) and/or Mr. Saragih conspire in this way – risking their careers for the (modest) financial gain of Mr. Lie. Mr. Ng has never supplied any answer;

(3) there is an even more fundamental question: what need of this elaborate conspiracy at all? On Mr. Ng's case Mr. Lie and his wife plundered the Permata Account at will from 2013 to 2015 – with regular and repeated thefts of IDR 400-500m and IDR 1bn. Why then would Mr. Lie go to the trouble of this grand conspiracy and paper trail to steal just IDR2bn on this occasion? Why not simply make 2 more IDR 1bn cash withdrawals (without the involvement of others or any false documentation) from the Permata Account?

(4) the theft case is also flatly inconsistent with any sort of bribery allegation against Mr. Rangkuti. In a piece of evidential gymnastics that makes little sense of the line of cross-examination pursued at trial against Mr. Rangkuti, Mr. Ng's case is that: (1) no sum of money was ever paid or going to be paid Mr. Rangkuti (whether for the purpose of a

consultancy fee or for the bribing of officials to '*accelerate*' the acquisition of a palm oil mill construction permit); but on the contrary (2) the IDR 2bn sum was simply stolen by Mr. Lie;

(5) the same point arises in relation to the detailed line of questioning of Mr. Rangkuti as to when, where, from whom and in what form the IDR2bn fee was paid. Again in a theft allegation which is a complete mismatch for this line of questioning (and which requires the Court to reject in full Mr. Rangkuti's evidence as to the payment of the IDR 2bn in Singapore dollars in a chocolate brown envelope received in PT PEU's office from Mr. Lie), it was ultimately put to Mr. Rangkuti that he did not in fact receive any cash and was '*giving this evidence because you want to give an explanation for Mr. Lie's benefit*';

(6) the reality is that there is a straightforward explanation for the IDR 2bn payment which is corroborated by all the contemporaneous documents; fits with the chronology; is consistent with the findings of the Indonesian police; and is consistent with the evidence of each of Mr. Lie, Mr. Rangkuti and Mr. Saragih: the money was a fee for Mr. Rangkuti's consultancy services in securing PT APMR's palm oil mill construction permit.

[182] Fourth, and in respect of the question as to why this allegation was raised and pursued with such vigour both in 2017 and at trial, Mr. Hardwick submits that the overwhelming probability is that the IDR 2bn allegation was an act of direct retaliation taken by Mr. Ng in response to Mr. Lie's police filing in April 2017 in respect of his unpaid dividend for the Financial Year 2015. For on 13th June 2017, two months after the dividend police report was filed, Mr. Ng caused his agent to file a complaint in respect of the IDR 2bn (which had been withdrawn over two years earlier in May 2015). The investigation in respect of this complaint was terminated by the Indonesian police on 7th February 2018 on the grounds of insufficient evidence. On 30th October 2018, a second police investigation was commenced in relation to the same IDR 2 bn allegation, upon the filing of a report by an 'Advocate' of PT APMR. Mr. Lie submits that the likely probability is that this second complaint was filed in retaliation to Mr. Lie issuing this Claim (issued on 12th July 2018 but received by Mr. Ng on 30th October 2018). This second complaint was terminated on 5th November 2019 following an investigation in which the police accepted that '*the fund was used or processing PT APRM's Building Permit*'. Although PT AMPR challenged this decision of the Indonesian Police,

the South Jakarta District Court, in its verdict issued on 8th January 2020, ruled that the termination of the investigation was '*right and correct in accordance with the provision of the applicable law*'.

[183] Mr. Lie further notes that (1) notwithstanding Mr. Ng's admitted knowledge of the termination of the second complaint and the District Court's decision, Mr. Ng wrongly alleged in his witness statement that there was an '*ongoing*' police investigation; and (2) although Mr. Lie had only ever appeared on a '*Wanted Persons List*' because he had missed a police interview (of which he had only two days' notice) on account of being in Singapore for medical treatment (and his immigration status was returned to normal on 28th November 2019) Mr. Ng insisted on using the pejorative reference to Mr. Lie as a '*fugitive from justice*' throughout these proceedings.

[184] Mr. Hardwick submits in conclusion that the contemporaneous documents and the evidence at trial demonstrates conclusively that there is no substance in this IDR 2bn theft allegation. Mr. Lie never needed to steal the relatively modest sum of USD 150,000 in May 2015 and never did so. Moreover, he submits that the allegation, once again, has no connection, far less a necessary connection, with the Claim (in particular given that it was no part of Mr. Lie's case that his termination as a director of PT PDP on 17th December 2015 was unfairly prejudicial).

The First Defendant's Submissions

[185] Mr. Choo-Choy identifies five evidential propositions in support of his contention that Mr. Lie misappropriated the IDR 2 billion from PT APMR.

[186] First, he contends that Mr. Lie misrepresented the purpose of the payment when seeking release of the funds from PT AMPR and concealed the purpose recorded in the Work Order Agreement. In the proof of expenditure document dated 4th May 2015, Mr. Lie gave as a reason for the payment *'Transfer of Funds to Plantation for Working Capital Request needs'*. However, the purpose of request for funds in the 5th March 2015 Work Order Agreement was described as *'handling and settling for the PT APMR's Palm Oil Mill construction Permit'*. Mr. Choo-Choy submits that there is '*an obvious difference between these two descriptions*': the description in the proof of expenditure document refers to the needs of the plantation itself and the transfer of funds to meet those needs,

whereas the description in the Work Order Agreement refers to the company's application for a mill permit. Mr. Choo-Choy invites the Court to draw the inference that Mr. Lie did not use the language contained in the Work Order Agreement because such language would have raised immediate suspicions. Mr. Choo-Choy also submits that Mr. Lie was extremely defensive about the purpose that he gave to PT APMR's accounting staff because, as soon as he was questioned about that purpose, he launched into a speech about the history of the criminal investigation in Indonesia.

[187] Second, Mr. Choo-Choy points out that there has not been a single document produced by either Mr. Lie, Mr. Rangkuti, or Mr. Saragih to evidence either any work having been done by Mr. Rangkuti pursuant to the Work Order Agreement or any communication in respect of the same. In the context of what was claimed to have been Mr. Rangkuti's lengthy involvement in the permit application process, the complete absence of any such documentation strongly suggests that no real work was performed by Mr. Rangkuti pursuant to the Work Order Agreement.

[188] Third, Mr. Choo-Choy submits that there was no coherent, comprehensible or consistent explanation of what services were provided by Mr. Rangkuti in return for IDR 2bn.

(1) Mr. Rangkuti's evidence in relation to the services he allegedly provided was '*surreal*'. The general direction of travel of his evidence appeared to be that he used the IDR 2bn (or part thereof) to '*lobby*' (which appeared to be a euphemism for '*bribe*') appropriate individuals within the East Kalimantan licensing authority in order to secure the permit. However, he (1) refused to answer any questions in respect of his alleged network of contacts on the ground that this was '*my secret*'; (2) denied that he had made any payments of money to others; (3) insisted that it was through his '*skill…and ability in lobbying*' that the permit was secured; (4) confirmed that the work he did was not documented in any way; (5) refused to explain how he arrived at the contract price of IDR 2bn; and (6) refused to explain what he had done with the IDR 2bn, stating that this was his '*own personal interest*' and his '*own secret*' and that he did not have to explain further.

(2) Mr. Choo-Choy contends that Mr. Saragih's evidence was almost as extraordinary in that (1) he could not initially remember Mr. Rangkuti's name or appear to recognise him; (2)

although he was identified as the applicant (on behalf of PT APMR) in the building construction permit and clearly handled the application on the company's behalf, he suggested that he actually provided assistance to Mr. Rangkuti in the latter's work, (3) he described Mr. Rangkuti's work as the giving of legal advice, but he explained that there was no written record of either his request for such advice or of Mr. Rangkuti giving any legal advice because (so Mr. Saragih claimed) it was all done orally; (4) he was unable to identify any specific legal advice that was sought and/or given; and (5) he confirmed that he had never seen the Work Order Agreement, the proof of expenditure document, or the receipt signed by Mr. Rangkuti in respect of the IDR 2bn even though he had given the impression in his witness statement (which referred to all three documents) that he was familiar with them.

(3) With regard to Mr. Lie's evidence in relation to the Work Order Agreement, Mr. Lie stated: '*I do not know what Mr. Rangkuti did – what work Mr. Rangkuti did … what is important for me is that I have got the permit*' and '*I myself do not know exactly what he did, but it entails … quite a long process …*'. Mr. Choo-Choy submits that this evidence was most puzzling if the Work Order Agreement were taken at face value, because it recorded that '*the results of the work will be reported by [Mr. Rangkuti] to [Mr. Lie]*' and Mr. Rangkuti's evidence was that he communicated solely with Mr. Lie with respect to his work.

[189] Fourth, Mr. Choo-Choy submits that the Work Order Agreement and its alleged implementation present multiple suspicious features, consistent with the document being a sham rather than a genuine contract for the provision of services. In particular (1) Mr. Lie was unable to explain the rationale for the provision in the Work Order Agreement that required Mr. Rangkuti to report exclusively to Mr. Lie and not disclose data and information to anyone else including PT APMR employees – Mr. Choo-Choy submits that it is '*simply inexplicable*' that there was need for such a prohibition if the Work Order Agreement was a *bona fide* contract for the provision of services to PT APMR; (2) Mr. Rangkuti's explanation for the need for a Work Order Agreement in terms '*[e]very work has to have agreement*' is most unconvincing when none of the lobbying by Mr. Rangkuti was to be done in writing and none of the communications between Mr. Rangkuti and Mr. Lie about Mr. Rangkuti's work were in written form; (3) the final sentence of the Work Order Agreement ('*this*

Work Order Agreement is made to be used as needed') confirms the role of the document as a form of cover for the extraction of the IDR 2 bn from PT APMR; (4) bona fide work orders or agreements within PT APMR carry a specific order or agreement number, are recorded in the company's work register, and make provision for the payment of VAT and treatment of withholding tax. By contrast, the Work Order Agreement does not have any of these features and Mr. Lie had no satisfactory explanation for these substantial deviations from normal commercial transactions; and (5) neither Mr. Lie nor Mr. Rangkuti was able to provide a satisfactory explanation for how the amount of IDR 2bn was calculated or why (if Mr. Rangkuti's concern was security) it was not paid to him by bank transfer, or further still, why the contract price was agreed in rupiah rather than Singapore dollars when Mr. Rangkuti's evidence was that he asked for the payment to be made in Singapore dollars. Mr. Choo-Choy submits that the Work Order Agreement and the receipt for IDR 2 billion appear to have been drafted together, after the event, so as to look like a legitimate rupiah transaction, whereas Mr. Lie in fact arranged to take the money out in Singapore dollars for his own reasons.

[190] Fifth, Mr. Choo-Choy submits that it appears unlikely that it was necessary for PT APMR to engage Mr. Rangkuti to provide assistance in relation to the building permit application having regard to (1) Mr. Saragih's enormous experience within the palm oil plantation industry in East Kalimantan (including in relation to building permit and other types of permit applications) and his good network of contacts within East Kalimantan, and (2) the fact that prior to the PT APMR application for a building permit (assuming he was truly involved in that application), Mr. Rangkuti had not personally been involved in any similar application for a palm oil factory building permit.

[191] In light of the above, Mr. Choo-Choy invited the Court to infer and find that:

(1) Mr. Rangkuti never performed the work described or referred to in the Work Order Agreement;

(2) Mr. Lie concocted the Work Order Agreement and persuaded Mr. Rangkuti to co-sign it with him in order to provide apparent justification for Mr. Lie's misappropriation of IDR 2bn from PT APMR;

(3) Mr. Lie misrepresented the purpose of the withdrawal of IDR 2bn in his request to PT APMR's accounting staff because he knew that stating that that amount of money was needed for the construction permit application would raise suspicions;

(4) Mr. Lie told Mr. Rangkuti to say that he had received the money in Singaporean dollars because he knew that, if asked, PT APMR's accounting staff would confirm that they had given the money to Mr. Lie in cash in that currency; and

(5) Mr. Lie asked Mr Saragih to provide false evidence about his having worked with Mr. Rangkuti on the construction permit application and Mr. Saragih was willing to do so in terms of a witness statement that he appears to have barely read and/or understood.

