IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 30

Suit No 318 of 2021

Between

Chng Kheng Chye (in a representative capacity on behalf of Kaefer Prostar Pte Ltd)

… *Plaintiff*

And

Kaefer Integrated Services Pte Ltd

… *Defendant*

JUDGMENT

[Companies — Statutory derivative action]
[Contract — Contractual terms]
[Contract — Formation — Oral contracts]

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v
Kaefer Integrated Services Pte Ltd

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9 February 2023 Judgment reserved.

Tan Siong Thye J:

Introduction

1 In HC/OS 227/2020 ("OS 227"), Chng Kheng Chye ("the Plaintiff") applied to the court for leave under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") to commence a derivative action on behalf of Kaefer Prostar Pte Ltd ("the Company") against Kaefer Integrated Services Pte Ltd ("the Defendant"). The Plaintiff's application in OS 227 was dismissed at first instance. However, the Plaintiff succeeded on appeal and was granted leave to take out this derivative action against the Defendant.[1]

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[1] Agreed Statement of Facts (Amendment No. 1) dated 27 October 2022 ("ASOF") at para 2.

2 The Defendant is wholly owned by Kaefer Gmbh ("Kaefer Germany"). The Defendant was the contracting party of the subcontract for the supply of the insulation materials for what the parties termed the "Yamal Project" ("the Yamal Supply Subcontract"), which I shall describe further at [11]–[15] below. However, the Company was the entity that performed the necessary work in furtherance of the Yamal Supply Subcontract for the supply of the insulation materials as well as the subcontract for the installation of these insulation materials. The Defendant paid the Company several sums totalling S$1,931,291.95. The Company alleges that the Defendant still owes the Company the sum of S$1,544,142.47 ("the Disputed Sum") for the Yamal Supply Subcontract.

3 The Plaintiff now brings the present derivative action as a representative of the Company against the Defendant for the Disputed Sum.[2] The Plaintiff claims that the Disputed Sum rightfully belonged to the Company and that the Company had loaned the Disputed Sum to the Defendant following an oral loan arrangement that was negotiated between the Plaintiff, who represented the Company, and Justin Cooper ("Justin"), the Managing Director of the Defendant. The Defendant, on the other hand, alleges that no such arrangement existed and that any profit entitlement payable to the Company would always be documented. The Defendant thus submits that the Plaintiff was not entitled to the Disputed Sum, as there was no document providing for such an entitlement.

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2 ASOF at para 2.

Background to the dispute

The parties

4 The Company is a Singapore-incorporated company. It was formerly known as Prostar Marine Services Pte Ltd.[3] It is in the business of passive fire protection.[4] The Company's shareholders are Kaefer Germany and the Plaintiff. Kaefer Germany is a majority shareholder of the Company and holds 64,002 shares or 80% of the Company's shares. The Plaintiff is a minority shareholder of the Company holding 16,000 shares or 20% of the Company's shares. He is also a director of the Company.[5]

5 The Defendant is a Singapore-incorporated company. It is in the business of scaffolding, insulation, fireproofing, painting and blasting services. The Defendant is wholly owned by Kaefer Germany.[6]

The Company's shareholding

Original shareholders

6 The Company was founded by one Richard Yeo Kin Poh ("Richard") and the Plaintiff (collectively "the Founders"). At the time of its incorporation, Richard held 40,002 shares in the Company, whereas the Plaintiff held 40,000

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3 Affidavit of Evidence-in-Chief of Victor Arthur Bogos dated 22 July 2022 ("VB Affidavit") at para 4.

4 Defendant's Closing Submissions dated 17 November 2022 ("DCS") at para 5.

5 ASOF at para 3.

6 ASOF at para 7.

shares in the Company.[7] The Founders thus had an approximately equal shareholding in the Company.

Sale of the Company's shares to Kaefer Germany

7 A Share Purchase Agreement dated 14 November 2012 was executed between Kaefer Germany as the purchaser and the Founders as the vendors ("the 2012 SPA"). Pursuant to the 2012 SPA, the parties intended that Kaefer Germany purchase all the Founders' shareholding in the Company. Richard successfully sold all of his shares in the Company. For reasons unrelated to the present matter, the Plaintiff eventually only sold 24,000 shares in the Company for S$4.5m, leaving a balance of 16,000 shares.[8]

8 For the balance of 16,000 shares, a fresh shareholders' agreement dated 20 July 2016 was executed between Kaefer Germany and the Plaintiff ("the 2016 Shareholders Agreement"). Under the 2016 Shareholders Agreement, the Plaintiff granted Kaefer Germany an option to purchase the Plaintiff's remaining shareholding in the Company ("the Option"). The Option would be opened for a period of six months commencing from the date the Company's financial statements for the financial year ended 31 December 2018 were laid before the Company's annual general meeting. The Option was eventually not exercised by Kaefer Germany.[9]

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7 ASOF at para 4.

8 ASOF at para 5.

9 ASOF at para 6.

The Company's business arrangement

9 Prior to November 2012, the Company operated its business in Indonesia through an entity known as PT Prostar Marine Contact ("PT Prostar"). PT Prostar was a wholly owned subsidiary of the Company.[10] The Company operated its Indonesian business through PT Prostar. PT Prostar directly entered into contracts with third parties in Indonesia. However, the Company was the entity that carried out and completed the works stipulated under the contracts. The Plaintiff alleges that the entire profit paid out of the contracted works was to be accounted for the Company's benefit as it was the Company that eventually performed the contracts. This was despite the Company not being a party to the contracts with the third parties in Indonesia.[11]

10 Following the sale of the Company's shares to Kaefer Germany pursuant to the 2012 SPA, the Company ceased using PT Prostar as the contracting party with the third parties in Indonesia. The Company instead used the Indonesian subsidiary of the Kaefer Group ("PT Kaefer") of the Kaefer Group of Companies ("the Kaefer Group") as the contracting party with the third parties in Indonesia.[12]

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10 ASOF at para 8.

11 Plaintiff's Closing Submissions dated 17 November 2022 ("PCS") at para 4.

12 PCS at para 5.

The Yamal Project and the Insulation Supply Subcontract

11 The Yamal Project involved, amongst others, insulation and fireproofing works to be carried out for the Yamal LNG plant in Russia.[13] The Yamal Project was completed around April 2017.[14]

12 The Yamal Project consists of four subcontracts.[15] The present derivative action relates to the profit paid out of the subcontract agreements for the supply and delivery of insulation materials ("the Insulation Supply Subcontract").[16] The Insulation Supply Subcontract was executed on 1 April 2016 between PT McDermott Indonesia ("PT McDermott") and the Defendant.[17] Mr David Wong Kwok Meng ("David"), the Defendant's project manager and President Director in charge of PT Kaefer in Batam, Indonesia,[18] signed the Insulation Supply Subcontract on behalf of the Defendant.[19] The signing was witnessed by Mr Kevin Tan ("Kevin"), who was the Defendant's Chief Financial Officer and Regional Financial Controller.[20]

13 The other three subcontracts under the Yamal Project involved the installation of the insulation works, the supply and delivery of the passive fire

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13 ASOF at para 10.

14 VB Affidavit at para 24.

15 ASOF at para 11.

16 VB Affidavit at para 14(a).

17 ASOF at para 11.

18 DCS at para 3(c); Bundle of Affidavits (Vol 2) dated 5 October 2022 ("2BA") at pp 984–985 (Wong Kwok Meng's Affidavit dated 21 July 2022 ("David Wong Affidavit") at para 3.

19 12 October 2022 Transcript at p 21 (lines 17–20).

20 12 October 2022 Transcript at p 17 (lines 17–21).

protection and the installation of the passive fire protection for PT McDermott.[21] These three subcontracts are not the subject matters of these proceedings. However, it is important to note that the Company was involved in works done in respect of these three subcontracts,[22] and the Defendant had accounted for the benefit of the Company the profits paid out under these three subcontracts.[23]

14 The Company was responsible for carrying out and completing the works under the Insulation Supply Subcontract, namely the supply and delivery of insulation materials.[24] It is undisputed that the Defendant paid for the insulation materials as the Defendant had preferential credit terms with the suppliers of the insulation materials. It is also undisputed that the entire value of the Insulation Supply Subcontract was approximately S$10m,[25] and the total profit generated was approximately S$3.5m after accounting for the costs.

15 Following the completion of the Insulation Supply Subcontract, PT McDermott made payment of S$3,475,434.42 to the Defendant. The Defendant accounted the sum of S$1,931,291.95 for the benefit of the Company. The Defendant alleges that this sum was evidenced by six management agreements ("the Management Agreements"). The Defendant retained the Disputed Sum as it alleges that the Management Agreements were the only contracts entered into between the Company and the Defendant to regulate the Company's profit entitlement for the Insulation Supply Subcontract. There was no documentary

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21 DCS at para 18.

22 26 October 2022 Transcript at p 45 (lines 1–13).

23 PCS at paras 10, 97 and 99; 26 October 2022 Transcript at pp 87 (line 7) to 91 (line 25); David Wong Affidavit at para 6.

24 VB Affidavit at para 18.

25 20 October 2022 Transcript at p 44 (lines 1–20).

evidence to indicate that the Company was entitled to the Disputed Sum.[26] The Plaintiff disputes the Defendant's retention of the Disputed Sum and alleges that, in accordance with an alleged payment arrangement (the details of which are elaborated at [92]–[131] below), the Company is entitled to the Disputed Sum.[27]

16 I shall now set out the parties' respective cases.

The parties' cases

The Plaintiff's case

17 The Plaintiff alleges that the Company was entitled to the entire profit paid out of the Yamal Project for the completion of the subcontracts undertaken by the Plaintiff for the Defendant, including the Disputed Sum. This was despite the Company not being the contracting party to the Insulation Supply Subcontract.

18 In support of the Company's entitlement to the Disputed Sum, the Plaintiff relies on several prior payment arrangements between the Company and the various Kaefer entities pursuant to several projects undertaken by the Company and the Kaefer entities.[28] The Plaintiff describes these payment arrangements ("the Payment Arrangement"), as follows:

> (a) The Company negotiated and secured the contracts for the various projects that the Company's customers requested.

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26 DCS at paras 20–21.

27 PCS at paras 6–7.

28 Statement of Claim (Amendment No. 1) dated 15 October 2021 ("SOC") at paras 6–8.

(b) The Company then assigned the respective Kaefer entity to act as the contracting party for the respective project. The appropriate Kaefer entity was chosen depending on the country in which the works were carried out.

(c) Although the Company was not a named party to the contract, it was nonetheless responsible for carrying out and completing the works.

(d) Following the completion of the contracted works, payment was made to the respective Kaefer entity involved in the project.

(e) The Plaintiff alleges, however, that these payments, and in particular the entire profit, were accounted for by the respective Kaefer entities for the benefit of the Company. Further, Kevin prepared the necessary accounting documentation recording the payment arrangement to ensure that the profit was accounted for the benefit of the Company.[29]

(f) The Plaintiff contends that there are two ways in which the Kaefer entities accounted the profit for the benefit of the Company. First, the Kaefer entities remitted the profit back to the Company. Second, the Kaefer entities transferred a portion of the profit directly to the Plaintiff equivalent to the Plaintiff's shareholding in the Company. In other words, when the money was not remitted directly to the Company, the profit was "accounted" for benefit of the Plaintiff as dividends by way of payments made directly to the Plaintiff from the Kaefer entities. The

[29] Plaintiff's Opening Statement dated 5 October 2022 ("POS") at paras 8–10.

quantum of such payments was equivalent to the Plaintiff's shareholding in the Company.[30]

19 The Plaintiff's case is that the Payment Arrangement represents the way in which the Company conducts its business within the Kaefer Group, whenever a project is undertaken by the Company but the contracting party is another Kaefer Group entity.[31] The Plaintiff's case is that the Payment Arrangement forms the basis in which business was conducted between the respective Kaefer entities and the Company. In respect of the Yamal Project and in particular the Insulation Supply Subcontract, therefore, the Plaintiff submits that the Company was entitled to the entire profit paid out from the Insulation Supply Subcontract to the Defendant, including the Disputed Sum.[32] This was despite the Company not being a party to the Insulation Supply Subcontract with PT McDermott and despite there being no documentary records stipulating the Company's scope of its profit entitlement.[33]

20 The Plaintiff further submits that the Company loaned the Disputed Sum to the Defendant for the Defendant to pay off its debts and other liabilities to Kaefer Germany pending the merger of the Company and the Defendant, as there was an understanding in 2016 that Kaefer Germany would be buying over the balance of the Plaintiff's shares in the Company ("the Loan Arrangement").

21 According to the Plaintiff, the Loan Arrangement was an oral agreement that arose from negotiations between the Plaintiff and Justin that took place

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30 12 October 2022 Transcript at p 29 (lines 9–16).

31 PCS at para 24.

32 PCS at para 7.

33 POS at para 20; SOC at para 9.

during the negotiations for the Yamal Project.[34] In particular, Justin, who represented the Defendant at that time, made a request to the Company for the Defendant to retain part of the Insulation Supply Subcontract's profit, *ie*, the Disputed Sum, as a loan to settle some of the Defendant's liabilities.[35] The Plaintiff agreed on behalf of the Company, but on the condition that the Disputed Sum would still be accounted for the benefit of the Company. In other words, the Disputed Sum would have to be paid back to the Company upon demand by the Company.[36] Justin, on behalf of the Defendant, accepted this condition and the Company thus allowed the Defendant to retain the Disputed Sum.[37] The Plaintiff claims that all of these negotiations took place prior to Justin leaving the Defendant's employment.[38] The Plaintiff also relies on several email exchanges between the Plaintiff and various representatives of the Kaefer Group to support his case that the Defendant had agreed to retain the Disputed Sum as a loan. It is undisputed that the Disputed Sum was used to pay off some of the liabilities of the Defendant.

22 All of this, in the Plaintiff's view, explained why he allowed the Defendant to retain the Disputed Sum. The Plaintiff now seeks on behalf of the Company, to claim back the Disputed Sum from the Defendant.

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34 Set Down Bundle dated 27 September 2022 ("SDB") at pp 22–25.

35 SOC at para 12.

36 SOC at para 13.

37 SOC at para 12.

38 12 October 2022 Transcript at p 135 (lines 17–25).

The Defendant's case

23 The Defendant does not dispute that it had retained the Disputed Sum. However, the Defendant denies that the Company was entitled to the entire profit from the Insulation Supply Subcontract. The Defendant also denies the existence of the Loan Arrangement. The Defendant's main defence is that the Management Agreements formed the contractual entitlement of the profit paid out of the Insulation Supply Subcontract and allocated it between the Company and the Defendant. Since the Management Agreements do not include the Disputed Sum, the Defendant states that the Plaintiff is not entitled to the Disputed Sum.[39] During the trial, however, both the Defendant's witnesses, Mr Victor Bogos ("Victor"), who was the Defendant's regional managing director,[40] and Mr Gregory Daniot ("Gregory"), who was the director of both the Company and the Defendant as well as the Company's former Regional Financial Controller,[41] advanced several further justifications for why the Defendant was entitled to retain the Disputed Sum. These were not pleaded in the Defendant's defence, nor were they stated in each of the witnesses' Affidavit of Evidence-in-Chief ("AEIC"). Be that as it may, I shall consider them in turn below.

24 As regards the Plaintiff's reliance on the Payment Arrangement outlined at [18] above, the Defendant's case is that the Payment Arrangement does not exist. Instead, any profit allocation to the Company would be discussed between representatives of the Company and the respective Kaefer entity. The negotiations would be reduced to written agreements, and any payments made,

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39 DCS at paras 21 and 102–105.

40 DCS at para 4(a).

41 DCS at para 4(b).

whether to the Company or to the Plaintiff, would be documented accordingly.[42] In other words, the Defendant's case is that the written agreements and documents are conclusive proof of the Company's profit entitlement.

25 The Defendant alleges that for the Yamal Project, the Company's profit entitlement pursuant to the Insulation Supply Subcontract is set out in the Management Agreements.[43] The Management Agreements are conclusive proof of "the obligations of the [D]efendant to [the Company], in terms of accounting for the profits of the Yamal [P]roject".[44] The Disputed Sum is not reflected in the Management Agreements. Thus, the Company is not entitled to the Disputed Sum as there is no document to substantiate the Company's claim.[45]

Issues to be determined

26 The overarching issue is whether the Company was entitled to the entire profit arising from the Insulation Supply Subcontract, including the Disputed Sum. The determination of this issue is largely a fact-finding exercise. The Court has to decide whether to believe:

(a) The Plaintiff's account that the Company was entitled to the entire profit paid out of the Insulation Supply Subcontract under the Yamal Project, including the Disputed Sum, and that the Company had allowed the Defendant to use the Disputed Sum to pay the Defendant's liabilities under the Loan Arrangement.

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42 DCS at para 44; 12 October 2022 Transcript at p 30 (lines 14–19).

43 DCS at para 102.

44 12 October 2022 Transcript at p 128 (lines 6–11).

45 Defendant's Opening Statement dated 6 October 2022 ("DOS") at paras 11(a), 11(b) and 11(c).

(b) The Defendant's account that the Company was not entitled to the Disputed Sum as the Company's proportion of the profit entitlements was documented under the Management Agreements.

27 Hence, the Court has to determine whether: (a) the Company's profit entitlement in respect of the work done for the Insulation Supply Subcontract was governed by the Management Agreements, and that these documents are conclusive proof of the Company's share of its profit; or (b) the Company would be entitled to the entire profit paid out of the projects for which it had undertaken work, regardless of the Management Agreements.

28 At the outset, I note that it would have been desirable and would have greatly assisted the Court if Justin and Kevin had been called to testify given their crucial role in the Yamal Project. Before the trial started, it appeared that both parties intended to call them to testify. At trial, however, both parties failed to call them as witnesses. Thus, I am mindful that much of the parties' accounts regarding Justin and Kevin must be treated cautiously as they fall within the realm of hearsay evidence.

29 The Plaintiff had rightfully informed the Court on the first day of the trial that the Plaintiff would not be making an application under s 32 of the Evidence Act 1893 (2020 Rev Ed) to admit Kevin's AEIC.[46] Thus, the Court does not have the benefit of Kevin's and Justin's first-hand account of the details of the Loan Arrangement and other relevant events pertaining to this case. Be that as it may, the burden is on the Plaintiff to prove his case on a balance of

[46] 12 October 2022 Transcript at pp 4 (line 18) to 5 (line 1).

probabilities. In order to resolve this factual dispute, it is important that the Court considers the internal business arrangements between the Company and the Defendant, particularly, the business arrangements within the Kaefer Group and between the Kaefer Group and the Company. The Court has to ascertain whether the parties conducted their business arrangements formally, with a system of documentation and proper written records put in place even in respect of internal transactions or arrangements. Alternatively, were the parties transacting with a certain degree of informality, such that transactions and arrangements were recorded verbally with minimal or no documentation put in place as they were closely related entities.

30 With the above factual issues in mind, I now turn to set out my analysis of the Plaintiff's case.

My decision

31 The Plaintiff's primary case is premised on both the Payment Arrangement and the Loan Arrangement. The Plaintiff submits that the Payment Arrangement supports his case that the Company would always be entitled to the entire profit earned from any project for which it had done work. Similarly, as regards the Insulation Supply Subcontract, the Company is entitled to the entire profit, which includes the Disputed Sum. The Loan Arrangement made between the Plaintiff and Justin supports the Plaintiff's case that the Defendant was allowed to retain the Disputed Sum to discharge some of the Defendant's liabilities on the understanding that this verbally-arranged loan was to be repaid.

