

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2018/0114

BETWEEN:

[1] SOEMARLI LIE

gg Claimant/
Applicant

and

[1] NG MIN HONG

Respondent

[2] SUCCESS OVERSEAS FINANCE LIMITED

Defendants

Appearances:

Mr. Matthew Hardwick, QC, with him Mr. Richard Evans and Dr. Alecia Johns for the Claimant/Applicant

Mr. Alexander Cook, with him Ms. Monique Hansen for the First Defendant/Respondent

2020: April 22;
July 21.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the judgment of the Court on the Claimant/Applicant's application filed on 11th March 2020 for specific disclosure and for variation of the case management timetable.

[2] The Claimant, Mr. Soemarli Lie, whom I shall respectfully refer to as 'SL', commenced these proceedings by a Claim Form on 12th July 2018. SL is a minority shareholder in the Third Defendant company, which I will refer to as 'SOFL'. SOFL is incorporated in the Territory of the Virgin Islands ('BVI'). The First Defendant/Respondent, whom I shall respectfully refer to as 'NMH', is a majority shareholder in SOFL. SL claims that NMH has acted in various ways

causing the affairs of SOFL to have been conducted in a manner that is oppressive, unfairly discriminatory and/or unfairly prejudicial to SL in his capacity as a member of SOFL, and that NMH is likely to continue doing so unless the Court grants relief pursuant to the BVI Business Companies Act, 2004 ('the Act'), section 184I. SL had also brought his action against the Second Defendant, but that is no longer being pursued.

- [3] SL's case, in broad summary, is as follows. I set out the main points in the parties' pleaded cases because this will help recognition of the main material issues. Nothing in this summary is to be taken as a finding of fact, nor as any indication that the Court is inclined to see matters this way. I summarize SL's allegations first because he is the Claimant in these proceedings.

The Claimant's allegations

- [4] SL used to be a palm oil plantation contractor in Indonesia. In around 1988, SL entered the palm oil production business. He established a joint venture with NMH's father Mr. Aleh Wiyono ('AW'), who was a distant family member. The basis of the relationship was a partnership, in which both SL and AW expected to be and were involved in the management of what SL refers to as 'the Business'. Both SL and AW had full access to all financial and operational records. SL's and AW's respective shareholdings were proportionate to the capital contributions they had made to the Business.
- [5] AW had a son, NMH. NMH entered the Business in around 1990. He was given a position with the title of 'Commissioner', which SL says was a purely supervisory position. Two years later, AW passed away. His son, NMH, inherited AW's shareholding. SL agreed that NMH would also accede to his late father's position in the Business as Chief Executive Officer. This was a largely nominal position, with NMH in reality taking a limited role.
- [6] Between 1992 and 1998 relations between SL and NMH continued as they had been between SL and AW. In 1998 they discussed a restructuring in light of economic turmoil then afflicting Indonesia. It was NMH who initiated this. The structure as we have it before the Court today eventually grew out of this.
- [7] In brief, NMH has 54.15% of the issued share capital of SOFL. SL has 45.85%. SOFL currently has a single director, a person nominated by NMH, one Mr. Daud Achmad, without

NMH having consulted with SL. SOFL in turn originally (after the re-structuring) held around 63% of the issued share capital in an Indonesian company called PT PDP. PT PDP held and still holds the shares in five Indonesian subsidiaries, which are operating companies. NMH is the sole director of PT PDP. Thus, through PT PDP, NMH has exclusive control over the Business. PT PDP is where the value of the enterprise converges. Moreover, since he controls the majority shareholding in SOFL, NMH has power to influence and ultimately replace the sole director of SOFL should that director not do NMH's bidding.