[192] Mr. Choo-Choy submits that the above, if proven, would clearly amount to serious misconduct on Mr. Lie's part which is highly material to whether Mr. Lie should be entitled to any relief under section 184I and, if he is, as to the form of any such relief.

[193] With regard to Mr. Hardwick's reliance on '*the previous engagements of Mr. Rangkuti*', Mr. Choo-Choy submits that (1) it is not within the confines of this trial for a wide-ranging inquiry into the legitimacy of Mr. Rangkuti's conduct over several years, (2) even if Mr. Rangkuti has worked on legitimate assignments for the PT PDP group in the past, it does not follow that he may not have been prepared to assist Mr. Lie by providing a paper trail as Mr. Ng alleges in relation to the IDR 2 billion, and (3) ultimately, the allegation of misappropriation in relation to the IDR 2 billion has to be considered on its own merits, having regard to the evidence relating to it.

[194] As to Mr. Hardwick's suggestion that there is no plausible motive for Mr. Lie's theft of IDR 2 billion from PT APMR, Mr. Choo-Choy submits that Mr. Lie misappropriated the IDR 2 billion because he could. He was the ultimate boss of the Medan office. Fraud is committed not only by those who are impoverished. Often, opportunity and belief that one can do the deed and not be caught are sufficient to motivate fraud.

[195] With regard to Mr. Hardwick's suggestion that Mr. Ng's case involves a broad and implausible conspiracy involving not only Mr. Lie and Mr. Rangkuti, but also PT APMR's accounting staff (such as the PT APMR cashier, finance manager and supervisor), this mischaracterises Mr. Ng's case. It has never been part of Mr. Ng's case that the PT APMR's accounting staff were knowing participants in the fraud. Mr. Ng's case is that Mr. Lie deliberately chose a benign description of the purpose of the request for the IDR 2 billion in order to mislead the accounting staff and conceal his true intentions from them. His case does not depend upon any of PT APMR's accounting staff having been in on the conspiracy. Nor is his case weakened by the fact that they were not so involved. Mr. Ng's case is that there was a conspiracy between Mr. Lie, Mr. Rangkuti and (to a lesser extent, at least as regards assistance during the proceedings themselves) Mr. Saragih.

Claimant's Responsive submissions

[196] Mr. Hardwick responds, in summary that:

(1) first, there was no misrepresentation. The two documents were two months apart. The 4th May 2015 proof of expenditure gives the more generic description of '*working capital needs*' - which was a generic description of PT APMR's need for capital for a mill. The 7th March 2015 Work Order, addressed to the consultant himself, described more specifically the '*permit*' that the consultant was required to obtain;

(2) second, as to the claim that no documents had been produced by Mr. Lie and Mr. Rangkuti to evidence work done, whilst this trial was and has become many things, it is <u>not</u> a claim against Mr. Rangkuti for recovery of his fee on the basis that he did not in fact do any significant work pursuant to the Work Order Agreement. Indeed whilst Mr. Lie has striven to understand the nature of Mr. Ng's misconduct allegations (with repeated RFIs and a contested specific disclosure application) the question of documentation evidencing work done by Mr. Rangkuti was never raised by Mr. Ng;

(3) third, as to the IDR 2bn sum itself, there was clear evidence that (1) PT APMR was the only East Kalimantan company without access to a mill; (2) the licensing process had become

more complex; (3) the construction permit was successfully obtained almost 11 months later on 28th January 2016; and (4) the Business (overall) was hugely profitable with a USD 13.1m dividend distributed by SOFL in April 2014. In this context the payment of USD 150,000 to Mr. Rangkuti to ensure the success of the construction permit application process is unsurprising;

(4) fourth, as to the alleged '*multiple suspicious features*' of the documents, the Work Order Agreement was disclosed on 17th July 2019 (prior even to standard disclosure on 6th December 2019). Mr. Ng did not serve a Notice to Prove until 13 months later, on 24th August 2020 (5 weeks before trial). The criticisms reduce to queries about (1) confidentiality provisions; (2) VAT; (3) the entry in a work register with a work order number; and (4) the payment in cash in Singapore dollars. 5 years after this agreement was entered into, Mr. Lie could not (and did not try to) supply answers to all of these details in respect of a document on which questions had never previously been asked. However: (1) Mr. Lie did explain that a work order with a '*number*' was a reference to '*technical*' matters not the provision of '*services*' (which is what this work order concerned); (2) the Court is aware that Mr. Lie and Mr. Ng always received their SOFL dividends in US dollars not IDR: that Mr. Rangkuti also required payment in a non IDR currency is unsurprising; and (3) whilst the thrust of all of these forensic points is that this Work Order Agreement was a dishonest 'cover' for the IDR 2bn theft, the intractable problem for Mr. Ng's case remains that the alleged thefts from the Permata Account, in the greater sum of IDR 2.9bn, were paid out from the Permata Account without any sort of 'cover'. So why resort to a 'cover' here? The answer is the same for all payments: they were not thefts at all but straightforward business-related payments;

(5) fifth, there was a need for PT APMR to engage to Mr. Rangkuti. By March 2015 the process was more complex – a point that Mr. Saragih repeatedly confirmed in cross-examination with reference to the newly introduced '*integrated licensing*' system.

ISSUE 8: THE COMPETITION/DIVERSION ALLEGATION

The Claimant's Submissions

Summary

[197] Mr. Ng's fourth allegation of misconduct against Mr. Lie is that he acted in breach of fiduciary duty as a director of PT PDP and the Indonesian Operating Companies by acquiring and operating certain plantations and factories in competition with PT PDP and in conflict of interest. Mr. Ng claims in his Re-Amended Defence that in early 2015 Mr. Lie secretly acquired (1) two palm oil factories (PT Mitra Bumi and PT SAMS); and (2) three palm oil plantations (PT Rendi, PT Palmaris and PT SAMS) which he began to operate in competition with PT PDP/the Indonesian Operation Companies. Mr. Ng further alleges that in breach of his directors' duties Mr. Lie poached around 10 members of staff of the Indonesian Operating Companies to work at the plantations.

[198] Whilst Mr. Lie again complained that these allegations were inadequately pleaded, he explained in his Reply that (1) PT SAMS (in which Mr. Lie had a 80% interest) was founded on 19th May 2004 (not early 2015 as alleged) and (far from it being a secret) Mr. Ng was '*well aware of its existence*'; (2) the purchase of PT Mitra Bumi, PT Rendi and PT Palmaris occurred in 2016 after Mr. Lie had resigned his executive/management role in the Business (and so that his children could run and be responsible for the same); and (3) the purchases did not represent competition with PT PDP (e.g. PT SAMS is located 100km distant from PT PEU and at least 6 other palm oil factories owned by other companies are in closer proximity).

[199] Mr. Hardwick submits that the Competition/Diversion Allegation is another example of an inadequately particularised assertion of misconduct drawn into the proceedings in an apparent attempt to apply pressure on Mr. Lie. His position is that the allegation fails on the facts and has no connection whatsoever with his unfair prejudice claim.

PT SAMS

[200] Mr. Lie relies upon the notarised deed of incorporation in respect of PT SAMS which clearly records its date of incorporation as 19th May 2004. On that basis he contends that the claim that he secretly acquired PT SAMS in early 2015 is obviously wrong.

[201] Further, Mr. Lie's position is that Mr. Ng was well aware of his interest in PT SAMS. His evidence was that from time to time he discussed the palm oil operation at PT SAMS with both Mr. Ng and Mr. Harahap in the office in Jakarta and that Mr. Ng had no problem with his ownership of PT SAMS. Mr. Hardwick submits that whilst Mr. Ng denied the conversations, Mr. Lie's evidence was compelling and that Mr. Lie can hardly have operated a mill and plantation, in the same Riau province as the 4 PT PEU mills and plantations and kept the same as a complete secret from 2004 to 2016. Mr. Hardwick also points out that the existence of PT SAMS was well known to PT PEU's employees as is clear from the short witness statements of Mr. Ng's minor witnesses Mr. Tusiman, Mr. Lambok, and Mr. Manurung, who describe how PT SAMS used the PT PEU seedlings nursery in 2004.

[202] Mr. Lie also denies the unpleaded allegations in respect of PT SAMS' alleged use of PT PEU property as contained in those same witness statements. Mr. Hardwick submits that (1) first, the allegations are unpleaded and are not in issue and the Court should have no regard to them; and (2) second, there was no wrongdoing: (a) the PT PEU directors agreed that PT SAMS could use a small plot in the Kalianta Satu seedlings nursery to plant its own seedlings while PT SAMS' own nursery was flooded; and (b) whilst Mr. Manurung did not receive a second salary from PT SAMS in respect of his temporary assistant manager appointment the PT PEU directors knew about this; and Mr. Manurung received remuneration from PT SAMS in the form of additional allowances.

PT Palmaris Reya and PT Rendi Permata Raya

[203] In respect of PT Palmaris and PT Rendi, Mr. Lie relies on the notarised deed of statement of resolutions at the EGSM of each company which confirm and record that Mr. Lie's shares in those

companies were acquired on 2nd March 2016 and 7th April 2016 respectively (months after Mr. Lie's resignation on 23rd November 2015).

[204] Mr. Choo-Choy maintains that at the very least discussions were underway for the acquisition of PT Palmaris and PT Rendi prior to Mr. Lie's resignation in November 2015. He relies on a 2016 Judgment of the Medan District Court (the '**2016 Judgment**'), which Messrs Carey Olsen (for Mr. Ng) disclosed at 5.05am (BVI time) on 14th October 220 in the course of the trial. At this point in the trial Mr. Lie remained under oath and just 3 hours later his cross-examination resumed (at 8am BVI time) and he was subject to a detailed cross-examination on this unfamiliar document. Mr. Ng seeks to rely upon concessions made by Mr. Lie's then-lawyers as to the relevant timeline in order to demonstrate that Mr. Lie knew of the opportunity to purchase the shares in PT Rendi and PT Palmaris prior to his resignation.

[205] In response to this, Mr. Hardwick submits that:

(1) this timeline was never raised in the course of these proceedings until mid-way through cross examination – depriving Mr. Lie and his legal team of any opportunity to investigate the same;

(2) whilst there are references in the 2016 Judgment to a number of documents including in particular (a) a 15th June 2015 '*Co-operation Plan Proposal*' and (b) a 21st December 2015 '*agreement on transfer of share transaction*', none of these documents were disclosed;

(3) there is no evidence from Mr. Kassigi Ong (or any of the other participants to the alleged discussions in 2015);

(4) as long ago as 2nd June 2019, Mr. Lie's June 2019 RFI sought '*proper particulars of all facts and matters relied upon in support of… the allegation that SL also secretly acquired the palm oil plantations (1) PT Rendi Permata Raya; (2) PT Palmaris Raya*…in early 2015' yet Mr. Ng refused to provide an answer. Mr. Hardwick says that it is intolerable and wrong that the facts and matters relied upon should first be sprung upon Mr. Lie over 16 months later and

half-way through a cross-examination, with references to documents never disclosed and never referenced before;

(5) having failed to give disclosure by the date ordered of 6th December 2019, Mr. Ng should not, consistent with the position set out in CPR 28.13(1), have permission to rely on the 2016 Judgment;

(6) if this Court does have regard to the 2016 Judgment and considers that Mr. Ng can fairly rely upon the timeline contained therein: (1) the timeline does not disclose a concluded sale prior to 17th December 2015: the meetings about a potential commission were only 21st and 22nd December 2015 such that it is entirely possible that the sale was concluded in the window between 17th December 2015 (Mr. Lie's termination) and these commission meetings; and (2) there is no evidence that supports Mr. Ng's allegation of deliberate disloyalty. On the contrary the evidence as to the events in Autumn 2015 discloses (a) Mr. Lie's attempts to become a director of SOFL; (b) Mr. Ng continuing to ignore his correspondence; and (c) the fact that with his directorship peremptorily terminated on 17th December 2015, Mr. Lie decided to purchase two small plantations in order to make provision for his 4 adult children.

