**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2022] SGCA(I) 2**

Civil Appeal No 18 of 2021

Between

Carlsberg Breweries A/S

… *Appellant*

And

CSAPL (Singapore) Holdings Pte Ltd

… *Respondent*

In the matter of SIC/Suit No 5 of 2019

Between

Carlsberg Breweries A/S

… *Plaintiff*

And

CSAPL (Singapore) Holdings Pte Ltd

… *Defendant*

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# JUDGMENT

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[Contract] — [Best effort obligations] — [Obligations imposed]
[Contract] — [Breach]

Version No 1: 10 Jan 2022 (21:23 hrs)

## TABLE OF CONTENTS

**INTRODUCTION ........................................................................................ 1**

**THE RELEVANT FACTS ............................................................................... 3**

DRAMATIS PERSONAE ........................................................................................ 3

FACTS LEADING UP TO THE DISPUTE ................................................................. 5

*The 2012/2013 disputes................................................................................ 7*

*The 2017/2018 disputes................................................................................ 10*

*The 2019 disputes and the present suit ...................................................... 14*

The 26 February 2019 board meeting ..................................................... 15

The 25 March 2019 board meeting ......................................................... 17

The 26 April 2019 board meeting ........................................................... 21

The 1 July 2019 board meeting .............................................................. 26

PROCEDURAL HISTORY OF THE INSTANT DISPUTE ........................................... 32

**THE DECISION BELOW ............................................................................ 34**

**ISSUES FOR DETERMINATION ............................................................... 36**

**ANALYSIS................................................................................................... 37**

THE RELEVANT BACKGROUND......................................................................... 37

THE CONTENT OF THE BEST EFFORTS OBLIGATION ......................................... 41

THE PERIOD FROM 9 TO 25 APRIL 2019 ......................................................... 43

**CONCLUSION ........................................................................................... 55**



Version No 1: 10 Jan 2022 (21:23 hrs)

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# Carlsberg Breweries A/S
# v
# CSAPL (Singapore) Holdings Pte Ltd

**[2022] SGCA(I) 2**

Court of Appeal — Civil Appeal No 18 of 2021
Andrew Phang Boon Leong JCA, Judith Prakash JCA, and Jonathan Hugh Mance IJ
19 October 2021

10 January 2022 Judgment reserved.

**Andrew Phang Boon Leong JCA (delivering the judgment of the court):**

## Introduction

1 This appeal arises out of a decision by the International Judge below (the "Judge") in *Carlsberg Breweries A/S v CSAPL (Singapore) Holdings Pte Ltd* [2021] 4 SLR 1 (the "Judgment") dismissing a claim by the Appellant ("Carlsberg") for repayment of a loan extended by Carlsberg to the Respondent ("CSAPLH") under the terms of a loan agreement entered into on 23 December 2010 and subsequently amended by addenda dated 24 September 2013 and 31 October 2013 ("the Loan Agreement") (see the Judgment at [112]). Carlsberg's claim for repayment is based on alleged breaches of a Deed of Undertaking dated 12 April 2018 ("the Deed of Undertaking"). These breaches are said to entitle Carlsberg to terminate a Deed of Release of the same date ("the Deed of Release"), and to declare all outstanding amounts under the Loan

Agreement immediately due and payable. It is not disputed that if the Deed of Undertaking was breached, Carlsberg would be entitled to terminate the Deed of Release.

2 The Deed of Undertaking and the Deed of Release arise in the context of a US$40m loan extended by Carlsberg to CSAPLH under the terms of the Loan Agreement. This loan was provided for the purpose of enabling CSAPLH to pay Carlsberg for a 40% shareholding in a joint venture vehicle, Carlsberg South Asia Pte Ltd ("CSAPL"). CSAPL owns shares in a Nepali subsidiary, Gorkha Breweries Pvt Ltd ("GBPL"). 90% of the shares in GBPL are held by CSAPL, while a 9.94% holding is registered in the name of one Rajendra Kumar Khetan ("RKK"), a Nepali businessman. The small balance of shares is held by individual Nepali shareholders who are not relevant for present purposes. CSAPL, through a holding company, also owns shares in an Indian subsidiary, Carlsberg India Pvt Ltd ("CIPL"), which plays only a subsidiary part in the instant dispute.

3 Carlsberg alleges that CSAPLH had breached cl 2(c) of the Deed of Undertaking ("clause 2(c)" or "cl 2(c)"), which provided that CSAPLH would "use its best efforts to ensure that the director appointed by [RKK] to the board of directors of [GBPL] attends all meetings of the board of directors of [GBPL]". In particular, Pradeep Prakash Khetan ("PPK"), who was at all material times the director appointed by RKK to the board of GBPL, did not attend the board meetings of GBPL on 26 February, 25 March, 26 April, and 1 July 2019. The central question before us is thus whether CSAPLH had complied with cl 2(c) by using its best efforts to ensure that PPK attended the meetings in question. In this appeal, Carlsberg argued that cl 2(c) had been breached because (a) CSAPLH had colluded with PPK to merely *pretend* to



Version No 1: 10 Jan 2022 (21:23 hrs)

persuade PPK to attend the board meetings, and (b) CSAPLH could have done more in relation to the third and fourth board meetings to persuade PPK to attend.

**The relevant facts**

***Dramatis Personae***

4 The Appellant, Carlsberg, is a wholly-owned subsidiary of Carlsberg A/S, a public company listed on the Denmark stock exchange.

5 The Respondent, CSAPLH, is a Singapore-registered company. Prior to October 2013, it owned 40% of the shares in CSAPL. Carlsberg owned the remaining 60% of the shares in CSAPL. CSAPL was incorporated in 2010 as part of a restructuring process to consolidate the interests of Carlsberg and the Khetan family in brewery businesses in India and Nepal into a single joint venture entity. In October 2013, CSAPLH entered into a share transfer agreement, pursuant to which CSAPLH sold a 6.67% shareholding in CSAPL to Carlsberg. As a result, Carlsberg held 2/3 of the shares in CSAPL, while CSAPLH held 1/3 of the shares. As indicated above, CSAPL holds 90% of GBPL, while RKK owns 9.94% of it.

6 The shareholders' agreement of GBPL was dated 1 November 2010 ("the GBPL SHA") and was made between Carlsberg, GBPL, CSAPL and RKK (who was defined as the "Khetan Family" in the GBPL SHA). Under the terms of the GBPL SHA, GBPL was to have a board consisting of up to six directors. Five directors were nominated by CSAPL, and one by the Khetan Family:

(a) RKK appointed PPK as a director to the board of GBPL.



Version No 1: 10 Jan 2022 (21:23 hrs)

(b) By virtue of their respective shareholdings in CSAPL, it was agreed that Carlsberg was entitled to nominate four directors and CSAPLH was entitled to nominate one director, each through CSAPL, to the board of GBPL. Carlsberg's nominated directors (the "Carlsberg-nominated directors") included its two witnesses at the trial below, Soren Hansen ("Mr Hansen"), who was a director of GBPL between 2010 and 16 December 2013, and Peter Steenberg ("Mr Steenberg"), who was a director from 17 November 2015 to present. The director nominated by CSAPLH from 6 September 2014 to date was Mr Pawan Jagetia ("Mr Jagetia").

7 The Khetan family holds extensive interests in a business empire, founded by the late MG Khetan, which is involved in banking, insurance, as well as food and beverage holdings. Of central importance to this appeal are three members of the Khetan family: RKK, Chandra Prakash Khetan ("CPK"), and PPK. RKK is the elder of MG Khetan's two sons, while CPK is the younger. PPK is RKK's and CPK's cousin, though it is not in contention that PPK was raised like a son by MG Khetan, and that PPK, RKK, and CPK saw each other as brothers. However, following MG Khetan's passing in 2007, disputes arose between PPK, RKK, and CPK. While the substance of these disputes is not directly relevant to present proceedings, the *fact* of the dispute and the state of the *present* relationship between PPK, RKK, and CPK are. We consider the evidence regarding the present relationship between PPK and CPK in particular below.

8 There are three other individuals relevant to the present dispute:



Version No 1: 10 Jan 2022 (21:23 hrs)

(a) Surendra Silwal ("Mr Silwal"), who was the GBPL company secretary, chief financial officer and deputy managing director;

(b) Ajith Babu ("Mr Babu"), who was the Managing Director of GBPL; and

(c) Shanta Tuladhar ("Ms Tuladhar"), who was the Human Resources Director of GBPL in early 2019.

We consider the respective roles played by these individuals below.

***Facts leading up to the dispute***

9 Sometime in 2009 and 2010, CSAPLH and Carlsberg agreed to, among other things, restructure and consolidate their holdings in Nepal (through GBPL) and India under a new Singapore company, CSAPL. This appears to have been with an eye towards allowing profits from GBPL to be paid out of Nepal, and circumventing restrictions on the flow of money directly from Nepal to India. The GBPL SHA, entered into on 1 November 2010, made provision for the appointment of directors as set out at [6] above. Significantly, the GBPL SHA also provided that:

(a) A director could be removed from office only by the party who nominated the director in question;

(b) Each party had the right to nominate an alternate director if a director was prevented from attending board meetings; and

(c) Critically, that "[t]he quorum for all meetings of the Board of Directors shall be more than half of the number of appointed Directors



Version No 1: 10 Jan 2022 (21:23 hrs)

> present in person, of which as a minimum 1 (one) shall be a Director nominated by the Khetan Family" (cl 1.9 of the GBPL SHA).

As is readily evident, cl 1.9 of the GBPL SHA in effect gave the "Director nominated by the Khetan Family", in this case PPK, a veto over resolutions passed at board meetings by not attending them and rendering them inquorate. We note in addition that while RKK was the individual referred to as the "Khetan Family" in the GBPL SHA, it was uncontested that Carlsberg dealt primarily with CPK, and not RKK, in relation to GBPL (see the Judgment at [12]). Carlsberg's Mr Hansen and Mr Steenberg also gave evidence that PPK would often assist CPK, and would on occasion convey CPK's wishes in relation to GBPL.

10 Following the signing of the GBPL SHA, CSAPLH took out a US$40m loan from Carlsberg to purchase 40% of the shares in CSAPL from Carlsberg. The Loan Agreement was entered into in December 2010 and provided (a) for an interest rate of 7.65% per annum, and (b) that the agreement would expire on 30 September 2013, after which the loan and accrued outstanding interest would have to be repaid to Carlsberg. The broader restructuring of the interests CSAPLH and Carlsberg had, which the Loan Agreement was a part of, was set out in a Transaction Agreement dated 1 December 2010. While Carlsberg owned 60% and CSAPLH owned 40% of CSAPL initially following the Loan Agreement, it was envisaged that Carlsberg would eventually become the 2/3 owner, and CSAPLH the 1/3 owner. This would occur by way of a put/call option for the sale of 6.67% of CSAPLH's shares in CSAPL. This arrangement was included at cl 7.1 of a shareholders' agreement signed by the shareholders of CSAPL and dated 31 December 2010 (the "CSAPL SHA").