32 This is contrasted with the Defendant's case, which is premised entirely on the Management Agreements. The Defendant argues that the Management Agreements are binding contracts entered into between the Defendant and the

Company.[47] Further, the Defendant argues that the Management Agreements are conclusive proof of the Company's profit entitlement in respect of the Insulation Supply Subcontract. Hence, the Defendant relies heavily on the Management Agreements in arguing that the Company is not entitled to the Disputed Sum.

33 I shall now deal with the Defendant's case on the Management Agreements. If I accept that the Management Agreements are binding contracts, then they are likely to be conclusive proof of the Company's profit entitlement flowing from the Insulation Supply Subcontract. Hence, the Company would not be entitled to the Disputed Sum. The Plaintiff's case, thus, has to be dismissed on this ground alone.

The Management Agreements

34 The Defendant's case is that the Management Agreements are contracts entered into between the Company and the Defendant to regulate the Company's profit entitlement from the Yamal Project.[48] In particular, the Defendant emphasises that the Management Agreements are each titled "Management Agreement" and that they are specifically labelled as "contract". The Defendant argues that the Management Agreements are, therefore, binding documentation between the Company and the Defendant.[49]

35 Further, the total value of the Management Agreements reflects the sum of S$1,931,291.95. This, in the Defendant's submission, is all that the Company is entitled to from the profit paid out of the Insulation Supply Subcontract. Since

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47 12 October 2022 Transcript at p 71 (lines 22–25).

48 VB Affidavit at para 22.

49 12 October 2022 Transcript at p 65 (lines 1–14).

there is no record in the Company's accounting books and documents indicating that the Company is entitled to the Disputed Sum, it follows that the Company is not entitled to the Disputed Sum.

36 The Plaintiff's response is that the Management Agreements are not agreements *per se*, but rather they are accounting documents to record the amount of profit paid by the Defendant to the Company for the indicated periods.[50] Accordingly, the Plaintiff submits that the Management Agreements have no legally binding effect, and are neither indicative nor conclusive of the Company's profit entitlement.[51] The Management Agreements, therefore, do not support the Defendant's case that the Company was not entitled to the Disputed Sum.

37 Turning to the Management Agreements, I observe that these documents, on their face, appear to be contracts entered into between the Defendant and the Company. The first Management Agreement dated 31 December 2016, for instance, states as follows:[52]

> **Management Agreement**
>
> This contract ("Contract") is an agreement between [the Defendant] (Address: …)
>
> and [the Company], (Address: …)
>
> For the period ending 1st January 2016 to 31 December 2016, The profit entitlement of [the Company] for Yamal material for Insulation :

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50 PCS at para 80; 12 October 2022 Transcript at pp 64 (lines 16–22) and 74 (lines 1–3).

51 12 October 2022 Transcript at p 72 (lines 3–7).

52 1BA at p 162.

Yamal Insulation Material Project Management Fee - …		SGD 235,975.10

Sign on the 31 day of December , 2016.

[The Defendant]	[The Company]
[The Defendant's company stamp and authorised signatory]	[The Company's company stamp and authorised signatory]

38 The rest of the five Management Agreements are identical in form to the one above, save that the amount of profit entitlement due to the Company and the period of the profit entitlement differ between each Management Agreement:

(a) the first Management Agreement was for the period between 1 January 2016 to 31 December 2016;[53]

(b) the second Management Agreement was for the period between 1 January 2017 to 31 March 2017;[54]

(c) the third Management Agreement was for the period between 1 March 2017 to 30 April 2017;[55]

(d) the fourth Management Agreement was for the period between 1 May 2017 to 31 May 2017;[56]

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53 Bundle of Affidavit Vol 1 dated 5 October 2022 ("1BA") at 162.

54 1BA at p 164.

55 1BA at p 166

56 1BA at p 168.

(e) the fifth Management Agreement was for the period between 1 July 2017 to 31 July 2017;[57] and

(f) the sixth Management Agreement was for the period between 1 August 2017 to 30 September 2017.[58]

Of the six Management Agreements, the first two Management Agreements were signed by Kevin on behalf of the Defendant, and the rest of the Management Agreements were signed on behalf of the Defendant by Gregory.[59] Both Kevin and Gregory were the Defendant's Regional Finance Officer at different periods of time.[60] On the other hand, Kristoff Tan Song Keong ("Kristoff"), the Company's general manager,[61] signed the Management Agreements on behalf of the Company.[62]

39 Despite the Management Agreements having the apparent appearance of a contract, I accept the Plaintiff's case that the Management Agreements are not in fact binding contracts. The Management Agreements also do not limit the Company's profit entitlement to what is stated therein.

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57 1BA at p 170.

58 1BA at p 172.

59 DCS at para 21.

60 Bundle of Affidavit Vol 4 dated 5 October 2022 ("4BA") at p 1750 (Affidavit of Evidence-in-Chief of Gregory Daniot dated 22 July 2022 ("Gregory Affidavit") at para 4); 1BA at p 7 (Affidavit of Evidence-in-Chief of Chng Kheng Chye filed on 21 July 2022 ("CKC Affidavit") at para 21); ASOF at para 9.

61 DCS at para 3(b).

62 2BA at p 807 (Affidavit of Evidence-in-Chief of Tan Song Keong dated 22 July 2022 ("Kristoff Affidavit") at para 12)

40 First, the most important question is whether the parties intend the Management Agreements to be a binding contract. The mere fact that a document uses words such as "contract" or "agreement", or contains the company stamp, does not necessarily mean that the document is a legally valid and binding contract. Indeed, to do so would be to elevate substance over form. It is essential to go beyond the veneer of the document to ascertain whether, in substance, that document was intended by the parties to operate as a legally valid and binding contract (see *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [77], citing *MCST Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 at [46]).

41 Second, and bearing the above in mind, I find that the substance of the Management Agreements does not have the hallmark of a valid and binding contract. In particular, it is unclear as to what was the consideration contemplated by the parties in respect of some of the Management Agreements. For instance, the first Management Agreement was indicated to be for the period commencing 1 January 2016, while the fourth, fifth and sixth Management Agreements were for periods after the completion of the Insulation Supply Subcontract, *ie*, April 2017. The Insulation Supply Subcontract, on the other hand, was executed in April 2016 and completed in April 2017. Thus, three out of the six Management Agreements were supposedly entered into after the completion of the Insulation Supply Subcontract.

42 This is, indeed, highly unusual. It is undisputed that the Insulation Supply Subcontract and the accompanying subcontract for the installation of those insulation materials were completed in April 2017. The Defendant's allegations that there were still uncompleted contractual works for which profit

was being paid to explain the three Management Agreements made after the completion of the Insulation Supply Subcontract and the installation of the insulation materials cannot be believed. Hence, this puts the legitimacy of the three Management Agreements, made after the completion date of April 2017, in serious doubt.

43 The total value of the purported contracts for the three Management Agreements post-April 2017 was S$745,316.85. This sum was paid by the Defendant to the Company, and the Defendant appears to have received no consideration in return. It is trite law that every legally binding agreement must be supported by consideration. If the Defendant alleges that the Management Agreements were contracts between the parties that sought to allocate the profit entitlement for the Insulation Supply Subcontract, then this gives rise to the question of why the Defendant continued paying the Company after the completion of the works for the Insulation Supply Subcontract and the installation of the insulation materials. The Defendant could not provide a satisfactory explanation as to what was the consideration underlying these three Management Agreements post-April 2017. This simply makes no sense, and it raises serious suspicion as to whether the Management Agreements were indeed intended to be binding contracts as alleged by the Defendant.

44 Victor suggested that the payments for these three Management Agreements were for the work done by the Plaintiff for the installation of the insulation materials.[63] Victor was asked to explain why these three Management Agreements were dated after the completion of the Insulation Supply Subcontract. Victor's response was that there was a delay in the installation of

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63 21 October 2022 Transcript at p 91 (lines 3–10).

the insulation materials, and this led to a corresponding extension in the period of supply of the insulation materials.[64]

45 Victor's explanation for why the three Management Agreements were dated after the completion date of the Insulation Supply Subcontract, *ie*, April 2017, was proven to be false. The evidence subsequently revealed that there was no delay in the subcontract for the installation of the insulation materials, and the insulation works were in fact completed in April 2017. In particular, two emails sent by the representatives of PT Kaefer showed that the supply and delivery of the insulation materials, as well as their installation, had already been completed sometime on 19 April 2017.[65] Further, the final invoice for the Insulation Supply Subcontract was issued by the Defendant on 25 April 2017, which was well within the contractually stipulated timeline.[66] When shown these documents, Victor conceded that there were in fact no delay in the installation of the insulation materials.[67] Accordingly, the last delivery date for the insulation materials under the Insulation Supply Subcontract and the installation date for the insulation materials fell within the original contractually stipulated time, *ie*, April 2017. Victor, therefore, provided no satisfactory explanation as to why the post-April 2017 Management Agreements were issued after the Insulation Supply Subcontract was completed.

46 Third, when the Management Agreements are scrutinised collectively and from a broader perspective, it is clear that the parties could not have

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64 21 October 2022 Transcript at p 91 (lines 21–24).

65 26 October 2022 Transcript at p 9 (lines 1–15).

66 Documents marked P2, P3, D2 and D3; 26 October 2022 Transcript at pp 75 (line 1) to 82 (line 15).

67 26 October 2022 Transcript at pp 9 (lines 1–15) and 75 (lines 10–22).

intended the very brief Management Agreements to be a valid and binding contract, albeit having included the labels "agreement" and "contract" in its contents. Close scrutiny of the Management Agreements shows a disturbing feature. The payments made thereunder were described as "profit entitlement of [the Company] for Yamal material for insulation". However, the table in the Management Agreements described the sum as "Yamal Insulation Material Project Management Fee". There is a material difference between payments made pursuant to a contractual profit entitlement versus payments made pursuant to a management fee. This, therefore, raises the question as to whether the Management Agreements were drafted to record the payment of money for the purpose of profit entitlement, or for the payment of management fees due to the Company. When queried on the stand, Victor was unable to explain the difference in the terminology used.[68] Clearly, something is seriously amiss in the Management Agreements.

47 I also accept the Plaintiff's submission that the usual manner to enter into a profit sharing contract is to negotiate and enter into a contract or agreement *before* the commencement of the Insulation Supply Subcontract.[69] In this case, the Management Agreements were signed during and after the Insulation Supply Subcontract. This further reinforces my finding that the Management Agreements cannot be a contract or an agreement contemplated by the parties. The Management Agreements, in substance, appear to be documents that merely record the progressive payments made by the Defendant to the Company.

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68 21 October 2022 Transcript at pp 130 (line 23) to 137 (line 20).

69 Plaintiff's Reply Submissions dated 24 November 2022 ("PRS") at para 9.

48 Further, Victor explained at trial that the Management Agreements were drafted to record negotiations between the Plaintiff and Kevin on the exact quantum of profit from the Insulation Supply Subcontract to which the Company was entitled. Following this, invoices would be raised to the Defendant in respect of the sums due to the Company under the respective Management Agreement, which the Defendant would pay.[70]

49 Victor once again qualified his explanation by stating that he had no personal knowledge of any negotiations that might have occurred prior to the execution of each of the Management Agreements.[71] Nevertheless, it is difficult to accept his explanation that this was how the Management Agreements in fact came to be executed. In particular, there appears to be a discrepancy in the fifth and the sixth Management Agreements, as the corresponding invoices to those Management Agreements were dated *before* the agreements were supposedly entered into.[72] For the fifth Management Agreement, although it was dated 31 July 2017, the accompanying invoice was dated 26 July 2017.[73] And for the sixth Management Agreement, while it was dated 30 September 2017, the accompanying invoice was dated 28 September 2017.[74] The serious discrepancies in the dates of some of these Management Agreements *vis-à-vis* the corresponding invoices suggest that the Management Agreements were not in fact negotiated contracts between the Plaintiff and Kevin. Rather, the

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70 21 October 2022 Transcript at pp 119 (line 9) to 120 (line 16).

71 21 October 2022 Transcript at p 121 (lines 1–3).

72 21 October 2022 Transcript at pp 124 (line 18) to 125 (line 10).

73 1BA at pp 169–170.

74 1BA at pp 171–172.

Management Agreements appear more likely to be documents produced to record any payment of profit from the Defendant to the Company.

50 I pause to emphasise another related point. The Counsel for the Plaintiff (Mr Yeo) referred to a management agreement which recorded the profit entitlements arising from two different projects. This was a management agreement dated 29 December 2016 signed between the Company and PT Kaefer. This management agreement stated the Company's profit entitlements in respect of two different projects, namely the "GORGON" project and two other subcontracts under the Yamal Project.[75] Accompanying the management agreement was a debit note also dated 29 December 2016 reflecting the same projects and the same sums of money as showed in the management agreement.[76] The Plaintiff explained that this was another example of the mechanism in which the parties remitted money back to the Company. Despite the use of labels such as "agreement" and "contract", the management agreement is clearly in substance an invoice from the Company to PT Kaefer seeking payments from different projects, and clearly supports the finding that the parties did not intend that any document titled "management agreement" to be a legally binding contract between the parties.

51 Crucially, Victor's admission at trial on the purpose of the Management Agreements and their accompanying invoices strengthens the Plaintiff's case that Management Agreements were created for accounting purposes, *ie*, to move funds from a particular Kaefer entity back to the Company:[77]

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75 1BA at p 174.

76 1BA at p 173.

77 26 October 2022 Transcript at pp 22 (line 25) to 23 (line 6).

A: That's the – yeah, the debit note is the – the note to move the profit between the two companies.

Q: Yes. And Kevin used the method of the management agreement and the debit note to move the monies from PT Kaefer in Indonesia back to [the Company]. Agree or disagree?

A: Agree.

52 This is further supported by Gregory's testimony at trial. Gregory confirmed that the Management Agreements were used only for the purposes of recording payments of the profit from the Defendant to the Company:[78]

MR YEO: So, [Gregory], will you agree with me that the management agreement, tacked together with either the tax invoice or the debit note, was for the purpose of bringing monies from [the Defendant] into [the Company]?

A: Yes, for the service rendered during the project.

…

MR YEO: … So in 2AB943, when this chop "posted", it means that it has been posted to the general ledger?

A: Yes, it had been posted into the general ledger in SAP, yes.

Q: In the SAP system?

A: Mm.

Q: And then the monies would be paid from [the Defendant] to [the Company]?

A: Yes.

Q: *And because in the tax invoice you need to have a basis for the payment, which is the reason why the [Management Agreements are] prepared?*

A: *Yes, because you cannot just transferred cash between two entities without an agreement, yeah.*

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78 27 October 2022 Transcript at pp 40 (line 1) to 41 (line 4)

[emphasis added]

Hence, the Management Agreements are in fact a veneer for recording progressive payments due to the Company by the Defendant from the Insulation Supply Subcontract.

53 Finally, it also appears that the Management Agreements, far from being negotiated between the parties, were actually prepared on an *ad hoc* basis. There appears to be some uncertainty as to the identities of the individuals involved in preparing the Management Agreements. Kristoff's evidence is that the Management Agreements were prepared by Kevin for accounting purposes "to transfer the monies from the Defendant or PT Kaefer to the Company".[79] Gregory's evidence was that the Management Agreements were prepared by one Erawati, who was a staff of the Company, on Kristoff's instruction.[80] Further, the amounts reflected in the debit notes were also decided by Kristoff.[81] Thereafter, the documents were signed by either Kevin and Kristoff, or after Kevin left the Company, by Gregory and Kristoff.[82] Gregory went so far as to say that the amounts contained in the Management Agreements were decided by Kristoff on an *ad hoc* fashion when "he wants to take out some cash from [the Defendant]".[83]

54 Be that as it may, both accounts at the very least support the finding that there was no negotiation between the parties as regards the apportionment of

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79 2BA at p 807 (Kristoff Affidavit at para 12).

80 27 October 2022 Transcript at pp 18 (line 12) to 21 (line 8).

81 27 October 2022 Transcript at pp 37 (line 18) to 38 (line 19).

82 27 October 2022 Transcript at p 17 (lines 7–21).

83 27 October 2022 Transcript at pp 37 (line 18) to 38 (line 19).

the profit paid out under the Insulation Supply Subcontract, or that the money paid out under the Management Agreements would represent the final and conclusive entitlement of profit on the Company's part. Rather, the Management Agreements were prepared as and when they were needed and appear to be no more than mere formalities recording payments made to the Company.

55 The evidence in totality thus supports the Plaintiff's submission that the Management Agreements are no more than documents created for accounting purposes. The Management Agreements are, in my view, not contracts or agreements, but mere evidence of receipts of payments by the Company. Hence, the Management Agreements are, in substance, not contracts or agreements that stipulate the Company was only entitled to S$1,931,291.95 for the Insulation Supply Subcontract. Accordingly, the Management Agreements cannot be evidence of the final amount of profit entitlement to which the Company is entitled.

56 Further, the Management Agreements did not state that the sums transferred represented the entire profit to which the Company was entitled, or words to such effect. Accordingly, even on the Defendant's case regarding the binding nature of the Management Agreements, those documents do not assist the Defendant's case that the Company is only entitled to the sums stated in the Management Agreements.

The Defendant's justification for retaining the Disputed Sum

57 Besides the Management Agreements, the Defendant's witnesses also raised additional reasons during the trial in an attempt to support its retention of the Disputed Sum. I shall now analyse each of these defences.

The purported profit allocation agreed between the parties

58 The Defendant first argues that the Company's profit entitlement from the Insulation Supply Subcontract was specifically negotiated between the parties. In Court, Victor gave evidence that part of the negotiations was captured in two emails sent on 4 April 2016 ("the 4 April 2016 Emails").[84] The Australian subsidiary of the Kaefer Group, Kaefer Integrated Services Pty Ltd ("Kaefer Australia"), was mentioned in the emails as the parties initially thought of using Kaefer Australia as the contracting party with PT McDermott instead of the Defendant. The first email, which was sent by Kevin to Victor at 10.32am on 4 April 2016, is as follows:[85]

> Hi Victor
>
> I am preparing EOI. I notice material supply scope has been issue to [the Defendant] and not [Kaefer Australia].
>
> I think it will be too late to change now.
>
> Only suggestion is that I show t/o (and 1.5% mgt fee) in Singapore and Australia take a profit fee for the job.
>
> Ok?
>
> Kevin

The second email, which was sent by the Plaintiff to Kevin at 11.14am on 4 April 2016, is as follows:[86]

> Kevin,
>
> As you are nominated to be our contact point between [the Company] and [Kaefer Australia], we need to move on [the Insulation Supply Subcontract] and how we are going to co-

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84 20 October 2022 Transcript at pp 61 (lines 2–24) and 63 (line 16) to 64 (line 13).

85 Bundle of Affidavit (Vol 3) dated 5 October 2022 ("3BA") at p 1611 (Affidavit of Evidence-in-Chief of Victor Arthur Bogos dated 7 July 2022 ("Victor Affidavit") at p 461).

86 3BA at p 1614 (Victor Affidavit at p 464).

> ordinate deliveries our end. As we are going to start work in June, we need to ensure we are well prepared by May.
>
> Also need to confirm our territory commission is 3% of FINAL material contract value
>
> Cheers
>
> KC [*ie*, the Plaintiff]

59 Victor explained that, following the 4 April 2016 Emails, the parties commenced negotiations regarding the Company's profit entitlement. This eventually resulted in the Management Agreements:[87]

> A: … You can see the subject is "McDermott Yamal Insulation Contract". So the initial discussions started around about this time, and if you take a contract value of S$10 million and you apply 3 per cent, it becomes 300,000. So [the Company] have been paid -- or in the end, through negotiation and through our [M]anagement [A]greements, we're paid S$1.9 million. So that was the first part that it started.
>
> MR YEO: And then?
>
> A: So after the period continued, the [M]anagement [A]greements and the negotiations would have taken place and ended up at S$1.9 million per our [M]anagement [A]greements, and then what we have left over is the share of the profit for [the Defendant]. …
>
> Q: So, [Victor], what you are telling us is that the initial agreement between [the Defendant] and [the Company] was that [the Company] will be only paid a sum of 3 per cent of the revenue?
>
> A: Correct. …

87 20 October 2022 Transcript at pp 64 (line 5) to 65 (line 3).