PT Mitra Bumi

[206] In respect of PT Mitra Bumi, Mr. Lie submits that the minutes of a meeting of PT Mitra Bumi on 13th November 20216 clearly record that Mr. Lie acquired 480 shares from three different shareholders on 13th November 2016 and not in 2015.

No competition

[207] Mr. Hardwick invites the court to reject the claim that any of PT SAMS, PT Mitra Bumi, PT Rendi, or PT Palmaris operated in competition with any of the Indonesian Operating Companies both by reference to (1) the physical location of the same as recorded on Mr. Lie's map of mills and plantations in Sumatra ('**the Map**'); and (2) the reality of the price setting of Crude Palm Oil (CPO) and Palm Kernel Oil (PK). In particular:

(1) the PT Rendi plantation is located in the far West of Utara on the coast. The plantation is over 300km distant (a 9-hour drive) from PT PEU's Teluk Dalam Mill and a 5 to 6 hour drive from the other PT PEU mills in Riau. Moreover, Mr. Lie's evidence is that it sells its Fresh Fruit Bunches ('**FFBs**') to a nearby mill owned by PT RMM;

(2) the Palmaris Raya plantation is in the bottom Western corner of Utara Province (Sumatra), close to the border between the Utara and Barat Provinces. Like PT Rendi, the PT Palmaris plantation did not and does not have a mill and is an even further drive from PT PEU's Teluk Dalam Mill and a similar distance from the PT PEU's mills in Riau. It sells its FFBs to a local mill just 15km away;

(3) whilst Mr. Ng's pleaded claim was that PT Palmaris Raya, PT Rendi and PT Mitra Bumi were operated in competition with the '*PT PDP /* the *Indonesian Operating Companies*', 4 of the 5 Indonesian Operating Companies were the East Kalimantan Companies, which were on a different land mass from Sumatra altogether, across the Java Sea in East Kalimantan;

(4) Mitra Bumi has a small 400 hectare plantation and a mill. Mr. Lie's evidence was that when and if it needs to buy FFBs it does so from the many small holder plantations that surround it;

(5) PT SAMS has a relatively small 1500 hectare plantation and if it ever needs to buy FFBs it buys them from small holders nearby. The closest PT PEU mill is the PT PEU Kalianta Dua mill approximately 100 km away and well outside the 25 km range which sellers generally travel to sell their FFBs. Mr. Lie's evidence is that on the relatively poor local roads that would take 3-4 hours by car and the journey would pass through 7 other palm oil mills <u>not</u> owned by PT PEU;

(6) the prices of CPO are fixed by the Joint Marketing Office. The sellers sell CPO to large buyers who buy all the CPO that is produced. Whilst Mr. Ng referred to the prices set as '*guidelines*' he accepted (1) the principle that most factories would use the price as their

daily guideline; and (2) that sellers (both state and private) follow the daily price set by the Joint Marketing Office and that the '*big buyers*' buy all the CPO that is produced and sold.

Failure to offer opportunity to purchase

[208] As to Mr. Ng's claim that Mr. Lie failed to offer to the PT PDP group the opportunity to purchase these factories and plantations when it came to his attention and in breach of duty took the opportunity for himself Mr. Hardwick submits that:

(1) this alleged failure cannot conceivably extend to PT SAMS (acquired in 2004) or PT Mitra Bumi (acquired in the autumn of 2016) and must be confined (presumably by reference to the 2016 Judgment) to the PT Rendi and PT Palmaris plantations;

(2) taking into account the size and location of these small plantations the allegation makes no sense. According to Mr. Ng (1) PT PEU's Teluk Dalam has a plantation of 5000ha; (2) PT PEU's Koto Kampar has a plantation of 7,500ha; and (3) PT PEU's Kalianta Dua and Satu plantations have a combined area of another 11,000ha – 23,500ha in all. However, the planted areas of the PT Rendi and PT Palmaris plantations were small (just 700ha and 800ha respectively); neither plantation had a mill (and were several hundred kms from the nearest PT PEU mill); and they were (and remain) unprofitable and poor quality plantations in need of much time and investment. Mr. Ng's assertion that PT PEU would have been interested in purchasing these two small plantations in Western Utara in 2015 or 2016 makes no sense;

(3) Mr. Ng has not attempted to articulate a business case in which the acquisition of these far flung plantations would make sense. The high point of his evidence was that '*it wouldn't be fair to say we would have no interest unless it was* offered *to us and it was rejected. But it wasn't offered to us in any way so wouldn't be fair to say that we are not interested*'. However, it is striking that although Mr. Ng claims that he discovered the purchases at some point '*in 2016*' the first time that any complaint was raised was in his original Defence served 3 years later on 21st January 2019.

No poaching of employees

[209] The final pleaded complaint against Mr. Lie in respect of the Competition/Diversion Allegation is that he allegedly poached 10 members of staff of the Indonesian Operating Companies to work at his plantations. Mr. Lie's case is that these employees applied for positions after ceasing employment at either PT PEU and PT BMML and commenced their employment thereafter at either PT Mitra Bumi and PT Palmaris Raya. Mr. Lie submits that in the absence of any evidence that any of their employment contracts contained any type of covenant restricting either (1) their ability to apply for these posts; or (2) Mr. Lie's ability to accept them, the alleged breach of duty is plainly unsustainable.

The First Defendant's Submissions

[210] Save for the poaching allegation which, in closing written and oral submissions, was not maintained in the absence of disclosure by Mr. Lie of pre-contractual communications between PT Palmaris and PT Mitra Bumi and the relevant employees prior to the signing of the contracts of employment disclosed by Mr. Lie (which were signed by Mr. Lie on behalf of PT Palmaris and by his son on behalf of PT Mitra Bumi from 28th March 2016 onwards), Mr. Choo-Choy submits that Mr. Lie acted in clear and serious breach of duty by (1) failing to disclose his significant interest in PT SAMS to the other directors of PT PDP and PT PEU and (2) pursuing the PT Palmaris and PT Rendi opportunities without first disclosing them to the other directors of PT PDP and PT PEU.

PT SAMS

[211] In respect of PT SAMS, Mr. Choo-Choy observes that Mr. Lie acknowledges he acquired (and still retains) an 80% shareholding in this company in about May 2004, when he was fully involved in the management of (as well as being a substantial shareholder within) the PT PDP group of companies. In addition to being the majority shareholder of PT SAMS, he was also its sole Commissioner (and still retains that position), exercising supervisory powers over the sole Director (who is and was the other 20% shareholder) of the company and Mr. Lie's biological brother (albeit

known as '*Handoyo Rusli*'). PT SAMS initially had one plantation only in the Riau province, not far from PT PEU's 3 plantations in that province (Kalianta Satu, Kalianta Dua and Koto Kampar). However, after he left PT PDP in December 2015, Mr. Lie confirmed that he expanded the business of PT SAMS in November 2016 by the addition of a second plantation (about 10 kms away) to PT SAMS's operations. A factory was also built at PT SAMS from 2007 onwards. Its share capital was successively and substantially increased over the years: by November 2008, the issued share capital had been increased from IDR 3 billion to IDR 20 billion, and it was further increased to IDR 100 billion by April 2015.

[212] Mr. Choo-Choy takes issue with Mr. Lie's claim that Mr. Ng was '*well aware*' of the existence and operations of PT SAMS and Mr. Lie's interest in it. He contends that that there is not a single document in the parties' disclosure to support Mr. Lie's account of having discussed PT SAMS with Mr. Ng. He submits that, at a minimum, Mr. Lie appears to have contravened his director's duty under Indonesian law to ensure that his shareholding interest in other companies (such as PT SAMS) was recorded in a special register within PT PDP or the Indonesian Operating Companies since there is no evidence (and Mr. Lie makes no claim) of such record being kept. Further, he submits that there is no witness evidence to corroborate Mr. Lie's account: Mr. Harahap has passed away and Mr. Ng firmly denies Mr. Lie's account. He claims that Mr. Lie's account of his discussions with Mr. Ng (about PT SAMS' production results) is inconsistent with his evidence at trial that he had nothing at all to do with production issues or the production department of PT SAMS.

[213] As to Mr. Hardwick's suggestion that it does not make sense that Mr. Lie had an interest in PT SAMS and Mr. Ng did not know of it between 2004 and 2016, Mr. Choo-Choy responds that Mr. Ng would not have known of it unless Mr. Lie disclosed the precise nature and extent of the interest to him. By Mr. Lie's own account, his day-to-day job was at PT PEU, not PT SAMS. Moreover, Mr. Ng was based in Jakarta, not Medan. Mr. Choo-Choy therefore submits that it would not have been surprising at all if Mr. Ng was unaware of Mr. Lie's interest in PT SAMS unless Mr. Lie actually told him about it. Mr. Choo-Choy further points out that, on Mr. Lie's own evidence that Mr. Ng '*may not have known at the time the precise nature of it* [i.e. Mr. Lie's interest in PT SAMS]', Mr. Lie

acknowledges that he did not disclose the precise nature and extent of his interest in PT SAMS to Mr. Ng.

[214] As to Mr. Hardwick's reliance on the fact that Mr. Ng's witnesses, Messrs Tulsiman and Lambok, gave evidence of use of PT PEU seedlings and truck equipment at PT SAMS, neither witness states that he was aware of Mr. Lie's equity stake in PT SAMS. The evidence merely shows that they were aware of the existence of PT SAMS and of the fact that it obtained some services from PT PEU, but that does not begin to support the proposition that Mr. Lie must therefore have disclosed the precise nature and extent of his interest in PT SAMS to Mr. Ng.

[215] Mr. Choo-Choy invites the Court to reject Mr. Lie's claim that PT SAMS cannot be considered to compete with PT PDP and the Indonesian Operating Companies. He submits that:

(1) There was, at the very least, a possibility of competition between PT SAMS and PT PEU (whose plantations and factory were in closest proximity to those of PT SAMS) and of conflict of interest between Mr. Lie's personal interest in promoting PT SAMS and his duties as a director of PT PDP and the latter's operating subsidiaries. He relies on the evidence of Mr. Lie's expert, Mr. Kadir, who confirmed that a director's duty to act in good faith in the interests of the company comprises a duty to give full and frank disclosure in the event of a conflict of interest, as well as in the event of a potential perception of conflict of interest.

(2) From a corporate asset perspective, it is not unusual for the same company to own plantations and/or factories in quite different locations. For instance, PT PEU owns plantations/factories at various locations in Riau, but also at a location in Northern Sumatra which is hundreds of kilometres away from Riau. Mr. Lie himself had developed his portfolio of plantations and factories in diverse locations hundreds of kilometres apart, at locations in Central Sumatra and in Eastern Sumatra. Mr. Lie expressly confirmed that he did not consider the 12-hour drive from Medan to PT Rendi and PT Palmaris to be so long as to make those businesses not worth acquiring, and further confirmed in his oral evidence that in the case of factory breakdowns at either PT SAMS or PT Mitra, the fresh fruit bunches (or '**FFBs**') that could not be processed at the location of breakdown would be sent to the other

factory for processing, notwithstanding the fact that the distance between those two factories is about 91km and slightly longer than the distance between the PT SAMS and PT PEU sites. All such businesses would, from a commercial point of view, be regarded as being assets of the same type or within the same class.