Version No 1: 10 Jan 2022 (21:23 hrs)

*The 2012/2013 disputes*

11 In 2012 and 2013, various disputes appear to have arisen between CSAPLH and Carlsberg. Among other things, CPK (a) demanded that Carlsberg write off the US$40m loan which had been made to CSAPLH, (b) disputed the value of the put/call option price that CSAPLH would receive on the sale of the 6.67% shares in CSAPL, and (c) objected to various matters relating to the running of GBPL. Carlsberg's evidence was that it was pressured by PPK refusing to pass resolutions and utilising his effective veto (under cl 1.9 of the GBPL SHA) to block the making of essential business decisions for GBPL. In particular, CSAPL was unable to draw dividends from GBPL for two years, for Financial Year ("FY") 2010/2011 and 2011/2012. GBPL's non-declaration of dividends caused Carlsberg to have to provide CSAPL a US$210m loan facility, which was entered into on 8 May 2012.

12 To resolve the disputes, and in particular that relating to the transfer of the 6.67% interest in CSAPL, Carlsberg held several meetings with CPK and made several proposals. A meeting was held between CPK and various officers of Carlsberg in Hanoi over 23 and 24 September 2013, and Carlsberg's proposals at that meeting included, broadly, that Carlsberg (a) offered to pay US$20m for the 6.67% of CSAPL (which it alleges was worth only US$3m at that point under the mechanism for determining the put/call option price in the CSAPL SHA), (b) agreed to extend the duration for the remaining portion of the loan, and (c) agreed to consider waiving the remaining US$20m loan amount altogether. In return, Carlsberg sought the removal of the quorum requirements set out in, *inter alia*, cl 1.9 of the GBPL SHA, such that it would no longer be hampered by PPK's effective veto by refusing to pass board resolutions he did not agree with. To allow both Carlsberg and CPK time to



Version No 1: 10 Jan 2022 (21:23 hrs)

finalise the proposed terms, an addendum to the Loan Agreement dated 24 September 2013 (the "First Addendum") was entered into. The First Addendum provided for an extension of the repayment date for the loan by approximately one month, until 31 October 2013.

13 Further to the First Addendum, a second addendum to the Loan Agreement (the "Second Addendum") was entered into on 31 October 2013 in settlement of the dispute over the 6.67% interest in CSAPL. The salient terms of the Second Addendum provided that:

(a) The amount outstanding on the US$40m loan (comprising the principal plus accrued interest) would be reduced by US$20m;

(b) The reduction of US$20m to the loan would be treated as Carlsberg's payment of the purchase consideration for the 6.67% share of CSAPL;

(c) The revised due date of the outstanding amount of the loan would be 8 May 2017;

(d) The share transfer of the 6.67% share was to be completed on 1 November 2013; and

(e) CSAPLH would have the right to appoint a Deputy Managing Director in, *inter alia*, GBPL.

We note for completeness that CPK alleged subsequently that Carlsberg had agreed to write off the *entirety* of the US$40m loan, albeit in two stages – US$20m in the Second Addendum, and a further US$20m subsequently. This



Version No 1: 10 Jan 2022 (21:23 hrs)

allegation, however, did not appear to be borne out by any documentary evidence before us, and is in any event not in issue in this appeal.

14 Apart from the Second Addendum, an amendment to the GBPL SHA was agreed upon and entered into on 31 October 2013. This reflected a change in the quorum requirements which Carlsberg had specifically negotiated and sought:

> Clause 1.9 of the Shareholders Agreement shall be deleted in its entirety and replaced with the following:
>
> > '1.9.1 The quorum for all meetings of the Board of Directors shall be more than half of the number of appointed Directors present in person of which 1 (one) shall be the Director appointed by the Khetan Family.
> >
> > 1.9.2 Notwithstanding clause 1.9.1 the quorum for any board meeting required to declare or disburse dividend [*sic*] shall be more than half of the number of appointed Directors present in person (*i.e.* the Director of the Khetan Family is not required to attend). The parties agree that in this context the chairman of the Board of Directors or the company secretary of the board can convene board meetings as required with the exclusive agenda points to declare and disburse dividend [*sic*] and any other decision which will be a legal prerequisite to declaration or disbursement of dividends, including but not limited to approval of audited accounts, appointment of auditor and convening Annual General Meeting.'

As is readily apparent from cl 1.9.2 above, the amended clause does not go as far as Carlsberg had sought in the Hanoi meeting over 23 and 24 September 2013 (see [12] above). This was, on Carlsberg's account, because CPK had adamantly refused to accept a complete removal of the quorum requirement. Instead, a compromise was accepted in the form of a carve-out from the quorum requirement for the issuance of dividends. Carlsberg's evidence was that it believed that this would help it avoid situations such as those described at [11]



Version No 1: 10 Jan 2022 (21:23 hrs)

above, where it would not be able to use moneys from GBPL to fund its India operations.

15 Following the settlement outlined at [13] and [14] above, GBPL's operations were able to resume smoothly. A board meeting was held on 16 December 2013 and numerous agenda items, including the declaration of dividends for three years (FY 2010/2011, 2011/2012, and 2012/2013), were addressed. Twelve resolutions by circulation were also adopted on 16 December 2013. As is reasonably clear, CPK's acceptance of the end of the dispute with Carlsberg appeared to *directly* correlate with the cessation of PPK's apparent refusal to pass any board resolutions.

*The 2017/2018 disputes*

16 Following the 2012/2013 disputes outlined above, there was a period of relative peace. CPK continued to play a significant role in GBPL, attending meetings (despite not being a director) and participating vocally in them. Carlsberg's unchallenged evidence was that up to and through 2018, CPK continued to be deeply and directly involved in GBPL.

17 As outlined above, the repayment date for the remaining loan amounts following the Second Addendum was 8 May 2017. In the lead-up to this repayment date, it was not contested that CSAPLH and Carlsberg attended several meetings and/or calls to discuss the future of the joint venture and the balance sum of the loan. CPK continued to insist that the *full* balance of the US$40m be written off, while Carlsberg insisted that there was no such agreement. The parties' accounts of these discussions differ:



Version No 1: 10 Jan 2022 (21:23 hrs)

(a) CPK's evidence is that in the light of the many issues CSAPLH was facing with Carlsberg, one of which being Carlsberg's refusal to write off the full balance of the loan, he began contemplating an initial public offering ("IPO") of CSAPL's business as an exit mechanism from the Carlsberg joint venture.

(b) By contrast, Carlsberg's evidence was that CSAPLH engaged in conduct which was disruptive to the joint venture business, in particular relating to CIPL. This led to Carlsberg issuing CSAPLH a formal notice that the amounts of US$28,862,273.72 plus interest of US$7,881,204.61 were due and payable by CSAPLH on 8 May 2017.

18 Following the formal notice Carlsberg issued, a meeting was held on or around 7 May 2017 in Singapore to try and resolve the issues between the parties. CPK was joined by Mr Jagetia and PPK to negotiate on behalf of CSAPLH at the meeting. In particular, there is e-mail documentary evidence from CPK to Carlsberg's representatives explicitly stating that Mr Jagetia and PPK would be joining him for that meeting. As matters transpired, this meeting failed to resolve the parties' differences. Carlsberg's evidence is that CSAPLH intensified its efforts to cause issues in CIPL, including *immediately* reneging on its previous confirmation for the appointment of a new (Carlsberg-affiliated) Managing Director for CIPL. This was said to have had the result of leaving Mr Jagetia, the Deputy-Managing Director, as the most senior individual in CIPL.

19 CSAPLH failed to repay the loan on the due date of 8 May 2017. However, Carlsberg did not move to enforce its claim immediately, and instead engaged in further negotiations with CSAPLH. These negotiations culminated



Version No 1: 10 Jan 2022 (21:23 hrs)

in a term sheet dated 6 December 2017 (the "Delhi Term Sheet"). The Delhi Term Sheet was the precursor to a number of documents agreed in 2018, which were envisaged as settling the dispute. In particular, the documents agreed upon in 2018 included an amended shareholders' agreement for CSAPL (the "Amended SHA"), as well as the Deed of Undertaking and Deed of Release referenced above. All three documents were dated 12 April 2018. The releases granted by Carlsberg to CSAPLH in the Deed of Release were subject to and conditioned on CSAPLH providing and fulfilling the undertakings given to Carlsberg under the Deed of Undertaking. An IPO was also envisaged as a means of raising money.

20 The salient point of the Deed of Release was that it provided that CSAPLH would be released from "all its covenants, liabilities and obligations under or pursuant to the Loan Agreement" from the "Release Date". The "Release Date" was defined under cl 1 of the Deed of Release as the earlier of either (a) 31 December 2019, or (b) the date of a public offering on a regulated market or recognised stock exchange of between 10% and 25% of the ordinary shares in the capital of CSAPL in issue from time to time, or the ownership of CSAPL in CIPL and GBPL. Clause 4 of the Deed of Release also provided that Carlsberg would waive all interest for the period from 6 December 2017 until the "Release Date". However, as at the date the Suit was commenced, *ie*, 26 July 2019, none of the events constituting the Release Date as defined in cl 1 of the Deed of Release had occurred.

21 The undertakings provided by CSAPLH to Carlsberg were set out in cl 2 of the Deed of Undertaking, as follows:

> CSAPLH hereby undertakes to Carlsberg that for the period commencing from the date of this Deed up to and including 31 December 2019 (the "Effective Date"):



Version No 1: 10 Jan 2022 (21:23 hrs)

> (a) it shall comply fully with the terms of the Amended Shareholders' Agreement (including the governance obligations in clause 3 and the principles set out in Annex 1 therein) and to the extent that there is any breach or non-compliance, such breach or non-compliance shall to the extent it is capable of remedy, be remedied to the satisfaction of Carlsberg within 30 days of the earlier of the date on which (a) CSAPLH becomes aware of its breach or failure to comply and (B) [*sic*] Carlsberg giving notice to CSAPLH of such breach or non-compliance;
>
> (b) it shall ensure that at least one (1) of its nominated directors attends all meetings convened by the Board or any Subsidiary Board with at least fourteen (14) days' prior written notice;
>
> (c) it shall use its best efforts to ensure that the director appointed by [RKK] to the board of directors of [GBPL] attends all meetings of the board of directors of [GBPL];
>
> (d) it shall not cause a Termination Event; and
>
> (e) it does not commence any legal proceedings (whether by arbitration or court proceedings) against Carlsberg or any member of the Carlsberg Group (a Legal Proceeding and together the Legal Proceedings).