- [8] In around July 2017, a number of SOFL's shares in PT PDP were disposed of by SOFL to an entity called PT Grahaidea Selarassindo ('Grahaidea'), reducing SOFL's shareholding in PT PDP from around 63% to around 29% ('the July 2017 Disposition'). Grahaidea is owned as to 50% each by NMH and his brother, Mr. Ng Ming Hwie. SL complains that this transfer was contrary to section 175 of the Act, in that it effected a disposal of around 54% of SOFL's shareholding in PT PDP, which SL contends required the approval of the members of SOFL, himself included, which NMH did not obtain. SL also claims that this transfer amounted to an unlawful appropriation of SL's assets by NMH.
- [9] Then, on or about 18th September 2018, PT PDP carried out a rights issue in the form of an amendment to its Articles of Association to increase its authorized and issued share capital. Following the rights issue, Grahaidea's shareholding in PT PDP was increased very significantly, as did that of another shareholder. SOFL's shareholding however remained the same. SOFL did not acquire any additional shares in PT PDP following the rights issue. This left SOFL with a negligible 1.38% shareholding in PT PDP.
- [10] SL thus alleges that the wealth of the Business has effectively been diverted away from SL and to NMH; that SL's beneficial share has been radically diluted and NMH's beneficial share exponentially increased.
- [11] SL complains that by reason of NMH's position as sole director of PT PDP and his interest in Grahaidea and his control over SOFL, it is reasonable to infer that NMH caused, suffered, and/or permitted the rights issue and SOFL's non-participation therein, thereby causing unfair prejudice to SL in his capacity as a member of SOFL.
- [12] SL has other complaints:

(1) SOFL refused and/or failed to pay SL dividends, contrary to a long-established practice of the business of SOFL. In this regard, SL contends that he received dividends consistently every year up until and including 2014. For 2015 and 2016, however, SL did not receive a dividend. SL avers that SOFL did declare a dividend for 2015, which was paid to SOFL's other members, but not to him. SL pleaded that as at the date of his Amended Statement of Claim he was not clear whether any dividend had been declared in respect of 2016, 2017 and 2018. SL claims that he has been unfairly prejudiced as a member by reason of this departure from the long-established practice and the withholding of his share of the 2015 dividend, and, if it transpires that others indeed received dividends in 2016, 2017 and 2018, then he would also have been unfairly prejudiced thereby.

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

[13] SL stood down from his executive role in SOFL with effect from 1st January 2016, whilst retaining his shareholding. This was a retirement. It followed certain health issues as well as a disagreement with NMH about whether the Business should be floated by way of an Initial Public Offering ('IPO'). NMH was strongly in favour, but SL did not support this course.

[14] SL considers that NMH and SOFL, under NMH's control, have thus taken steps which have been to NMH's benefit but, unlawfully and unfairly, to SL's prejudice and detriment.

[15] SL seeks an order that NMH purchase SL's shares in SOFL at a price calculated with reference to the value of SOFL prior to the July 2017 Disposition and the dilution of its ownership in PT PDP in or around September 2018 connected with the rights issue.

NMH's case

[16] NMH strongly resists the claims.

- [17] NMH pleads that for a number of years up to 2015, he and other interested parties questioned the conduct by SL of his management of the Indonesian operating companies. In particular, they queried his methodology concerning the grant of bonuses and the very poor profitability of plantations in East Kalimantan. SL refused to engage on these topics.
- [18] In around 2010, the possibility of listing PT PDP on the Indonesian Stock Exchange was raised. SL was violently opposed to this. NMH believes that this was because independent audits would reveal SL's deficient management practices and his breaches of duty, and his desire to remain in control.
- [19] In November/December 2015, SL tendered his withdrawal from involvement, ostensibly on account of age. But, inconsistently with this explanation, his son, his sister and an agronomist also resigned at the same time. SL's position as a director of PT PDP was terminated at a meeting of PT PDP's shareholders on 17th December 2015.
- [20] NMH pleads that during SL's tenure as operations director of the operating companies:
- (1) From around 2000 to 2015, SL sold palm fruit shells without accounting to the relevant companies for the sale proceeds. NMH believes SL misappropriated the sale proceeds for his own use;
 - (2) From around 2004 to 2006, SL purchased uncertified seedlings at a discount for the East Kalimantan plantations, resulting in poor growth and yields, causing significant long-term losses for the companies;
 - (3) In May 2015, SL wrongfully withdrew a sum of about US\$170,000 from an operating company; NMH believes this was a misappropriation for SL's own benefit;
 - (4) In early 2015, SL had secretly acquired palm oil factories and three palm oil plantations that he began to operate in competition with PT PDP and the operating companies. A number of staff have been poached by SL and are now working for him in those competing businesses, as are his son, his sister and the agronomist;