Victor also explained that the 4 April 2016 Emails were evidence of the parties' negotiations in respect of the profit allocation between the Company and the Defendant.[88]

60 If what Victor said was true, namely that the Company initially asked for three percent of the contract value of S$10m, *ie*, S$300,000, then this raises the question as to why the Defendant had instead paid the Company S$1,931,291.95. This sum was clearly more than what the Company had asked for, *ie*, more than six times of the Company's asking sum. Assuming also that the figure of three percent referred to the profit earned from the Insulation Supply Subcontract, which is S$3,475,434.42, the amount which the Company would have been entitled to would have been only S$104,263.02. On either value, when asked to explain how the Company was eventually paid S$1,931,291.95, Victor was unable to provide an answer. Victor's explanation is thus incredulous and cannot be believed.

61 Further, when queried on the stand, Victor conceded that he had no personal knowledge of the negotiations and no way of proving if they in fact occurred.[89] When pressed further, Victor conceded that the 4 April 2016 Emails did not in fact form the basis for any profit entitlement agreement between the parties:[90]

> MR YEO: So, [Victor], I put it to you that this email that you're referring to, 4 April 2016 -- right?
>
> A: Yes.

---

88 26 October 2022 Transcript at p 120 (lines 5–11).

89 20 October 2022 Transcript at p 66 (lines 9–14).

90 20 October 2022 Transcript at p 73 (lines 4–15).

> Q: Did not form the basis for any agreement on profit entitlement. Agree or disagree?
>
> A: Agree.
>
> Q: I also put it to you that the so-called negotiations that you referred to during your evidence, you are unable to give any more particulars --
>
> A: Correct.
>
> Q: -- other than it was between [the Plaintiff] and Kevin. Right?
>
> A: Correct.

This concession puts a critical dent in the Defendant's case that the parties had negotiated and mutually agreed to record the Company's and the Defendant's respective share of the profit arising from the Insulation Supply Subcontract. This further undermined the credibility and reliability of Victor's evidence.

62 More fundamentally, nothing in the 4 April 2016 Emails even hint of any agreement between the parties on the quantum of profit that both the Company and the Defendant are entitled to from the Insulation Supply Subcontract. Yet on the Defendant's case, despite the absence of any such negotiations, in the process of performing the Insulation Supply Subcontract, the parties were somehow able to conclude the Management Agreements. This manner of entering into a contract is highly unusual and irregular. Indeed, when asked about whether it was usual for parties to conclude contracts in this manner, Victor agreed that it was unusual:[91]

> COURT: Now, even in a case of a subcontract, I would -- in normal circumstances, there would be a negotiation between the company of the subcontract, as to how much each party is entitled to, to the subcontract. That's the normal situation.

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[91] 26 October 2022 Transcript at pp 121 (line 16) to 123 (line 10).

A: Yes.

COURT: Right?

A: That's correct.

…

COURT: So this is a very unusual situation.

A: Yes.

COURT: Where there is no such negotiation at the beginning, but in the process of fulfilling the contract, you have six separate management agreements.

A: Correct, yes.

COURT: Other than this Yamal project, and the Inpex project, have you come across such an arrangement before?

…

COURT: Have you come across parties entering contracts in this manner?

A: No, your Honour. No, I haven't.

COURT: And I must say, this is the first time I have encountered such a way in which parties entered into such a contractual agreement.

A: Yes. Yes, this -- agreed, your Honour. I think -- yeah, no, I agree. I think normally the process you've mentioned is the normal process.

63 When Victor was pressed on whether there was any agreement between the Company and the Defendant on the latter's entitlement to retain the Disputed Sum, he resiled from his earlier positive assertion and referred the Court to another email dated 7 March 2016 ("the 7 March 2016 Email") sent by Kevin to Victor. That email reads as follows:[92]

> Also [the Plaintiff] is fine if the Material supply scope for the YAMAL Insulation is awarded to Australia directly. [The

92 3BA at p 1608.

> Company] will take the lead for the whole execution of the project. As the $$ is in the material supply he wanted to negotiate a management fee that you are comfortable with.

64 It is clear that nothing in the 7 March 2016 Email even hints of the Defendant's entitlement to retain the Disputed Sum. When pressed on this point, Victor conceded that there was in fact no agreement on the profit entitlement. All that the Defendant was relying on are the Management Agreements.[93] This concession is yet another critical blow to the Defendant's case, as it further reinforces the absence of any entitlement on the Defendant's part to retain the Disputed Sum.

65 Accordingly, there was in fact no agreement on the profit entitlement and, specifically, there was no agreement that the Defendant was entitled to retain the Disputed Sum.

The purported work done by Kaefer Australia and the Defendant

66 The Defendant then argues that it is entitled to retain the Disputed Sum on the basis of the work done by Kaefer Australia and the Defendant in respect of the procurement of the insulation materials for the Insulation Supply Subcontract. Specifically, Victor explained that in the preparation for the Yamal Project, personnel from Kaefer Australia were engaged to review engineering drawings, prepare the specifications, and develop the quantities of insulation materials required as well as to prepare the purchase orders for the insulation materials. This preparation was done in consultation with PT Kaefer and the Defendant. It was only after the discussions had concluded that purchase orders

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93 21 October 2022 Transcript at pp 70 (line 9) to 74 (line 10).

were issued to the Defendant's suppliers.[94] Victor thus explained that the costs of Kaefer Australia's resources are reflected in the profit allocation entitlement to the Defendant:[95]

> A: So the administrative activities and a lot of the sales work and the engineering work was undertaken by various people from [the Defendant], which included the previous regional director, [Justin], as well as people in [Kaefer Australia], as well as people in our Indonesian office as well in PT Kaefer, and the $3.4 million profit that was generated on the [Supply Subcontract], the $1.5 million that's been retained in [the Defendant] is to cover our costs and to account for a profit for us as well.
>
> COURT: Your 1.5 million is to cover what?
>
> A: To cover those costs that I've just mentioned, so the estimation costs, the engineering costs, in both Australia as well as Singapore as well as in Indonesia. This process to secure an LNG job of this size, we usually go through, in most cases, a two-year process.

67 Regarding the work done by the Defendant, Victor explained that the work mainly turned on the administrative work done to produce the purchase orders.[96] This was done following the award of the Insulation Supply Subcontract to the Defendant.

68 These explanations are mere assertions given by the Defendant in order to justify its retention of the Disputed Sum. There is no contemporaneous evidence to suggest that the parties had agreed that the Defendant was entitled to the Disputed Sum given its alleged contributions towards the Insulation

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94 21 October 202 Transcript at pp 53 (line 20) to 56 (line 2).

95 21 October 202 Transcript at pp 57 (line 22) to 58 (line 12).

96 21 October 2022 Transcript at p 61 (lines 2–6).

Supply Subcontract. Nor did Victor furnish any evidence relating to the Defendant's contribution to the performance of the subcontracts.

69 Further, Victor's AEIC did not state that the Defendant was entitled to the Disputed Sum based on the work that the Defendant had done or contributed for the Insulation Supply Subcontract. Indeed, Victor did not provide any evidence detailing the manner in which any of the Defendant's personnel were involved in the Insulation Supply Subcontract. Nor was there any document detailing the costs incurred by the Defendant in performing the work in respect of the Insulation Supply Subcontract. The Defendant's main (and only) defence pleaded in this derivative action, as detailed in their Defence and both Victor's and Gregory's AEIC, is that the parties had agreed that the Company was only entitled to S$1,931,291.95 as *per* the Management Agreements.

70 In any case, when asked about the amount of work done in terms of man-hours, Victor's response was that it was impossible to give a proper estimate as the work done was complex and involved numerous Kaefer entities, including PT Kaefer and the Defendant.[97] If the work had already been done, there ought to be some record indicating as such. Moreover, Victor confirmed in Court that the Defendant ultimately did not pay Kaefer Australia any form of fees for the latter's assistance in the Insulation Supply Subcontract.[98] Ultimately, when pressed on this point, Victor conceded that there was in fact no agreement between the parties for the Disputed Sum to be retained to pay off Kaefer Australia for its work done:[99]

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97 21 October 2022 Transcript at p 79 (lines 2–16).

98 26 October 2022 Transcript at p 100 (lines 20–25).

99 21 October 2022 Transcript at pp 79 (line 18) to 80 (line 3).

> MR YEO: You have been talking about Kaefer Australia, so my question is: where is this agreement that [the Defendant] is entitled to keep the [Disputed Sum] because all these works were done by Kaefer Australia? Where is the agreement?
>
> A: There's no agreement.
>
> Q: But you said there were negotiations between [the Plaintiff] and Kevin?
>
> A: We have negotiated with [the Company] for the [M]anagement [A]greements, and we have paid those. That's our obligations.

71 On the other hand, David in his AEIC stated that it was actually the Company, together with PT Kaefer, that completed the Yamal Project.[100] This aspect of David's evidence was not challenged by the Defendant in cross-examination. In this regard, I note the rule in *Browne v Dunn* (1893) 6 R 67, which was stated by Lord Herschell LC at 70–71:

> … it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. … it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

Accordingly, it is essential that when the Defendant sought to disagree with David's evidence-in-chief it must put its case to him so that he had an

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100 2BA at pp 984–985 (David Wong Affidavit at paras 4–5).

opportunity to explain the Defendant's allegations, failing which there might be an implicit acceptance of David's evidence-in-chief.

72 The Defendant's failure to put its case to David, *ie*, that the Company did not do any work in furtherance of the Yamal Project, means that it is not now open to the Defendant to allege that David's evidence does not support the Plaintiff's case and should be rejected by the Court. The Defendant must be taken to have accepted David's evidence that it was the Company and PT Kaefer which performed the works in relation to the Insulation Supply Subcontract. Hence, the Defendant's case that it was entitled to retain the Disputed Sum on the basis of the works done by the Defendant and Kaefer Australia cannot stand.

The Defendant's purported profit margin allocation

73 The Defendant also alleges a 15% profit margin entitlement from the total value of the Insulation Supply Subcontract, *ie*, 15% of S$10m which equates to S$1.5m, on its part to justify the retention of the Disputed Sum. This was explained by Gregory in Court as follows:[101]

> A: … So what we've done is that we considered that the delta between 15, which is the standard project margin for [the Defendant], which should be the project margin for [the Defendant], the delta, so 34.62 per cent minus around 15 per cent, this is what --
>
> COURT: No, minus 15 per cent for whom?
>
> A: … [The Defendant] at the end of the day, once the profit has been transferred for … the [Management Agreements], the margin stands at 15 per cent, which is the standard margin for any project.

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101 27 October 2022 Transcript at pp 25 (line 19) to 26 (line 12) and 31 (line 9) to 32 (line 4).

> COURT: What is this 15 per cent? Is this a management fee, or --
>
> A: No, 15 per cent is just the profit kept by [the Defendant] after the [Management Agreements]. So we had the [Management Agreements], the money transferred between [the Defendant] and [the Company], which was the S$1.9 million. And after this money is take[n] out – –
>
> …
>
> A: Well, you are right in your understanding, and if I -- if you will allow me just on the 15 per cent. So, yes, this is a standard profit margin that we aim to get. You know, when we prepare the project, we expect to get 15 per cent out of the project, as a profit margin. Yeah.
>
> …
>
> A: Whenever we bid, or we estimate a project, we expect --before the project start -- to get around 15 per cent. And, usually, once the project completes and there is no big issue, we usually arrive at those 15 per cent margin of the total contract value.
>
> So this is what we expect, this is the standard profit margin for a project at [the Defendant].
>
> …
>
> MR YEO: … [Gregory], you are giving evidence now that there is a standard profit margin of 15 per cent.
>
> A: This is what we aim for, yeah. This is not what we get all the time, yeah.

74 Gregory, therefore, claimed at trial that there was an understanding that the Defendant was always entitled to a standard 15% profit margin from the final contract sum arising from any transactions which it entered into on behalf of the Kaefer Group. However, when he was asked to elaborate further, Gregory explained that the 15% profit margin from the final contract sum was in fact derived from the Management Agreements. Put another way, Gregory's explanation was that since the parties entered into the Management Agreements

and nothing further, this suggests that the Defendant was in fact entitled to a 15% profit margin allocation arising from the Insulation Supply Subcontract:[102]

> MR YEO: … This agreement that [the Defendant] retains 15 per cent and the balance to be paid to [the Company], this agreement, right, who discussed and who were the parties that agreed on this method of apportionment?
>
> A: This was just like there was no formal agreement, there is nothing being discussed. It's just that at some point the [Management Agreements] were prepared and the money paid, it was just decided not to go further, because we had to keep 15 per cent margin for this particular project.

75 At the outset, I note that the alleged 15% profit margin entitlement on the Defendant's part was not mentioned anywhere in Gregory's AEIC. In fact, the first time the Court was made aware of this was during the trial.[103] The alleged 15% profit margin was also not pleaded in the Defendant's defence.[104] When pressed on whether there was in fact an agreement between Gregory and Kristoff regarding this 15% profit margin entitlement for the Defendant, Gregory vacillated in his testimony as to whether there was such an agreement:[105]

> COURT: How do you reconcile with your other evidence to say that you and [Kristoff] agreed that we cannot withdraw a sum of money from the Yamal [P]roject, because they had reached the limit of [1.9] million? So you entered into an agreement with [Kristoff].

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102 27 October 2022 Transcript at p 33 (lines 13–25).

103 27 October 2022 Transcript at pp 44 (line 16) to 45 (line 17).

104 27 October 2022 Transcript at p 45 (lines 18–22).

105 27 October 2022 Transcript at pp 72 (lines 11–18) and 73 (lines 4–23).

A:	I did not, it was just, you know, a verbal discussion saying, okay, we reach close to 15 per cent, you cannot take any more money out of [the Company]. Yeah.
…	
COURT:	No, no, is there an agreement with you and Kristoff --
A:	No, no agreement. Yeah. Just a discussion.
COURT:	But that is the impression I got. This morning that you and Kristoff agreed that [the Defendant] is entitled to 15 per cent. So is that correct or is that not correct?
A:	That's the agreed -- it's a discussion, so we had this discussion that [the Defendant] is entitled to 15 per cent, but I don't have any written evidence, your Honour.
COURT:	So there is an agreement with you and Kristoff?
A:	Yes, a verbal agreement, yes, yeah.
COURT:	One minute you tell me there is no agreement, next minute you tell me there is an agreement.
A:	I don't have any proof or evidence to provide to you, yeah.
COURT:	So which version should I listen to you? Agreement or no agreement?
A:	Verbal agreement, yeah.

It is clear that Gregory had embellished this aspect of his evidence. I am unable to accept Gregory's evidence on the alleged 15% profit margin from the final contract sum on the Defendant's part to justify its retention of the Disputed Sum.

76 More importantly, it seems that Gregory's explanation to justify the Defendant's alleged 15% profit margin entitlement is premised entirely on the Management Agreements being evidence of the parties' profit allocation. I emphasise that, for the reasons I gave above, the Management Agreements are not in fact agreements that conclusively determine the parties' profit allocation.

Accordingly, the factual premise from which Gregory derived the purported 15% profit margin entitlement does not hold water.

77 Even if I were to take Gregory's explanation for how he derived the 15% profit margin entitlement at face value, his explanation was based simply on subtracting the total value of the Insulation Supply Subcontract, *ie*, S$10m, from the costs incurred in performing the contract and the profit paid out to the Company under the Management Agreements:[106]

> A: … at the end of the day, once the profit has been transferred for those [M]anagement [A]greements … the margin stands at 15 per cent, which is the standard margin for any project.
>
> …
>
> A: The gross profit margin for [the Defendant] was 34 per cent. Then we made [the Management Agreements] between [the Company] and [the Defendant].
>
> COURT: No, no, before you go into that. How did you come to the conclusion that the profit margin for [the Defendant] is 34 per cent?
>
> A: So the 34 per cent comes just from the actual figure. So revenue, 10 million, minus all the cost related to the project.
>
> …
>
> COURT: So the profit margin for this project is 34 per cent.
>
> A: Yes.
>
> COURT: So it's not an entitlement for [the Defendant].
>
> A: No, no, this is the project margin.
>
> …

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106 27 October 2022 Transcript at pp 26 (line 1), 27 (lines 11–19), 28 (lines 5–9 and 13–21), 28 (line 24) to 29 (line 2).

> A: And then if you take out the 1.9 million –
>
> …
>
> A: Out of [the Defendant], out of the profit margin of 34 per cent
>
> …
>
> A: -- it comes down to 15 per cent. Because you take out 1.9 million profit out of [the Defendant].
>
> …
>
> COURT: … So if you minus 1.9 million, there is a balance – 1.9 million out of the 3.4 million, what would be the percentage?
>
> A: So 15 per cent.

78 In other words, it is simply an arithmetic exercise to derive the so-called 15% profit margin entitlement on the Defendant's part. There was no agreement or understanding whatsoever between the parties that this was an entitlement that must be respected.

79 Gregory explained that this 15% profit margin was a target that the Defendant aimed for.[107] However, the 15% profit margin on the contract sum of S$10m is S$1.5m, which is less than the Disputed Sum of S$1,544,142.27. Gregory has not provided any evidence, other than the Management Agreements, to substantiate the Defendant's case of the 15% profit margin entitlement being the parties' expectation in respect of the profit allocation arising from the Insulation Supply Subcontract. Indeed, Gregory conceded that there was no separate formal agreement or discussions that evidenced this profit margin entitlement on the Defendant's part:[108]

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107 27 October 2022 Transcript at p 31 (lines 9–22).

108 27 October 2022 Transcript at pp 34 (lines 17–19), 35 (lines 4–18) and 48 (lines 3–5).

> MR YEO: So, [Gregory], you agree that there was no formal agreement and there was nothing discussed.
>
> A: There is no formal agreement, yeah. No discussion.
>
> …
>
> A: So except the [Management Agreements], there was no other discussion or any other agreement pertaining to those 15 per cent profit margin that remains. That's what I meant. We just stopped after the [Management Agreements], and there was no further discussion on this topic, either by -- between myself and Kristoff.
>
> COURT: Yes.
>
> MR YEO: So, [Gregory], what you are saying is that prior to the issuance of the balance four management agreements signed by you, there was no formal agreement that the payment was stopped when [the Defendant] retains 15 per cent profit margin?
>
> A: There was no agreement except [the Management Agreements] that it would continue or it would stop. There was nothing, yeah.
>
> …
>
> A: There was never an agreement. This is just a standard margin computed and calculated. But there was no agreement that they should retain 15 per cent. Yeah.

80 More importantly, Gregory also conceded at trial that there was no agreement between the parties to limit the Company's entitlement to the profit to only S$1.9m, while the Defendant was entitled to retain the Disputed Sum.[109]

81 What was even more damning to Gregory's evidence was his testimony that he in fact *assumed*, without checking with his boss, Victor, that the

[109] 27 October 2022 Transcript at p 37 (lines 6–10).

Defendant was entitled to retain 15% of the profit margin arising from the total value of the Insulation Supply Subcontract:[110]

> COURT: … first tell me how you come to an understanding that Kaefer Singapore is entitled to 15 per cent.
>
> A: So my understanding, your Honour, is that it was just the standard margin across the project for [the Defendant]. So there was no agreement, *it was just an assumption, based on historical project, that the margin usually retained on those project is 15 per cent.*
>
> COURT: All project 15 per cent?
>
> A: It's around that. It's a standard, it's an average. But obviously some project might be at 10, some other at 20. But on average, it's usually 15 per cent.
>
> COURT: So why in this particular case 15 per cent, not 10 per cent, not 20 per cent.
>
> A: It's an assumption.
>
> COURT: It's your assumption?
>
> A: Yes, your Honour.
>
> COURT: In your assumption, did you – your boss is [Victor], I believe.
>
> A: Yes, yeah.
>
> COURT: Did you check with [Victor] that the margin for this project is 15 per cent?
>
> A: No, I didn't check directly with him.
>
> [emphasis added]

Gregory's evidence regarding the Defendant's purported 15% profit margin entitlement is thus a false assertion.