Carlsberg's evidence in relation to cl 2(c) is that it had initially worded cl 2(c) as an absolute condition such that CSAPLH would *ensure*, instead of merely using best efforts to procure, that the director appointed by RKK would attend all meetings of the GBPL board. This was explained on the basis that CPK was responsible for and actively managed his family's interests in its dealings with Carlsberg, including GBPL matters. He was seen as the decision-maker in the venture with Carlsberg for the Khetan Family. However, CSAPLH refused to agree to an absolute condition, and Carlsberg eventually consented to a "best efforts" clause instead. It is Carlsberg's evidence that it did so because such a change in phrasing "would not have made much of a difference as CP[K] would have been able to get PP[K] (or any other Khetan Family-nominated director) to attend the GBPL board meetings if CP[K] wanted to" given his influence and control over the family's GBPL-related affairs.



Version No 1: 10 Jan 2022 (21:23 hrs)

22 Following the Deeds of Undertaking and Release, there was again a period of relative "peace". There were four quorate board meetings in 2018 from the time the said deeds were entered into. These took place on 23 April, 25 June, 18 September, and 3 December 2018. However, the peace was not to last. In late-2018 to early-2019, CSAPLH took issue with a number of matters relating to the pace and progress of the envisaged IPO, as well as shareholder matters relating to CSAPL.

*The 2019 disputes and the present suit*

23 Following the dispute relating to the IPO and the shareholder matters, PPK stopped attending GBPL board meetings again. The board meetings PPK failed to attend were those on 26 February, 25 March, 26 April, and 1 July 2019. These board meetings are central to the present suit.

24 A day after PPK failed to attend the board meeting on 26 February 2019, CSAPLH issued a Notice of Material Breach of the CSAPL SHA to Carlsberg. The Notice of Material Breach alleged, broadly, breaches relating to:

(a) Carlsberg's alleged failure to commit to an expedited process of an IPO of CSAPL's combined businesses in India and Nepal; and

(b) Carlsberg's alleged failure to work in good faith to support CSAPLH in respect of assigning an option under the CSAPL SHA in order to obtain a loan from a financial institution.

The Notice of Material Breach was followed by CSAPLH commencing arbitration proceedings against Carlsberg on 18 April 2019 relating to the two issues set out above.



Version No 1: 10 Jan 2022 (21:23 hrs)

25 We turn to set out the details of each of the four board meetings PPK missed, which are central to this appeal. Before doing so, we emphasise that PPK has continued to refuse to attend any GBPL board meetings. These include, *inter alia*, meetings called for 12 August 2019, 2 October 2019, 7 November 2019, 2 December 2019, 14 February 2020, 5 March 2020, 28 April 2020, 29 June 2020, 18 August 2020, and 5 October 2020.

The 26 February 2019 board meeting

26 On 7 February 2019, PPK sent an e-mail to Mr Babu concerning certain points relating to GBPL's sales and marketing strategy, and in particular regarding (a) the key performance indicators ("KPIs") for GBPL's "field [sales] team", (b) KPIs for "RTM" [*ie*, 'Route to Market'], and (c) "RTM rollout changes if any". He stated that his e-mail was a "reminder for the upcoming meeting so that [those issues did not get] deferred again" and that he "shall appreciate if it can be circulated in advance to enable observations and suggestions". In other words, PPK's e-mail of 7 February 2019 suggested that he intended to attend the 26 February 2019 meeting.

27 On 10 February 2019, the draft agenda of the 26 February 2019 meeting was sent out by Mr Silwal, together with the draft itinerary for the Commercial Review ("CR") meeting. The board agenda included the following items:

(a) at item II(D) – "Sales and Trade Marketing Organization (This agenda has been moved to CR on 25 Feb and the pre-read for this agenda is part of the pre-read deck circulated on 19 Feb by [Mr Babu])";

(b) at item III(A) – "CR Update";

(c) at item III(D) – "Update on [Dividend] Payout Process";



Version No 1: 10 Jan 2022 (21:23 hrs)

(d) at item III(E) – "Status on Share [transfer] from RKK to Amazonia Capital Pte [*ie*, a company controlled by CPK]"; and

(e) at item III(F) – "Status on MD's work permit and registration at Labor Department".

On 15 February 2019, Mr Steenberg asked for additional items to be placed on the board agenda as well as in the pre-read material relating to the 2018 dividends.

28 There was no indication from PPK that he would not be attending the meeting until 20 February 2019, when he sent an e-mail asking for the meeting to be rescheduled:

> Dear Surendra,
>
> Due to some urgent and unavoidable circumstances, I need to travel and won't be attending the upcoming board meeting, hence request you to plan it for March end as convenient to all

However, given that there were urgent matters to be discussed, including a number marked for approval in the finalised board agenda circulated on 20 February 2019, and which could not proceed absent the approval of the GBPL board, Mr Steenberg replied by e-mail on 21 February 2019 asking that the meeting not be rescheduled. Instead, it was proposed that PPK join the meeting remotely:

> The board meeting has been validly convened and we need to proceed with the board meeting as we have urgent and pressing matters to discuss. I trust that there will be ways for you to join from your location by phone or VC or alternatively that you discuss with [RKK] to ensure an alternate or other ways for the board meeting to go ahead. I will be attending the board meeting and so will the other directors I have spoken to.



Version No 1: 10 Jan 2022 (21:23 hrs)

29 CPK alleges that he called PPK on 21 February 2019 to persuade him to attend the board meeting. However, his effort was said to have been rebuffed. CSAPLH points to an e-mail from CPK to PPK dated 21 February 2019 which states "Reference our discussion earlier today, I hope you still try to make it to the GBPL board meeting". PPK replied on 22 February 2019 stating, shortly, that "I have tried my best but it doesn't look possible". PPK's account of why he could not attend the meeting on 26 February was that he had to attend a meeting concerning the Hari Khetan Campus ("HKC"), an educational campus located in a city 100km away from where PPK resided. PPK asserted that the issues concerning the HKC were highly sensitive and required his immediate attention. In particular, PPK claimed that a meeting with "government officials, parliamentarians and dignitaries" concerning the HKC had been fixed for 25 and 26 February 2019, and that this meeting had only been scheduled on 20 February 2019. Because of this other commitment, PPK claimed to be unable to attend the board meeting on 26 February 2019.

30 Setting aside the fact that the meeting with "government officials, parliamentarians and dignitaries" seemed to have been called at very short notice (called on 20 February for a meeting on 25–26 February), it bears noting that there was no further information provided regarding this alleged meeting concerning HKC. Carlsberg did not suggest that PPK's attendance at the HKC meeting was contrived, but the Judge found, unsurprisingly, that he had not shown "that he could not have made some accommodation in joining the meeting by telephone or video conference" (see the Judgment at [96]).

The 25 March 2019 board meeting

31 On 8 March 2019, Mr Steenberg sent an e-mail to Mr Silwal, copying in the rest of the GBPL directors, requesting that a meeting be convened on



Version No 1: 10 Jan 2022 (21:23 hrs)

25 March 2019. It was the evidence of both CPK and PPK that "[o]n or around 19 March 2019", PPK called CPK, expressing concerns about the way in which GBPL was being run. The account given by both CPK and PPK was that PPK was upset by the conduct of the directors appointed by Carlsberg, and was concerned about his own personal liability as the only director who was resident in Nepal. Despite PPK ostensibly never having stated, at least prior to 25 March 2019, that he would not appear at the scheduled board meeting on 25 March 2019, PPK and CPK both gave evidence that CPK had *insisted* that PPK should raise his concerns at that meeting. Setting aside the oddity of CPK insisting that PPK attend a meeting that he (PPK) had given no indication that he would not attend, CPK claimed to have followed up his oral insistence with a series of further telephone calls between 19 March 2019 and 25 March 2019. CPK stated that he had reminded PPK that the board meeting had been scheduled for the end of March 2019 at PPK's request, and that PPK eventually "relented and told [CPK] that he would attend the GBPL board meeting at [CPK's] request". PPK gave a similar account.

32 On 19 March 2019, RKK e-mailed Mr Silwal complaining that he had only received part of the dividend due to him. PPK's evidence is that RKK later sent an e-mail to Mr Babu, copying in various government authorities and stating that the failure to pay him the dividends on his 9.94% shareholding amounted to a serious violation of his rights. Mr Silwal's evidence was that this led to his meeting with RKK at RKK's office in Kathmandu and telling him that the remaining portion of his dividend would be paid shortly. He also informed RKK of the absence of PPK at the 26 February meeting and asked him to request that PPK attend the next meeting scheduled for 25 March 2019. RKK's response was allegedly that he would leave it to PPK to make his own decisions. On 24 March 2019, Mr Silwal again met with RKK, telling him that the remaining



Version No 1: 10 Jan 2022 (21:23 hrs)

amount of dividend due to him had been paid and that he should receive the money the following day, which he duly did.

33 On 20 March 2019, ABT Legal and HR Consultancy authored an opinion for PPK. The opinion stated that, under various pieces of legislation, the chief executive officer, managing director, and directors could be held liable for the acts of the company, and that whoever was available locally was likely to be the first in line for any prosecution. PPK claimed to have understood this to mean that he could be liable for any decisions in which he had participated as a director, as he believed that he was the only locally-resident director. Setting aside the fact that Mr Babu, though an Indian national, was at all material times resident in Nepal (see the Judgment at [52]), PPK's *own* evidence did not go so far as to claim that the lawyers had advised him that absenting himself from board meetings would exempt him from responsibility.

34 On the night of 24 March 2019, one day prior to the board meeting on 25 March 2019, PPK sent an e-mail to CPK, copying in the GBPL board:

> Dear CP,
>
> I hear your several communications and concerns to resolve matters related to GBPL by discussions in the board. But at the same time, I want to share my frustrations on the way some directors of GBPL board are directing GBPL, without a formal discussion and decision of the board, on matters which may violate local laws and potentially undermine the existence and rights of local investor. In particular, I have the following questions:
>
> 1. Who stopped dividend payments for [RKK's] shares when AGM approved the dividend in January
>
> 2. Who will be liable given [GBPL's managing director] is working without valid work permit
>
> 3. Why GBPL has not provided new [Route to Market Key Performance Indicators] despite several requests



Version No 1: 10 Jan 2022 (21:23 hrs)

> 4. What is the definition of a "failed" board meeting as termed by some of the board directors. Is it a term as defined by Nepal law or is it self-dictated definitions on how board meetings are to be defined?
>
> On your repeated insistence to attend the board meeting of GBPL, I would attend the board meeting, but if I feel that there is still intentions [*sic*] to not follow the rule of law of the country and trying to ignore the local investor [*sic*], I will have to take corrective measures.
>
> Best regards
>
> P.P. Khetan

In short, while PPK was ostensibly setting out grievances he had, there was no indication that he did not intend to attend the board meeting on 25 March 2019.