(3) From an operations perspective, the PT SAMS plantation/factory compete with the PT PEU plantations/factories because (1) they may potentially buy FFBs from the same sellers if/when they do not have enough FFBs from their own plantations (and Mr. Choo-Choy invites the Court to reject Mr. Lie's suggestion that a factory would not buy FFBs from a plantation more than 25 km away, given Mr. Lie's own evidence that FFBs would be sent between PT SAMS and PT Mitra Bumi which are 91 km apart and the inevitable need to travel significant distances from one plantation to another given the large size of plantations); (2) they may potentially compete with respect to the sale of the palm oil end products (CPO and PK) (and Mr. Choo-Choy invites the court to reject Mr. Lie's suggestion that there is no competition because the prices of CPO and palm oil kernel are fixed, submitting that there may still be competition in terms of volume/quantity of products sold because there is not infinite demand for their products); and (3) they may potentially compete for plantation land and factory sites.

PT Mitra Bumi

[216] In respect of PT Mitra Bumi, Mr. Choo-Choy submits that all of the points as to competition and conflict of interest apply *a fortiori* to PT Mitra Bumi given its closer proximity to the PT PEU plantations and factories than PT SAMS. Further, while Mr. Choo-Choy accepts that Mr. Lie's acquisition of PT Mitra Bumi on 30th November 2016 was after he left the PT PDP group, Mr. Choo-Choy submits that the existence of this interest is highly material to whether it is realistic to regard Mr. Lie as having been Mr. Ng's quasi-partner during the alleged period of unfair prejudice between 2017 and 2019.

PT Palmaris and PT Rendi

[217] As regards PT Palmaris and PT Rendi, Mr. Choo-Choy begins by pointing out that Mr. Lie had stated in his trial witness statement that he acquired those companies on 2nd March 2016 and 7th April 2016 respectively, i.e. after he had left the management of the PT PDP group of companies in November / December 2015. He said nothing in his statement as to whether he had learned of the opportunity to acquire these companies prior to leaving the PT PDP group. At the outset of his cross-examination in relation to those two companies, he stated unequivocally that he only sought to acquire PT Palmaris and PT Rendi after he had left PT PDP in December 2015 and that he had only had brief negotiations for their acquisition in or from January 2016. Mr. Lie was clearly aware of the importance of showing that he had not been disloyal in any way to PT PDP prior to leaving the group. However, Mr. Choo-Choy submits that his testimony in this context was demonstrably false.

[218] Mr. Choo-Choy relies on the 2016 Judgment from the Medan District Court proceedings in support of his contention that Mr. Lie knew of the opportunity to acquire these companies in 2015 (months before leaving the management of the PT PDP group). Mr. Choo-Choy contends that the 2016 Judgment shows the following:

(1) Mr. Abdul Wahid Rambey ('**Mr. Abdul**') (the claimant in the Medan District Court proceedings) had met with Mr. Lie at PT PEU's offices in Medan in early June 2015 to discuss the PT Palmaris and PT Rendi opportunity and Mr. Lie had requested detailed information about the plantations.

(2) There was a further meeting between Mr. Abdul and Mr. Lie on 15th June 2015 at which the information requested by Mr. Lie was provided by Mr. Abdul including a '*Cooperation Plan Proposal with PT [PEU]*' and pursuant to which, if the co-operation was successful, Mr. Abdul would be given shares in PT PEU.

(3) Mr. Lie admitted that there had been meetings with Mr. Abdul and '*intensive communications…between [Mr. Lie]…and Defendant V Kassigi Ong [one of the* former

owners of PT Palmaris and PT Rendi]' in connection with the PT Palmaris and PT Rendi opportunity, but asserted that the meetings were about the potential sale of PT Palmaris and PT Rendi by their former owners (represented by Mr. Kassigi Ong) to Mr. Lie, and denied that there was any agreement with Mr. Abdul to give him any shares or make any payment to him.

(4) Mr. Lie stated in his defence that '*after the agreement on transfer of share transaction*', there were meetings on 21st December and 22nd December 2015 with Mr. Abdul regarding the payment of a goodwill or commission fee to him. Thus, by his own defence in those proceedings, Mr. Lie acknowledged that his agreement to buy PT Palmaris and PT Rendi had already been reached prior to 21st December 2015.

(5) When confronted with the 2016 Judgment, Mr. Choo-Choy submits that Mr. Lie's general strategy was to say that all of Mr. Abdul's claim for additional payment had been rejected by the Medan District Court. What he did not and could not deny however was that he had had interactions with Mr. Abdul over the period June to December 2015 that had culminated in his agreement to buy the shares of PT Palmaris and PT Rendi prior to 21st December 2015.

[219] In so far as Mr. Hardwick questioned the admissibility of the 2016 Judgment for the first time during his oral closing submissions because of the timing of its disclosure on Mr. Ng's behalf, Mr. Choo-Choy submitted that it was much too late for that objection to be raised and relied on the following:

(1) It was wrong of Mr. Hardwick to speak in terms of a failure by Mr. Ng to give disclosure. The relevant chronology was as follows. On 9th October 2020, Mr. Ng's legal team came across a news article about the commission fee dispute relating to PT Palmaris whilst searching online for anything relating to PT Palmaris. But the judgment itself was not discovered until 12th October through a legal portal online, and an Indonesian copy of it was obtained on 13th October. An English translation was obtained on 14th October and later that day both the original Indonesian version and the translation were sent to Messrs Conyers for inclusion in the trial bundle. Messrs Conyers agreed to this inclusion, whereas they had objected to the inclusion of some other documents. Contrary to Mr. Lie's submission, therefore, there was

no failure on Mr. Ng's part to give disclosure that had already been ordered. There was no obligation to disclose the document unless and until it came within Mr. Ng's control, which did not occur until 13-14th October.

(2) If someone has been guilty of a failure to provide disclosure in this regard, it is Mr. Lie, because he was a party to the 2016 Judgment and must have had a copy of it within his control. His failure to give disclosure of it was compounded by his failure to obtain the relevant Indonesian case file from Mr. Rangkuti, whose firm represented Mr. Lie in the proceedings.

(3) In any event, the time for objecting to the admissibility of the judgment was when it came to its inclusion in the trial bundle for use at the trial. Not only did Mr. Lie's legal team not object to the inclusion of the document in the trial bundle, but they did not object to the cross-examination of Mr. Lie on the contents of the judgment. Nor did they even reserve their right to do so at the time.

(4) Last but not least, it would be inappropriate and artificial to treat the judgment as inadmissible when Mr. Lie has given his evidence in relation to it, and Mr. Hardwick accepts that the judgment shows at a minimum that discussions took place regarding the sale of PT Palmaris and PT Rendi.

[220] Mr. Choo-Choy submits that the chronology apparent from the 2016 Judgment is further supported by (1) the PT Palmaris deed which recorded that the transfer of shares had been announced in a Medan newspaper dated 26th November 2015; (2) the PT Rendi deed which contained a similar reference to a newspaper announcement dated 3rd March 2016; and (3) the fact that the existing Directors and Commissioners of both PT Rendi and PT Palmaris resigned on 24th November 2015. Mr. Choo-Choy contends that it is likely that with a deal having been concluded at least in principle between Mr. Lie and the former owners, and in anticipation of Mr. Lie and his son becoming the new Director and Commissioner respectively of each company, the existing Directors and Commissioners resigned.

[221] Mr. Choo-Choy submits that despite having become aware of the PT Palmaris and PT Rendi opportunities in June 2015, Mr. Lie did not disclose those opportunities to Mr. Ng or any of the other management or shareholders of PT PEU and instead, deliberately decided not to report these corporate opportunities to PT PEU, so that he could pursue them for his and his son's personal benefit.

[222] Mr. Choo-Choy submits this was a textbook example of disloyal conduct on the part of a fiduciary. It was clearly not conduct '*in good faith and with full responsibility*' (to use the language of the Indonesian Companies Law). Mr. Choo-Choy also submits that Mr. Lie knew perfectly well that his conduct was wrong and disloyal towards PT PEU and the PT PDP group generally, which is why he desperately sought to rely on the dates of the formal approval of the share sale and purchase by the general shareholders' meetings later in 2016 and ignored the question of the period over which he negotiated the acquisition and diversion of the opportunity to himself and his family between June and December 2015.

[223] Mr. Choo-Choy submits that (1) the only reason Mr. Lie gave for failing to disclose the PT Palmaris and PT Rendi opportunities to PT PEU before leaving the PT PDP group was that the plantations were too small and would not have been of interest to PT PEU; (2) that, however, is the classic excuse given by defaulting directors for failing to bring valuable corporate opportunities to the attention of their fellow board members and exploiting them for personal gain and in any event; (3) in any event the excuse was refuted by Mr. Ng who confirmed that PT Palmaris and PT Rendi (which are not dissimilar in size from some of the East Kalimantan Companies' plantations and which were referred to in the 2016 Judgment as having a combined plantable area of up to about 6,000 Hectares) would have been of interest to PT PEU; and (4) even if Mr. Lie had genuinely thought that PT PDP and/or PT PEU would not be interested in the PT Palmaris and PT Rendi opportunities, since he was not a disinterested fiduciary, he ought to have presented the relevant information to his co-directors on the boards of PT PDP and PT PEU and let them decide whether or not PT PDP and/or PT PEU should pursue those opportunities. He could not in good faith have acted as judge and jury in his own cause: Mr. Lie's expert witness Mr. Kadir, confirmed that a director's duty to act in good faith in the interests of the company comprises a duty to give full and

frank disclosure in the event of a conflict of interest, as well as in the event of a potential perception of conflict of interest.

[224] Mr. Choo-Choy submits that Mr. Lie's conduct in respect of the Competition/Diversion Allegation was wrongful by both Indonesian legal standards and BVI legal standards and should be taken into account when determining whether any relief (and if so what form of relief) should be granted to Mr. Lie.

Claimant's Responsive Submissions

[225] In closing oral submissions Mr. Hardwick (1) addressed the various arguments summarised above; and (2) submitted in addition that whilst this Competition/Diversion Allegation had now been elevated to the first allegation of misconduct, there were 4 immediate clues as to the '*trumped up*' nature thereof:

(1) first, he noted the absence of any contemporaneous complaint. Mr. Ng never made <u>any</u> complaint about this prior to proceedings (as confirmed by Response 13 of Mr. Ng's RFI response). There is no reference to the allegation in any pre-action correspondence. Instead, the allegation was first raised in a single paragraph of the Defence on 21st January 2019, over 2 years after the solicitor correspondence had commenced; and over 4 years after the acts complained of. This, he submitted, was very curious in respect of a misconduct allegation that Mr. Ng now prioritises above all others. Moreover, Mr. Ng has said nothing and as to when and how he discovered these supposed secret acquisitions;

(2) second, although this allegation relates to alleged '*secret*' acquisitions of plantations, prior to the trial Mr. Ng had not shown the slightest curiosity or interest in when and how Mr. Lie acquired these plantations. In fact, it was the other way round: it was Mr. Lie who sought further particulars of the allegation, which Mr. Ng refused to provide. A genuine complainant in respect of secret acquisitions would have a raft of legitimate information and disclosure requests. Yet there was not a single one;

(3) third, the key material now relied upon by Mr. Ng is the 2016 Judgment, with a timeline appearing to show discussions about PT Palmaris and PT Rendi prior to the termination of Mr. Lie's directorship in PT PDP on 17th December 2015. Yet Mr. Choo-Choy explained that this document was located '*with the benefit of some unexpected luck*' by Messrs Carey Olsen in internet searches in the course of the trial. Again, that is very revealing: this document was searched for and found by lawyers as part of their litigation strategy, to try to unearth some evidence of misconduct. It is not a genuine contemporaneous complaint by Mr. Ng;

(4) fourth, no coherent business case was ever presented by Mr. Ng. It is said that these acquisitions were the '*diversion*' of a corporate opportunity of which SOFL would have wished to take advantage. But that makes no sense without some analysis of the market: no opportunity has been lost unless there is, in Sumatra and/or East Kalimantan, limited supply. If there was or is a reasonably buoyant plantation market, nothing has been lost as a result of Mr. Lie purchasing these two relatively small plantations. Moreover PT PEU had 23,500 ha of plantations in Sumatra and the EK Companies had another 25,000 ha. Yet PT Rendi and PT Palmaris are relatively small plantations, on the West coast of the Utara Province in Sumatra with 800ha and 700ha respectively, and no mills. If (which is not known) there were or are <u>other</u> plantations in Sumatra or East Kalimantan available for purchase, this is a baseless complaint.