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110 27 October 2022 Transcript at pp 68 (line 16) to 69 (line 13).

82 This assertion is also contradicted by Victor's evidence that the Company was only entitled to a 3% profit margin (see [59] above). Victor's evidence suggests that the Defendant was entitled to a higher percentage of profit margin than what Gregory had suggested, *ie*, the remaining 97%. It seems that Victor and Gregory gave contradictory evidence on crucial aspects of the defence, *ie*, the Defendant's entitlement in the Insulation Supply Subcontract.

83 Accordingly, there is no evidence that the Defendant was entitled to retain the Disputed Sum on the basis of a purported agreement between the Company and the Defendant regarding the Defendant's entitlement to a 15% profit margin from the contract sum.

The absence of any intention to pay the Company the entire profit from the Insulation Supply Subcontract

84 In an attempt to justify the Defendant's retention of the Disputed Sum, Victor gave evidence that there was no intention to pay the entire profit from the Insulation Supply Subcontract to the Company. Victor referred to the 7 March 2016 Email and the 4 April 2016 Emails as evidence of this.[111]

85 As mentioned above, the two emails did not support Victor's assertion that the Company was not entitled to the entire profit from the Insulation Supply Subcontract. Indeed, Victor reluctantly conceded:[112]

> COURT: Could you please then answer my question? I'm not asking for your interpretation. I'm just asking you: tell me, in this email, where did it say that [the Company] is not entitled to all the proceeds?

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111 21 October 2022 Transcript at p 81 (lines 16–22).

112 21 October 2022 Transcript at pp 84 (lines 17–23) and 85 (line 8).

> A: Okay, it -- okay, it specifically doesn't.
>
> COURT: Go to the [4 April 2016 Emails]. Where does it say that [the Company] is not entitled to all the proceeds?
>
> …
>
> A: Okay. Your Honour, it doesn't say specifically.

86 Moreover, Victor was unable to provide the Court with a valid explanation or refer to other evidence supporting the Defendant's case on how the parties arrived at the respective profit entitlement. Therefore, there is no evidence to suggest that the Defendant was entitled to retain the Disputed Sum for the Insulation Supply Subcontract.

Summary of the Defendant's defence regarding its entitlement to the Disputed Sum

87 Ultimately, the Defendant alleges that the Company was not entitled to the Disputed Sum as this was the Defendant's share of the profit in the Insulation Supply Subcontract. This, therefore, implies that the Company's share was S$1,931,291,95 and the Defendant's share was S$1,544,142.27. Assuming the Defendant is right, the immediate question is how the parties arrived at such a precise apportionment of the profits for the Insulation Supply Subcontract. There is no evidence to assist the Court in accepting this assertion other than the Management Agreements (the basis of which I have rejected above). The Defendant also did not plead on how the parties were to share the profit accrued from the Insulation Supply Subcontract when the Defendant secured the Yamal Project from PT McDermott. And as I have found above, the further justifications which were provided by the Defendant's witnesses were not only unpleaded and belatedly raised during the trial, but more importantly were neither supported by any evidence nor capable of withstanding logical scrutiny.

The Defendant's case on the entitlement to the Disputed Sum is, therefore, not credible and difficult to believe.

88 Despite my finding that the Defendant cannot establish any defence to justify its retention of the Disputed Sum, I am aware that this does not automatically mean that the Plaintiff succeeds in his case. This is because such a finding merely means that the Defendant's defence against the Plaintiff's claim for the Disputed Sum cannot be made out. This finding does not discharge the Plaintiff's burden of proving that the Company was entitled to the Disputed sum. In this connection, I am mindful of the fundamental requirement that the Plaintiff ultimately bears the legal burden of proving his case on a balance of probabilities. Indeed, it is a trite proposition that a plaintiff in a civil claim bears the legal burden of proving the existence of any relevant fact necessary to make out its claim on a balance of probabilities (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [60]). The defendant, on the other hand, will likewise have a legal burden of proving a pleaded defence, unless the defence is a bare denial of the claim (see *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [31]).

89 The mere fact that the court is not satisfied that a defendant has not made out its defence on a balance of probabilities does not mean that the plaintiff succeeds on its claim on the basis that there is no viable defence. This is because the legal burden of proof is always placed on the plaintiff and does not shift, as the party that bears "the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists" (*Britestone* at [58]). To do otherwise would, as Goh Yihan JC correctly and aptly stressed in *Chan Tam Hoi (alias*

Paul Chan) v Wang Jian and other matters [2022] SGHC 192 ("*Chan Tam Hoi*") at [38], "confer an unintended advantage to the plaintiff where the defendant's defence is unsustainable".

90 In the present case, the legal burden of proof is ultimately placed on the Plaintiff to prove that the Company was entitled to the Disputed Sum, and that the Loan Arrangement exists to justify the Defendant's retention of the Disputed Sum. With this in mind, I shall now consider the Plaintiff's case on the Company's entitlement to the Disputed Sum.

The Company's entitlement to the Disputed Sum

91 I shall now consider the Plaintiff's case that the Company was entitled to the Disputed Sum, on the basis of the Payment Arrangement.

The Payment Arrangement

92 The Plaintiff relies heavily on the Payment Arrangement to advance his case that the Company was entitled to the Disputed Sum. In particular, the Plaintiff referred to the arrangement between the Company and the various Kaefer entities in respect of three prior projects: (a) the Australian Pacific LNG project ("the APLNG Project"); (b) the "Inpex Project"; and (c) the "Wheatstone Project".[113]

93 According to the Plaintiff, the manner in which the Kaefer Group and the Company dealt with each other in respect of these projects evinces a common understanding that the Company would be entitled to the entire profit paid out of these projects for which it had undertaken to do work. In these

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113 PCS at paras 24–51.

projects, the Company was not the contracting party with the third party; rather the contracting party would always be a Kaefer Group entity. Thus, the payment of profit was made to the respective Kaefer Group entity which was the contracting party for the relevant project. In turn, the respective Kaefer Group entities channelled the profit to the Company.[114] The Plaintiff alleges that there was a well-established understanding, captured in verbal agreements between the Plaintiff and the respective representatives of these Kaefer Group entities, which reflects the Payment Arrangement:[115]

> Q: … So your evidence is that for these three projects, Wheatstone, APLNG, and Inpex, there were verbal agreements between [the Company] and each of the respective Kaefer companies in charge of those three projects. Yes?
>
> A: Yes.
>
> Q: And your evidence is that the verbal agreements between [the Company] and these Kaefer companies in Australia, Indonesia, and Thailand require these Kaefer companies to pay all of the profits that they generated from their projects to [the Company].
>
> A: Correct.

94 The Plaintiff thus submits that the Payment Arrangement similarly applies to the parties as regards the Company's profit entitlement flowing from the Insulation Supply Subcontract. Accordingly, the Plaintiff argues that, despite the Management Agreements, there was, nevertheless, an implicit understanding that the Company was entitled to the Disputed Sum. The Defendant was thus permitted to retain the Disputed Sum because the Company had agreed to allow the Defendant to use the Disputed Sum to discharge its liabilities in anticipation of a merger between the Company and the Defendant.

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114 13 October 2022 Transcript at pp 3 (line 20) to 4 (line).

115 13 October 2022 Transcript at pp 5 (line 23) to 6 (line 9).

It was not disputed that the Disputed Sum was indeed used to discharge some of the Defendant's liabilities. This was at the time when Kaefer Germany intended to buy over the Plaintiff's remaining 20% shares in the Company and the Company and the Defendant would merge as one entity.

95 I shall now consider the parties' evidence in relation to these three projects.

(1) The APLNG Project

96 The Company carried out and completed the APLNG Project in Batam on behalf of PT Kaefer. PT Kaefer was the contracting party for the benefit of the customer, PT Sembawang Marine & Offshore Engineering ("PT SMOE"). The APLNG Project was valued at about US$6m.[116]

97 The contract for the APLNG Project ("the APLNG Contract") was negotiated by the Company before Kaefer Germany became a shareholder in the Company. However, the APLNG Contract was signed in November 2012, after the execution of the 2012 SPA. Justin signed the APLNG Contract on behalf of PT Kaefer on 27 December 2012.[117] Despite this, the Plaintiff claims that the entire profit paid out of the APLNG Project was accounted for the benefit of the Company. This amounted to some US$1.2m.[118] According to the Plaintiff, this was evident in the Company's financial statement for the year ended 31 December 2014 ("the FY2014 Financial Statement"), which reflected

116 13 October 2022 Transcript at p 51 (lines 10–11).

117 POS at para 14.

118 13 October 2022 Transcript at pp 53 (line 23) to 54 (line 9).

the payment of the profit from the APLNG Project as the Company's revenue in its accounts.[119]

98 The Defendant's case in respect of the APLNG Project was that there was never any profit distributed to the Company.[120] Instead, the payments made to the Company were reimbursements in respect of the expenses incurred by the Company and labour supplied by the Company in carrying out the works for the APLNG Project. Further, the profit from the APLNG Project was not paid out to the Company because there was no written agreement for the allocation of profit from the APLNG Project to the Company.[121] In response to the Plaintiff's claims that the Company's profit entitlement from the APLNG Project was recorded in the FY2014 Financial Statement, the Defendant submits that the financial statement did not expressly state that the Company's revenue included the profit paid out of the APLNG Project.[122]

99 I accept the Plaintiff's claim that the sums paid to the Company as recorded in the FY2014 Financial Statement relate to the profit paid to the Company. The evidence shows that the Company only had the APLNG Project in 2013. I also accept the Plaintiff's explanation that it is simply inconceivable that the Company was tasked to perform the work and yet not be paid.[123]

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119 Agreed Bundle of Documents (Vol 1) dated 5 October 2022 ("1AB") at p 499; PCS at para 35; 12 October 2022 Transcript at p 43 (lines 12–23); 13 October 2022 Transcript at p 66 (lines 4–12).

120 3BA at pp 1717–1718 (Supplementary Affidavit of Evidence-in-Chief of Victor Arthur Bogos dated 13 September 2022 ("Victor Supplementary Affidavit") at paras 19–20); DCS at para 58.

121 3BA at p 1719 (Victor Supplementary Affidavit at para 25).

122 13 October 2022 Transcript at p 55 (lines 1–5 and 11–15).

123 12 October 2022 Transcript at pp 42 (line 24) to 43 (line 2).

100 The Defendant does not dispute that the Company had completed work for the APLNG Project, nor does it dispute that the Company had only done work for the APLNG Project in 2013. Further, the Defendant offers no explanation for why the FY2014 Financial Statement reflected such a huge sum of money recorded under the Company's accounts. Indeed, Victor conceded at trial that he did not have any personal knowledge of the APLNG Project, as he was not involved with PT Kaefer nor the Company at the time of the APLNG Project.[124]

101 On the contrary, the reasonable explanation is that the Company was entitled to the profit from the APLNG Project. Indeed, the Plaintiff explained that it would be contrary to accounting practices to double report a revenue, *ie*, to report the revenue from the APLNG Project in both the Company's accounts and PT Kaefer's accounts.[125] The fact that the revenue from the APLNG Project was recorded under the Company's accounts, as opposed to PT Kaefer's accounts, suggests that there was an understanding between the Kaefer Group and the Company that the Company was entitled to the entire profit from the APLNG Project, although such an arrangement was evidently not recorded in a written agreement.

(2) The Inpex Project

102 The Plaintiff further relies on the Company's profit entitlement under the Inpex Project. The contract for the Inpex Project ("the Inpex Contract") was entered into on 15 July 2013 between the Thailand subsidiary of the Kaefer

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124 20 October 2022 Transcript at pp 83 (lines 24–25), 84 (lines 8–11) and 89 (lines 12–13).

125 12 October 2022 Transcript at p 44 (lines 4–9).

Group ("Kaefer Thailand") and STP & I Public Company Limited ("STPIPC").[126] The Inpex Project was initially valued at US$14m.[127] At trial, the Plaintiff stated that the Inpex Project was now valued at approximately US$52.8m.[128] The Contract was also signed by Justin on behalf of Kaefer Thailand.[129] Like the APLNG Project, the Company was the entity that performed the work for the Inpex Project.[130] Similarly, the Plaintiff claims that despite the contracting party being Kaefer Thailand, the profit paid out of the Inpex Project was accounted for the benefit of the Company.[131] In particular, the Plaintiff's case is that taking into account the actual value of the Inpex Project, the Company was entitled to receive around US$9.3m to US$9.5m from Kaefer Thailand, after the latter received payment from STPIPC.

103 The Defendant does not deny that the Company did all the works and that Kaefer Thailand was merely the contracting party. The Defendant, however, referred to three written agreements between Kaefer Thailand and the Company setting out the Company's profit entitlement ("the Inpex Profit Agreements").[132] One of the Inpex Profit Agreements was a document titled "Profit Agreement" dated 31 December 2014 between Kaefer Thailand and the Company. This agreement was worded as follows:[133]

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126 2BA at p 774; 1AB at pp 176–204.

127 2BA at p 789; 13 Oct 2022 Transcript at p 22 (lines 18–20).

128 13 October 2022 Transcript at p 24 (lines 14–22).

129 POS at para 16.

130 12 October 2022 Transcript at p 28 (lines 1–4).

131 POS at para 17.

132 DCS at para 60; Agreed Bundle of Documents (Vol 7) dated 5 October 2022 ("7AB") at pp 3747, 3749 and 3750.

133 7AB at p 3747.

> This contract ("Contract") is an agreement between [Kaefer Thailand]
>
> …
>
> and [the Company], …
>
> For the period ending 31 December 2014, The profit entitlement of [the Company] for The Supply and application of Fireproofing and Cryogenic Proofing for [the Inpex Project] is agreed to be USD1,000,000.00 only
>
> Sign on the 31st day of December, 2014.
>
> | | |
> |---|---|
> | [Kaefer Thailand] | [The Company] |
> | [Kaefer Thailand's company stamp and authorised signature] | [The Company's company stamp and authorised signature] |

104 The Inpex Profit Agreements appear to be similar to the Management Agreements in the Insulation Supply Subcontract, save that the Company's profit entitlement is different under each of the three Inpex Profit Agreements.

105 The Defendant then referred to an accounting spreadsheet document dated December 2015 indicating the revenue derived from the Inpex Project ("the Inpex Spreadsheet").[134] According to the Defendant, the Inpex Spreadsheet shows, under the column titled "Profit taken in [the Company] to date", the sums of US$1m and US$1.25m. The Defendant thus argues that the Inpex Spreadsheet, when read with the Inpex Profit Agreements, is conclusive proof of the Company's entitlement to the profit valued at US$2.25m. The Defendant alleges that the Company was not entitled to the balance sum of US$3,358,744.01 recorded in the Inpex Spreadsheet under the title "Balance profit in [T]hailand".

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134 Agreed Bundle of Documents (Vol 4) dated 5 October 2022 ("4AB") at p 1872.

106 In response, the Plaintiff argues that the three Inpex Profit Agreements were merely accounting documents,[135] and do not conclusively show that the Company is only entitled to US$2.25m as stated in the Inpex Profit Agreements. The Inpex Profit Agreements, like the Management Agreements, were not intended to be legally binding agreements between the parties. Instead, these agreements were merely evidence of receipt of monies by the Company.

107 Further, the Plaintiff submits that the balance sum of US$3,358,744.01 reflected in the Inpex Spreadsheet was in fact accounted for as the Company's profit, after deducting a 3% "cross border fee" payable to Kaefer Thailand and a "management fee" of 1.5% payable to Kaefer Germany.[136] The Plaintiff explains the method in which the profit was "accounted" for to the Company. Instead of paying the Company directly, Kaefer Thailand, for tax purpose, decided to pay US$3,358,744.01 to the shareholders of the Company, *ie*, the Plaintiff and Kaefer Germany as their "dividend entitlement". This was explained by the Plaintiff during his cross-examination by the Counsel for the Defendant (Mr Lim), as follows:[137]

> Q: Right? So this sum of 3.3 million, you have just said and I am asking you to clarify, you are saying that this 3.3 million has been paid by Kaefer Thailand to [the Company]. Is that what you are saying?
>
> A: It is paid by Kaefer Thailand to -- as a dividend. In a sense that this profit that is accountable to [the Company], instead of bringing back this money to Singapore for all the tax reason, Kaefer decided to distribute this profit as dividend. …

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135 13 October 2022 Transcript at p 20 (lines 19–23).

136 PCS at para 42.

137 13 October 2022 Transcript at pp 43 (line 20) to 44 (line 15) and 49 (line 21) to 50 (line 6).

> Q: No, I'm afraid I don't understand. My question is a very simple one. I'm talking about cash flow. I'm saying that in these records it says balance profit as at December 2015. The number recognised is 3.3 million, and I'm asking you whether this money, this 3.3 million is still with Kaefer Thailand, or has it been transferred by Kaefer Thailand to [the Company].
>
> A: That's why I said, Mr Lim, you don't understand me. This money has already been accounted for by Kaefer Thailand to [the Company], in the form of dividend, paid by Kaefer Thailand to the shareholders of [the Company]. Which means myself and Kaefer.
>
> …
>
> A: On the question on whether Kaefer Thailand has paid me directly, the answer is no. … this dividend was paid out to me by Kaefer Germany. They declared the dividend as the shareholder, and paid it -- this amount, my share of the amount during the first buyout of my share.
>
> …
>
> A: … I am saying that I got my 50 per cent share of this 3.3 million dividend through Germany, Kaefer Germany. Not through Kaefer Thailand.

108 The Plaintiff explained that the remaining profit of US$3,358,744.01 was then converted into Singapore dollars, which amounts to S$4,635,066.73. Following the necessary deductions, the remaining sum was then split between Kaefer Germany and the Plaintiff as shareholders of the Company.[138] This amounted to approximately S$1,854,000,[139] which the Plaintiff submits was equivalent to the dividend pay-out that he would have been entitled to by virtue of his shareholding in the Company, had the money been transferred to the Company. This payment made to the Plaintiff was also reflected in Attachment

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138 13 October 2022 Transcript at pp 68 (line 8) to 69 (line 15).

139 3BA at pp 1716–1717.

1 of the Addendum to the 2016 Shareholders Agreement under the heading "Ichthys Thailand 01/08/2012-31/12/2015".[140]

109 The Defendant does not dispute that this was how the profit from the Inpex Project was "accounted" for the Company's benefit.[141] Indeed, Victor confirmed it at trial:[142]

> MR YEO: So, [Victor], under the payment arrangement, the entire 5.608 million was to be paid back to [the Company], but it was not. Instead, 2.25 million was paid back to [the Company] and the balance profit in Thailand of 3.358 was accounted to [the Company] by way of a declaration of dividend to the two shareholders. You agree with that?
>
> A: When you say "payment arrangement", what are you referring to? Is it the alleged payment arrangement?
>
> Q: Yes, the payment arrangement which we have pleaded, which is that if [the Company] executes and completes the work --
>
> …
>
> Q: -- even though they are not the contracting party but Kaefer Thailand is the contracting party, Kaefer Thailand accounts for all the monies back to [the Company].
>
> A: Correct.
>
> …
>
> Q: You agree with that one. So based on that understanding, we should have the 5.608 paid back to [the Company], right, based on the understanding, because we have already lessed off the --
>
> A: Correct. My recollection is it was dealt through the shareholders' agreement –

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140 Agreed Bundle of Documents (Vol 2) dated 5 October 2022 ("2AB") at pp 601–603.