35 As matters transpired, PPK did not attend the board meeting on 25 March 2019. His evidence was that he had taken ill that morning and went to the Emergency Department of Himal Hospital with heart palpitations and dizziness. He did not attend the meeting of the Avsar Foundation – a meeting which CPK and Mr Silwal were also supposed to attend – that afternoon and had sent an e-mail to its representatives at 1.46pm to explain his absence. No such explanation was given to GBPL. As appears from the medical note, PPK was discharged the same day with medication and instructions to rest for three days, and follow-up as necessary.

36 Both PPK and CPK stated in their evidence that CPK had called PPK after his 1.46pm e-mail to ask after him and his health, and that PPK then apologised to CPK for missing the meeting, and informed CPK that he would attend the next GBPL board meeting.

37 On 27 March 2019, Mr Jagetia wrote an e-mail to the CSAPL board proposing that PPK's 24 March e-mail be the subject of consideration at



Version No 1: 10 Jan 2022 (21:23 hrs)

CSAPL's board meeting that day. The CSAPL board adjourned the matter, taking the view that the appropriate forum for those matters to be considered was the GBPL board.

The 26 April 2019 board meeting

38 On 9 April 2019, there was a brief meeting between Mr Jagetia and PPK, during which, according to the former, PPK said that he would not let the Carlsberg-nominated directors make decisions by majority vote on the topics he had raised, that he would attend GBPL board meetings only after his concerns were addressed, and that in the meantime, the GBPL board could make decisions in the interests of GBPL by passing resolutions by circulation (which would mean only by consensus). Despite its brevity, Mr Jagetia's account indicates that it conveyed a clear and in our view significant message in terms to which we will return below at [75]. On the same day a proposed agenda was sent out for the 26 April meeting. Agenda items included the following:

(a) "Noting failed quorum for board meetings duly called for 26 February and 25 March – vote if needed on making such note in the board";

(b) "HR Director replacement – get a status from GBPL management – vote to put current HR Director on garden leave within a week from the board meeting and immediately start recruiting a new local HR director for GBPL"; and

(c) "Dividends – explanation by GBPL management, also answering the questions raised by [PPK] in this matter – Carlsberg supports that dividend is paid out timely [*sic*] to all shareholders".



Version No 1: 10 Jan 2022 (21:23 hrs)

39 On 20 April 2019, the deck of documents for the 26 April 2019 board meeting was sent to the board members. A further e-mail from Mr Babu that day included additional pre-read material. In his e-mail, Mr Babu wrote:

> Dear Board Directors,
>
> Pls find attached additional pre reads/addl pre reads for the following agenda items for the Board meeting on 26th April
>
> 1. Section 2 D: Sales and Trade Marketing Organisation
>
>    Attached file: Nepal Sales organization.pdf
>
>    Attached file: Nepal Trade Marketing Organisation.pdf
>
> 2. Section 3 F: MD's work permit status
>
>    Attached: Peter's mail dated 8th April and attachment in that mail.

The reference in the e-mail to "Peter's mail dated 8th April and attachment in that mail", refers to an e-mail from Mr Steenberg dated 8 April 2019, which enclosed a legal opinion from Pioneer Law Associates stating that a work permit was not necessary for Mr Babu.

40 At the meeting for the Indian subsidiary on 23 April 2019, Mr Jagetia suggested that Mr Silwal write to PPK in advance to confirm his participation at the scheduled 26 April meeting. This was despite Mr Jagetia *insisting* – as CPK had in a separate context (see above at [31]) – that he had no prior indication of PPK's non-attendance at the 26 April meeting. In any event, Carlsberg's Troels Libak Stollberg ("Mr Stollberg"), by e-mail, asked Mr Silwal to check whether PPK would be attending. On 24 April 2019, Mr Silwal forwarded Mr Stollberg's e-mail to PPK, asking that PPK "[Please] let me know on your participation of the 26th April Board Meeting".



Version No 1: 10 Jan 2022 (21:23 hrs)

41 On 25 April 2019, one day before the board meeting, PPK sent the following e-mail to the GBPL board, CPK, and a number of the board members of CSAPL:

> Dear all,
>
> I am very concerned the way [GBPL] is being managed by individual representatives of CSAPL representing [*sic*] in the board of GBPL (and also sometimes by non board members). I had expressed my concerns in my email to all on the 24th March, which is still not addressed to. As a local director representing local and minority shareholder, I am worried and scared that the unilateral way to manage the company and disrespect of local laws and corporate governance norms, could lead to a situation wherein the local director is penalized as the first impact of any action taken by authorities here will be hard hitting on me as I am a resident here.
>
> I see that in the proposed agenda below, instead of impartially investigating the complaint of HR head, she is being victimized by being asked to take garden leave.
>
> Seeing the proposed agenda below, I fear that directors representing CSAPL are trying to force decisions by way of majority against the interest of the company and not addressing the issues of minority shareholder, hence to protect the interest of minority shareholder and the company, I will not be attending the meeting, however I am always available to support the business and any business critical decision can be made through resolution by circulation
>
> Best regards
>
> P.P. Khetan

42 Upon receipt of PPK's e-mail, Carlsberg's Mr Graham Fewkes ("Mr Fewkes") replied by e-mail on 25 April 2019, as follows:

> Dear PP,
>
> Thank you for reaching out to us.
>
> Obviously I cannot speak for CSAPL in its entirety, but please reconsider your participation in tomorrow's board meeting, as we highly value your opinions and the board meetings is [*sic*] the right forum to discuss.

On the issue of the HR director, the GBPL board members unanimously, including yourself, agreed she needs to be replaced due to performance issue. [Mr Silwal] noted from a call [on] 4 January 2019 the unanimous conclusion: 'Finally, the Board decided to replace the existing HR head as soon as possible in line with the discussion'. As far as we understand, there is nothing under local law which prevents the HR director's dismissal for performance issues.

Meanwhile, the HR director has raised some concerns on 22 March which is [*sic*] now being investigated by two board directors, nominated by CSAPLH and Carlsberg respectively. While the investigation is ongoing, we are proposing the HR director be put on garden leave pending completion of the investigation, which we believe to be a responsible course of action. This is still subject to discussion at and possible approval by the board in compliance with [GBPL's] [Articles of Association] and local laws and regulations. We would love to hear your input so if you have any view regarding the HR director, we would like to encourage you to attend the board meeting so that the other directors can hear from you before the board makes a decision.

Similarly, if you believe you have not received satisfactory answers to your 24 March email, the management and other directors of [GBPL] can help address that during tomorrow's board meeting. As you chose not to attend the last two board meetings and maybe choose not to attend tomorrow's board meeting, it is not really reasonable that you assert that [GBPL] is being managed with no regard to your view while you have chosen not to participate in the decision making process. Similarly, we struggle to see how your decision not to attend board meetings could be held against [GBPL] or its board.

To protect the interests of minority shareholder and [GBPL], it would normally be the duty of a minority representative director to attend and actively participate in board meetings as opposed to boycotting board meetings. Your proposal that business of [GBPL] instead be transacted by circular resolutions would only mean that all decisions must be subject to your veto which is inconsistent with the shareholder agreement of [GBPL] and with local laws and regulation, which do not require all decisions presented to the board of [GBPL] [to] be subject to your veto.

Once again, in the best interest of [GBPL], we urge you to reconsider your decision not to attend the board meeting tomorrow and we look forward to seeing and hearing from you.



Version No 1: 10 Jan 2022 (21:23 hrs)

On the same day, and following Mr Fewkes' e-mail, CPK sent an e-mail, copying all of the Carlsberg-nominated directors and PPK, stating:

> Dear PP
>
> I agree with Graham that you should attend the board meeting and discuss your issues there. Your concerns could be included in the agenda and proper way forward could be discussed. Please reconsider.
>
> Thanks and Best Regards

43 On 26 April 2019, CPK e-mailed Mr Silwal, copying Mr Jagetia and Mr Fewkes, as follows:

> Silwalji
>
> Can you please meet RK and convince him to send [PPK] to board meeting.
>
> Thanks and Best Regards

On the same day, CPK also appears to have e-mailed Mr Jagetia, again copying Mr Fewkes, as follows:

> Please let me know if you have any ideas on how to make Pp join the meeting

This message was followed shortly thereafter by Mr Jagetia's reply, which again copies Mr Fewkes, as follows:

> I think addressing his concerns through an email response could help. I will propose a communication on behalf of CSAPL nominated directors (after agreeing with them) and send it to PP Khetan. Thx

Carlsberg's position was that these messages were carefully choreographed and for show, with the scrupulous copying of Mr Fewkes simply a method to create a paper trail of CPK's seemingly assiduous attempts to procure PPK's attendance.



Version No 1: 10 Jan 2022 (21:23 hrs)

44 As matters transpired, PPK did not attend the 26 April Board Meeting. The reasons which he outlined in his affidavit of evidence-in-chief ("AEIC"), were that:

> 105 My refusal to attend the GBPL board meetings was to prevent decisions being made by the majority which in my view would not be in the interests of GBPL and [RKK], whom I represented on the board. It was also to protect myself from criminal prosecution based on the concerns that I had raised and which had not been addressed by the majority of the directors.

45 Curiously, however, while PPK claimed in his AEIC that it was "sometime" in April 2019 that he had decided not to attend the 26 April meeting, he was able to specifically and precisely state under cross-examination that he had decided not to attend the meeting only on 25 April 2019 when he sent the e-mail at [41] above. No explanation appears to have been provided for this discrepancy.

The 1 July 2019 board meeting

46 On 28 April 2019, Mr Jagetia wrote to the Carlsberg-nominated directors of GBPL as follows:

> I recommend that we respond to PP Khetan via email on the commercial and legal issues raised by him on his emails of March 24 and April 25 and following that ask him to confirm that he will make himself available for (1) physical board meeting scheduled on July 1, and (2) resolutions by circulation in the interim on important business topics.
>
> Below I summarize the topics and an approach to answer:
>
> 1. Delayed dividend payment to minority shareholder
>
> Surendra to detail all the steps taken to pay the dividends on time and the *communications/instructions from directors and non directors [sic] on withholding the dividend payments*
>
> 2. MD legal status



Version No 1: 10 Jan 2022 (21:23 hrs)

> Surendra to detail legal positions (labour acts old and new, circulars from various government departments, chronology starting with MD appointment, employment contract, communications/instructions from directors and non directors over last 12 months, latest status of employment contract and registration/approval of MD from Nepalese authorities and *implications legal as well as reputational on directors and GBPL* from the developments over last 12 months as well as going forward.
>
> 3. RTM KPIs.
>
> [Mr Babu] to detail various RTM initiatives over last 12 months, objectives/targets and the investments made so far, achievements so far and the path forward. All at very granular level and with relevant data to support
>
> 4. Definition of failed Board meetings.
>
> *[Carlsberg-nominated directors] who have coined the term* 'failed Board meeting' vs a more commonly known term 'inadequate quorum' to *detail their motivation and legal basis* for making such declarations.
>
> 5. HR director garden leave.
>
> [Carlsberg-nominated directors] who put forward the agenda item for April 26 Board meeting to *detail their motivation* and *Carlsberg group policy* on treatment of claimant vs accused during the investigation.
>
> Given the claim of some [Carlsberg-nominated directors]/alternates/shareholder representatives of a valid GBPL Board decision to remove the director, Surendra to clarify the status of Board decision as well as whether the recommendation to remove HR director had merit considering the harassment claims dating back to early 2018 and intervention (or lack thereof) from Carlsberg India and Asia HR heads. Thx
>
> [emphasis added]

Mr Jagetia insisted that this e-mail was "neutral", though this was not accepted by the Judge, who saw it as implying criticism of Carlsberg and its appointees (see the Judgment at [80]).