- (5) A police report was consequently lodged against SL in June 2017 and in October 2018 an investigation was opened against him. As a result, his Indonesian passport was revoked, he has been added to a 'Wanted Persons List', he has since become a fugitive from justice, and is believed by NMH to be hiding in Singapore since November 2018.
- [21] NMH denies that SL was very knowledgeable about the palm oil production business before joining the operating companies. SL had been a contract middleman or broker and had a fertilizer distribution business. NMH denies that SL had established a joint venture with AW. NMH deprecates SL's reference to 'the Business', as conflating different corporate entities. NMH further denies that there had been any partnership with SL.
- [22] NMH admits that SL had access to all financial and operational records, but only insofar as this was inherent in and contingent upon his office as a director. NMH denies that any broader agreement or expectation had been in place. Upon SL's withdrawal from management roles, his access to financial and operational records ceased.
- [23] NMH denies that he was appointed to a purely supervisory position as Commissioner. He was appointed as a director of PT PDP and each of the Indonesian operating companies from 1992.
- [24] NMH denies that he initiated the process of restructuring; rather, the restructuring was discussed between SL and NMH at the advice and suggestion of their bank relationship officer.
- [25] NMH disagrees with the circumstances leading to SL's departure. It is NMH's case that SL withdrew from his management of the operating companies because he was becoming increasingly challenged over his management of the operating companies, the proposed IPO would have revealed any misdeeds or breaches of duty and brought with it further scrutiny, and because he had, in breach of duty, secretly purchased competing plantations.
- [26] NMH avers that SL could have had no reasonable expectation to receive any dividend from any company of which he was not a shareholder; there was no established practice of SOFL to pay dividends each year. This would depend upon the profit and other matters and was a matter for the Board of Directors.

- [27] NMH pleads that SL has failed to plead how NMH has conducted the affairs of SOFL in an unlawful manner. NMH is not and never has been a director of SOFL. SL has thus not made out a case that NMH has been conducting the company's affairs and his claim fails at the first hurdle.
- [28] NMH admits that he can pass any resolution of members of SOFL with his majority, but avers that this does not mean he can give SOFL's director any binding instructions.
- [29] NMH denies that SL was not consulted about the appointment of NMH's brother to the Board of SOFL. NMH avers that SL vehemently opposed it. NMH admits that SL was not consulted about the appointment of Mr. Achmad, but avers that no such consultation was required.
- [30] In relation to dividends, NMH admits that SOFL paid dividends during the years 2004 to 2014. This depended solely upon whether SOFL itself had received dividends from PT PDP. NMH pleads that
- "However, NMH understands that in 2015, 2016, 2017 and 2018, no dividends were paid to the Company [SOFL] by PT PDP and, accordingly, none were paid by the Company to its shareholders during those years".
- [31] NMH denies that any of the shareholders of SOFL were paid a dividend in respect of 2015, 2016, 2017 and 2018.
- [32] Concerning access to documentation to which SL as a member of SOFL should normally be entitled to see, NMH avers that SOFL's Board had determined that it would be contrary to SOFL's interests to allow this, given SL's alleged wrongdoings, the police investigation into SL's conduct and his competing interests.
- [33] Concerning the transfer of SOFL's shareholding in PT PDP to Grahaidea, this was done in order to re-patriate the shareholding pursuant to an Indonesian Government Tax Amnesty Programme.
- [34] Concerning SOFL's alleged non-participation in the rights issue of PT PDP, NMH pleads that this rights issue was put into effect as a preparatory step in an IPO for shares in PT PDP. NMH avers that SOFL was offered an opportunity to participate in the rights issue, but it did not do

so. NMH was informed that SOFL did not have sufficient funds to participate in the rights issue.

[35] NMH denies any breach of the Act and claims that SL comes to the Court with unclean hands and/or that he acquiesced in the conduct complained of and is guilty of inexcusable delay.

[36] NMH pleads that if there is to a share buy-out, the valuation date should be the date of judgment.

The Claimant's Reply

[37] The Claimant served a long and detailed Reply. In essence, he maintained his claim in full. I need not repeat much of it for present purposes. A few points stand out nonetheless.