141 3BA at p 1716; DCS at para 62.

142 20 October 2022 Transcript at pp 145 (line 14) to 147 (line 4) and 150 (lines 6–8).

…

Q: Yes, I'm coming to that now.

So the method in which the 5.608 was accounted back to [the Company] in the [Inpex Project], it's a bit of a hybrid, in the sense that there was cash accounting which is represented by the 1.25 million -- correct?

A: Yes.

Q: But the balance of 3.358 was not paid back to [the Company], but instead, as you have alluded to, was dealt with to [the Company] through the shareholders' agreement?

A: Yes, that's my understanding.

Q: So in that sense, the entire 5.608 was accounted for, and like you said, everyone was very happy?

A: Yes, correct.

…

Q: So would you agree that up to this stage, actually, the entire sum of 5.608 has been accounted for to [the Company]?

A: Yes.

110 In other words, the profit derived from the Inpex Project was accounted to the Company in two ways: (a) first, an upfront cash payment of US$2.25m to the Company through the three Inpex Profit Agreements; and (b) a direct payment of money to the Company's shareholders in a proportion equivalent to their shareholding, which in the Plaintiff's case amounted to S$1,854,000. In respect of (b), although the money was not paid directly to the Company, it logically follows from the fact that the money was nevertheless paid directly to the Plaintiff, albeit in a proportion equivalent to his shareholding in the Company, as the Company was entitled to that portion of the profit paid out of the Inpex Project.

111 The manner in which the parties conducted themselves in the Inpex Project supported the Plaintiff's case that the entire profit paid out of the Inpex Project were ultimately accounted for the benefit of the Company.

(3) The Wheatstone Project

112 Finally, the Plaintiff referred to the Wheatstone Project. The contract for this project ("the Wheatstone Contract") was executed on 8 January 2015 between Bechtel Overseas Corporation ("Bechtel") and Kaefer Australia.[143] The Wheatstone Contract was valued at about US$ 8m.[144] Similarly, the Company was not a party to the Wheatstone Contract, although the Company performed all the work required under the Wheatstone Contract.[145]

113 The Plaintiff submits that in the Wheatstone Project, the Company would issue invoices for its work done in respect of the Wheatstone Project to Kaefer Australia.[146] Kaefer Australia would issue invoices to Bechtel for the progress claims.[147] The full payment made by Bechtel to Kaefer Australia was, in turn, transferred to the Company.[148]

114 The Defendant argues that similar to the Inpex Project, the profit allocation to the Company arising from the Wheatstone Project was detailed in

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143 2BA at pp 552–553.

144 12 October 2022 Transcript at pp 40 (line 25) to 41 (line 4).

145 20 October 2022 Transcript at pp 123 (line 21) to 124 (line 2).

146 2BA at pp 649–651.

147 2BA at pp 652–671.

148 POS at para 18; 2BA at pp 539–540 (Supplementary Affidavit of Evidence-in-Chief of Chng Kheng Chye dated 16 August 2022 ("CKC Supplementary Affidavit") at para 7).

a written business agreement. The Defendant refers to a business agreement entered into between the Company and Kaefer Australia dated 1 January 2015 ("the Wheatstone Business Agreement"),[149] which provided that the Company was entitled to the entire profit from its work done for the Wheatstone Project.[150] The salient terms of the Wheatstone Business Agreement are as follows:[151]

> [Kaefer Australia] will subcontract 100% of the contract to [the Company]
>
> Terms and Condition:
>
> …
>
> - This is a back to back contract of WHEASTONE LNG PROJECT … and all risk and rewards lies with [the Company]
> - [Kaefer Australia] is entitled to a fixed contract fee of USD $100,000.00 (USD One Hundred Thousand only) for this contract.
>
> …
>
> Dated: 1st January 2015
>
> | [The Company] | Kaefer Australia |
> | --- | --- |
> | [The Company's company stamp and authorised signatory] | [The Defendant's authorised signatory] |

115 The Plaintiff does not deny that the Wheatstone Business Agreement exists.[152] However, the Plaintiff suggests, in his written closing submissions, that this business agreement is merely an accounting document and has no binding effect between the Company and Kaefer Australia.[153]

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149 3BA at p 1727 (Victor Affidavit at p 17); 7AB at p 3748.

150 12 October 2022 Transcript at pp 28 (line 22) to 29 (line 4).

151 7AB at p 3748.

152 13 October 2022 Transcript at pp 9 (lines 14–17) and 17 (lines 9–13).

153 13 October 2022 Transcript at pp 9 (lines 18–24) and 10 (lines 1–13); PCS at para 48

116 I do not accept the Plaintiff's written submissions in this respect. The Wheatstone Business Agreement is clearly drafted differently from the Management Agreements and the Inpex Profit Agreements. The Wheatstone Business Agreement appears to be a legally valid and binding contract. It states, for instance, the parties to the contract, the amount of money that is to be paid to Kaefer Australia, and a choice of law clause. Most importantly, the Wheatstone Business Agreement "is a back to back contract of [the Wheatstone Contract]".[154]

117 In any case, the Plaintiff has rightly conceded in his oral closing submissions that the Wheatstone Business Agreement is a valid and binding contract.[155] Indeed, the Wheatstone Business Agreement has the essential features of a valid contract between the Company and Kaefer Australia, and clearly stipulates the Company's profit entitlement arising out of its work done in respect of the Wheatstone Project. This is clear from the words "[Kaefer Australia] will subcontract 100% of the contract to [the Company]" and that "all risk and rewards lies with [the Company]".[156] This "back-to-back" arrangement involved the issuance of invoices by Kaefer Australia to Bechtel. Upon Kaefer Australia's receipt of payment (as it is the contracting party), the money was then paid to the Company pursuant to a back-to-back invoice issued by the Company to Kaefer Australia.[157]

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154 3BA at p 1727 (Victor Affidavit at p 17).

155 12 January 2023 Transcript at pp 37 (lines 12–25) and 49 (lines 3–7).

156 2BA at p 1727 (Victor Affidavit at p 17).

157 PCS at para 49.

118 The Defendant contends that there were several invoices generated by the Company which recorded the sums sought from Kaefer Australia for the Company's work done in respect of the Wheatstone Project ("the Wheatstone Invoices").[158] The Defendant thus submits that the Wheatstone Invoices all refer to the Wheatstone Business Agreement. For instance, the Wheatstone Invoice dated 11 October 2016 described the invoiced sum as "[p]rogress invoice for [Wheatstone Contract] … *as per business agreement*" [emphasis added].[159] Accordingly, the Defendant submits that the Wheatstone Business Agreement and the Wheatstone Invoices refute the Plaintiff's case premised on the Payment Arrangement, *ie*, that the profit accounted by the Kaefer entity was agreed on verbally and were never recorded in writing. The Defendant submits that for the Wheatstone Project, the Company's profit entitlement was derived from the Wheatstone Business Agreement.[160]

119 Despite the existence of the Wheatstone Business Agreement, the parties' conduct in the Wheatstone Project nevertheless supports the Plaintiff's case that the Company is entitled to the entire profit arising from that project. Indeed, I accept the Plaintiff's oral submission that the Wheatstone Business Agreement simply reduces the Payment Arrangement into writing.[161] And as Victor accepted at trial, Kaefer Australia did not retain any of the profit from the Wheatstone Project except for the cross-border fee of US$100,000, which was provided for under the Wheatstone Business Agreement.[162]

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158 2BA at pp 649–656 (CKC Supplementary Affidavit at pp 113–120).

159 2BA at p 649 (CKC Supplementary Affidavit at p 113).

160 13 October 2022 Transcript at pp 13 (line 21) to 14 (line 3) and 15 (lines 11–15).

161 12 January 2023 Transcript at pp 48 (line 18) to 49 (line 7).

162 20 October 2022 Transcript at p 134 (lines 17–19).

(4) The Defendant's submission on the Payment Arrangement

120 In order to discredit the Plaintiff's reliance on the Payment Arrangement, the Defendant submits that the Plaintiff cannot rely on the Payment Arrangement as the Plaintiff has not discharged his burden of proving, on a balance of probabilities, that the Payment Arrangement fulfils the elements of establishing an oral agreement. According to the Defendant, the Plaintiff has not particularised, aside from the Company, the counter party to these Payment Arrangement, how this arrangement came about, when it began, and the key terms of this arrangement.[163] Further, the Defendant argues that the Plaintiff cannot rely on the Wheatstone Project, and that the Court should not have regard to any evidence given in relation to that project. This is because the Plaintiff has never pleaded that the Payment Arrangement applied to Kaefer Australia under the Wheatstone Project.[164]

121 I shall now briefly deal with these points.

122 In so far as the Defendant's argument on the Plaintiff's failure to particularise the Payment Arrangement is concerned, I do not accept that this amounted to the Plaintiff's failure to discharge his burden of proof on a balance of probabilities. It is clear from the above details regarding the three projects that the Plaintiff has sufficiently particularised the parties to the transactions, the nature of the transactions and the payments relating to each project.

123 More importantly, I accept the Plaintiff's submission that the Defendant has fundamentally misconstrued the Plaintiff's case as regards the Payment

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163 DCS at para 39.

164 DCS at paras 39 and 43.

Arrangement. The Plaintiff never pleaded the Payment Arrangement as a form of oral agreement between the Company and the relevant Kaefer Group entity; rather, the Plaintiff's case is that the Payment Arrangement represents a way in which business is done *vis-à-vis* the Company and the relevant Kaefer Group entity.[165] In other words, the Plaintiff relies on the Payment Arrangement to establish a practice between the Company and the Kaefer Group. This practice is that any profit paid out of projects for which the Company had done work would be accounted for the benefit of the Company. Such accounting would either be direct through payments made by the relevant Kaefer Group entity to the Company, or indirect through payments made to the Plaintiff as the Company's shareholder.

124 As for the Defendant's complaint that the Plaintiff has not pleaded the Wheatstone Project, it is true that the Wheatstone Project was not raised in the Plaintiff's Statement of Claim, whether in the original version or the amended version.[166] However, I do not accept the Defendant's submission that the Plaintiff's submissions and evidence on the Wheatstone Project ought to be disregarded.

125 It is well accepted that the function of pleadings is to give fair notice of the case which has to be met and to define the issues which the court will have to decide on so as to resolve the matters in dispute between the parties (see *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") at [61]). Pleadings, therefore, serve the purpose of delineating the parameters of the case and shaping the course of the

165 PRS at para 5.

166 SDB at pp 3–5 and 28–32.

trial (see *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [36]). Accordingly, the court generally will not consider claims which are not pleaded (*V Nithia* at [38]). However, the court is not required to adopt an overly formalistic and inflexibly rule-bound approach, and departure from the general rule is allowed where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so (see *V Nithia* at [39]–[40]). In this regard, evidence given at trial, where appropriate, can overcome a defect in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced (see *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]).

126 Despite not being contained in the Statement of Claim or the Statement of Claim (Amendment No. 1), details regarding the Wheatstone Project and the application of the Payment Arrangement to Kaefer Australia were set out in the Plaintiff's Supplementary AEIC filed on 16 August 2022. It was also then that the Defendant had notice of the Plaintiff's reliance on the Wheatstone Project. The Defendant did object to the inclusion of the Wheatstone Project in the Plaintiff's Supplementary AEIC, as stated in Victor's Supplementary AEIC filed on 13 September 2022,[167] for instance, by taking out a notice of objection. However, this objection aside, the Defendant was happy to go along with this point and also took the opportunity to respond to the Plaintiff's case on the Wheatstone Project at multiple points: (a) in Victor's AEIC filed on 13 September 2022; (b) during cross-examination of the relevant witnesses at trial; and (c) in the parties' written submissions. Further, documents relating to the Wheatstone Project were also tendered before this Court throughout the

[167] 3BA at pp 1712–1713 (Victor AEIC at paras 6–7).

course of this derivative action. Further, at no point in time throughout the trial did the Defendant bring home its concern to this Court, *ie*, that the application of the Payment Arrangement to Kaefer Australia was not pleaded in the Statement of Claim. It is only in its closing submissions that the Defendant then raised its objection and asked the Court to disregard any submissions and evidence led on the Wheatstone Project.

127 After all these developments, the Defendant's objections cannot seriously be taken. The Defendant has had sufficient notice of this point and has had adequate opportunities to respond to this point during the trial and after. Moreover, the Plaintiff's reference to the Wheatstone Project did not materially change the Defendant's strategy or burden at trial or in its submissions. Indeed, the Defendant was able to sufficiently raise evidence at trial and make arguments to deal with the Plaintiff's case on the Wheatstone Project.

128 Therefore, the Defendant cannot be said to be prejudiced in any way, and it certainly cannot complain that the Plaintiff's case on the Wheatstone Project should be disregarded. In contrast, not ruling on the issues would have been unjust to the Plaintiff as he had expended resources to procure evidence and make submissions on the Wheatstone Project. Moreover, the Defendant did not raise any challenges to the pleadings earlier, and this deprived the Plaintiff of an opportunity to further amend its pleadings.

(5) Summary of the Court's findings on the Payment Arrangement

129 In summary, the three projects discussed above support the Plaintiff's case regarding the Payment Arrangement. In the case of the APLNG Project and the Wheatstone Project, the respective Kaefer entities would pay to the Company all of the profits received from the projects. This operational

understanding between the Company and the Defendant might have been done with or without any written agreements. However, it remains that whilst the respective Kaefer Group entity, as the contracting party for each of these projects, may have been entitled to payment of a fee in some circumstances, that Kaefer entity would certainly not be entitled to keep all or even part of the profit. As for the Inpex Project, it is true that only some of the profit earned was paid *directly* to the Company. However, a portion of the profit in the Inpex Project was paid to the Company's shareholders, *ie*, the Plaintiff and Kaefer Germany. In that sense, therefore, the entire profit arising from the Inpex Project was accounted for the benefit of the Company, either directly or indirectly.

130 The existence of this Payment Arrangement is further supported by the parties' conduct as regards the allocation of the profits in respect of three of the subcontracts under the Yamal Project. It is undisputed that the Company was the entity that financed the works to be done under the three subcontracts, and also provided the necessary manpower in support of the completion of these subcontracts.[168] It is undisputed that in respect of the profit paid out of the subcontract involving the supply and delivery of passive fire protection, such profit was paid to the Company by virtue of the Company being the contracting party under this subcontract. It is also undisputed that, in respect of the profits paid out under the subcontracts involving the installation of the insulation materials and passive fire protection undertaken by PT Kaefer (which was the named party to these subcontracts), they were all accounted back to the Company.[169] This was the evidence given by David in his AEIC, who was the

168 2BA at p 985 (David Affidavit at para 5).

169 2BA at p 985 (David Affidavit at para 5); PRS at para 15.

individual responsible for running the Company's business.[170] As I have noted at [71] above, the Defendant did not challenge David's evidence in this regard during David's cross-examination at trial. I therefore accept that the three other subcontracts under the Yamal Project further strengthen the Plaintiff's case that there existed an understanding between the Company and the Kaefer Group that all profits paid out of the subcontracts would be channelled to the Company.

131 Accordingly, through the Payment Arrangement, the Plaintiff has discharged his burden of proving that in every project for which the Company had done work, the profit paid to the respective Kaefer Group entity would be accounted for the benefit of the Company. Therefore, I find that on a balance of probabilities the profit paid out under the Insulation Supply Subcontract (including the Disputed Sum) should likewise be accounted for the benefit of the Company.

132 I shall next consider the existence of the Loan Arrangement that the Plaintiff relies on in explaining the Defendant's retention of the Disputed Sum.

The existence of the Loan Arrangement

133 The final thrust of the Plaintiff's case is his explanation for the Defendant's retention of the Disputed Sum. As I have stated at [20] above, the Plaintiff's case is that the Defendant retained the Disputed Sum on the basis of the Loan Arrangement which was entered into between the Plaintiff and Justin on behalf of the Company and the Defendant respectively. The Plaintiff claims that, in exchange, the amount retained would be taken into consideration for the

170 2BA at p 984 (David Affidavit at para 3).

purposes of calculating the valuation of his shareholding in the Company.[171] Further, the Loan Arrangement was not reduced to writing and was a purely oral understanding between the parties.

134 The Defendant disputes the existence of the Loan Arrangement. The Defendant's case is that the elements for the formation of an oral agreement were not established, in particular that the document does not show that there was any offer, acceptance or intention to create legal relations between the Company and the Defendant.[172] First, the Defendant points out that it is not apparent from the Plaintiff's pleaded case nor his evidence as to a single point in time when the necessary *consensus ad idem* is reached.[173] Second, the Defendant also points out that there is no certainty of the terms of the Loan Arrangement between the Plaintiff and Justin. In particular, the Defendant submits that it is not clear how much of the profit from the Yamal Project was to be retained by the Defendant as a loan to settle some of the Defendant's liabilities, nor the date on which the Defendant was supposed to repay the purported loan to the Company.[174] Finally, the Defendant submits that it is not apparent from the Plaintiff's pleaded case what was the consideration for the Loan Arrangement.[175]

135 I shall consider the principles relating to the formation of an oral agreement.

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171 1BA at pp 14–15 (Affidavit of Evidence-in-Chief of Chng Kheng Chye dated 7 July 2022 at paras 39–40).

172 DCS at para 84.

173 DCS at para 86.

174 DCS at para 87.

175 DCS at para 88.

(1) The law on oral agreements

136 It is well accepted that the principles for ascertaining the formation of an agreement, whether the agreement is oral or written in nature, are substantively the same (see *Chan Tam Hoi* at [63], citing *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at p 184). Whether an oral agreement amounts to a binding contract depends on whether the following elements are established: (a) offer and acceptance; (b) intention to create legal relations; (c) certainty of terms; and (d) consideration (see *Tan Swee Wan and another v Johnny Lian Tian Yong* [2018] SGHC 169 at [222]).

137 However, it must be emphasised that a distinction needs to be drawn between the *substantive* requirements for proving an oral agreement, and the *mode* of proving an oral agreement. As Goh JC aptly observed in *Chan Tam Hoi* at [63]:

> 63 … oral agreements present a different challenge from written contracts in how one goes about proving those substantive requirements. This is because unlike a written contract, where the substantive requirements (such as formation, consideration and certainty) can be found on the face of the written document, an oral agreement, by its very nature, is not recorded on such a written document. Accordingly, it is important to differentiate between two separate questions: first, the substantive requirements needed for an oral agreement, and second, *how* to go about proving those substantive requirements. …
>
> [emphasis in original]

138 The relevant considerations that the court should bear in mind when determining whether an oral agreement was formed were succinctly summarised by Ang Cheng Hock JC (as he then was) in *Tan Li Yin Michel v Avril Rengasamy* [2018] SGHC 274 at [29]:

> In ascertaining the existence of an oral agreement, the court has to consider the relevant documentary evidence and contemporaneous conduct of the parties at the material time (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [39]). The test for determining the existence of any such agreement is objective (at [40]). The Court of Appeal has also emphasized the importance of looking to the relevant documentary evidence *first* as they would be more reliable than a witness' oral testimony given well after the fact, and which may be coloured by the onset of subsequent events and the dispute between the parties (*OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41]). Where there is little or no documentary evidence, the court will "attempt its level best by examining closely (and in particular) the precise factual matrix" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [60]).
>
> [emphasis in original]

139 In determining whether the substantive requirements of an oral agreement are satisfied, the court must, therefore, first look to the relevant documentary evidence. These documents reduce the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists. This is important since a witness' oral testimony given well after the fact may be less reliable for various reasons and may be coloured by the onset of subsequent events and the dispute between the parties.