ISSUE 10: RELIEF

[226] The parties are not in agreement as to how the matter of relief should most appropriately be addressed.

[227] The parties and the Court have agreed that the terms and appropriateness of any specific form of any relief ought to await the Court's findings in relation to the Unfair Prejudice Allegations, the Quasi-Partnership Allegation and the Misconduct Allegations. However, given that the Court will rule at this stage on liability, whether relief ought to be granted, and the general form of relief (as provided for in the CMC Order), the parties have made preliminary submissions in this regard and

these are summarised in this section below. The parties reserved their rights to make more detailed submissions as to the specific form and appropriateness of relief (including whether a minority discount is appropriate in the event that a share purchase order is made as to any considerations relevant to the exercise of the Court's discretion as to the grant of relief) in light of the Court's findings.

The Claimant's Submissions

[228] In the event that Mr. Lie succeeds in establishing unfair prejudice, he seeks an order that Mr. Ng purchase his shares in SOFL and requires that the share purchase be (1) at a price to be determined by the Court; (2) without any discount to reflect his minority shareholding (as per the reasonable offer identified by Lord Hoffman in **O'Neill v Phillips** at 1106); and (3) on the basis of the value of SOFL prior to the 2017 Disposition, the 2018 Rights Issue and the 2019 Disposition. In this respect, he cites **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), paragraph 8-59 to the effect that the Court will, in general, value the shares as if the unfairly prejudicial conduct has not taken place; and that the simplest method of achieving this may be, depending on the circumstances, to value the shares as at a convenient date shortly before the unfairly prejudicial conduct began.

[229] Mr. Hardwick observes that the Court has a wide discretion in fashioning the remedy to the wrong done (**Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), paragraph 8-06) and that in the exercise of that discretion will take into account: (1) any misconduct on the part of the applicant (see **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), paragraph 8-07), including (2) any delay in commencing proceedings (**Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020), paragraph 8-07). However, he invites the Court to reject Mr. Choo-Choy's claim that relief ought to be declined on the basis of the Misconduct Allegations (and Mr. Lie's alleged lack of 'clean hands') and/or Mr. Lie's alleged acquiescence and delay in respect of the bringing of the claim.

Acquiescence / delay

[230] In respect of Mr. Ng's allegation of inexcusable delay and/or acquiescence, Mr. Hardwick refers to **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020) paragraph 7-87 which explains that while there is no statutory period of limitation applicable to unfair prejudice petitions, the Court will not allow a petition '*to degenerate into 'a raking over of old grievances"*. Mr. Hardwick refers also to the decision of Fancourt J. in **Re Edwardian Group Ltd**[25] who held that an unjustified delay resulting in prejudice or an irretrievable change of position are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy.

[231] Mr. Hardwick submits that Mr. Ng's assertion of '*inexcusable delay*' is not understood and is obviously wrong given that the Claim Form was issued on 12th July 2018, (1) within 2 years of the first particular of unfair prejudice (the Non-Payment of Dividends); (2) within one year of the 2017 Disposition; and (3) prior even to the 2018 Rights Issue and the 2019 Disposition (the particulars of which had to be introduced by amendment). He submits that there is plainly no question of any '*unjustified delay resulting in prejudice*' or an '*irretrievable change of position*'. On the contrary, he argues that any issues of delay and prejudice only arise in relation to the Misconduct Allegations (with the Palm Shells Allegation dating back 20 years to 2000 and the Seedling Allegation dating back 11 years to 2009).

Misconduct

[232] In respect of the Misconduct Allegations, Mr. Hardwick refers to the decision in **Re London School of Electronics**[26] where Nourse J clarified that (1) a petitioner for relief on statutory grounds is not seeking relief in equity; and therefore (2) the equitable doctrine of '*clean hands*' is not directly applicable although the conduct of the petitioner '*may be material in a number of ways*'. He notes that this Court in **CH Trustees SA v Omega Services Group Limited & Others**[27] likewise held (at paragraph [122]) that there is '*no requirement for a petitioner to come to the court with clean hands*'. Mr. Hardwick submits that (1) this Court should reject Mr. Choo-Choy's contention that (by

[25] [2018] EWHC 1715 (Ch).
[26] [1986] 1 Ch. 211 (at 221H to 222C).
[27] BVIHC (COM) 0037 of 215.

reason of the words of section 184I(2) '*if the court considers that it is just and equitable to do so*') it must be a pre-condition to the grant of relief that the petitioner comes to court with clean hands; and (2) that the analysis of Nourse J. in **Re London School of Electronics** is unimpeachable.

[233] Mr. Hardwick also refers also to the English Court of Appeal decision in **Richardson v Blackmore**,[28] in which it was held that the petitioner's conduct is only relevant insofar as it has *'an immediate or necessary relation to the circumstances upon which the petitioner's entitlement, or otherwise, to relief depended'*. In that case the Court of Appeal (at paragraph [56]) agreed with the judge that proven forgery by the petitioner (although it was conduct to be '*deplored*') '*had no bearing on the matters directly in issue*' such that the judge had been right to disregard it and that it was (at best) an episode in the background history.

[234] Mr. Hardwick submits that the Misconduct Allegations are wholly inadequate in terms of particularisation and have not been made out (for all the reasons stated above). He submits that, in any event, they bear no '*immediate or necessary relation*' to the Unfair Prejudice Allegations: the Seedlings Allegation (2009–2010) predates all of the Unfair Prejudice Allegations by over 6 years; and whilst the Palm Shells Allegation (2000-2015) the IDR 2bn Allegation (May 2015) and the Competition/Diversion Allegation (2015/2016) bear at least a temporal relation to the Information Refusal, none of these bear any immediate or necessary relation to the Non-Payment of Dividends, the 2017 Disposition, the 2018 Rights Issue and the 2019 Disposition.

Minority Discount

[235] In oral closing submissions Mr. Hardwick submitted that the question as to whether or not there should be a discount to reflect Mr. Lie's minority shareholding was better determined at the consequential hearing when the Court's judgment was known and its findings were available. He explained that this was because (1) if the Court does find that there is a quasi-partnership, Mr. Ng accepts that there should be no minority discount; whilst (2) if the Court does not find a quasi-partnership, Mr. Lie will nonetheless be pressing for valuation with no minority discount by

[28] [2006] BCC 276 (at [56]).

reference to the body of case law (see **Re Dinglis Properties Ltd**[29] and the cases reviewed therein) which establishes that ultimately the right order is a question of fairness in each case.

The First Defendant's Submissions

Misconduct

[236] Mr. Choo-Choy submits that even if unfairly prejudicial conduct is established, the Court retains a discretion as to whether to grant relief and, if so, the nature and scope of any relief. He observes that Section 184I(2) of the Act specifically prefaces the making of any order by the Court with the words '*[i]f…the Court considers that it is just and equitable to do so'*, language which is different to that found in section 996(1) of the English Companies Act 2006. He submits that where, as here, the essence of the Court's discretion is equitable, the petitioner must come to Court with clean hands as a prerequisite to the grant of relief (with reference to Lord Cross in **Ebrahimi** at 387G: '*A petitioner who relies on the 'just and equitable' clause must come to court with clean hands*'). He argues that, by analogy with the Court's just and equitable winding-up jurisdiction, it is seriously arguable that it must be a pre-condition to the grant of relief under section 184I that the petitioner comes to this Court with clean hands.

[237] Mr. Choo-Choy submits that even if one were to assume that the absence of '*clean hands*' is not a bar to relief under section 184I, the Court ought to attach considerable weight to the petitioner's own misconduct in view of the '*just and equitable*' pre-conditioning of section 184I(2). He submits that English jurisprudence recognises that there may be cases of misconduct on the petitioner's part that is sufficiently serious and relevant to the matters which form the subject of the unfair prejudice complaint that the Court is justified in denying the petitioner any relief, even if the petitioner otherwise makes out his complaint of unfair prejudice: see **Richardson v Blackmore**[30] and **Interactive Technology Corp v Ferster**,[31] where Morgan J acknowledged that '*the petitioner's wrongdoing may justify the court in refusing to grant relief to the petitioner*'. He relies also on **Re London School of Electronics Ltd** at 222B-C where Nourse J. held, in respect of the relevance of

[29] [2019] EWHC 1664 (Ch).
[30] [2006] BCC 276 at [56].
[31] [2016] EWHC 2896 (Ch) at [318].

the petitioner's conduct, that *'First, it may render the conduct on the other side, even if it is prejudicial, not unfair…Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant'*.

[238] Mr. Choo-Choy submits that if any of the allegations of misconduct against Mr. Lie are made out, the Court will have to give careful consideration as to whether it is appropriate to grant any relief at all to Mr. Lie in the light of the seriousness of the proven allegations. In particular, if the allegations in respect of Mr. Lie's wrongful diversion of the PT Palmaris and PT Rendi opportunities are made out, Mr. Choo-Choy submits that it is open to the Court to refuse to grant any relief to Mr. Lie.

Valuation & Minority Discount

[239] With regard to the Court's approach to the fair valuation of the petitioner's shares if a buy-out order were established to be appropriate, Mr. Choo-Choy submits that it is well-established that where the company is a quasi-partnership, the successful petitioner's shares will ordinarily be valued *pro rata* according to the value of the shares in the company as a whole, without any discount to reflect the fact that the holding is a minority holding: see **Re Bird Precision Bellows Ltd**,[32] as approved on appeal at [1986] Ch 658, and see also **O'Neill v Phillips** at 1107D-E, and **CVC/Opportunity Equity Partners Ltd v Demarco Almeida**,[33] at [40]–[42]. However, he submits that where there was never any quasi-partnership or a quasi-partnership has come to an end (e.g. as a result of the petitioner's decision to leave the relationship and cease to be involved in the management of the business whilst continuing to remain a shareholder), a discounted basis of valuation is generally appropriate, unless perhaps the petitioner could point to exceptional circumstances that would justify a *pro rata* valuation without minority discount: see **Re a Company (No 005134 of 1986), ex parte Harries**,[34] **Phoenix Office Supplies Ltd & Ors v Larvin**,[35] **Strahan v Wilcock**,[36] **Irvine v Irvine (No 2)**,[37] **Re C F Booth Ltd**[38] and **Re Dinglis Properties Ltd**[39] (where the Deputy Judge

[32] [1984] Ch 419.
[33] [2002] 2 BCLC 108.
[34] [1989] BCLC 383 (Peter Gibson J).
[35] [2003] 1 BCLC 76 (English Court of Appeal).
[36] [2006] 2 BCLC 555 (at [17], per Arden LJ with whom Richards LJ and Mummery LJ agreed).
[37] [2007] 1 BCLC 445 (at [11], per Blackburne J).
[38] [2017] EWHC 457 (Ch) (at [139]).

concluded, at [367], that '*outside the quasi-partnership scenario, it will be a very unusual case which calls for no discount to be applied*').

[240] Mr. Choo-Choy acknowledged that there is some conflicting first instance authority in England as to the approach to valuation of a petitioner's shares when there is no relationship of quasi-partnership, but relies on the preferred view of the authors of **Minority Shareholders: Law, Practice and Procedure** (6th edn. Oxford 2018), at paragraphs. 7-90 – 7.101) that a minority discount is justified where there is no quasi-partnership at the time of the unfair prejudice, unless there are exceptional circumstances to justify a different approach. Mr. Choo-Choy further submitted that that approach has been approved obiter by the Privy Council in **Shanda Games Ltd v Maso Capital Investments Ltd**,[40] where Lady Arden (delivering the judgment of the Board) referred with approval to the approach taken by the English Court of Appeal in **Strahan v Wilcock** that '*when the court is considering the price to be paid for the petitioner's shares under an order for their purchase in unfair prejudice proceedings, exceptional circumstances must exist for the shares to be valued without a minority discount if the company is not a quasi-partnership*', and went on to observe that '*it is a general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share … [and] … in the absence of some indication to the contrary, or special circumstances, the minority's shareholder's shares should be valued as a minority shareholding and not on a pro rata basis*'. However, Mr. Choo-Choy agreed with Mr. Hardwick that this question of minority discount is more appropriately addressed at a consequential hearing following the judgment of the Court.