[38] SL admits the existence of the Tax Amnesty Programme, but observes that it ended on 31st March 2017, whereas the disposition in question took place in July 2017, and no specific term of the Programme has been pleaded by the Defendants.

[39] Moreover, SL alleges that the Tax Amnesty Programme was not a justification for the disposition.

Requests for Further Information

[40] Both sides served long Requests for Further Information upon the other. Amongst the mass of detail of which clarification was sought, there was this request by the Claimant and response by the Defendants:

“20.1 identify the date or dates when on which NMH made a declaration(s) to the Indonesian Government in respect of the 2,052,631 shares in PT PDP pursuant to the Indonesian Government's Tax Amnesty Programme (“the Declaration”);

...

Responses ...

20.1 1 April 2017.”

The Claimant's Request for Information Application

[41] The Claimant had filed an application on 9th September 2019 seeking an order pursuant to CPR 34.2(1) to require NMH to provide further information in relation to written requests for further information. NMH strongly resisted that application. This Court, by Justice Farara (Ag.), was satisfied that NMH should provide replies to a number of the requests. In particular, the Court considered that:

- (1) Absence of details for sales of palm fruit shells could be cured during discovery or may not be relied upon as a basis for this pleaded allegation of dishonesty;
- (2) Issues pertaining to alleged 'poor growth' and 'poor yield' due to the alleged purchase of uncertified seedlings would be better suited to discovery and, if necessary, expert evidence and not for pleadings;
- (3) The issue whether shares were transferred pursuant to the Tax Amnesty Programme is at the core of the claim. NMH was therefore ordered to answer the questions put, including request 20.1;
- (4) Issues pertaining to the PT PDP rights issue, and SOFL's non-participation therein, were also at the core of this claim and thus questions on these aspects also needed to be answered.

Specific disclosure requests

[42] The Claimant has applied for specific disclosure of the following categories of documents, which SL says NMH has not disclosed as part of his standard disclosure:

- (1) All minutes (Annual General Shareholders Meeting, Extraordinary General Shareholders Meeting), resolutions and directors' reports of SOFL, PT PDP and its operating subsidiaries for the period 1st January 2015 to 31st December 2018.

The Claimant contends that this category is directly relevant to whether dividends were declared by each entity, which in turn is directly relevant to whether dividends were declared at the SOFL level and the overall level of profitability of the business, for valuation purposes. The Claimant observes that NMH has produced documents in this category for a period up until SL's departure from his directorship, but not subsequently. In particular, the Claimant notes that NMH disclosed a number of resolutions but not for

the critical period 1st September 2015 to 19th February 2018. This forms part of the period in which SL claims he did not receive dividends.

- (2) All financial and accounting documents related to PT PDP and its operating subsidiaries relevant to the issue of the valuation of SOFL prior to the July 2017 disposition beginning at 1st January 2015 and up to the end of the financial year 2018.

The Claimant contends that this category is relevant to the issue of the valuation of SOFL prior to the July 2017 Disposition.

- (3) Schedules detailing sale of palm fruit shells for the years 2000 to 2012.

The Claimant contends that a one-page list of information disclosed by NMH in this category does not provide adequate details.

- (4) The Tax Amnesty Declaration to the Indonesian government date 1st April 2017.

The Claimant contends that this document is both directly relevant to the issue whether or not the transfer of SOFL's shareholding in PT PDP to Grahaidea was effected pursuant to that Tax Amnesty Programme and that it was also specifically mentioned at response 20.1 of NMH's response to SL's Request for Further Information dated 1st November 2019.

- (5) Amendments to PT PDP's Articles of Association dated 20th June 2017, 20th December 2017, 30th August 2018, 18th September 2018, 22nd November 2018 and all minutes of General Meeting of Shareholders approving the same.

The Claimant contends that this category of documents is relevant to whether SL breached directors' duties in selling palm fruit shells between 2000 to 2015, buying uncertified seedlings in around 2004 to 2006, misappropriating funds in 2015, commencing competing businesses in early 2015 and poaching staff.

- (6) Any General Shareholders Meeting invitation to SOFL on the rights issue of PT PDP in 2018.