140 It is only where the documentary evidence is unsatisfactory will the court turn to examine the parties' oral testimony. Thus, the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 held at [60] that where there is little or no documentary evidence, the court will "nevertheless attempt its level best by examining closely (and in particular) the precise factual matrix". In examining the reliability of oral testimony, Quentin Loh J (as he then was) in *ARS v ART* [2015] SGHC 78 ("*ARS*") set out at [53(d)]–[53(f)] the following guiding principles that a court ought to bear in mind:

(a) oral testimony may be less reliable as it is based on the witness' recollection and it may be affected by subsequent events (such as the dispute between the parties);

(b) credible oral testimony may clarify the existing documentary evidence; and

(c) where the witness is not legally trained, the court should not place undue emphasis on the choice of words.

141 With the above principles in mind, I now turn to consider the parties' case and the evidence relating to the Loan Arrangement, beginning first with the relevant documentary evidence and written communications.

(2) The relevant documentary evidence

142 In support of the Plaintiff's case that Justin and the Plaintiff had negotiated and orally concluded the Loan Arrangement on behalf of the Defendant and the Company respectively, the Plaintiff relies on several documents. These are, namely, an email dated 8 March 2017 ("the 8 March Email"), email exchanges on 11 September 2019 ("the 11 September Email Thread"), and a project account referring to the Yamal Project ("the Yamal Project Account").[176] The Plaintiff submits that the documentary evidence shows that the parties agreed for the Defendant to retain the Disputed Sum by way of a loan, and it follows from this that the Company was entitled to the Disputed Sum.[177]

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176 POS at para 28

177 12 October 2022 Transcript at p 82 (lines 4–14).

(A) THE FINANCIAL STATEMENTS

143 It is undisputed that the Disputed Sum was not recorded on the Company's financial statements as an amount payable or receivable from the Defendant, either as a loan extended by the Company to the Defendant or a profit entitlement payable by the Defendant to the Company. The financial statements of the Defendant also do not record the Disputed Sum as an amount owing or payable by the Defendant to the Company, either as a loan extended by the Company to the Defendant or a profit entitlement payable by the Defendant to the Company.[178]

144 Accordingly, the financial statements do not assist the Court in determining the Defendant's entitlement to retain the Disputed Sum, as well as the basis for doing so.

(B) THE 8 MARCH EMAIL

145 The 8 March Email was sent by Kevin to the Plaintiff, with Victor copied in that email. The relevant part of the 8 March Email reads as follows:[179]

> HI Victor and KC [*ie*, the Plaintiff]
>
> This is to documented [*sic*] down the understanding and arrangement for the final 20% sell out by [the Plaintiff] at the end of 2018.
>
> …
>
> 2) For [the Defendant] the [Yamal Project] result are taken into consideration (Less Germany mgt fee)
>
> …

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178 13 October 2022 Transcript at p 85 (lines 5–12).

179 1BA at p 528 (CKC Affidavit at p 528).

146 The Defendant submits that the 8 March Email does not relate to any agreement between the Company and the Defendant in respect of the Disputed Sum. Rather, the Plaintiff was merely suggesting, in the 8 March Email, that the valuation of the Plaintiff's shareholding should include the profit which the Company was entitled under the Yamal Project. This was said in the context of Kaefer Germany's consideration of the option to purchase the balance of the Plaintiff's shareholding in the Company. Nothing in the language of the 8 March Email, according to the Defendant, supports the Plaintiff's case that the Loan Arrangement existed.[180]

147 I accept the Defendant's case that the plain wording of the 8 March Email simply states that the valuation of the Plaintiff's shares in the Company would take into account the profit due to the Company. There is no mention of whether the Company was entitled to retain the Disputed Sum on the basis of the Loan Arrangement. Indeed, the Plaintiff concedes that the 8 March Email does not expressly state that the Company was entitled to the Disputed Sum; it also did not state that the Disputed Sum was to be retained by the Defendant as a loan.[181]

148 However, the mere fact that the 8 March Email does not expressly state the existence of the Loan Arrangement does not necessarily render this document irrelevant. Instead, it is necessary to consider the Plaintiff's oral testimony to "clarify the existing documentary evidence" (see *ARS* at [53]). I shall now consider the Plaintiff's oral testimony regarding the 8 March Email at [178]–[179] below.

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180 DCS at paras 67 and 69–70.

181 12 October 2022 Transcript at pp 83 (lines 13–20 and 25), 84 (line 1) and 98 (lines 10–14); 13 October 2022 Transcript at pp 77 (line 11) to 78 (line 20).

(C) THE 11 SEPTEMBER EMAIL THREAD AND THE YAMAL PROJECT ACCOUNT

149 The 11 September Email Thread documented ongoing discussions between the Plaintiff and Kaefer Germany regarding the latter's consideration of the call option under the 2016 Shareholders Agreement to buy out the Plaintiff's remaining 20% shareholding in the Company.

150 The 11 September Email Thread was initiated by Victor asking Gregory and Kristoff if they were aware of any dividends due to the Plaintiff from the Yamal Project:[182]

> [Gregory]/[Kristoff]
>
> Are you aware of a dividend due to [the Plaintiff] for [the Yamal Project]? I thought all payments were squared off in previous dividends?
>
> Thanks
>
> Victor

151 Kristoff replied stating that there was an agreement between Kevin and the Plaintiff to pay dividends from the Yamal Project to the Plaintiff and the Defendant was allowed to retain the Disputed Sum out of goodwill for the Defendant to settle certain liabilities:[183]

> Dear Victor,
>
> There is indeed an agreement between Kevin and [the Plaintiff] for the dividend due to [the Plaintiff] for [the Yamal Project] and I believed [Gregory] have [*sic*] a copy of the agreement. [The Plaintiff] out of goodwill give the supply scope to [the Defendant] because [K]evin needs the funds to pay back the loan from Germany and overdraft from the bank. This is the actual situation and with an agreement that [the Plaintiff] will be getting the dividends from it.

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182 1BA at p 527 (CKC Affidavit at p 527).

183 1BA at p 527 (CKC Affidavit at p 527).

> [Gregory] can sent to you the email which is drafted by Kevin.
>
> Rdgs,
>
> [Kristoff]

152 In a subsequent email, Gregory estimated the 20% dividends owed to the Plaintiff for the Yamal Project to be approximately "300k SGD":[184]

> Hi Victor,
>
> …
>
> This email attached from Kevin/ yourself is the only documentation. Amount is approx. 300k SGD as per my calculation.

153 Gregory also prepared a spreadsheet, the Yamal Project Account, which shows that the Defendant had paid S$1,931,291.95 to the Company. The Yamal Project Account was attached to the 11 September Email Thread. The Yamal Project Account describes S$1,931,291.95 as "Profit already taken out by [the Company]". At the bottom of the table is the sum of S$3,475,434.42, *ie*, the total profit derived from the Insulation Supply Subcontract. This sum was described as "Project margin before transfer to [the Company]".[185]

154 The Plaintiff relies on the 11 September Email Thread and the Yamal Project Account to establish that the Disputed Sum was in fact due to the Company and the Defendant knew about it. Accordingly, the Loan Arrangement exists.[186] In respect of the 11 September Email Thread, the Plaintiff's case is that the reference to "approx. 300k SGD" in the 11 September Email Thread was a reference to the Plaintiff's dividend pay-out from the Disputed Sum which he

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184 1BA at p 527 (CKC Affidavit at p 527).

185 1BA at p 536 (CKC Affidavit at p 536).

186 12 October 2022 Transcript at p 99 (lines 14–19).

claims to be entitled to by virtue of his 20% shareholding in the Company. This, in the Plaintiff's view, could only be the case if the Company was entitled to the Disputed Sum. This is because 20% of the Disputed Sum would have been S$303,424.00. The Plaintiff submits that this is roughly equivalent to the alleged share of the profit in terms of his dividend entitlement.[187] Referring to the Yamal Project Account, the Plaintiff contends that the value of "Profit, -1,544,142.47" refers to the balance profit that was retained by the Defendant which the Company was entitled to.[188] The Plaintiff also refers to the value of "-303,424.00" and the words "[the Plaintiff] potential share considering 20% shareholding".[189] According to the Plaintiff, since he was a 20% shareholder in the Company, and since the Yamal Project Account accurately reflects his potential dividend entitlement, the Plaintiff submits that the Yamal Project Account supports his case that the Company was entitled to receive the Disputed Sum and that the Loan Arrangement exists.[190]

155 The Defendant's case is that the 11 September Email Thread does not support the finding that the Company was entitled to the Disputed Sum. Rather, the 11 September Email Thread relates to the *possible* dividends the Plaintiff might have received from the Company following the profit being paid out of the Yamal Project. The Defendant argues that the 11 September Email Thread does not mention any purported agreement between the Company and the Defendant that the Company was entitled to the Disputed Sum, or that the

187 1BA at pp 16–17 (CKC Affidavit at paras 45–48).

188 12 October 2022 Transcript at p 107 (lines 14–19).

189 12 October 2022 Transcript at pp 105 (line 22) to 107 (line 25).

190 12 October 2022 Transcript at p 109 (lines 5–14).

Disputed Sum was a loan granted by the Company to the Defendant.[191] The Defendant's case in respect of the Yamal Project Account is that there is no evidence to show that the Company was entitled to the Disputed Sum. Rather, the Yamal Project Account prepared by Gregory was merely part of an "internal investigation" to show Victor the potential amount of dividends to be paid to the Plaintiff, *on the assumption* that the Plaintiff's claim of 20% dividends was true.[192]

156 The Plaintiff conceded at trial that nothing in the 11 September Email Thread *expressly* refers to the Company's entitlement to the Disputed Sum, or to the existence of the Loan Arrangement.[193] The Plaintiff also conceded in cross-examination that the Yamal Project Account did not state, on the face of that table, that the Disputed Sum was payable to the Company.[194]

157 Despite this, I accept the Plaintiff's submissions that the 11 September Email Thread and the Yamal Project Account support the Plaintiff's case that the Company was entitled to the Disputed Sum and also support the existence of the Loan Arrangement.

158 I shall begin with Victor's email in the 11 September Email Thread (see [150] above). Victor asked Gregory and Kristoff whether they were aware of any dividend payment due to the Plaintiff. The language of the email showed that Victor was under the impression that all dividend payments due to the Plaintiff had been made. Victor was thus referring to the Plaintiff's purported

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191 12 October 2022 Transcript at p 103 (lines 14–18).

192 4BA at pp 1753–1754 (Gregory Affidavit at paras 16 and 17); DCS at para 79.

193 12 October 2022 Transcript at p 104 (lines 10–24).

194 12 October 2022 Transcript at p 109 (lines 5–9).

entitlement to the dividend payment from the Disputed Sum. This is because Victor's question that "I thought all payments were squared off in previous dividends?" was a reference to the Plaintiff's dividend entitlement which was paid out from the $1.9m transferred to the Company.

159 I shall now refer to Gregory's response email to Victor (see [152] above). In that email, Gregory claimed that "[t]his email attached from Kevin/ yourself is the only documentation [of the Plaintiff's entitlement arising from the Disputed Sum]. Amount is approx. 300k SGD as per my calculation".[195] At trial, however, Gregory testified that he knew, even back in 2017, that the Company was not entitled to the Disputed Sum.[196] Gregory also gave evidence that there was an unwritten understanding that the Defendant was entitled to a 15% profit margin from the contract sum for the Insulation Supply Subcontract.[197] I have already dealt with this latter aspect of Gregory's evidence at [73]–[83] above. But assuming that this was true, *ie*, that the Defendant was already entitled to the 15% profit margin from the contract sum for the Insulation Supply Subcontract, it would not have been necessary for Gregory to prepare the Yamal Project Account to calculate the Plaintiff's supposed dividend entitlement from the Disputed Sum.

160 Gregory explained in his AEIC that when the Plaintiff had confronted him in 2019 regarding the Plaintiff's dividend entitlement arising from the Disputed Sum, Gregory was "puzzled".[198] Gregory thus explained that he

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195 1BA at p 527.

196 27 October 2022 Transcript at p 50 (lines 5–8).

197 27 October 2022 Transcript at p 68 (lines 16–25).

198 4BA at p 1751 (Gregory Affidavit at para 8).

"downloaded the financial information relating to the Yamal Project" from the Kaefer Group's accounting system and created the Yamal Project Account to calculate the Plaintiff's dividend entitlement, in the event that the Company was entitled to the Disputed Sum.[199]

161 If Gregory knew as far back as in 2017 that the Company was not entitled to the Disputed Sum, and if he knew that the Defendant was at all times entitled to a 15% cut of the profit arising from the Insulation Supply Subcontract, *ie*, the Disputed Sum, it must logically follow that the Plaintiff would not have been entitled to a portion of the Disputed Sum representing his dividend entitlement as a shareholder of the Company. Accordingly, even if the Plaintiff had approached Gregory to inform him of the Plaintiff's dividend entitlement in 2019, the simple response would have been that the Company was not entitled to the Disputed Sum. Therefore, the Plaintiff would not be entitled to the dividend payout. Thus, in response to Victor's email asking for confirmation of the Plaintiff's dividend entitlement from the Disputed Sum, Gregory could have simply informed Victor that there was no such entitlement due to the Plaintiff given Gregory's alleged understanding at that time. Indeed, Gregory's concession at trial was telling:[200]

> Q: Now, [Gregory], I put it to you that there was never any agreement that [the Company] would retain [the Disputed Sum] to represent a 15 per cent profit margin in the [Supply Subcontract]. Agree or disagree?
>
> A: I agree.
>
> Q: I'm going to -- okay. Tell me whether you agree with this statement.

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199 4BA at p 1751 (Gregory Affidavit at para 9).

200 27 October 2022 Transcript at pp 66 (line 23) to 67 (line 10) and 75 (line 23) to 76 (line 8).

A: Yeah.

Q: And the statement is that there was never any agreement that [the Defendant] would retain [the Disputed Sum] to represent a 15 per cent profit margin in the Yamal [P]roject. Agree or disagree?

A: I agree.

…

COURT: Yes. But why did you not then state to [Victor] that [the Company] is not entitled to 1.5 million and [the Plaintiff] is not [entitled] to his dividend? Why didn't you say that?

A: I wanted to make sure first that, you know, I consider all the facts.

COURT: Yes, but you already considered all the facts.

A: *You are right; I could have just said it straight away in the email*. But I wanted to be cautious and just make sure, you know, that I provide all the facts and evidence to Victor, before actually saying no directly. So it was more being cautious, yeah.

[emphasis added]

162 It would thus have been unnecessary for Gregory to have created the Yamal Project Account to calculate the Plaintiff's dividend entitlement in the first place. Indeed, Gregory acknowledged this at trial:[201]

COURT: But, you see, that's precisely Mr Yeo's point. In 2017 you told us categorically that [the Company] is not entitled to [the Disputed Sum].

A: No, they are not entitled, yeah.

COURT: Yeah. So then he asked you that if [the Plaintiff] come and see you to say that, "Hey, I'm entitled to 20 per cent of the 1.5 million" --

…

A: The logical, it's no. But, yes.

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[201] 27 October 2022 Transcript at pp 52 (line 18) to 53 (line 20) and 61 (lines 9–12).

…

COURT:	[Gregory], unless you are not certain in 2017 as to whether [the Company] is entitled to 1.5 million, that is a completely different thing. But you told us in 2017 you are very certain that [the Company] is not entitled to 1.5 million.
A:	Yes, they were not entitled.
COURT:	What is the problem if [the Plaintiff] come to see you in 2017 whether, "Can I have my 20 per cent of the 1.5 million?" And you need to calculate. That means in 2017 you are not aware as to whether [the Company] is entitled to 1.5 million. Must be. Otherwise you wouldn't have go on to calculate.
A:	I do not see any agreement, so there is no -- they are not entitled because there is nothing in front of me telling me that they are entitled to anything.

…

COURT:	So if [the Company] is not entitled to [the Disputed Sum] --
A:	No, they are not at the end of the day, yes.
COURT:	Is [the Plaintiff] entitled to 20 per cent of [the Disputed Sum]?
A:	He is not. There is no agreement.

163 When confronted with the serious and material inconsistencies in his evidence, Gregory explained that although he knew that the Company was not entitled to the Disputed Sum, he wanted to be diplomatic to the Plaintiff and did not want to tell the Plaintiff bluntly that the Plaintiff was not entitled.[202] But it was not the Plaintiff who had asked him about his dividend. It was Victor, his boss, who sent him and Kristoff an email asking them whether the Plaintiff was entitled to any dividend. Thus, Gregory's explanation about being diplomatic to

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202 27 October 2022 Transcript at p 57 (lines 7–11)

the Plaintiff is completely irrelevant. In any case, this was the first time the Court was informed of this explanation and none of this featured anywhere in Gregory's AEIC.[203] Gregory could not explain why he did not mention this new development in his AEIC:[204]

> COURT: [Gregory], Mr Yeo is saying this: if you had said what you told us this morning, in 2017 you knew that [the Company] is not entitled to the [Disputed Sum].
>
> A: Yes, I knew they were not entitled.
>
> COURT: No, this affidavit in paragraph 8 refers to a situation in 2019. So in 2019, you state in your affidavit you are puzzled. Right? There's no reason for you to be puzzled if what you told us is the truth. If in 2017 you knew that he was entitled.
>
> So in your affidavit you should not have stated you were puzzled. You should have stated that you knew that [the Company] was not entitled, that [the Plaintiff] was not entitled to 20 per cent of the [Disputed Sum], but you just wanted to be diplomatic and you didn't want to tell him bluntly, is what you told us in court?
>
> A: Yeah.

164 Accordingly, I do not accept Gregory's evidence on this very crucial issue of whether the Company was entitled to the Disputed Sum. I am also unable to accept the Defendant's explanation as regards the preparation of the Yamal Project Account regarding the Disputed Sum. On the contrary, the true reason for Gregory to prepare the Yamal Project Account was because at that time he thought that the Plaintiff was entitled to the portion of the Disputed Sum according to his shareholding in the Company.

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203 27 October 2022 Transcript at pp 59 (line 1) to 60 (line 18).

204 27 October 2022 Transcript at p 59 (lines 1–16).

165 Finally, it is important to bear in mind Kristoff's reply email in the 11 September Email Thread. Kristoff's reply (see [151] above) in fact confirms that there was some form of agreement reached between the parties regarding the Defendant's retention of the Disputed Sum and the Plaintiff's dividends from a portion of the Disputed Sum to be paid directly to the Plaintiff. I note that Kristoff's email states that it was Kevin, and not Justin, who had concluded the Loan Arrangement with the Plaintiff. This apparent inconsistency is explicable as at the material time Justin had left the Defendant's employment and Kevin was still the Defendant's employee. Kevin was also involved in the negotiations as both the Plaintiff and Justin had informed Kevin of the Loan Arrangement. In any case, this inconsistency is not material, as what is important is that Kristoff's email suggested that the Loan Arrangement was in fact negotiated between the parties. In any case, I shall refer to the Plaintiff's oral testimony at [175]–[177] below which would shed light on how the entire Loan Arrangement was negotiated.

(D) THE 7 SEPTEMBER EMAIL AND 16 SEPTEMBER EMAIL

166 There is one final piece of written correspondence that I find to be relevant in establishing the Plaintiff's case on the existence of the Loan Arrangement. This relates to the email correspondence between the Plaintiff and Mr Steen Hansen ("Hansen"), who was the then-Chief Financial Officer of Kaefer Germany, that occurred shortly before the 11 September Email Thread.