[241] Mr. Choo-Choy submits further that when determining a fair valuation, the Court may order adjustments to be made to the valuation e.g. to reflect the effect on the company of all or any wrongs which the wrongdoer respondent has committed against it (see e.g. **Re Tobian Properties Ltd**.[41] Mr. Choo-Choy submits that, by parity of reasoning, the Court must also be entitled to order adjustments to the fair valuation to reflect the legal consequences of any misconduct by the minority shareholder – including in respect of any sums which the petitioner may be proven to have

[39] [2019] EWHC 1664 (Ch).
[40] [2020] UKPC 2, at [37], [38] and [42].
[41] [2013] 2 BCLC 567, at [26]).

misappropriated at the respondent's expense. He relies on **Gray v Braid Group (Holdings) Ltd**[42] where the Court of Session held that a successful petitioner's shares should be valued at the lower valuation prescribed by the company's articles of association where misconduct by the petitioner was established.

[242] Mr. Choo-Choy submits finally that (1) if the Court were to find that any of the 2017 Disposition, SOFL's non-participation in the 2018 Rights Issue and/or the 2019 Disposition was not unfairly prejudicial to Mr. Lie, then the buy-out valuation should proceed on the basis that that conduct has properly occurred and should not therefore be ignored as a valuation assumption; (2) the buy-out valuation should in any event proceed (for the reasons earlier set out) on the basis that the value of Mr. Lie's shareholding in SOFL should be appropriately discounted to reflect the fact that it is a minority shareholding; and (3) if the Court were to find that Mr. Lie had wrongfully misappropriated funds out of the Permata Account in Mr. Ng's name and/or the IDR 2bn, then the Court ought to direct that the total misappropriated amount should be deducted from any purchase price that may be payable by Mr. Ng to Mr. Lie upon completion of the buy-out valuation.

DISCUSSION

[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.

[244] In terms of witnesses, Mr. Lie was not as truthful a witness as his learned Queen's Counsel Mr. Hardwick submitted he was, but I generally considered Mr. Lie to be a consistent and reliable witness.

[245] 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

[42] [2016] CSIH 68.

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.

[246] In terms of the other main witnesses:

(1) Mr. Rangkuti, for Mr. Lie, was not a candid witness, and it was difficult to take him seriously as a witness, even though he was represented as being a lawyer, and indeed appears to be Mr. Lie's Indonesian legal representative of choice for a variety of work, including litigation. Although Mr. Rangkuti sought to portray his work under the Work Order Agreement in issue mainly as 'lobbying', with some closely guarded secret to success that he refused to reveal, with nothing committed to paper, it was hard to escape the inference that some *negotium perambulans in tenebris* (or 'shady dealing') was afoot. It was not farfetched to suppose that Mr. Rangkuti might indeed have been prepared to fabricate a story for Mr. Lie to cover misappropriation by him, and indeed that Mr. Rangkuti and Mr. Lie might have combined to do so, but there was nothing else of significance to lift such a supposition out of the realm of speculation, let alone to tip the balance of probabilities.

(2) Mr. Saragih, for Mr. Lie, was not entirely reliable either. It was, in my respectful judgment, a farfetched representation on Mr. Saragih's part that he went to the trouble of photographing the plantations, and in particular, neglected parts thereof, out of love of them. I am in no doubt that he did so with the purpose of helping Mr. Lie in his battles with Mr. Ng, and to show that Mr. Ng was not particularly good at maintaining them. On the other hand, I accept that the photographs showed what he said they showed, including neglect of maintenance under Mr. Ng's ultimate management. I was not able to accept Mr. Ng's rejection of the photographs by disavowing that they showed PT PDP's palm trees. That was, in my respectful judgment, a self-serving, knee-jerk reaction on Mr. Ng's part, and he was not able to explain convincingly why those were not PT PDP's trees.

[247] Having seen and heard the witnesses, read their statements, and considered the competing submissions of Counsel, I accept the following, and find them as facts.

Quasi-partnership

[248] Mr. Lie established a joint venture with Nr. Ng's father, Mr. Wiyono, in 1988 for the establishment and operation of what Mr. Lie has referred to as the Business, as I shall do as well. Both expected to be and were involved in the management of the Business, with full access to all financial and operational records and details of the Business, by dint of the close family and social relationship between Mr. Lie and Mr. Wiyono. When Mr. Wiyono passed away and Mr. Ng inherited his father's shareholding in PT PDP, the relationship between Mr. Lie and Mr. Ng in connection with the Business remained as it had been between Mr. Lie and Mr. Wiyono. At the end of 2015, Mr. Lie reasonably expected that he would continue to receive pertinent information concerning SOFL's affairs, since SOFL was subject to the same joint venture or quasi-partnership; yet Mr. Ng refused to supply him with requested information in respect of SOFL's affairs.

[249] The basis of the joint venture as between Mr. Lie and Mr. Wiyono was that of a partnership between them, where both expected to be and were involved in the management of the business. This is despite other individuals being minority shareholders in the various Indonesian companies, and indeed in SOFL. Those minority shareholders may have had their uses, and thus could be called 'strategic', but this did not change the reality that fundamentally this was a business venture jointly conducted first between Mr. Lie and Mr. Wiyono and then, after the latter's death, between Mr. Lie and Mr. Ng.

[250] Upon Mr. Wiyono's death, Mr.Lie agreed that Mr. Ng should be appointed as CEO to replace Mr. Wiyono. I use the word 'replace' here deliberately.

[251] The understanding between Mr. Lie and Mr. Ng's side of the family, which included both Mr. Ng and his mother, being Mr. Wiyono's widow, was that the business would be conducted as before Mr. Wiyono's death, with the difference that Mr. Lie would take more of a leading role whilst Mr. Ng

would be inducted by Mr. Lie into the ways and means of successful palm oil development and commercial exploitation.

[252] Mr. Wiyono's widow had expressed the wish that Mr. Lie should educate her son. By educate, it is clear to me, was meant not to 'educate' in a narrow academic sense, but in the art of building productive and enduring business relationships and how to assess suitable commercial opportunities and bring them to fruition. It is clear to me that Mr. Lie has a winning way with people that engenders loyalty amongst his staff. It is equally clear to me that Mr. Ng, on the other hand, though clever, pointedly demonstrates a less personable approach.

[253] Mr. Lie and Mr. Ng expected to have and did have full access to all financial and operational records and details of the business, not as directors, but as joint venture partners, and Mr. Ng wrongfully caused this to be stopped.

[254] It is appropriate in my judgment to apply principles set forth in **Ebrahimi v Westbourne Galleries**[43] (as approved in the House of Lords decision in **O'Neill v Phillips**[44]) in which Lord Wilberforce explained how the '*superimposition of equitable considerations*' over and above that which is laid down in a company's articles requires *'an association formed or continued on the basis of a personal relationship involving mutual confidence'* or *'an agreement, or understanding, that all, or some…of the shareholders shall participate in the conduct of the business'.* I am satisfied that there was such an agreement or understanding here pertaining to SOFL.

[255] I accept that SOFL was not a mere '*commercial association*' but (applying the test of Lord Wilberforce in **Ebrahimi**) (1) SOFL was '*an association…continued on the basis of a personal relationship, involving mutual confidence*'; and (2) the underpinning '*agreement, or understanding, that…some…of the shareholders shall participate in the conduct of the business*' (which had its original foundations back in 1988) is expressly confirmed by the DBT Mandate.

[43] [1973] AC 360.
[44] [1999] 1 WLR 1092.

[256] I accept that there was no need for there to have been a written venture or partnership agreement, given the erstwhile close relationship between Mr. Lie and Mr. Ng's families.

[257] I accept Mr. Hardwick's submission that the cases have recognised understandings enforceable in equity short of actual participation in day-to-day management, including *'a right of access to company records'* (relying on **Phoenix Office Supplies v Larvin**[45]) and a *'right in equity to be consulted'* (relying on **Hollington on Shareholders' Rights** (9th edn. Sweet & Maxwell 2020) paragraph 7-50 and **Re Elgindata**[46]). I accept Mr. Lie's argument that Mr. Lie's right to be consulted and to be provided with information was denied by Mr. Ng in a manner which was unfairly prejudicial to him.

Dividends

[258] Mr. Lie's case is that Mr. Ng has refused and/or failed to pay him dividends for the Financial Years 2015, 2016, 2017 and 2018. I accept this.

[259] It is common ground between the parties that the only source of any dividends paid by SOFL, would have been the dividends SOFL received from PT PDP.

[260] SOFL's board resolutions between 2007 and 2014 show the declaration of dividends in substantial amounts, with Mr. Lie's 45.85% share ranging between USD 1.7 and 7.5 million and resulting in his receipt of over USD 13m in 2013 alone. I accept that there was a long established practice of payment of dividends for the Business.

[261] Mr. Ng's position is that SOFL did not in fact receive any dividends from PT PDP in respect of the Financial Years 2015 to 2018, and hence could not declare any dividends in favour of its shareholders as it had done in earlier years. I accept that Mr. Ng also deliberately caused this to be stopped, even though there were plenty of funds to be distributed. I emphatically reject, as self-serving, unsupported and artificial, that the money was to be retained to finance other projects. Mr.

[45] EWCA Civ [2003] 1 BCLC.
[46] [1991] BCLC 959 at 986.

Ng, and nobody else, stopped the dividends specifically and precisely to ensure that Mr. Lie would not receive any further money after Mr. Lie resigned from and/or was sacked from his role as director of the Indonesian operating companies towards the end of 2015.

[262] Mr. Choo-Choy, for Mr. Ng, submitted that a complaint of unfair prejudice in respect of the affairs of SOFL cannot, without more and on the present facts, extend to a failure by PT PDP to declare or pay a dividend to SOFL. This was of a piece with Mr. Choo-Choy's manifold other technical legal arguments. 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.

[264] SOFL's shareholders would automatically receive dividends when dividends were paid at the operating company subsidiary level, as Mr. Ng himself pleaded. That was the business reality. I do not give credence to Mr. Ng's attempt at trial to recant from that pleaded assertion. That attempt was self-serving, and redolent of Mr. Ng's prevalent propensity to manipulate matters to suit his case.

[265] I accept that SOFL's failure, at Mr, Ng's behest, to pay dividends to Mr. Lie for financial years 2015 – 2018 and/or to give genuine consideration to whether dividends should be paid was unfair and prejudicial to Mr. Lie, causing him obvious economic harm. Mr. Ng's whole point in this regard was to ensure that Mr. Lie would not receive one cent more, if he could help it. Mr. Lie's complaints in this regard are well founded and I find that they succeed.

The 2017 Disposition

[266] By reason of the 2017 Disposition, SOFL's interest in its only asset (PT PDP) was reduced from 63.16% to 28.94%. In turn, Mr. Lie's economic interest in PT PDP was reduced from 28.94% to just 13.27%, which he submits was plainly unfairly prejudicial to him.

[267] Mr. Ng admits that the transfer took place, but claims that this was a repatriation of his shareholding, pursuant to the Indonesian Government's 'Tax Amnesty Programme'.

[268] I do not believe this explanation of Mr. Ng. Mr. Ng also surprisingly said that the tax declaration was in fact not his, apparently forgetting that he had already in plain terms acknowledged that he himself had made such a tax declaration. Extraordinarily, Mr. Ng changed his case at trial, claiming that it was not he but Grahaidea that had the responsibility for making the necessary tax amnesty declaration.

[269] Mr. Ng gave very selective and insufficient disclosure of the documents which would most obviously prove his story. Equally extraordinarily, Mr. Ng did not produce his tax amnesty declaration, nor any other document that supports his assertions that this was the reason for the transfer.