The Claimant contends that this category goes to an issue for expert evidence of Indonesian law whether PT PDP had complied with all legal requirements relating to pre-emption rights.

- (7) Any deed or shareholders' resolutions approving the rights issue of PT PDP in 2018 (including the approval/receipt of notification from Minister of Law and Human Rights (MOLHR) and Investment Coordinating Board (BKPM).

The Claimant likewise contends that this category goes to an issue for expert evidence of Indonesian law whether PT PDP had complied with all legal requirements relating to pre-emption rights.

[43] These requests should be seen in the context of a case management order dated 17th September 2019 ('the CMC Order'). In that order the Court directed first that the issue of liability and the general form of relief upon the claim shall be determined at trial with the issue of quantum (if applicable) to be stood over. Standard disclosure was ordered in respect of documents pertaining to both liability and quantum, and it was made expressly applicable to SL, NMH and SOFL, with a deadline of 6th December 2019. Each party was then ordered to file and serve witness of fact statements by 14th February 2020. Other consequential directions were given. Trial of the claim has been scheduled to take place in October 2020.

[44] SL complains that NMH's standard disclosure has been deficient and that SOFL has given none at all, in flagrant, defiant breach of the CMC Order. The Claimant has also applied for an order that NMH files and serves an affidavit outlining all steps taken to procure SOFL's compliance with its disclosure obligations. The Claimant contends that NMH has resolutely failed to use his power as majority shareholder of SOFL to remedy that breach.

[45] SL made two disclosure requests, on 20th January 2020 and 25th February 2020 respectively. Both remained unanswered, so the Claimant said, by the date of the hearing.

[46] The Claimant relies upon rule 28.5(5) of the Civil Procedure Rules 2000 ('CPR'). CPR 28.5(5) provides:

“An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.”

[47] The Claimant refers to CPR 28.1(4) for the definition of direct relevance. CPR 28.1(4) provides that a document is ‘directly relevant’ if:

“(a) the party with control of the document intends to rely on it;
(b) it tends to adversely affect that party’s case; or
(c) it tends to support another party’s case, but the rule of law known as “the rule in Peruvian Guano” does not apply.”

[48] Control of a document is a key concept here. CPR 28.2(1) provides that

“A party’s duty to disclose documents is limited to documents which are or have been in the control of that party.”

[49] Control is defined in CPR 28.2(2) as follows:

“For this purpose a party has or has had control of a document if –
a. it is or was in the physical possession of the party;
b. the party has or has had a right to inspect or take copies of it; or
c. the party has or has had a right to possession of it.”

[50] The Claimant refers to the criteria the Court must apply when considering an application for specific disclosure. These are set out at CPR28.6 (1) and (2):

“1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

2. The court must have regard to
a. the likely benefits of specific disclosure; and
b. the likely cost of specific disclosure; and
c. whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with such an order.”

[51] The Claimant relies upon CPR 28.16(1) to seek inspection of documents mentioned in the Respondents’ statements of case and/or affidavit/witness statements. The Claimant relies upon the English Court of Appeal authority of **Expandable v Rubin**¹ for the proposition that the relevant question is whether there has been a direct allusion to, or specific mention of, a document, on the basis that mention of a document is a form of disclosure, which entitles the

¹ EWCA Civ 59.

other party to its inspection.² The Claimant submits that the requesting party does not have to prove that such a document is directly relevant.³

[52] NMH opposes the application. He says many of the documents sought are not ‘directly relevant’ to the matters in question to the proceedings; or they are not in NMH’s control; or they are not necessary to dispose fairly of the claim, or their specific disclosure would not save costs. NMH argues that the disclosure requests are disproportionate, would increase the costs of this litigation substantially and appear to be a fishing expedition for confidential and commercially sensitive documents.