Version No 1: 10 Jan 2022 (21:23 hrs)

47 On 29 April 2019, Mr Jagetia again sought to raise the issues outlined in his e-mail of 28 April 2019 with the CSAPL board, proposing that it "take note of the email from [the] director of the minority shareholder at GBPL dated 25 March 2019" as well as PPK's subsequent 25 April e-mail. Mr Steenberg, who sat on both the CSAPL and GBPL boards, asked what the purpose of bringing this issue to the CSAPL board was, given that the right forum for the issues raised was the GBPL board. The matter was thus not further ventilated in the CSAPL board meeting.

48 On 6 May 2019, CPK and Mr Jagetia met with PPK in Singapore. Their evidence was that PPK provided them with a medical certificate at that meeting in relation to his non-attendance of the 25 March meeting. PPK was also said to have recounted his concerns about the governance of GBPL, and in particular his alleged potential liability as a resident director in Nepal. PPK was also said to have provided CPK and Mr Jagetia with legal opinions he had procured regarding his potential liability. CPK claimed to have told PPK that he ought to attend the board meetings to raise his concerns, and stated that he had even offered to indemnify PPK for any financial losses he might suffer in relation to his expressed concerns about the governance of GBPL. PPK allegedly replied that he did not want to attend the board meetings until his concerns had been addressed by the board of directors, and that an indemnity was insufficient in the face of potential criminal liability.

49 In addition, the following acts after the 6 May 2019 meeting between CPK, PPK, and Mr Jagetia are of note:

(a) On 10 June 2019, Mr Jagetia met with PPK in the GBPL office in Nepal and allegedly asked him to attend the meeting scheduled for



Version No 1: 10 Jan 2022 (21:23 hrs)

1 July 2019. He told PPK of his intention to get the directors of GBPL and/or CSAPL to respond to the concerns which PPK had raised, and (re-)sent a copy of his earlier e-mail dated 28 April 2019 to the Carlsberg-nominated directors.

(b) CPK claimed to have spoken to PPK between May and June 2019 and had asked him to attend the 1 July 2019 board meeting more than ten times. On 28 June 2019, when both PPK and CPK were attending the wedding anniversary of PPK's in-laws in Phuket, CPK further claimed to have asked PPK to attend the board meeting, including by video conferencing as necessary. He purportedly offered to be with PPK during the video conference or telephone call in order to give him support, if necessary, but the evidence of both CPK and PPK was that PPK would not agree to this.

50 On 12 June 2019, Ulrik Andersen, Carlsberg's General Counsel, sent a letter by e-mail and courier to RKK referring to clauses 1.9 and 1.10 of the GBPL SHA as amended by the addendum of 31 October 2013. The letter pointed to the absence of RKK's nominated director, PPK, from the board meetings of 26 February 2019, 25 March 2019 and 26 April 2019, and the absence of a quorum in consequence. It was argued that PPK had thus demonstrated that he was unwilling and/or unable to fulfil his duties as a director on the GBPL board. Carlsberg thus demanded that RKK should, within eight calendar days, nominate a replacement director who was willing and able to discharge the duties of a director. The letter was copied to CSAPL and GBPL.

51 RKK's response to this letter is significant. In his response, he stated that:



Version No 1: 10 Jan 2022 (21:23 hrs)

> Me as part of Khetan Family and participant party of the agreement of 2010 [presumably referring to the CSAPL SHA] I never appointed PP Khetan as Board Member of GBPL. He is not trustworthy for me. We should meet to discuss this.

52 This led to a meeting between Mr Hansen and RKK on 21 June 2019. Mr Hansen made notes of the meeting that evening and recorded a summary in an e-mail to RKK dated 26 June 2019, which the latter then corrected and amplified. The relevant portions of the corrected summary are as follows:

> 4. With regards to the appointment of [PPK] to the GBPL Board, you [referring to RKK] stressed that you have never signed any formal papers to appoint of [PPK] to that Board. You have had no direct contact with [PPK] & [CPK] since 22 June 2014 relating to any matter including Board matters in GBPL. *In reality, [PPK] reports to [CPK], who depends on [PPK] to look after [CPK's] interests in Nepal. Hence, you have at no point in time asked [PPK] to stay away from the Board meetings. …*
>
> 5. I mentioned when we met that GBPL had important decisions to take … We both agreed that it was in the company's best interest to have a Board that works efficiently, and where the board members show up to take the right decisions. If you were to appoint a director, you prefer that you are not appointing yourself. You would prefer to appoint e.g. Surendra Silwal since you are confident that you will be able to convince him to show up at the Board meetings if it is not against the contract that is signed with [PPK]/[CPK] on 1st April 2018. Silwal is honest to GBPL & to [RKK] too but he is personally bonding with [CPK]. Since other businesses are part wise being transferred to [RKK] by [PPK]/[CPK], it is not clear if [RKK] can take any decision as a shareholder of GBPL being obligatory to sale [*sic*] it to [CPK].
>
> [emphasis added]

As is apparent from the summary extracted above, RKK's position was that PPK was reporting to CPK, and helped CPK look after his interests in Nepal. RKK further said that he could not get involved as he was morally committed to giving up his 10% share in GBPL to CPK already as part of the family settlement (relating to the distribution of M G Khetan's estate) and therefore could not intervene where PPK was concerned.



Version No 1: 10 Jan 2022 (21:23 hrs)

53 On 24 June 2019, Mr Silwal sent out the agenda for the 1 July meeting with a detailed board pack. In the agenda appeared the following:

(a) "Note of the failed quorum for the BM of Feb 26, 2019, Mar 25, 2019 and Apr 24, 2019";

(b) "Sales and Trade Marketing Organization";

(c) "HR Director Status";

(d) "Update on Dividend Payout Process/Payout Status";

(e) "Status on Share transfer from RKK to Amazonia Capital Pte";

(f) "Status on MD's work permit and registration at Labor Department/Updates on Pioneer Law Associates Legal Opinion"; and

(g) "Communication of Corporate Governance Principles".

54 On 28 June 2019, PPK sent an e-mail to the GBPL board stating, as an addition to his earlier e-mail of 25 April 2019, that:

> In all the recent communication being floated around about the upcoming board meeting on the 1st of July, I don't see any concern or effort by any of the board directors to resolve the issues related to protection of interest/rights of minority shareholder and have good governance in GBPL management wherein a tainted MD is still protected.
>
> Hence I would like to express my inability to join the meeting unless the above issues are resolved.
>
> But as committed earlier as well, I am always available to support the business and any business critical decision can be made through resolution by circulation

55 Mr Fewkes responded to ask PPK if he had cleared such a position with RKK, and to do so if he had not. He further stated that it would be in the best



Version No 1: 10 Jan 2022 (21:23 hrs)

interest of GBPL and all its shareholders if PPK attended the GBPL board meeting that coming Monday. Mr Fewkes' e-mail went on to state as follows:

> … Then we can hear and discuss your viewpoints in the right forum. Already 3 times you have chosen not to attend. If more convenient, you can dial in or RK[K] could appoint an alternate director for the meeting.

PPK did not respond.

56 As outlined above, several further board meetings of GBPL were held after 1 July 2019. PPK did not attend any of them.

***Procedural history of the instant dispute***

57 On 26 July 2019, Carlsberg commenced HC/S 758/2019 (the "Suit") in the Singapore Courts. The Suit sought repayment of US$42,950,829.71 under the Loan Agreement, comprising US$36,743,478.34 due as of 8 May 2017 (as stipulated in the Second Addendum) and interest of US$6,207,351.37 for the period from 8 May 2017 to 12 July 2019. Carlsberg alleged that this sum had fallen due because CSAPLH's breaches of the Deed of Undertaking led to the releases under the Deed of Release being revoked. In particular, Carlsberg alleged that CSALPH had breached:

(a) Clause 2(a) of the Deed of Undertaking by:

(i) Failing to comply with cl 5 of the Amended SHA by insisting that any IPO take place only in India;

(ii) Failing to comply with cll 3.1, 3.2, and 12 of the Amended SHA by deliberately boycotting CSAPL's EGMs on 4 July and 11 July 2019; and



Version No 1: 10 Jan 2022 (21:23 hrs)

(b) Clause 2(c) of the Deed of Undertaking by failing to use its best efforts to ensure that PPK attended the four GBPL board meetings.

58 On 8 November 2019, CSAPLH applied for the Suit to be stayed pending the final determination of Arbitration No 152 of 2019 ("the Arbitration") in the Singapore International Arbitration Centre. The Arbitration is a consolidated arbitration arising out of a number of different requests for arbitration made by both parties. On 29 December 2019, pending determination of the stay application, the Deputy Registrar ordered that the Suit be transferred to the Singapore International Commercial Court. It was designated as SIC/S 5/2019 thereafter.

59 CSAPLH's application for a stay was heard before the Judge on 19 February 2020. Broadly, both Carlsberg and CSAPLH agreed that Carlsberg's claims relating to breaches of cl 2(a) of the Deed of Undertaking ought to be stayed, and the only issue before the Judge was whether Carlsberg's claims in the Suit relating to the alleged breach of cl 2(c) ought also to be stayed in favour of the Arbitration. The Judge took the view that the interests of justice would be best served by the clause 2(c) issues being determined as soon as convenient, because they had the potential to be determinative of the entire dispute and could be decided in a much shorter timeframe than the Arbitration. This, he held, would not infringe upon the jurisdiction of the arbitrators determining the disputes relating to the IPO in the Arbitration. Accordingly, a stay was ordered in relation to all matters other than the clause 2(c) issues, which were permitted to proceed to trial.



Version No 1: 10 Jan 2022 (21:23 hrs)

**The decision below**

60 Trial of the clause 2(c) issues was heard over six days in February 2021. The Judge ultimately found that there had been no breach of the "best efforts" clause in cl 2(c) of the Deed of Undertaking which would warrant revoking the release from loan liabilities in the Deed of Release. Accordingly, the Judge dismissed Carlsberg's claim for repayment of the balance loan.