[270] Moreover, Mr. Ng did not repatriate his shareholding in SOFL at all: he continued to hold it.

[271] Furthermore, I accept that the chronology of events in 2017 supports Mr. Lie's submission that the 2017 Disposition was a deliberate act of retaliation by Mr. Ng. Three months prior to the 2017 Disposition Mr. Lie had filed a police report in Indonesia against Mr. Ng in respect of the unpaid dividend for the Financial Year 2015. In early July 2017, the police had conducted an unsuccessful mediation in respect of this unpaid dividend. The 2017 Disposition took place one week after the unsuccessful mediation and without notice to Mr. Lie.

[272] I accept that the 2017 Disposition was an egregious and unlawful appropriation of Mr. Lie's beneficial interest in SOFL, at the behest of Mr. Ng, which had a significant '*depressive effect*' (in

the language of HHJ Purle QC in **Re Sunrise Radio**[47]) on the value of Mr. Lie's shareholding in SOFL.

The 2018 Disposition

[273] On 18th September 2018, two months after the Claim was issued, PT PDP carried out the 2018 Rights Issue, pursuant to which Grahaidea acquired over 60 million additional shares in PT PDP. SOFL did not participate in the Rights Issue. As a result of the 2018 Rights Issue, SOFL's percentage shareholding in PT PDP reduced from 28.94% (following the 2017 Disposition) to just 1.38%. Grahaidea became the largest single shareholder with 49.6% of PT PDP.

[274] I reject Mr. Ng's assertion that the 2018 Rights Issue was a '*preparatory step*' towards an IPO of PT PDP; and I accept that the overwhelming likelihood is that it was a crude and deliberate act of share dilution – reducing SOFL's interest in PT PDP to a mere 1.38%. I take note of:

(1) the known hostility by this point in time in September 2018 on the part of Mr. Ng towards Mr. Lie (with the issue of the Claim two months previously in July 2018);

(2) the fact of the 2017 Disposition which had reduced SOFL's interest in PT PDP from 63.13% to 28.94%;

(3) the fact that by the 2018 Rights Issue, Grahaidea (jointly owned by Mr. Ng and his brother) became the largest shareholder in PT PDP;

(4) the fact that whilst each of (1) Mohammad Achiruddin Noer (on behalf of his mother and then shareholder Madam Noer); (2) PTPN 4; (3) the management of the labour union of PT PEU's four plantations); and (4) Mr. Lie had provided reasoned written objections to an IPO, Mr. Ng had never engaged with any of these objections in 2015;

[47] [2009] EWHC 2893.

(5) the fact that the 2018 Rights Issue was a central part of Mr. Lie's claim from the moment that it was introduced by way of amendment on 16th May 2019 and Mr. Ng had every opportunity (including in responding to Mr. Lie's RFI) to develop his case as to the *bona fides* of the 2018 Rights Issue, justified by a specific commercial purpose. Instead, his approach was one of obstruction and obfuscation; and

(6) the dearth of any proper evidence that an IPO was contemplated in September 2018. Not a single document was produced to and nothing at all was said by Mr. Ng as what steps had been taken since 2015 in order to progress the 2018 Rights Issue. With the exception of an 11th May 2017 letter from PT Galelia, there is not a single PT PDP minute, resolution or other document over the period 2016 – 2020 which corroborates Mr. Ng's claim that an IPO was genuinely intended in September 2018. Moreover, there is no document which corroborates Mr. Ng's claim that the major ongoing obstacle to the proposed IPO was a problem with '*concession certificates*' nor is there any evidence from any of the professionals one would expect to be involved in an IPO process (such as legal counsel, accountants, specialist sector advisers).

[275] I also reject Mr. Ng's claim that SOFL was given an opportunity to participate in the 2018 Rights Issue.

[276] Mr. Hardwick refers to Mr. Lie's June 2019 RFI seeking proper particulars of when and by whom SOFL was allegedly offered '*an opportunity*' to participate in the 2018 Rights Issue. Following an unsatisfactory response, Mr. Lie issued the RFI Application and Mr. Ng was ordered to answer this question (among others). In his 1st November 2019 RFI Response, Mr. Ng appended an EGSM invitation dated 6th August 2018 and stated SOFL '*had notice of what was proposed, and had the opportunity to participate in the Rights Issue, but did not*'. However (as observed by Mr. Lie's expert Mr Andi Kadir at paragraph 61 of his report) this 6th August 2018 notice was an invitation to the wrong meeting: it was an invitation to SOFL to attend an EGSM of PT PDP on Thursday 30th August 2018 for the purpose of approving a '*Transfer of Shares*' and was not in respect of the 2018 Rights Issue which was approved in the course of a PT PDP AGM on 18th September 2018. SOFL was never sent an invitation to the 18th September 2018 AGM.

[277] Mr. Ng's fall-back position is that '*Mr. Achmad attended the AGM on behalf of SOFL.*' However, Mr. Hardwick points out that (1) neither Mr. Ng nor SOFL have disclosed the minute of this PT PDP AGM; (2) the only document that, under compulsion of Court order, Mr. Ng disclosed in respect of the AGM was an invitation to the wrong meeting; and (3) Mr. Achmad has not produced a witness statement and did not attend trial to give evidence on this important point.

[278] As to an alleged conversation between Mr. Achmad and Mr. Ng at the 18th September 2018 AGM, 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. Accordingly, I accept that Mr. Ng's claim that he had a conversation with Mr. Achmad at the claimed meeting on 18th September 2018 in which Mr. Achmad '*informed*' Mr. Ng '*verbally*' that SOFL did not have sufficient funds to participate in the 2018 Rights Issue was contrived and a convenient fiction.

[279] As to the claimed insufficiency of SOFL funds, (1) Mr. Ng's written closings submissions state that '*On the basis of a 28.9% shareholding, SOFL's pro rata entitlement would have been nearly IDR 35 billion, equivalent to nearly USD 2.4 million*'; and (2) Mr. Hardwick contends that if SOFL had received (as it should have received) its USD 4.6m portion of PT PDP's USD 16m dividend for the Financial Year 2017, I accept that SOFL would easily have been able to fund the acquisition of the same.

[280] Mr. Choo-Choy accepts that the 2018 Rights Issue took place and that the prejudicial effect of SOFL's non-participation in the Rights Issue is 'indisputable', since the result has been that SOFL's percentage shareholding in PT PDP has been diluted from 28.95% (where it stood following the 2017 Disposition) to 1.38%, with the consequence that the value of Mr. Lie's 45.85% shareholding in SOFL will have been commensurately diminished. However, he submits that the question is whether the dilution of SOFL's shareholding in these circumstances is <u>unfairly</u> prejudicial as against Mr. Lie. In this regard, SOFL's non-participation in the 2018 Rights Issue was <u>not</u> unfair as against Mr. Lie given that: (1) SOFL was not legally obliged to participate in the 2018 Rights Issue and its failure to do so cannot therefore, of itself, be a ground of unfairness; (2) SOFL was unable to

participate because it did not have sufficient funds to do so, thus it is impossible to see on what credible basis its non-participation in the 2018 Rights Issue could be said to be unfair; and (3) on Mr. Ng's evidence, Mr. Achmad did in fact attend the 18th September 2018 AGM on behalf of SOFL and had informed Mr. Ng (as was in fact the case) that SOFL did not have sufficient funds to subscribe for its pro rata entitlement to the newly issued shares.

[281] I do not accept this line of argument. I find that the effect of this rights issue was indeed unfairly prejudicial towards Mr. Lie, because the very purpose of this transaction had been to shift value in the Business from Mr. Lie to Mr. Ng by means of this manoeuvre.

The 2019 Disposition

[282] On or about 16th September 2019 (the day before the CMC in this matter), the 2019 Disposition took place by virtue of which SOFL disposed of its remaining 1,736,842 shares in PT PDP to PT PDP itself. Mr. Lie claims that the 2019 Disposition was in breach of section 175 of the Act and a final act of unlawful appropriation which was unfairly prejudicial to Mr. Lie. He alleges that Mr. Ng's failure to supply requested information on the transaction (both in response to Messrs Conyers 28th January 2020 letter and the 2019 Disposition RFI) was also unfair.

[283] Mr. Hardwick submits that the Court should reject Mr. Ng's evidence in his witness statement that the 2019 Disposition '*was a commercial decision taken by the board of SOFL, for which I had no knowledge or input*' as entirely incredible. I accept this submission. As Mr. Hardwick argued, if there were any truth in the claim that Mr. Achmad were a real director, any litigant in Mr. Ng's position would have taken urgent steps to attempt to ascertain what had happened. The fact that Mr. Ng claims that he did not even attempt to, reveals again the obvious truth that following the 2017 Disposition and the 2018 Rights Issue this was the final act by which Mr. Ng eliminated any remaining value in Mr. Lie's 45% SOFL shareholding. I agree.

[284] I also accept Mr. Hardwick's submissions that if Mr. Achmad was satisfied that the 2019 Disposition was '*appropriate*', Mr. Ng could and should have called Mr. Achmad to supply evidence to that effect. I accept that in the unexplained absence of Mr. Achmad (coupled with a complete failure to

disclose any relevant documents) the Court can and should draw the adverse inference that, on the contrary, there was nothing '*commercial*' or '*appropriate*' about the 2019 Disposition at all, and so I find as a fact.

[285] I am persuaded that Mr. Ng deliberately caused the 2017, 2018 and 2019 Dispositions, with the same specific prejudicial purpose of depriving Mr. Lie of the value of his SOFL shareholding and transferring such value to himself and his brother. Accordingly, such prejudice was also unfair.

[286] I should comment briefly upon the significance, or otherwise, of a breach of section 175 of the Act. It is plain that there was indeed such a breach in respect of both the 2017 Disposition and the 2019 Disposition. As a matter of legal analysis, breach of section 175 of the Act does not of itself invalidate or nullify an asset disposal. The argument is not infrequently run (as it was here), that a breach is only of a technical nature where the majority of members can authorize a disposal anyway. Such an argument ignores the purpose and intent behind the section. Taken to its logical conclusion, such an argument would mean that section 175 is, in practice, a useless provision or one that is so weak as to be a pointless formality. That is hardly likely to be correct. Rather, section 175 of the Act creates an important check. The check operates by requiring the company's directors to provide details of a proposed disposal to the members so that the members can then authorise the disposal by way of a resolution of members. Inherently this requires that the directors must give sufficient details pertaining to the proposed disposal to all the company's members to enable all the company's members to decide whether or not to authorise the disposal. Such a step also affords minority shareholders an opportunity, if necessary, to apply to the Court for interim relief to injunct conduct that might be oppressive, unfairly prejudicial or unfairly discriminatory against the minority's interests. A disposal which has not met the requirements of the section is not inherently oppressive, nor inherently prejudicial, nor inherently discriminatory, although it may well be if it is the interests of a minority that are overridden, to the advantage of the majority, and the majority, in reality, control the Board of directors. In general, though, a failure to satisfy the requirements of section 175 will be unfair, even if all members are similarly affected, because every member is entitled to it being applied properly. Thus, where the requirements of section 175 have been disregarded or ignored, this can be an indicator of more fundamental oppressive or unfairly prejudicial conduct. So it is in this case.

Mr. Ng's allegations against Mr. Lie

[287] In terms of Mr. Ng's allegations against Mr. Lie, these were, on the whole, sweeping allegations with inadequate documentary support:

Alleged misappropriation of sale proceeds from palm fruit shells

(1) Concerning alleged misappropriation by Mr. Lie of proceeds of sale of palm fruit shells, both liability and quantum are not proven.

[288] I accept that the Palm Shells Allegation is a serious allegation of theft and dishonesty which has never been properly particularised in accordance with the well-known requirement that a party alleging dishonesty must clearly plead the facts, matters, and circumstances relied on to show dishonesty (see e.g. **Three Rivers District Council v The Governor et al No. 3**[48] at [51-53] and [183-190]).