[53] NMH broadly agrees with the applicable legal principles. He highlights that direct relevance must be assessed by reference to the pleadings, relying upon the judgment of this Court in **Kathryn Ma Wai Fong v Incredible Power Limited**.⁴

[54] NMH also relies upon the English High Court decision in **B v B (Matrimonial Proceedings: Discovery)**⁵ for the proposition that where a litigant is a director of a company whose documents are sought and where that company is not merely the *alter ego* of the litigant (when he would have unfettered control of the company’s affairs), the Court may order disclosure only of such documents as are in the possession, custody or power of the litigant, and not those over which he merely has a right of inspection qua director of a company. Power, in this context, ‘means “the enforceable right to inspect or obtain possession or control of the document”’.⁶

[55] NMH also relies upon the English High Court (Family Division) case of **Mubarak v Mubarak**⁷ that a disclosure respondent who is a director is not liable to disclose a company’s documents

² Expandable v Rubin EWCA Civ 59 at [24] and [25] (Rix LJ).

³ Renaissance Ventures Ltd and Joseph Katz v Comodo Holdings Ltd BVIHCMAP 2018/0005, BVIHCMAP2018/0008 (unreported, delivered 13th July 2018) at [27] (Webster JA (Ag.)).

⁴ BVIHCM2015/0047 (unreported, delivered 30th January 2020) at paragraph [76] (Wallbank J (Ag.)).

⁵ [1978] Fam 181.

⁶ B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181 at 186 (Dunn J).

⁷ [2003] 2 FLR 553.

unless he has an enforceable right to call for them, and in his personal capacity not merely qua director or agent.⁸

- [56] NMH claims that he has no such enforceable right to call for SOFL's documents and those of PT PDP and its operating subsidiaries, and therefore he cannot be compelled to give specific disclosure of such documents. The Claimant contends that NMH is sheltering behind this technicality as a contrivance, because in reality he does control SOFL, PT PDP and the operating subsidiaries. It is rather remarkable, observes the Claimant, that NMH should be able with such ease to cause assets to be transferred to a company owned by NMH and his brother and to permit SOFL's interest (and indirectly that of SL) in PT PDP to be reduced to a negligible token, but that NMH should ostensibly have such difficulty in giving disclosure of documents that might help the Claimant.
- [57] Pertaining to consideration whether specific disclosure is necessary in order to save costs, NMH relies upon the English High Court, Chancery Division, case of **Aherne v Cape Intermediate Holdings Plc**⁹ for a proposition that to evaluate the time that would be involved in retrieving documents, the Court will consider in detail the nature of the documents in question and how they are stored.
- [58] NMH argues that SL's evidence in support of the application makes no attempt to explain how each of the categories sought is relevant to the issues in the claim.
- [59] He contends moreover that the Claimant has also framed the categories far too broadly with no attempt made to define the documents requested with specificity.
- [60] NMH has put in evidence that, as at the date of the hearing he is unable to gain physical access to any of the documents SL seeks in this application, as at least some of the company documents are in hard copy format and located in a warehouse some five hours drive from him. As at the date of the hearing various movement restrictions were in place due to the global COVID-19 pandemic.

⁸ [2003] 2 FLR 553 at 562 (Hughes J).

⁹ (Unreported, 4th June 2013 at 12 – 13 (McCloud M)).

- [61] Also, NMH argues that the vast majority of categories seek disclosure of documents which are not in his personal control, but rather that of PT PDP and/or the Indonesian operating companies. He admits he is PT PDP's sole director, but this is a company that has several shareholders, none of which is himself. He says he has written to that company's shareholders and they have refused to allow him to share PT PDP's company data with SL. Thus, says NMH, this Court has no power to order him to give specific disclosure of documents belonging to PT PDP and/or the Indonesian operating companies.
- [62] NMH contends that even if he had a right to possess all the categories of documents sought in his own right, which he says he does not, disclosure would be wholly disproportionate and generative of costs, rather than saving costs. He says the exercise would take at least three months' worth of work by three full time staff, at a cost of around US\$15,000 to US\$20,000.
- [63] NMH contends further that the majority of the documents sought are confidential and highly commercially sensitive to the group of companies owned by PT PDP. NMH accuses SL of seeking a collateral advantage in light of his competing activities and to be conducting a classic fishing expedition.
- [64] NMH also resists SL's application for an order that NMH produce an affidavit outlining what steps he has taken to procure SOFL's compliance with its disclosure obligations pursuant to the CMC order. He does so on the basis that he is not a director of SOFL and that he is not in a position to direct SOFL's affairs, that being the sole preserve of SOFL's Board of Directors. NMH claims that he has nonetheless written to SOFL's director, but without reply.
- [65] The Claimant argues in response that the factual matrix of the case and its procedural history shows that NMH does have control over all the material documents, by virtue of his controlling shareholding position in SOFL, the nominee nature of SOFL's sole director, and NMH's sole directorship of PT PDP.
- [66] The Claimant also submits that NMH's alleged difficulties in accessing documents are of his own making, and that he has had plenty of time to go and look for them within the case management timetable.