61 In coming to that conclusion, the Judge reasoned as follows:

(a) First, the Judge did not find that *any* of the witnesses who gave evidence at the trial had been dishonest in their evidence. The Judge found Carlsberg's Mr Hansen and Mr Steenberg to be honest witnesses (see the Judgment at [17]). As for CSAPLH's four witnesses – CPK, PPK, Mr Jagetia, and Mr Silwal – the Judge found that they were not dishonest witnesses (see the Judgment at [20(b)] and [22]), even though he noted that Mr Jagetia and Mr Silwal were "somewhat partisan in seeking to advocate CSAPLH's case, where possible" (see the Judgment at [20]), and that PPK "had difficulty in answering questions directly, being keen to justify his concerns and his stance" (see the Judgment at [22]).

(b) Second, the Judge found that while PPK had outlined a total of five concerns in his correspondence with Carlsberg – namely, the delayed payout of dividends to RKK, the fact of Mr Babu working without a work permit, why GBPL had not provided its RTM KPIs despite those having been sought earlier, what a "failed" board meeting was and why the 26 February board meeting was described as such, and the complaints about harassment from Ms Tuladhar – PPK's *genuine*



Version No 1: 10 Jan 2022 (21:23 hrs)

and *fundamental* motivation was with the new marketing model that Mr Babu was seeking to introduce (see the Judgment at [32]). This is a significant plank in the Judge's reasoning, as will be elaborated upon further at [67] below.

(c) The Judge rejected any suggestion that CSAPLH (through CPK) and PPK had colluded or created a sham performance of CPK trying to convince PPK to attend the board meetings (see the Judgment at [22] and [26]). The Judge's reasoning for this was that: (a) there was a "difficult relationship" between PPK and CPK, with the latter not having sympathy for a number of the former's positions; (b) CSAPLH (through CPK) "would have been foolhardy deliberately to seek to exert leverage against Carlsberg in the manner suggested in the face of the potential consequences"; and (c) inducing paralysis by having PPK not attend board meetings and/or not pass resolutions "would cause serious damage to CSAPLH's own interests" in view of its indirect ownership interest in GBPL.

(d) The Judge accepted in full the evidence of CPK, Mr Jagetia, and Mr Silwal about what had been done to try and contact and persuade PPK (see the Judgment at [102]). The Judge accepted the documentary record of e-mails and requests to attend the board meetings at its face value and as genuine attempts to ensure PPK's attendance (see the Judgment at [102]).

62 Finally, the Judge concluded that there was nothing further that CSAPLH could have done to convince PPK to attend. PPK was fixed in his desire to not attend the meetings unless Carlsberg came "cap in hand" to acknowledge that it had been wrong (see the Judgment at [104]). Accordingly,



Version No 1: 10 Jan 2022 (21:23 hrs)

not only was the Judge satisfied that it would have been futile for CSAPLH to have continued its attempts to persuade PPK, particularly for and following the 26 April 2019 meeting, he was also persuaded that CSAPLH had satisfied its obligation to exercise best endeavours to procure PPK's attendance (see the Judgment at [103]).

**Issues for determination**

63 As alluded to above, Carlsberg mounted its appeal on two main bases:

(a) First, it alleged that the Judge had erred in rejecting its suggestion that PPK and CPK (and by extension CSAPLH) were colluding, and that CSAPLH had thus not discharged its obligation to use its best efforts to procure PPK's attendance at the four board meetings.

(b) Second, Carlsberg denied that CSAPLH had in fact exercised its best efforts to procure PPK's attendance at board meetings, particularly by reference to the time period between 9 to 25 April 2019.

64 From the very outset, we emphasise that we were unpersuaded that there was sufficient evidence before us to overturn the Judge's finding that there had not been collusion. First, all the evidence Carlsberg pointed to in that regard was purely circumstantial. While this was not fatal – and was in some senses unsurprising given the difficulty of establishing collusion – the fact remained that Carlsberg had not done enough in the cross-examination of CSAPLH's witnesses to construct a case that there had been collusion. Second, it could not be said that the evidence Carlsberg pointed to on appeal had been ignored by the Judge below, nor could it be said that Carlsberg had succeeded in



Version No 1: 10 Jan 2022 (21:23 hrs)

establishing, to the relevant appellate standard, that the Judge's findings of fact were against the weight of the evidence, or manifestly wrong. We are thus prepared to reject, upfront, Carlsberg's first contention on appeal. All that is before this court in this regard is whether there is *adequate* basis to overturn the Judge's factual finding, and we are of the view that there is not.

65 This then leaves Carlsberg's argument that CSAPLH could have done more to procure PPK's attendance, which forms the bulk of our analysis. It is to that argument that we now turn.

**Analysis**

***The relevant background***

66 Before delving into the critical period from 9 to 25 April 2019, it is important to first consider the relevant background. One aspect of the relevant background is what the Judge determined PPK's motivations to be. This is because the Judge, on the basis of his findings as to PPK's motivations, ultimately concluded that any further steps which CSAPLH might have taken between 9 to 25 April 2019 (and thereafter) would have been futile. It is thus important to consider the Judge's findings as to PPK's motivations, and whether they support the conclusion the Judge ultimately drew as to the question of futility.

67 In his Judgment, the Judge was *categorical* in his view that PPK's "fundamental" concern was with the RTM Model which Carlsberg's directors on the board of GBPL had advocated (the "RTM Model"). This model, explained succinctly, centred on GBPL cutting out middlemen wholesalers for its products, and reaching out to its retailers directly. The Judge further stated



Version No 1: 10 Jan 2022 (21:23 hrs)

that a deep-seated objection to the RTM Model itself "lay at the heart of [PPK's] expressed general concern about the way in which the Carlsberg-nominated directors and Mr Babu behaved" (see the Judgment at [32]). PPK's alleged objection to the RTM Model was the basis upon which the Judge concluded that PPK's concerns were genuinely held. In this regard, the Judge specifically stated that PPK "resented the fact that the decision was taken to move ahead on the new model and this coloured his views about other matters, including those other issues which he raised in the 24 March e-mail" (see the Judgment at [33]). Moreover, the Judge considered that the issues raised by PPK "were real, so far as he was concerned", and that "each [issue] was seen through the filter of the rejection of his views on the new sales model" (see the Judgment at [34]). As is readily apparent, therefore, the Judge's conclusion that PPK's "fundamental" concern was with the RTM Model underpinned much of his analysis – so much so that the Judge concluded that "[n]one of the concerns expressed in PPK's e-mails represented the real problem that he had", and that the real problem was with the RTM Model (see the Judgment at [31]).

68 With the greatest of respect, however, it is not apparent that the Judge's conclusion that the RTM Model was PPK's "fundamental" concern which animated his refusal to attend board meetings is sustainable:

(a) First, CSAPLH did not in fact plead that PPK had a concern with the RTM Model, much less a *fundamental* concern with the said model. There is no suggestion in the *entirety* of CSAPLH's pleadings that PPK's rejection of the RTM Model was the basis for his refusal to attend board meetings.

(b) Second, the RTM Model had been introduced in stages across different geographical regions. However, PPK did not, in any of his e-



Version No 1: 10 Jan 2022 (21:23 hrs)

mail correspondence, *ever* suggest that he objected to the model itself, nor did he voice *any* objections to the progressive roll-out of the model. If, as the Judge suggested (see the Judgment at [98]), PPK's "fundamental" issue was with the RTM Model itself, it is implausible that PPK would have agreed to the gradual rollout of the Model in the first place in 2018, and even more implausible that his criticism of the RTM Model would only arise, as it did for the very first time, in his oral evidence and in response to a completely unrelated question. That PPK made reference to the RTM Model's flaws only *once* in his *entire* oral evidence is also itself telling.

(c) Moreover, and in any event, there is no real evidence to show that PPK was in fact fundamentally motivated by his objections to the RTM Model:

(i) First, as outlined in an e-mail from Mr Babu to PPK on 3 December 2018, *all* of GBPL's directors were supportive of the new RTM Model when it was introduced. Concerns about the effect it would have on middlemen wholesalers had *already* been canvassed, and were being accommodated by examining whether there were any "downsides" relating to wholesalers. Critically, the e-mail makes clear that the *entire* board of GBPL, *including* PPK, agreed to this. If, as the Judge suggests, PPK had a "fundamental" objection to the RTM Model, which *necessarily* entailed cutting the middlemen wholesalers out of the equation, he would no doubt have raised this "fundamental" objection from the very beginning. After all, the entire *raison d'être* of the new RTM Model *was* to cut out the middlemen wholesalers.



Version No 1: 10 Jan 2022 (21:23 hrs)

(ii) Second, and rendering PPK's apparent change of heart from support for the RTM Model to fundamental objection to it all the more inconceivable, there were board meetings on 23 April, 25 June, 18 September, and 3 December 2018, at which his objections could have been raised. Yet, there was a complete and deafening silence from PPK as to any intrinsic or fundamental objections to the model. Given that PPK was willing to make even the *description* of a board meeting as a "failed" board meeting an issue over the course of *several* e-mails, it is inconceivable that PPK would not have raised objections with the model on a conceptual basis if that was truly motivating his animus. In fact, if he did feel so strongly about the RTM Model itself – and its very premise of cutting out the middlemen wholesalers – it is surprising that PPK did not exercise his purported "right of veto" in 2018. It would then be *even more surprising* for the GBPL board to be recorded in the minutes of meetings from September and December 2018 as, among other things, "suggest[ing] to increase the momentum to cover more markets" with the RTM Model. It would be unbelievable, if PPK's objections ran so deep, for him to have gone along with this.

(iii) Third, all the correspondence between PPK and Mr Babu concerning the RTM Model related to Mr Babu's provision of information, and in particular KPIs. The correspondence did not reveal any deep-seated or conceptual objection PPK had to the RTM Model. This was why CSAPLH's *own* case – both in



Version No 1: 10 Jan 2022 (21:23 hrs)

its pleadings and opening statement – did not make *any* reference to the RTM Model being PPK's *fundamental* objection.

(d) To put matters into further perspective, the phrase "RTM" did not appear even once in CSAPLH's written closing submissions in the proceedings below. Yet, the Respondent's Case now seeks to make PPK's objections to the RTM Model the beating heart of his grievances.

69 Given the foregoing, we do not consider the Judge's identification of the RTM Model as fundamental to PPK's disagreements with the Carlsberg-nominated directors and, ultimately, his refusal to attend board meetings, to be defensible. There is not only insufficient evidence to show that the RTM Model was PPK's fundamental concern, there is even less evidence to show that PPK's objection to the RTM Model was what caused him to deliberately refuse to attend board meetings.

70 A further consequence of this conclusion is, subject to the further analysis below on the issue of futility, that it may cast doubt on the Judge's finding that anything more which CSAPLH might have done, particularly between 9 to 25 April 2019, would have been futile. We therefore turn, in this light, to consider the specific point of whether CSAPLH could have done more in the period between 9 and 25 April 2019 to procure PPK's attendance at the board meetings.