167 By way of background, the Plaintiff had, during the discussions regarding Kaefer Germany's intended buyout of his shareholding in the Company, mentioned that he was entitled to a "portion of share" for the Yamal

Project.[205] Hansen, whom the Plaintiff was communicating with, informed the Plaintiff that he had no knowledge about the Plaintiff's alleged entitlement to any share of the profit from the Yamal Project and requested for documentation of the same.[206]

168 On 7 September 2019, the Plaintiff wrote to Hansen the following ("the 7 September Email"):[207]

> Dear Mr. Hansen,
>
> I agreed to Kevin Tan request then to have the material portion booked at [the Defendant] because of tax saving etc and he used this proceed to offset the overdraft with the bank. Where else do you think [the Defendant] got this money? You were the CFO and I am surprised that you are not aware about this. It's very clear that I was too trusting and naïve then and people are now taking advantage of me. I have spoken to Kevin about this recently and he knows all the details which I am sure [the Defendant] has as well. The reason Kevin sent the email to Victor and me to include this item in the buyout was in case of such thing happening now. I don't have your requested documentation except the number verbally given to me by Kevin. It's up to you how we proceed to end this item.

169 In a follow-up email to Hansen dated 16 September 2019, the Plaintiff again raised the following ("the 16 September Email"):[208]

> Dear Mr Hansen,
>
> I hope that Victor or [Gregory] have forwarded you all the documentation you asked about.
>
> On TOP of this, this profit should be in [the Company] book but was diverted to [the Defendant] to benefit [the Defendant] first. In evaluating my current share price, this figure was obviously omitted and I must say it doesn't reflect the actual value versus

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205 3BA at p 1627 (Victor Affidavit at p 477).

206 3BA at p 1627 (Victor Affidavit at p 477).

207 3BA at pp 1626–1627 (Victor Affidavit at pp 476–477).

208 3BA at p 1626 (Victor Affidavit at p 476).

> what's on offer now. It's easy to ignore this but we must do what's right!

170 It is important to note that both the 7 September Email and the 16 September Email were the first time the Plaintiff had informed a representative of the Kaefer Group of the existence of the Loan Arrangement. I find this to be important, as there was no reason for the Plaintiff to have fabricated the Loan Arrangement to Hansen. More importantly, what the Plaintiff has said in these two emails was corroborated by Kristoff's email to Victor in the 11 September Email Thread, *ie*, that Kevin and the Plaintiff had agreed for some of the profit from the Insulation Supply Subcontract to be retained by the Defendant to pay off the Defendant's liabilities, but that dividends from a portion of the Disputed Sum equivalent to the Plaintiff's shareholding in the Company would be paid to the Plaintiff (see [151] above). Similarly, I note that there appears to be an inconsistency regarding whether it was Justin or Kevin who had negotiated the Loan Arrangement with the Plaintiff, although as explained (at [165] above) this inconsistency is not in my view material.

171 Accordingly, I find that the 7 September Email and the 16 September Email are also relevant in supporting the Plaintiff's case regarding the Loan Arrangement, in so far as they explain the parties' understanding regarding the Defendant's retention of the Disputed Sum.

(E) SUMMARY OF THE COURT'S FINDINGS ON THE RELEVANT DOCUMENTARY EVIDENCE

172 To summarise, the 8 March Email does not expressly mention that the parties had entered into the Loan Arrangement or that the Company was entitled to the Disputed Sum. On the face of it, therefore, the Plaintiff cannot rely on the

language of the 8 March Email to support his case that the Loan Arrangement existed. However, when I consider the Plaintiff's oral testimony regarding the context of the 8 March Email (at [178]–[179] below), I find that the 8 March Email is relevant to the Plaintiff's case.

173 The 11 September Email Thread and the Yamal Project Account on the other hand, support the Plaintiff's case regarding the Company's entitlement to the Disputed Sum. In particular, the only logical explanation for Gregory to prepare the Yamal Project Account was to explain to Victor the Plaintiff's share of 20% in the Disputed Sum, which should have been but was yet to be accounted for the benefit of the Company. It should also be emphasised that Gregory had signed four of the Management Agreements. Thus, he would have known whether the Company was entitled to the Disputed Sum. If it were true that Gregory knew that the Company was not entitled to the Disputed Sum at that time, *ie*, September 2019, he would have told Victor accordingly. Instead, he took considerable time and resources to prepare the Yamal Project Account, a very detailed document, to explain to Victor the Disputed Sum due to the Company and the Plaintiff's potential share in the Disputed Sum. This showed that Gregory understood the meaning of Kevin's email in the 11 September Email Thread.[209] Further, the 7 September Email and the 16 September Email are also relevant to assist the Court to understand the basis on which the Defendant had retained the Disputed Sum.

(3) The relevant oral testimonies

174 The relevant oral testimonies further support the finding that the Loan Arrangement existed.

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209 PCS at paras 111–113.

175 The Plaintiff was unable to remember the exact date the parties completed negotiations on the Loan Arrangement. However, the Plaintiff submitted that it occurred sometime before the award of the Yamal Project subcontracts and around the time the parties were negotiating with PT McDermott regarding the award of those subcontracts:[210]

> Q: So we start off by looking at your answer to the question of the date on which the agreement was entered. You say that your answer was that:
>
> "There is no specific date. The Agreement was discussed and agreed upon during the negotiation of the Project."
>
> That's your answer, yes? And so, you are referring to a contract where the date is unknown. Yes?
>
> A: Not yet awarded.
>
> Q: Not yet awarded. What does that mean, Mr Chng [*ie*, the Plaintiff]?
>
> A: Because we are -- if you read it correctly, during the negotiation of the project, by the word "negotiation", Mr Lim, it means that the contract hasn't been awarded.
>
> Q: The word "negotiation" doesn't mean that the contract has been awarded. But the question, Mr Chng, that is being asked for you to state or identify is the date on which the agreement was allegedly entered into, not the question of negotiations.
>
> A: So that's why I say it's before the contract was awarded. So before the contract was awarded means it was during negotiation.
>
> Q: … The answer to the question which appears in page 22 is, we asked the date, what date was the agreement entered into. And your answer is:
>
> "There is no specific date"
>
> You are talking about the specific date of the agreement, right? You are saying there was such an agreement, but there's no date, correct?
>
> A: It's all verbal. It's a discussion between me, [Justin].

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210 12 October 2022 Transcripts at pp 130 (line 19) to 131 (line 14).

…

A: I wish I can remember the date, sir.

Q: So your answer is, "I cannot" –

A: Can't remember the date.

Q: You can't remember the date?

A: I know that it was done before the contract was awarded.

Q: Right.

A: So it was during negotiation of project.

176 The Plaintiff then elaborated on the manner in which the negotiations between the parties took place:[211]

Q: … You say that -- in response to the question, it's whether the alleged agreement, at paragraph (d), was entered into orally or in writing, and your answer is that this is an oral agreement, yes?

A: … Yes, Mr Lim Tat. Because since day one of our incorporation between [the Defendant] and between [the Company], we have been working on this arrangement. Justin is a hands-on man, which trust him -- I trust him. Kevin is -- I trust him, too. And that's how we work.

We are sitting -- we are almost communicating with each other every other day. Why should we put everything down in writing, waste our time and money?

It's all very informal. It's -- you know, it's how we conduct business. My instruction from [Justin] is, "I will take care of the corporate bullshit, you just go out and get the business. Make as much money as possible."

Q: So this is an oral agreement for which the parties you say involved in the discussion and the entering of the agreement is yourself, [Justin], and [Kevin]. Yes?

A: [Kevin] was originally not there. After my discussion with [Justin], I remember then Kevin came into the picture, and was informed of our decision.

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211 12 October 2022 Transcript at pp 132 (line 24) to 133 (line 22), 135 (lines 17–23), 139 (line 19) to 140 (line 4).

> …
>
> Q: I would put it to you that because [Justin] left the [D]efendant's employment in February 2016, he could not have entered into an agreement on behalf of the [D]efendant for the Yamal [P]roject.
>
> A: Why not? He still at -- at that material time, while we are negotiating the contract, he was still the regional managing director.
>
> …
>
> Q: … you are saying that even though [Justin] left the [D]efendant's employment in February 2016, you say that he was still able to conclude that agreement on behalf of the [D]efendant with [the Company]. That's your evidence?
>
> A: Yes. When he left, the job is at the negotiation stage. And that is what we agreed on. …

177 The Plaintiff thus confirmed that while it was Justin with whom he had negotiated the Loan Arrangement, Kevin knew and was aware of this negotiation and the eventual agreement. This explains why both Kristoff in the 11 September Email Thread and the Plaintiff in the 7 September Email mentioned that Kevin was part of the negotiations.

178 Regarding the Plaintiff's oral testimony on the 8 March Email, the Plaintiff claims that there was an implicit understanding in the 8 March Email that the parties did enter into the Loan Arrangement. The Plaintiff explained at trial as follows:[212]

> Q: So can I ask you to tell the court, where in this email from [Kevin], dated 8 March, does it say that [the Defendant] and Kaefer Germany recognises that [the Company] is entitled to the profit of 1,544,142.47 to be retained by the [D]efendant; where does it say that?

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212 12 October 2022 Transcript at pp 83 (line 13) to 84 (line 3) and 92 (line 16) to 94 (line 6).

A: It didn't state that. To me, it's an internal Kaefer matter. And whether Kevin or Victor informed [Kaefer Germany] or not, I don't know. But as far as I'm concerned, this email was generated because I've requested [Kevin], who is leaving soon, at that time, that he must be sure that this portion of the loan is covered. That's why it's sent to me and to [Victor].

Q: Your evidence is that it doesn't say that, right?

A: It doesn't say that, but what he say make sense to me, that he is implying that the com – [the Defendant] do owe the balance profit to [the Company].

…

Q: You then agree that item A of paragraph 14, which is [Kevin's] email, right, relates to the buyout of your shares?

A: All right.

Q: By Kaefer Germany?

A: All right.

Q: And actually doesn't confirm or provide evidence of this profit that must be, in your words, accounted for by the [D]efendant to [the Company]. Correct?

A: It's all linked, Mr Lim Tat. How can I get a dividend payment for this portion that is retained in [the Defendant] if the profit is not accountable to the [Company]. So I can -- this only applies because the fact that the entire profit belongs to [the Company]. This statement doesn't make any sense if … all the profit are not accounted to [the Company]. This statement A, 14A doesn't apply at all.

…

A: Okay. The only way I can receive my share of -- I use the word "dividends" -- is if only that profit belongs to [the Company]. I'm not a shareholder or anything of [the Defendant]. So by Kevin implying that the result of the Yamal material balance which is retained in [the Defendant], they have to pay out my cut of the share, meant that this profit actually belongs to [the Company]. That's – that's the only way it can correlate. I can only get a share of the profit in [the Defendant] if that money belongs to [the Company].

> So, like I say, this email got no meaning, if the entire profit did not belong to the [Company]. So, Kevin, by writing it this way, encompassed the left and right of the whole thing.

179 The Plaintiff's explanation regarding the contents of the 8 March Email, and in particular, the words "[f]or [the Defendant] the [Yamal Project] result are taken into consideration (Less Germany mgt fee)", must be considered in the context of the background that the Company would be wholly owned by Kaefer Germany. At that time, there was an expectation that Kaefer Germany would buy out the Plaintiff's remaining shareholding in the Company. I shall elaborate more on this at [183]–[190] below. Under this buyout scheme, there was an implicit understanding and arrangement that the valuation of the Plaintiff's shares would take into account the profit that was due to the Company. That is why the Plaintiff said that the profit that would be taken into consideration in this valuation process would include the Disputed Sum.

(4) Summary of the Court's findings on the existence of the Loan Arrangement

180 From the above, therefore, I accept the Plaintiff's oral testimony as regards the existence of the Loan Arrangement. I find that the Plaintiff was largely consistent in his account as to how the Loan Arrangement came into existence and is also corroborated by the documentary evidence in the form of the email correspondence which I referred to above.

181 Loh J in *ARS* at [53(f)] stated that where the witness was not legally trained the court should not place undue emphasis on the choice of words. In this instance, the Plaintiff was not legally trained. When the Plaintiff used the word "loan" to describe the arrangement between the Company and the Defendant, the Plaintiff was referring to no more than an understanding between

the parties regarding the flow and accounting of monies paid by third parties for work done by an entity under the Kaefer Group. The Plaintiff's explanation at trial was as follows:[213]

> COURT: Is it reflected anywhere in [the Company] that the sum of 1.5 million was a loan to [the Defendant]?
>
> A: Not the term "loan", no.
>
> COURT: No. Or "receivable"? Is it reflected in the [Company's] account … that the outstanding sum of 1.5 is recorded as receivable from [the Defendant]?
>
> A: No, sir. The intention was, because of the buyout … this amount was not meant to be declared as a receivable in [the Company]. It's supposed to be like declared as dividend. That's why [Kevin] put … my share of the 20 per cent dividend in the email.
>
> That was the intention at that time; that is declared as a dividend. That means the monies stay in [the Defendant].

182 When the Plaintiff used the word "loan", he was referring to the understanding that money would ultimately be paid back to the Plaintiff and the Company. How the money was eventually paid back was not as important from the Plaintiff's perspective – it may be indirectly through a payment to the Company, followed by the Company's declaration of a dividend paid to the Plaintiff as its shareholder, or as a direct payment from the relevant Kaefer Group entity to the Plaintiff, similar to what occurred in the Inpex Project (see [110] above).

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213 13 October 2022 Transcript at p 85 (lines 5–20).

(5) The intended merger of the Company under the Kaefer Group

183 There was no written agreement or documentation stipulating the Company's entitlement to the Disputed Sum, but this can be explained from the parties' relationship and the circumstances operating on them at that time. The most obvious and common feature about the Company and the Defendant is that they were both under the control of the Kaefer Group. The Defendant, in particular, was wholly owned by Kaefer Germany, which also had controlling shareholding of 80% in the Company. Therefore, there was some degree of informality and flexibility when they engaged each other in a common project like the Insulation Supply Subcontract, notwithstanding that they were separate legal entities.

184 Following Kaefer Germany's acquisition of the shares in the Company from Richard, and around the time of the Yamal Project, there was an underlying expectation that Kaefer Germany would be acquiring the Plaintiff's remaining shareholding in the Company.[214] This meant that there was an expectation that the Company would become a wholly owned subsidiary existing within the Kaefer Group.[215] This was confirmed by Victor and Gregory. At that time, they and the staff believed that there would soon be a merger of the Company and the Defendant. This explains why, around that time, the parties' internal dealings became much more informal, and there was no emphasis placed on proper and strict accounting between the parties. The Company and the Defendant were also operating from the same premises at No 6 Sungei Kadut Street 2, Singapore 729228, and the Defendant did not pay

214 20 October 2022 Transcript at p 54 (lines 17–20).

215 12 October 2022 Transcript at p 60 (lines 6–9).

any rental, either to the Company or to the Landlord; rather, the rental was only paid for by the Company to the Landlord.[216]

185 The staff from the Company also assisted the Defendant in its various operations so as to maximise operational efficiency and minimise costs. Moreover, the staff of one Kaefer entity also signed documents belonging to another Kaefer entity. For instance, under the Yamal Project, Kristoff signed the subcontract for the supply and delivery of the passive fire protection, as well as the subcontract for the relevant installation works on behalf of PT Kaefer, despite not being an employee of PT Kaefer.[217] Similarly, David had signed the Insulation Supply Subcontract and the installation subcontract for the insulation material on behalf of the Defendant, despite not being its employee.[218] These incidents demonstrate the blurring of lines between the separate and distinct nature of each Kaefer entity, with their operations managed without any due regard paid to their separate legal personalities.

186 Following the proposed share buyout by Kaefer Germany in 2016, the intention was to shift the Defendant's operations to the Company and operate as one entity. Indeed, Victor agreed in Court that the intention then was for the Company to operate as one profit centre:[219]

> Q: Okay. So from a business standpoint, would it be right for me to say that [the Company], after 2016 and the integration and bearing the HR costs of [the Defendant] plus the co-location, *would you agree with me that [the Company], from the business standpoint, was going to be the profit centre and not [the Defendant]*?

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216 PCS at para 63.

217 PCS at para 54.

218 PCS at para 55; 21 October 2022 Transcript at pp 63 (line 18) to 65 (line 12).

219 20 October 2022 Transcript at pp 34 (line 13) to 36 (line 5).

A: *That's correct* … we were phasing down [the Defendant] because obviously we still had to finish the Yamal [P]roject and we needed the resources to do that, and we were increasing our operations into [the Company]. So *we were streamlining the organisation into one*, but we had to finish, obviously, [the Yamal Project], and we had to … step down those costs and those overheads whilst the other business was integrating.

Q: Correct. I understand what you are saying. So, in other words, what you are saying is that you were, effectively, working towards shutting down [the Defendant] slowly –

A: Yes.

Q: -- and boosting up [the Company]?

A: Yes, because we still had to finish the [Yamal Project].

…

Q: In that exercise, you obviously needed to transfer liabilities; for example, the HR costs?

…

Q: And do the co-location?

A: Yes … merging into the –

…

Q: … So, basically, you were merging both companies?

A: Yes, *streamlining the business together, yeah.*

Q: Of course, in line with this exercise to integrate and to merge, one of the key items that would need to be dealt with would be the liabilities under [the Defendant]?

A: When you say "Kaefer Singapore", sorry, Mr Yeo, are you --

Q: [the Defendant]; right?

A: Yes.

187 Given this expectation of phasing down the Defendant's operations and merging it with the Company, it is not inconceivable that strict and proper accounting principles in accordance with recognition of the various Kaefer

entities, like the Company and the Defendant, as separate and distinct legal entities with their own accounts and documentation, would not have been at the forefront of the Kaefer Group's consideration.[220] Indeed, the Kaefer Group's intention to transform the Company into its profit centre is wholly consistent with the understanding that all profits derived from projects entered into between the respective Kaefer entities and third parties would eventually be transferred to the Company. The Company was intended to be the "profit centre" in respect of projects conducted in that region by the Kaefer Group.

188 An appreciation of this background explains why the parties' dealings were carried out informally, and why there was the absence of written documentation regarding the parties' entitlement to the Disputed Sum. In 2016 when the Yamal Project was being carried out, the parties were already working towards integrating the Plaintiff and the Defendant. For all intents and purposes, only one entity was envisaged and all the profits for the Yamal Project was to be booked under and accounted for the benefit of the Company as the profit centre.

189 The Kaefer Group's intention to integrate the Defendant with the Company and the winding down of the Defendant's operations also supported the existence of the Loan Arrangement. As Victor testified at trial, the liabilities of the Defendant needed to be pared down as part of the integration process.[221] This was achieved through the sale of the Defendant's fixed assets, and with cash.[222] In particular, Kristoff's reply in the 11 September Email Thread referred

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220 20 October 2022 Transcript at pp 16 (line 20) to 17 (line 2).

221 20 October 2022 Transcript at pp 35 (line 22) to 36 (line 5).

222 20 October 2022 Transcript at pp 38 (line 16) to 47 (line 11).

to the Plaintiff agreeing to the Defendant's retention of the profit from the Yamal Project to enable the Defendant to settle its liabilities (see [151] above). Since it is undisputed that the Defendant has not retained any money from the other subcontracts under the Yamal Project (see [130] above), Kristoff's statement in his reply email could only be a reference to the Disputed Sum, which was then held on by the Defendant and which was yet to be paid to the Company.

190 For the above reasons, I find that the Company was entitled to the Disputed Sum, and the only reason why the Defendant retained the Disputed Sum was due to the Loan Arrangement.

The Plaintiff was not acting in bad faith

191 Unfortunately, Kaefer Germany did not buy over the Plaintiff's shares in the Company, and the *laissez faire* way in which the Company and the Defendant operated ultimately affected the interest of the Plaintiff, who remained a 20% shareholder in the Company. While the issue of the Disputed Sum remaining unpaid to the Company may not have any significant implication on the Defendant and the Kaefer Group, it nevertheless has a substantial impact on the Plaintiff, who is entitled to S$303,424 from the Disputed Sum in the form of a dividend payout.