Discussion

[67] By way of a general observation, whilst the Claimant is persuasive and credible in his contentions that NMH is in reality in control of SOFL, PT PDP and the Indonesian operating companies, I have come to the conclusion that it would be unjust and unfair if I were to make any findings in this regard on the written evidence alone. I accept that the Court has power to make findings of fact on the basis of written evidence in an interlocutory application, but the Claimant's contentions require a finding of bad faith and/or dishonesty on the part of NMH of a particularly egregious nature, namely as part of a deliberate effort to mislead the Court and thereby to abuse its processes. Those would be grave findings. It would, in all fairness and justice, I think, require documentary disclosure and oral evidence to determine whether or not NMH is acting in good or bad faith here. The Claimant paints a strong picture of bad faith on NMH's part, but without such an investigation, I must keep an open mind. Even strong pictures can fade when a strong light is shone on them. NMH contends that he has no unfettered right to control SOFL because he is not a director and he is not the sole shareholder. Similarly, for PT PDP, NMH admits he is the sole director but says he is not a shareholder. Having relied upon such a structure, NMH will need to be shown to be lying about where the *de facto* control lies. The Claimant urges that the answer to that question is obvious: NMH. But procedural fairness counsels against reaching such a conclusion without a substantial hearing of the evidence.

[68] NMH's reliance upon **B v B (Matrimonial Proceedings: Discovery)**¹⁰ and **Mubarak v Mubarak**¹¹ is in my respectful opinion permissible even though those two cases are not on all fours with our current situation. They are both English law authorities, addressing specific disclosure under the Rules of the Supreme Court ('RSC'), not the CPR. Under the RSC, after 1964, a document liable to be disclosed had to be in the 'custody', 'possession' or 'power' of the disclosure respondent. 'Custody' had been added in 1964.¹² It meant the 'actual, physical or corporeal holding of a document regardless of the right to its possession'.¹³ As Dunn J

¹⁰ [1978] Fam 181.

¹¹ [2003] 2 FLR 553.

¹² B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181 at 186 F (Dunn J).

¹³ BvB (Matrimonial Proceedings: Discovery) [1978] Fam 181 at 186 D – E (Dunn J).

explained in **B v B (Matrimonial Proceedings: Discovery)**¹⁴ the disclosure respondent was under a duty to disclose such documents, even if they belonged to another, but if that other person objected then the court could exercise discretion whether or not to order inspection. Concerning possession and power, these two cases are consistent that the principle was as follows:

“What is, however, clear is that to be in the possession or power of a judgment debtor the document must be one which he has the necessary enforceable right to call for, and in his personal capacity, not merely qua director or agent.”¹⁵

[69] Our CPR regime takes a somewhat different approach. Disjunctive concepts of ‘custody’, ‘possession’ or ‘power’ have been replaced in CPR 28.2(2) by a single concept of ‘control’. A person controls a document if he has or had physical possession of it or has or had a right to inspect or take copies of it or if he had a right to possess it. Where a document belongs to a company, a director might or might not have or have had physical possession of the company’s document, even if he is the sole director. Each case will turn on its own facts. Similarly, rights to inspect, take copies or possess a company’s documents necessarily imply the company conferring such a right, or at least consenting to it. It follows also that where there is unity of interest in a company and control converging in a single person such that the company is the *alter ego* of the person, it would be artificial to insist that the company is somehow required to confer such a right or consent to disclosure when all along the company can only act through the agency of that very same person. Seen in this way, the same reasoning expressed in **B v B (Matrimonial Proceedings: Discovery)** and **Mubarak v Mubarak** applies to CPR28.2(2).