***The content of the best efforts obligation***

71 Before we consider whether CSAPLH ought to have done more between 9 to 25 April 2019 in order to comply with its obligation under cl 2(c), it is important to set out the applicable law. In this case, both parties relied on this



Version No 1: 10 Jan 2022 (21:23 hrs)

court's decision in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy*") as applying to the instant cl 2(c). In relation to the content of cl 2(c), parties rely on *KS Energy* at [47] (citing *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474):

> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a "best endeavours" obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of "endeavours" required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.
>
> (f) Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out.
>
> [emphasis and references omitted]

72 At [93] of *KS Energy*, this court, following a further survey of the applicable English and Scottish cases, identified a number of further guidelines *vis-à-vis* the operation and extent of "best endeavours" clauses:

> (a) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted" or "to do all that it reasonably could".
>
> (b) The obligor need only do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to



Version No 1: 10 Jan 2022 (21:23 hrs)

> do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved.
>
> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice.
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken.
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.
>
> [references omitted]

*KS Energy* at [62] makes clear that these guidelines apply even where parties use a variation of the phrases "all reasonable endeavours" or "best endeavours".

### *The period from 9 to 25 April 2019*

73 Carlsberg argues that more could have been done between 9 and 25 April 2019 (when PPK sent his e-mail indicating he would not be attending the board meeting) to persuade PPK to attend the 26 April 2019 meeting, and that CSAPLH's failure to do so constitutes a breach of cl 2(c). We note from the very outset that the Judge dealt with this period mainly by reference to PPK's supposedly fundamental objection to the RTM Model, which, the Judge reasoned, would have rendered any further efforts during that period futile. Two particular passages from the Judgment are relevant:

(a) First, in his opening paragraph addressing CSAPLH's efforts, the Judge said that, while "it was not until sometime in April 2019 that



Version No 1: 10 Jan 2022 (21:23 hrs)

he [PPK] decided not to attend further board meetings until his concerns had been properly addressed, the seeds of his refusal to attend the 26 April and 1 July meetings were present long before and in truth emanated from the major difference he had with Mr Babu and the other members of the board who had approved the new model of sales/marketing" (see the Judgment at [100]). However, this reasoning loses its central supporting strut once it is concluded, as we have done, that there was no fundamental disagreement regarding the RTM Model at all.

(b) Second, the Judge said specifically of the 26 April meeting that while it could not be said that CSAPLH had failed to do all that was reasonably necessary in good faith, "there is less certainty about CSAPLH's state of knowledge" than in relation to the earlier 25 March meeting. He went on at [108] of the Judgment to observe that:

> … Even if there were grounds for thinking on 9 April 2019 that PPK might not attend the upcoming meeting, there was no reason to think that any further efforts to procure his attendance would make any difference and I find that they would not have caused him to act any differently than he did. Considerable and apparently successful efforts had been made to persuade him to attend on 25 March 2019 only to be superseded by his hospitalisation. When on 25 April 2019 his e-mail arrived, stating that he would not attend on 26 April 2019, it must have been increasingly obvious that, even if further efforts were made to persuade him to attend, they would be futile. …

The finding that further efforts would not have made any difference is again inextricably linked with the finding about PPK's supposedly "fundamental" objection to the new RTM Model. The apparent success of the steps taken prior to 25 March 2019, which were only superseded by hospitalisation, is a reason why *further* steps between 9 and 25 April



Version No 1: 10 Jan 2022 (21:23 hrs)

2019 ought to have been regarded as worthwhile and likely to yield positive results, rather than as a justification for *not* taking further steps.

74 There are three premises which must be established for Carlsberg's argument concerning the period from 9 to 25 April 2019 to be viable:

(a) First, Mr Jagetia (for CSAPLH) must have known on 9 April 2019, or at the very least had reason to suspect, that PPK did not intend to attend the 26 April 2019 board meeting.

(b) Second, Carlsberg must be able to demonstrate that reasonable steps could have been undertaken, and that the steps sought would have had at least a significant or real prospect of success.

(c) Third, and closely linked to the second requirement, the actions it is alleged that CSAPLH ought to have taken cannot have been futile.

Each of the above premises is, in our view, borne out on the facts.

75 Mr Jagetia must have known, or at the very least had reason to suspect, following his meeting with PPK on 9 April 2019 (see [38] above), that PPK either did not intend to attend the 26 April 2019 board meeting, or was now seriously contemplating not doing so. The evidence for this is twofold:

(a) First, in PPK's AEIC, he specifically outlines his interactions with Mr Jagetia on 9 April 2019 as follows:

> … I told Mr Jagetia that I *would join the GBPL board meetings when my concerns were properly addressed* and when there was alignment among the GBPL directors. *In the meantime*, I expressed that any critical business decisions could be *passed through resolution by circulation*. [emphasis added]



Version No 1: 10 Jan 2022 (21:23 hrs)

(b) PPK's AEIC evidence in this regard is, ironically, buttressed by Mr Jagetia's own AEIC evidence. At [49] of his own AEIC, Mr Jagetia states that:

> … I asked Mr PP Khetan about his concerns on management and governance of GBPL and the ways to resolve the issues which he had raised. Mr PP Khetan was quite adamant that *he would not let the Carlsberg nominated directors make the decisions through majority vote on the topics which he had raised.* Mr PP Khetan expressed that there had been a change in attitude by the other directors with respect to his concerns and that other board directors no longer appeared willing to discuss issues with him informally to resolve disagreements prior to board meetings, as had been the previous practice. Mr PP Khetan stated that *after his concerns are addressed and an alignment is reached among the directors, he would attend the GBPL board meetings and that in the meanwhile, the GBPL board could make decisions in the interests of the company by passing resolutions by circular.* [emphasis added]

In the light of this evidence, the Judge treated the position at the 9 April 2019 meeting as open to two interpretations, between which he did not come to a decision. On the first view, he thought, PPK was saying that he would attend the informal meetings with Carlsberg that customarily preceded board meetings, to seek alignment first. On the second view, PPK was simply saying he would not participate in board meetings unless there was prior agreement to his views. The Judge took the view that the position was further confused by evidence (i) from PPK that he had formed a conclusion that the Carlsberg-nominated directors were no longer prepared to cooperate (by meeting informally), and (ii) from Mr Jagetia that PPK said this at their 9 April 2019 meeting.

76 We for our part find it difficult to interpret the evidence as supporting a conclusion that PPK was indicating a willingness to take part in any meetings



Version No 1: 10 Jan 2022 (21:23 hrs)

of any sort. Mr Jagetia does not suggest that this is how he understood PPK's position. Further, had Mr Jagetia thought this to be the position, that would have been an immediate reason for Mr Jagetia to contact those directors, or CPK, or Carlsberg, which he does not appear to have done. The more likely position on the evidence appears to us to be that PPK was indicating that he was not going to engage in any form of meeting – where he might be outvoted – unless there was prior agreement with his stance. That too would have been a reason for contacting the Carlsberg-nominated directors, or CPK, or Carlsberg, with a view to persuading PPK otherwise.

77 In the result, we consider that Mr Jagetia's AEIC evidence indicates that he knew that, following his meeting with PPK on 9 April 2019, PPK did not intend, or was very likely not intending, to attend the board meeting on 26 April 2019. In particular, we would understand PPK's statement that he told Mr Jagetia that "he would not let the Carlsberg nominated directors make the decisions through majority vote on the topics which he had raised", as involving a reasonably clear indication on his (PPK's) part that he intended to exercise a *de facto* veto by not attending either informal or board meetings. Further, Mr Jagetia is not an ingenue who would not have understood the point PPK was making – he was a canny businessman closely involved in the management of a major company. It must therefore, we consider, have been clear to him that PPK stating that he would not let the Carlsberg-nominated directors decide by majority vote meant that PPK did not intend, or was very unlikely to be intending, to attend the upcoming board meeting – where he would be outvoted. Moreover, Mr Jagetia's AEIC indicates to us that PPK's position was that it was only after his concerns were addressed that he would attend the GBPL board meetings, and we think that, if PPK had really been conveying a willingness to take part in the informal "alignment" meetings preceding board meetings, that



Version No 1: 10 Jan 2022 (21:23 hrs)

would have appeared much more clearly. Thus, unless PPK's concerns were addressed prior to the 26 April 2019 board meeting, Mr Jagetia's own account of what PPK told him makes clear that PPK would not be attending the 26 April 2019 meeting.

78 Mr Jagetia's oral evidence is significant because despite his unequivocal evidence in his AEIC, he sought to deny in his oral evidence that he knew PPK did not intend to attend the board meeting on 26 April 2019:

> Q: Mr Jagetia, I put it to you that when you say Mr PP Khetan stated that after his concerns are addressed and an alignment is reached among the directors, he would attend the GBPL board meeting means that he would attend the GBPL board meetings only after his concerns were addressed and an alignment is reached. Do you agree or disagree?
>
> A: Disagree.
>
> Q: Is it your evidence now that Mr PP Khetan had not indicated to you that he was not intending to attend the 25 April 2019 board meeting?
>
> A: That has been the case all along, both known to Carlsberg directors as well as sort of me through CP Khetan that there was no issue about 26 April board meeting at that point in time.

Quite simply, we cannot give any credit or weight to Mr Jagetia's suggestion in his evidence under cross-examination on this point. It is divergent from not only what he set out in his own AEIC; it is also divergent from PPK's AEIC. While Mr Jagetia sought to justify his new account on the ground that PPK's e-mail of 24 March 2019 had stated that he would attend the board meeting, that statement was specifically qualified as follows: "On your repeated insistence to attend the board meeting of GBPL, I would attend the board meeting, *but if I feel that there is still intentions to not follow the rule of law of the country and trying to ignore the local investor, I will have to take corrective measures* [*sic*]" [emphasis added]. Given the caveat in PPK's e-mail of 24 March 2019, and the clear



Version No 1: 10 Jan 2022 (21:23 hrs)

statements PPK made to Mr Jagetia as set out in both PPK and Mr Jagetia's AEICs, we therefore entirely discount Mr Jagetia's oral evidence under cross-examination on this point. We emphasise that even Mr Jagetia's oral evidence does not contain the *slightest* suggestion that PPK had expressed or stated any willingness to attend an informal alignment meeting.

79 We therefore approach the matter on the basis that PPK had informed Mr Jagetia he would attend board meetings after (or when) his concerns were "properly addressed". In the meantime, presumably referring to the period when he would not join board meetings, critical decisions could be passed through resolution by circulation – which did not require board meetings. Given that PPK had not stated that his concerns were properly addressed, and that the 26 April 2019 board meeting was the very next board meeting, it is clear that PPK was in effect saying that he would not join the 26 April board meeting unless his concerns were "properly addressed". He was then making provisions for his non-attendance, stating that critical business decisions could be passed by circular resolutions. Mr Jagetia, for his part, must have understood the clear thrust of PPK's statements, and thus was aware that PPK did not or very likely did not intend to attend the 26 April 2019 board meeting.