[289] As documentary evidence to support this allegation, Mr. Ng provided 37 pages of spreadsheets concerning sales of palm fruit shells sales for the years 2013 to 2015 and very little else, despite ample opportunities to do so. However, this omitted to provide any sales information for the period 2000 to 2012 and in any event nothing in this documentation shed any light on the basis of the misappropriation case against Mr. Lie. When taken to these spreadsheets in cross-examination, Mr. Ng claimed that '*internal accounting people*' sought to reconcile those figures with '*the money that was paid*'. However, (1) the '*internal accounting*' material has never been disclosed in these proceedings (2) none of the '*accounting people*' gave evidence and (3) none of this was addressed in Mr. Ng's witness statement, leaving the alleged failure to account entirely unexplained.

[290] What the Court would have expected to see would be documentary evidence of the quantities of palm fruit shells produced and disposed of, evidence of the sale price obtained, if any, and records

[48] [2003] 2 AC 1.

showing where ordinarily the proceeds of such sale would be paid. No such information was laid before the Court. As it turned out to be the case, this allegation was comprised of very little more than bare assertions. Even such assertions as were made seemed to show Mr. Ng as undecided for what period he was making the claim and in respect of what quantities.

[291] In short, this allegation was insufficiently particularised and supported such that this Court should dismiss it as hopeless.

Alleged uncertified seedlings

(2) Concerning alleged purchase of uncertified seedlings at discounted prices causing poor growth and poor production yields, liability, causation and quantum are not proven.

[292] Mr. Ng alleges that Mr. Lie purchased uncertified seedlings at a discounted price which resulted in '*poor growth and a poor production yield*' causing losses of approximately IDR 250 billion.

[293] Whilst Mr. Ng produced some evidence, albeit far from conclusive, that seedlings bought under Mr. Lie's management were of questionable provenance and thus might have been from poor stock or otherwise of low quality, in order to succeed with a claim of this type, a considerable amount of further evidence would have been required.

[294] There was no evidence that the seedlings in fact used were in any way of inferior quality. Then, to establish causation over the considerable period of time that would be required to elapse before yields could be ascertained, evidence would have been required to demonstrate that any depressed yields were more likely than not to have been caused by such inferiority. In short, reliable evidence of a comparison between crops would have been required. That would have entailed comparable conditions in terms of husbandry, agricultural practices and growing conditions. There was no such evidence here. The evidential material required to enable this Court to find on a balance of probabilities that this allegation, and its alleged attendant loss, was made out was lacking. Thus, this allegation also falls to be dismissed as hopeless.

Alleged misappropriation of IDR 2billion

(3) Concerning alleged misappropriation by Mr. Lie of IDR 2billion, this too is not proven.

[295] Mr. Ng claims that on 4th May 2015, Mr. Lie wrongfully withdrew the sum of IDR 2bn (approximately USD 150,000) from PT APMR's bank account and that this sum was misappropriated by Mr. Lie for his own benefit. Mr. Lie's case is that his withdrawal of the IDR 2 billion (1) was used in connection with PT APMR's application for a palm oil construction permit, specifically for the payment to the consultant Mr. Rangkuti for his services in assisting with the acquisition of the permit; and (2) was recorded in the financial books and records of PT APMR (as accepted by its board of directors).

[296] Mr. Ng relies heavily upon unsatisfactory aspects of Mr. Rangkuti's evidence and upon anomalies with the Work Order Agreement to urge that this was a cover for the alleged misappropriation. Whilst I accept that Mr. Rangkuti was not a frank witness, nor a convincing one, and whilst I accept that there is likely to have been something about his work performed pursuant to that Work Order Agreement that was intended to be kept away from scrutiny, there are other possible explanations for the transaction in question than the rather elaborate conspiracy for Mr. Lie's personal benefit that Mr. Ng hypothesizes.

[297] Mr. Ng has the burden of proof, on a balance of probabilities, to make out this allegation. In my judgment, Mr. Ng has not shown that his hypothesis is more likely than not to have been the true and correct one.

[298] There is no evidence that Mr. Lie withdrew this sum for his own benefit, as opposed to that of the Business. I accept the submission of Counsel for Mr. Lie that it is unlikely that Mr. Lie and his lawyer Mr. Rangkuti would have gone to the trouble of concocting such an elaborate cover story over a relatively small sum of money, which Mr. Lie could simply have taken from a bank account without any such cover.

[299] In my view, Mr. Ng sought to exploit the circumstance – in which he knew that Mr. Lie and Mr. Rangkuti would not wish to reveal what really happened in that transaction - to allege personal

misappropriation and a mendacious cover story. Mr. Ng did not succeed in demonstrating on a balance of probabilities that Mr. Lie did misappropriate the sum in question for his own benefit.

PT SAMS

(4) Concerning the alleged secret acquisition of PT SAMS, this allegation fails.

[300] It is in my judgment more probable than not that Mr. Ng did know about Mr. Lie's ownership of this company and its oil palm plantation business. It appears to have been no secret that the nursery facilities of the Business, as well as some of its staff, were used upon occasion to help out PT SAMS. Mr. Lie was the obvious link. In the context of the Indonesian palm oil industry, it is unlikely in my judgment for ownership connections to remain hidden for long. Indeed, I accept, on a balance of probabilities, that Mr. Lie and Mr. Ng discussed the palm oil operation at PT SAMS and that Mr. Ng had no problem with his ownership of PT SAMS.

PT Mitra Bumi

(5) Concerning the alleged secret acquisition of PT Mitra Bumi, this allegation fails.

[301] Mr. Ng claims that in early 2015 Mr. Lie secretly acquired PT Mitra Bumi, which Mr. Lie then operated in competition with the Business.

[302] Mr. Lie claims that he purchased PT Mitra Bumi in 2016, after he had ceased his executive/management role in the Business. I accept that minutes of a meeting of PT Mitra Bumi on 13th November 2016 clearly record that Mr. Lie acquired 480 shares from three different shareholders on 13th November 2016 and not in 2015. Counsel for Mr. Ng accepted this. In my judgment this suffices to determine this allegation, in favour of Mr. Lie.

[303] If I understand him correctly, Counsel for Mr. Ng however suggested that if Mr. Lie and Mr. Ng were to be found to have been in quasi-partnership in relation to the Business, Mr. Lie would

nonetheless be in the wrong as his operation of PT Mitra Bumi would represent improper competition with the Business. I am not persuaded by this argument. In my view there can be no criticism of Mr. Lie in acquiring a palm oil factory and/or plantation in 2016 in an owning capacity, even whilst in a subsisting quasi-partnership with Mr. Ng in the same general industrial sector. Even though such an arrangement might give rise to a conflict of interests on the part of Mr. Lie, as an owner (as opposed to a director), Mr. Lie would not be under the same fiduciary duties towards the Business as if he had been a director.

PT Rendi and PT Palmaris

(6) Concerning the alleged acquisition of PT Rendi and PT Palmaris, this allegation is however, in my judgment, proven.

[304] Mr. Lie was approached by the previous owners, who were looking for a potential buyer, before he stepped down or was sacked from his role as director of PT PDP and he started negotiating to purchase these two plantation owning companies in 2015.

[305] Mr. Lie should have disclosed the Medan 2016 Judgment. He should also have offered the opportunity of purchasing these oil palm plantation companies to PT PDP but did not do so. Whilst I am persuaded that Mr. Ng (and PT PDP) did not genuinely care about this, neither Mr. Ng nor PT PDP formally waived their potential interest in purchasing these companies. Nor is there any evidence indicating some kind of informal waiver by conduct.

[306] I do not accept that PT Rendi and PT Palmaris were competitors of PT PDP and the Indonesian operating companies in any real or sensible sense, due to their far distance from the plantations of these companies, and the relatively small size of the plantations concerned. That said, PT Rendi's and PT Palmaris's palm oil businesses were operating in the same business sector, with, ultimately, the same large buyers buying the oil at a similar price as produced by PT PDP and the Indonesian operating companies. This is sufficient in my view to establish that the purchase of these two companies by PT PDP might have been a business opportunity that PT PDP could have

been interested in. I am satisfied that Mr. Lie diverted these business opportunities to himself, although he paid for them. The proper course for Mr. Lie would have been to inform the other decision makers in PT PDP of the approach, and his personal expression of interest therein, but he remained silent whilst the groundwork for the deal was laid, consummating the purchase once he was out of PT PDP. To Mr. Lie, these companies had value, reflected in the price he paid for them. There is no evidence that these companies would have had any less, nor indeed more, value to PT PDP than what Mr. Lie paid for them as at the date he did. There is no evidence that Mr. Lie purchased these companies at an undervalue, or that the price he paid did not include a part representing the value of its business opportunities as at the date of sale. PT PDP, for its part, did not pay to purchase these companies and the business opportunities they represented, and to that extent PT PDP is not out of pocket. What, if any, loss should thus be ascribed to SOFL as damages for loss of opportunity can appropriately be reserved for further submissions.

Alleged poaching of staff

(7) Allegations that Mr. Lie poached staff are also not proven.

[307] Quite apart from lack of documentary evidence, or indeed cogent oral evidence to support this allegation, purely from a personality point of view, and having had the opportunity to see and hear both Mr. Lie and Mr. Ng give evidence, I can see that Mr. Lie's personality would attract staff away from a business controlled by Mr. Ng, without Mr. Lie necessarily actively touting for them to join him.

Clean hands

[308] Concerning Mr. Ng's submission that Mr. Lie should be denied relief as he does not come to the Court with clean hands, I do not accept that lack of clean hands prevents Mr. Lie seeking relief from Mr. Ng's unfairly prejudicial/oppressive conduct. I observe this as a matter of law (since Mr. Lie seeks a statutory remedy) and fact: Mr. Lie's breach of duty as a director of PT PDP in failing to disclose and offer the opportunity to purchase PT Rendi and PT Palmaris to PT PDP is not related to Mr. Ng's wrongful conduct and does not exonerate Mr. Ng from it. Mr. Lie's wrongdoing, as a matter of principle, in this regard is merely part of the factual background.

Alleged acquiescence/delay

[309] Nor do I think Mr. Lie acquiesced in Mr. Ng's wrongdoing or lost his right to make this claim due to laches. I am satisfied that Mr. Lie made this claim reasonably promptly.

Police reports

[310] I should say a word about police reports referred to in this case. I note that in certain jurisdictions, including apparently in Indonesia, it is not uncommon for parties who have fallen out with each other to complain to the police about their opponent. Often, the reason would seem to be a self-serving oppression tactic, in the hope that pejorative inferences might be raised and endure. I do not think it was any different here. Mr. Ng sought to capitalise exaggeratedly upon a situation – which I am satisfied was entirely innocent – to portray Mr. Lie as a 'fugitive from justice'. Mr. Lie was nothing of the sort. This Court is neither swayed nor impressed with such moves. In my considered view, police reports lodged against Mr. Lie (or against Mr. Ng for that matter) in Indonesia are irrelevant for advancing a case of wrongdoing in this jurisdiction and no substantive adverse inferences can be drawn from them.

DISPOSITION

[311] The net result is that in so far as liability is concerned, the claim succeeds. Mr. Lie succeeds with his quasi-partnership allegation and his unfair prejudice allegations. Mr. Ng's misconduct allegations fail. Mr. Lie shall be entitled to an order that Mr. Ng should buy out Mr. Lie's shareholding in SOFL at a value as if the unfairly prejudicial conduct had not occurred. I note that the parties agreed that it would be sensible for the parties to have an opportunity to make more detailed and focused submissions regarding the specifics of the appropriate form of relief (for example, whether there ought to be a minority discount in the event that a buy-out order is made) once the Court has delivered its judgment on these matters and I shall direct that a further hearing shall be fixed to this end.

[312] I take this opportunity to thank the parties' learned Counsel for their assistance during this matter, and in particular for their efforts in furnishing the Court with a joint Note, filed on 23rd July 2021, summarising the factual and legal issues and the parties' submissions thereon to assist with preparation of this judgment, as directed at the hearing on 22nd March 2021.

Gerhard Wallbank
High Court Judge

By the Court

Registrar