192 In this vein, the Defendant submits that the Plaintiff had commenced the present derivative action in bad faith and this amounts to an abuse of s 216A of the CA. The Defendant alludes to the fact that the Plaintiff commenced the present derivative action almost two years after the completion of the Yamal Project, and after negotiations between the Plaintiff and Kaefer Germany

regarding the sale of the Plaintiff's shares had broken down.[223] In other words, the Defendant's case was that the Plaintiff has brought the present derivative suit in bad faith and for a collateral purpose as the Plaintiff was attempting to pressure Kaefer Germany into buying out the Plaintiff's minority shareholding at a higher value.[224]

193 I do not accept the Defendant's submission that the Plaintiff's commencement of the present derivative action was for a collateral purpose sufficient to amount to an abuse of s 216A of the CA.

194 I shall deal with the concept of "good faith" in the context of a statutory derivative action. In *Jian Li Investment Holdings Pte Ltd and others v Healthstats International Pte Ltd and others* [2019] 4 SLR 825, Ang Cheng Hock JC (as he then was) held at [44] that one facet of the "good faith" requirement is that the complainant seeking to bring the derivative action cannot be doing so for a collateral purpose. Ang JC elaborated on the notion of a collateral purpose at [45], as follows:

> 45 As regards this second facet of the good faith requirement, it will not suffice to show dislike, ill-feeling or personal animosity between the parties as hostility between warring factions within a company is commonplace. However, if it can be shown that the applicant is "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations", then this would constitute a lack of good faith: *Pang Yong Hock* at [20]. A history of grievances against the majority shareholders or the board would make it easier to characterise the derivative action as having been brought for no other purpose other than the satisfaction of the applicant's private vendetta: *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at [41], cited with approval in *Ang Thiam Swee* at [13]. An applicant's good faith

223 DCS at para 9; 2AB at pp 956–958.

224 DCS at paras 8 and 117.

> will also be in doubt if he appears set on damaging the company out of sheer spite or for the benefit of a competitor: *Pang Yong Hock* at [20]; *Wong Kai Wah v Wong Kai Yuan and another* [2014] SGHC 147 ("*Wong Kai Wah*") at [70].

195 Ang JC at [47] also drew the distinction between a complainant's "motive" and "purpose" in analysing whether the complainant is bringing the derivative action in "good faith":

> 47 In considering the requirement of good faith, a distinction between "motive" and "purpose" should be drawn. The element of good faith is "dependent less on the motives" behind the application and "more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests": *Ang Thiam Swee* … at [16]. *In other words, it is not the questionable motivations of the applicant* per se *that amounts to bad faith; instead bad faith may be established where questionable motivations constitute a personal purpose which will be pursued at the expense of or in lieu of the company's interests*. In this sense, the requirements under s 216A(3)(*b*) and s 216A(3)(*c*) of the CA are quite clearly inter-linked: *Ang Thiam Swee* at [13] and [16], citing *Pang Yong Hock* at [20].
>
> [emphasis added]

196 In other words, the court must not only consider the applicant's motive for bringing the statutory derivative action, but must also consider whether the applicant's purpose for bringing the derivative action amounts to advancing his personal interest *at the expense of the company's interest*. It follows that an applicant who seeks to bring a derivative action in his or her own interest is not necessarily acting in bad faith, as long as it would also be in the company's interest to do so. This point was emphasised by the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*"). In *Ang Thiam Swee*, the Court of Appeal at [13]–[16] endorsed a line of Canadian authorities stating that an applicant who brings a derivative action to maximise the value of his shares would not be found to be acting in bad faith:

13 …This crucial distinction between the applicant's *motivation* or *motive* on the one hand and his *purpose* on the other has been neatly encapsulated in Palmer J's judgment in *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 ("*Swansson*") at [41] as follows:

> To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue … On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

14 Canadian case law has over time unequivocally established that an applicant who acts out of self-interest need not be lacking in good faith. In *Primex Investments Ltd v Northwest Sports Enterprises Ltd and 453333 BC Ltd* [1996] 4 WWR 54 ("*Primex Investments*"), which concerned s 225 of the British Columbia Company Act (RSBC 1979, c 59) (now repealed and replaced by s 233 of the British Columbia Business Corporations Act (SBC 2002, c 57)), Tysoe J observed at [42] that:

> I have no doubt that the Petitioner is acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximize the value of its shares in Northwest by pursuing causes of action which it may have against Mr. Griffiths and the other directors. The Petitioner's self-interest coincides with the interests of Northwest. This does not mean the Petitioner is acting in bad faith: see *Richardson Greenshields of Canada Ltd. v. Kalmacoff* [(1995) 22 OR (3d) 577]. *Anything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company to prosecute an action which is in its interests to prosecute*. [emphasis added]

> 15 In *Richardson Greenshields of Canada Limited v Kalmacoff et al* (1995) 22 OR (3d) 577 ("Richardson Greenshields") at 586–587, it was held that:
>
> > … [T]he extent of [the appellant shareholder's] stake, monetary or otherwise, in the outcome of these proceedings is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. … I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. *Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution.* … [emphasis added]
>
> 16 The general tenor which emerges from the case law is that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests. As this court noted in Pang Yong Hock at [20], "there is an interplay of the requirements in s 216A(3)(b) and (c)" …
>
> [emphasis in original]

197 To summarise, the fact that the complainant may have a personal interest in pursuing the derivative action is not necessarily fatal to the finding of good faith. On the contrary, where the complainant is seeking, by bringing the proposed action, to maximise the value of or to restore value to his shares in the company, the court may, on the contrary, find that the complainant is acting in good faith. This is because an action that benefits the company will ultimately benefit its shareholders, and the complainant's personal interest is, therefore, aligned with the company's interest.

198 With the above principles in mind, it becomes clear that the fact that the Plaintiff brought the present derivative action after the collapse of the negotiations for the buyout of the Plaintiff's shares by Kaefer Germany is not detrimental to the *bona fide* nature of this derivative action.

199 It is true that, when questioned by the Counsel for the Defendant regarding the Plaintiff's thoughts on Kaefer Germany's refusal to buy out his shares in the Company, the Plaintiff expressed his unhappiness:[225]

> Q: … in your discourse by email with Mr Steen Hansen, you had reached a point where you were very unhappy with the development. Would that be fair to say?
>
> A: I think you would be unhappy too, Mr Lim Tat. You know, there is an agreement between me and Kaefer previous management, that there is a base of 3 million to purchase my share. And suddenly the new management come in with a less than 20 per cent of that, and you expect me to be happy about it, sir? I don't think anyone would be happy, right.

200 It is, however, well accepted that dislike, ill-feeling or personal animosity between the parties is insufficient to show that the complainant was acting in bad faith in bringing the derivative action. What is required is that the complainant is "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations", then this would constitute a lack of good faith (see *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [20]). In this instant case, it cannot be argued that the Plaintiff lacks good faith on the basis that the Plaintiff was also motivated by personal considerations in bringing the present derivative action, or that the Plaintiff was also motivated by the collateral purpose of putting pressure on Kaefer Germany into buying up the Plaintiff's shares at a higher value. Rather,

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225 12 October 2022 Transcript at pp 52 (line 23) to 53 (line 8).

I find that the Plaintiff was motivated by his wish to claim back what, in his view, was money rightfully owed to the Company. In doing so, the Plaintiff would no doubt benefit in terms of an increase in the value of his shareholding. As the Plaintiff said in cross-examination, "the worth of [his] share, is based on the profit of [the Company]".[226]

201 The Plaintiff's motivation as mentioned above also becomes more apparent in the next line of questioning by the Counsel for the Defendant:[227]

> MR LIM: Mr Chng [*ie*, the Plaintiff], your motivation for commencing these proceedings for [the Company] is because [the Defendant] did not buy over [the Plaintiff's shares in the Company]. Would that be right?
>
> A: It's partially correct, Mr Lim Tat. The fact that this -- this deal did not go through, and the fact that Mr Steen Hansen, the CEO, say that we can remain shareholder, so I decided that I will remain a shareholder. So that's my real reason. As a shareholder and a director, I have to claim back this money.

While the Plaintiff explained that he was partially motivated by the fact that Kaefer Germany ultimately did not buy out the Plaintiff's shares, I accept the Plaintiff's submission that he was also motivated by the Company's interest and in ensuring proper accountability and corporate governance, especially given that he envisaged his role as a minority shareholder in the long run:[228]

> Q: You mention in your affidavit of evidence-in-chief that you are pursuing this action because it's an issue of governance, right? That's what you say, issue of governance?

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226 12 October 2022 Transcript at p 136 (line 23).

227 12 October 2022 Transcript at pp 60 (line 19) to 61 (line 4).

228 12 October 2022 Transcript at pp 144 (line 16) to 145 (line 4).

> A: All right, because I have decided that [the Defendant] is not going anywhere with this share purchase, and Mr Hansen welcomed me to be his shareholder. So I have to take the position that I will remain the shareholder for a long time, because the business has become very, very viable. It's good for me to be there.
>
> So I must make sure that everything is properly accounted for. They are going to be my long-term partner. If they can do -- run away with this, I'm in big shit.

202 It cannot be said that the Plaintiff was acting in bad faith by pursuing the present derivative action. On the contrary, this is a case where the Plaintiff's interest is aligned with that of the Company. The fact that the Plaintiff succeeding in this derivative action would result in a positive impact on the value of his shareholding in the Company does not in itself amount to a lack of good faith. If the Plaintiff did not take action for the return of the Disputed Sum from the Defendant, the Kaefer Group would not have taken any action as Kaefer Germany is the majority shareholder of the Company. For all intents and purposes, the Company is, in substance, part of the Kaefer Group. In fact, it is advantageous to the majority shareholder of the Company, *ie*, Kaefer Germany, to retain the Disputed Sum in the Defendant, a wholly owned entity of Kaefer Germany, so that it pays less for the Plaintiff's shares in the Company. Accordingly, I do not accept the Defendant's submission that the Plaintiff's commencement of the present derivative action is an abuse of s 216A of the CA.

The credibility and reliability of the witnesses

203 I turn lastly to deal with the credibility and reliability of the witnesses. This is especially important given that the Court is ultimately dealing with factual issues and, as can be seen from the above, there is a dearth of objective evidence on either party's side that deals with the issue of which corporate

entity, *ie*, the Company or the Defendant, was entitled to the Disputed Sum. In such cases, the credibility and reliability of the witnesses' testimonies take on greater significance, and are often the only source of evidence from which the Court can conduct its fact-finding exercise to resolve the disputes.

204 The Plaintiff was a candid and forthright witness. When he was questioned by the Court on, for instance, the 8 March Email and the 11 September Email Thread, the Plaintiff conceded without significant resistance that those emails do not, on their face, say anything regarding the Loan Arrangement or the Company's entitlement to the Disputed Sum. When he was questioned by the Court on the lack of documentation, he accepted that it was his oversight, and explained that the Company operated its business with a certain degree of informality:[229]

COURT:	You see, Mr Chng [*ie,* the Plaintiff], is it good corporate governance to commit a company for contract that's worth more than $1 million verbally?
A:	Not with our client, sir.
COURT:	No, with anyone?
A:	Yeah --
…	
COURT:	You see, Mr Chng, governance doesn't matter whether it is outside the Kaefer Group or within the Kaefer Group. Because each company is different.
A:	Correct, sir.
COURT:	So is it good corporate governance?
A:	Yes, that's -- that was a shortcoming on my part. But, you know, this is the first time and the last time that I was engaging with a big company,

[229] 13 October 2022 Transcript at pp 84 (line 8) to 85 (line 4).

> and I have to learn their practices. But under the management of [Justin], no such thing was in play.
>
> You know, our company is very simple, we are basically -- everything, we will just do it, like a one-man show company. And it was still a one-man show management.

205 These concessions on the Plaintiff's part made the Plaintiff's evidence and version of events more reasonable and suggest to the Court that the Plaintiff has got nothing to hide.

206 In contrast, I find Victor and Gregory to be evasive when pressed on several points. Moreover, as shown above, the evidence given by Victor and Gregory was often incoherent and suffered from serious material inconsistencies.

207 Turning first to Victor, when questioned on whether he was the one who gave the instructions to Kevin to retain the Disputed Sum in the Defendant's account, Victor's answers were evasive.[230] It was only when the Court intervened that Victor finally explained that he did not give any instructions because the Defendant had "signed management agreements to pay [the Company] its share of that profit, and what was left over was … [the Defendant's] right to retain that profit."[231] Even then, Victor was evasive and he did not provide a clear answer on how the profit entitlement between the Company and the Defendant was arrived at. Further, when questioned on whether the 4 April 2016 Emails stated that the Company was not entitled to the entire profit from the Insulation Supply Subcontract, Victor also remained

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230 20 October 2022 Transcript at pp 56 (line 10) to 57 (line 13).

231 20 October 2022 Transcript at pp 57 (line 20) to 59 (line 11).

evasive and repeatedly chose not to answer the question until he was warned by the Court.[232]

208 Moreover, when asked to explain to the Court the justification for the Defendant to retain the Disputed Sum, Victor's evidence was internally inconsistent. Victor first gave evidence that the Defendant's retention of the Disputed Sum was premised on the 4 April 2016 Emails which state that the Company would retain its "territory commission" which was "3%" of the final contract value. However, when he was unable to explain how the Company was eventually paid S$1,931,291.95 despite three percent of the final value for the Insulation Supply Subcontract being only S$300,000, Victor shifted his case to the 7 March 2016 Email and sought to explain, but again without success, that this email formed the justification behind the Defendant's retention of the Disputed Sum. When these failed, Victor then sought to explain the Defendant's retention of the Disputed Sum on the basis that the profit accrued to the Defendant were used to pay for the costs incurred by Kaefer Australia. However, as I have found at [69] above, this evidence was not found in Victor's AEIC. This aspect of Victor's testimony contains false assertions made up by him on the go. Finally, when all the previous explanations were not accepted, Victor asserted that the Company had done only 10% or less of the work and was therefore entitled to a corresponding proportion of the profit amounting to about S$350,000. Similarly, when pressed on this, Victor was unable to explain why the Company was paid S$1,931,291.00 instead, and again became evasive with his answers.[233] It is thus clear that Victor was embellishing his evidence on

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232 21 October 2022 Transcript at pp 81 (line 23) to 85 (line 9).

233 26 October 2022 Transcript at pp 123 (line 17) to 127 (line 16).

the go as the trial progressed, as he sought to adapt his evidence to suit the Defendant's case.

209 When Gregory was asked the same questions as Victor, he furnished an entirely different version. As I have stated at [73] above, Gregory claimed that the accepted profit margin in the Kaefer entity was 15%, *ie*, after the Defendant was paid 15% of the profit, the balance was then paid to the Company. However, Gregory's explanation was given for the first time during cross-examination and none of this featured in his AEIC. His evidence was, therefore, internally inconsistent. More importantly, Gregory's evidence in this regard also contradicts Victor's (constantly evolving) account as to the Company's entitlement to its three percent profit margin.

210 What was most egregious was the fact that Victor was caught "red-handed" in not telling the truth in Court. As I have discussed at [44] above, when asked to explain why three of the six Management Agreements were dated after the completion of the Insulation Supply Subcontract, Victor claimed that this was because there was a delay in the installation of the insulation materials and this led to a corresponding extension in the period of supply of the insulation materials. This explanation, however, was proven to be completely false as the evidence subsequently revealed that there was no delay in the subcontract for the installation of the insulation materials which was also completed in April 2017.

211 For the above reasons, I find that the Defendant's witnesses were unreliable and lacked credibility. Their testimonies were internally and externally inconsistent. This also made it more difficult for me to believe the Defendant's case on its retention of the Disputed Sum which, as can be seen

above, was constantly evolving. On the contrary, the Plaintiff was candid, frank and truthful in his testimony in Court. His candour and willingness to make concessions that harmed his case readily made him a more reliable and trustworthy witness.

Conclusion

212 For the above reasons, I allow the Plaintiff's claim against the Defendant. I make the following findings:

(a) The Management Agreements relied on by the Defendant are not legally binding contracts. Rather, I find that these documents are merely evidence of receipts of payments by the Company. Further, the Management Agreements do not state that the Company was only entitled to S$1,931,291.95 for the Yamal Project's Insulation Supply Subcontract. Accordingly, the Management Agreements cannot be evidence that supports the final amount of profit entitlement to which the Company is entitled. The Management Agreements do not suggest that the Company is not entitled to the Disputed Sum.

(b) The Defendant is unable to furnish any valid justification for its retention of the Disputed Sum from the Yamal Project's Insulation Supply Subcontract for the following reasons:

(i) First, I am satisfied that there is no evidence to support the finding of an agreement between the Defendant's and the Company's representatives on the Company's profit entitlement and, specifically, an agreement that the Defendant was entitled to retain the Disputed Sum.

(ii) Second, there is no basis for the Defendant to suggest that it is entitled to retain the Disputed Sum for the work done by Kaefer Australia and the Defendant regarding the procurement of the insulation materials for the Insulation Supply Subcontract. Victor's and Gregory's evidence on this matter cannot be believed and must be rejected. There is simply no evidence to support the Defendant's claim for the Disputed Sum.

(c) Turning to the Plaintiff's case, I am satisfied that both the documentary evidence and the Plaintiff's testimony support the finding that the Loan Arrangement was concluded between the Company and the Defendant for the following reasons:

(i) The Plaintiff has shown, on a balance of probabilities, that the Payment Arrangement existed, and that pursuant to this arrangement, the profit paid out of any projects for which the Company had done work would be accounted for the benefit of the Company. Accordingly, the Company is entitled to retain the entire profit paid out of the Yamal Project's Insulation Supply Subcontract. Further, the Company had done the work in furtherance of the performance of the Insulation Supply Subcontract.

(ii) The documentary evidence supports the existence of the Loan Arrangement between the Company and the Defendant. The Defendant was in fact to account the profit, including the Disputed Sum, for the benefit of the Company.

(iii) Finally, the Plaintiff's oral testimony supports the existence of the Loan Arrangement. I find that the Plaintiff was

largely consistent in his account as to how the Loan Arrangement came into existence. This is also corroborated by the documentary evidence in the form of the email correspondence which I referred to above. I also find the Plaintiff to be a forthcoming, candid and reasonable witness. His testimony can be believed. On the other hand, I find the Defendant's witnesses evasive and had also embellished numerous aspects of their evidence with falsehood.

(d) I also observe that the absence of any written documentation between the parties regarding the existence of the Loan Arrangement can be attributed to the informal nature in which the parties operated the Company and transacted with each other. At the material time, there was an expectation that the Company would become a wholly owned subsidiary within the Kaefer Group, and that the Company would be designated as the Kaefer Group's "profit centre" in respect of projects conducted in the region by the Kaefer Group. An appreciation of this background explains why the parties' dealings were carried out more informally, and why there was the absence of written documentation regarding the parties' entitlement of the Disputed Sum.

(e) Finally, I find that the Plaintiff was not acting in bad faith in bringing the present derivative action on behalf of the Company to recover the Disputed Sum. The mere fact that the Plaintiff had expressed his unhappiness with the Defendant and Kaefer Germany, the majority shareholder of the Company, is insufficient to show that the Plaintiff was acting in bad faith in bringing the present derivative action. The Plaintiff is motivated by the Company's financial interest and in

ensuring proper accountability and corporate governance as the value of his shares and the Company's performance are interdependent.

213 The Defendant is to pay costs to the Plaintiff to be agreed or assessed.

Tan Siong Thye
Judge of the High Court

Yeo Choon Hsien Leslie (Sterling Law Corporation) for the plaintiff;
Lim Tat, Subir Singh Grewal and Glenda Lim Jia Qian (Aequitas Law LLP) for the defendant.