80 Turning to the second and third pre-requisites (see [74] above), it is clear that in circumstances where Mr Jagetia learned on 9 April 2019 that PPK either did not intend to attend the 26 April board meeting, or was seriously considering not attending that meeting, *CSAPLH could have done more to persuade PPK to attend that meeting*. In particular, as Carlsberg points out, CSAPLH could have attempted to talk to and persuade PPK in the period from 9 to 25 April 2019. Yet, no such attempt at communication was made. Moreover, CSAPLH could have informed Carlsberg of its discovery or even its suspicions that PPK might



Version No 1: 10 Jan 2022 (21:23 hrs)

not attend the board meeting, and asked for Carlsberg to aid in the efforts to persuade PPK to attend the same. Yet, again, no such steps were taken. Furthermore, and assuming that Mr Jagetia did not inform CPK about PPK's intentions, Mr Jagetia could at the very least have informed CPK about those intentions. This would have given an opportunity for CPK to speak to PPK and seek to persuade him in the period between 9 and 25 April 2019. This was all the more so given PPK's oral evidence that he only finally decided to boycott the 26 April 2019 board meeting on 25 April 2019. As matters stood, there was nothing whatsoever in CPK's AEIC or oral evidence as to any communication between him and PPK during that period. If CPK's evidence is to be accepted, it would appear that Mr Jagetia had kept him in the dark. Further, despite suggestions by CSAPLH that CPK and PPK were still at odds in 2019, there are considerable indications (for example, in RKK's account of the position: see [51] and [52] above) that this was not so, and that CPK was in fact influential in relation to the shares held by RKK, whose nominated director on the GBPL board PPK was and whose interests PPK was thereby ostensibly safeguarding.

81 There are thus at least ***three further*** efforts that CSAPLH could have made following the meeting of 9 April 2019 – discussing PPK's concerns with him, informing Carlsberg of PPK's concerns and working on a unified approach to PPK's concerns, and keeping CPK apprised so that he could offer his input on how to persuade PPK. Yet, ***none*** of these steps was taken. These actions which CSAPLH could have taken specifically *pre-dated* the cut-off point of 25 April 2019. That cut-off point is significant because (a) the Judge had categorically found that "all efforts were futile" after that point (see the Judgment at [109]), and (b) it represents the point at which it became clear that a final decision not to attend had been made by PPK. Further, although the Judge



Version No 1: 10 Jan 2022 (21:23 hrs)

found that the concerns expressed in PPK's e-mails were real concerns, he also found that they were not concerns that could justify failure to attend board meetings (see the Judgment at [96]; see also [61]–[65] of the Judgment), and we have rejected his further finding that PPK viewed the concerns expressed through the prism of a fundamental objection to the RTM Model. The reality is that the concerns and complaints, so far as they had any intrinsic merit, were relatively insignificant and the sort of concerns that would normally have been discussed and, if there proved to be any merit in them, resolved at a board meeting. On the face of it, they were concerns that PPK would and should have been readily persuaded should be discussed at such a board meeting. That would have been in the interests of the RKK shareholding which PPK was representing (whoever was in reality the beneficial owner or *de facto* controller of that shareholding). Deprived of the underpinning of the supposed "fundamental" objection to the RTM Model, it is difficult to see any reason why PPK would or might not have been persuaded during April 2019 to agree to attend the 26 April 2019 meeting, as he had agreed to do (but was prevented by hospitalisation from doing) in the case of the 25 March 2019 meeting. The Judge at one point supported his conclusion regarding the futility of any further efforts by a finding that Mr Jagetia's failure to, at any point, provide further information to satisfy PPK's concerns was "because he knew, from conversations with PPK and CPK, that it would make no difference" (see the Judgment at [98]). However, counsel for CSAPLH, Mr Michael Palmer, expressly stated at the hearing of the appeal that CSAPLH was not taking the position that it ever gained the impression from PPK or thought that PPK was unpersuadable, and that this was why, even after 21 July 2019, they continued efforts to secure his attendance. Accordingly, the three premises set out at [74] above for Carlsberg to succeed in its arguments concerning the period from 9 to 25 April 2019 are satisfied.



Version No 1: 10 Jan 2022 (21:23 hrs)

82 We pause at this point to deal with a number of arguments raised by CSAPLH in its Respondent's Case:

(a) At [76] of the Respondent's Case, CSAPLH complains that it could not have addressed PPK's concerns by itself, and needed the Carlsberg-nominated directors to come forward and provide a "more coordinated, cohesive and detailed answer" to PPK. In our view, this contention does not assist CSAPLH. If it believed that Carlsberg needed to be involved in the response, it should have informed Carlsberg of what it had discovered on 9 April 2019. Yet, it chose not to do so and left Carlsberg in the dark. There does not appear to be any defensible reason for that decision.

(b) At [77] of the Respondent's Case, CSAPLH suggests that it would have been unreasonable to expect it to address PPK's concerns by itself without first reaching a shared position with Carlsberg. In particular, CSAPLH points to the fact that it took the view that it was Carlsberg's nominated directors who caused the delay in RKK receiving his dividends. CSAPLH contends that if this had been communicated to PPK, that would have worsened the relationship. We cannot accept this contention. As set out above at [75(a)], PPK would be *amply aware* of who had asked for the dividends to be halted and not paid out. He was copied on the multiple e-mails exchanged on the topic. CSAPLH's example here is thus misleading and of no assistance. Moreover, in so far as CSAPLH suggests that it had to reach a shared position with Carlsberg first, this is (i) unfounded in so far as uncontroversial information which CSAPLH possessed could have been passed directly to PPK to ameliorate some of his more immediate concerns, and



Version No 1: 10 Jan 2022 (21:23 hrs)

(ii) unhelpful in so far as CSAPLH did not even *inform* Carlsberg about the indications PPK had conveyed at the 9 April 2019 meeting with Mr Jagetia. CSAPLH's arguments here thus simply do not assist its case.

(c) At [78] of the Respondent's Case, CSAPLH attempts to suggest, by reference to various acts and e-mails, that Carlsberg had rebuffed its attempts to reach alignment about how to respond to PPK's concerns. This, however, conveniently elides two important facts: First, CSAPLH did not inform Carlsberg about what Mr Jagetia had learned on 9 April 2019, and did not give Carlsberg *any* indication as to even the possibility that PPK might not attend the meeting on 26 April 2019. Second, CSAPLH tries to rely on events *after* the meeting on 26 April 2019 to suggest that attempts to reach alignment with Carlsberg would be in vain:

(i) CSAPLH points out how on 27 March 2019, Mr Jagetia forwarded PPK's e-mail of 24 March 2019 to the directors of CSAPL and proposed that the CSAPL board take note of PPK's e-mail. This is a misleading suggestion in so far as PPK's concerns were specifically aimed at the board of *GBPL* and *not* CSAPL. Thus, Mr Jagetia was raising PPK's e-mail at the wrong forum. In any event, CSAPL's board did not rule out addressing the e-mail. Rather, it decided that the e-mail should be discussed in person at the next board meeting. It is thus not at all apparent how this episode supports CSAPLH's strained narrative about Carlsberg rebuffing its efforts to reach alignment.

(ii) Next, CSAPLH points to Mr Jagetia's e-mail of 28 April 2019, which Carlsberg's nominated directors on



Version No 1: 10 Jan 2022 (21:23 hrs)

> the GBPL board did not respond to, as well as Mr Jagetia's follow-up e-mail of 23 June 2019. Quite simply, this is, with respect, a misleading snapshot of the facts. Putting to one side the fact that Mr Jagetia's e-mail of 28 April 2019 came hot on the heels of CSAPLH commencing arbitration against Carlsberg on 18 April 2019 (see above at [24]), Mr Jagetia's e-mail was partisan and unhelpful (see the Judgment at [80]). Read on its plain text, it appeared more as a polemic than an update. Not only did the e-mail post-date the board meeting of 26 April 2019 and the period of 9 to 25 April which Carlsberg refers to, the Judge found that it "appeared designed to justify PPK's stance" and "implied criticism of the Carlsberg-nominated directors" (see the Judgment at [80]). Thus, CSAPLH's attempted reliance on Mr Jagetia's e-mail of 28 April 2019 is misplaced, not only because it could not be said to be a genuine attempt to reach a consensus or compromise with Carlsberg on the position to adopt *vis-à-vis* PPK, but also because it post-dated the period in which Carlsberg argues that something ought to have been done. Mr Jagetia's e-mail thus does not at all assist CSAPLH's case in this regard.

In sum, there appears to be little merit in CSAPLH's arguments. Those arguments obfuscate the plain fact that CSAPLH did not do *anything* to persuade PPK between 9 and 25 April 2019 despite learning of his intention to not attend the 26 April board meeting on 9 April 2019, did not give Carlsberg *any* indication that PPK intended to not attend the meeting, and did not suggest to Carlsberg that a collective response to persuade PPK would be appropriate. This is perhaps unsurprising given the backdrop of open hostilities having



Version No 1: 10 Jan 2022 (21:23 hrs)

broken out with CSAPLH's commencement of arbitration on 18 April 2019, but does not detract from CSAPLH's obligation under cl 2(c) to undertake "best efforts" to procure PPK's attendance at board meetings. CSAPLH simply cannot be said to have complied with that obligation in this context.

83 In the circumstances, Carlsberg has established that there was in fact more that CSAPLH could have done in the period between 9 and 25 April 2019 to persuade PPK to attend the board meeting on 26 April 2019. The evidential burden thus shifts to CSAPLH to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail (see *KS Energy* at [93]). It is uncontested that CSAPLH did not take the steps Carlsberg argues that it should have. Given the analysis above, it cannot be said that CSAPLH was not reasonably required to take those steps, nor can it be said that those steps would have been futile or bound to fail. Something as basic as informing the Carlsberg-nominated directors would have opened up a whole range of further negotiating options, but CSAPLH had declined to do so. It thus cannot be said that CSAPLH has discharged the evidential burden upon it, and CSAPLH is accordingly in breach of its obligations under cl 2(c).

**Conclusion**

84 Ultimately, CSAPLH could have done more to procure PPK's attendance at the meeting of 26 April 2019. That suffices as breach of CSAPLH's obligations under cl 2(c), and accordingly Carlsberg is entitled to terminate the Deed of Release. All outstanding amounts under the Loan Agreement are thus due and payable.



Version No 1: 10 Jan 2022 (21:23 hrs)

85 For the reasons set out above, we allow the appeal. Having regard to the parties' respective submissions as to costs, we award the appellant costs of S$70,000 (all-in). There will also be the usual consequential orders.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Jonathan Hugh Mance
International Judge

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Ng Joel Yuan-Ming, and Joyce Khoo (Quahe Woo & Palmer LLC)
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Version No 1: 10 Jan 2022 (21:23 hrs)