[70] There is even a simpler way of looking at it. We can ask ‘Who ultimately controls the document?’ The answer is equally basic: the company.

[71] So, as a matter of law, I accept that NMH is right that he is not liable to disclose documents controlled by the companies without their consent. Unless he is in reality the controller of SOFL, PT PDP and the operating subsidiaries (which he says he is not), then he needs these companies’ consent to disclose documents belonging to these companies if he does not control them personally as well. He says he does not have the companies’ consent. I am at present not in a position to rule that he is lying about this.

¹⁴ **B v B (Matrimonial Proceedings: Discovery)** [1978] Fam 181 at 187 C (Dunn J).

¹⁵ **Mubarak v Mubarak** [2003] 2 FLR 553 at 562 (Hughes J).

[72] In consequence, for present purposes the Court will proceed on the basis that NMH does not control PT PDP's documents nor those of its Indonesian operating companies. Obviously if he has such documents in his personal control then he must disclose those that are ordered to be disclosed. I cannot tell from the evidence before me whether or not he does in reality have any such documents. That must be a matter for his own self-certification.

[73] I appreciate the Claimant will have concerns that the approach I have taken above will have the effect of letting NMH get away with suppressing documents. I am alive to that. That would of course be permitting NMH to abuse the processes of the Court. Whilst the Court must of course be astute to prevent such abuses, where possible, the Civil Procedure Rules impose no effective sanction upon the suppression of documents. It is of course objectively unfair to allow an unscrupulous litigant to obtain an advantage over his opponent by lying about the existence or otherwise of documents and about his access to them. But the scheme of the Rules is for disclosure to be a self-certified process. That will always be open to abuse. It thus becomes readily understandable why no effective sanction was provided for: there would simply be no point. This does not mean, however, that the Court can or should use its fact finding powers in a way calculated to preempt such an abuse (here, for example, by determining on documents alone that NMH in reality does control SOFL, PT PDP and its subsidiaries and that he is pretending the contrary). That would amount to unjustifiable judicial overreach, as indeed the English High Court recognized in **Mubarak v Mubarak**.¹⁶ For the Court's part, where grave allegations of dishonesty are made, the Court must abide by the well-settled processes to ensure a fair and just determination of such a serious issue is made. It should be borne in mind that disclosure is not the final battle in a case. The day of reckoning is the trial.

Category 1: All minutes (Annual General Shareholders Meeting, Extraordinary General Shareholders Meeting), resolutions and directors' reports of SOFL, PT PDP and its operating subsidiaries for the period 1st January 2015 to 31st December 2018

[74] I accept that all Board and Shareholder meeting minutes, resolutions and directors' reports in relation to SOFL for the period 1st January 2015 to 31st December 2018 are directly relevant to the issue whether or not dividends for SOFL were declared (for whatever financial year(s)) in this period. They ought to be disclosed and produced for inspection, without redaction.

¹⁶ [2003] 2 FLR 553 at 556, second full paragraph (Hughes J).

- [75] I am satisfied that this category of documents is, or should be, in NMH's control. NMH as a member of SOFL will be entitled to inspect all or most of these documents of SOFL. By section 100(2) of the Act NMH is entitled, subject to subsection (3) (directors' refusal), on giving written notice to the company, to inspect (a) the memorandum and articles; (b) the register of members; (c) the register of directors; and (d) minutes of meetings and resolutions of members and of those classes of members of which he is a member. Where directors have made reports to the company's shareholders (and directors' reports generally are made to the shareholders because those are the persons directors generally report to), then NMH should normally also be entitled to inspect them. I would add that I see no good reason for SOFL's Board of Directors to refuse NMH to inspect any of these records under section 100(3). It is this Court that decides what documents should be disclosed to the Claimant and SOFL's Board of Directors has no right to trump that. If it is the case that SOFL's Board of Directors should seek to invoke section 100(3), SOFL will be required to apply to the Court for an order sanctioning such refusal. The Court will then determine as a preliminary issue whether it should even hear the company, given its apparently contemptuous and contumacious breach of the Court's case management order. The Court will then also be astute not to permit SOFL's Board of Directors to invoke section 100(3) as a cynical contrivance in an effort to suppress documents.
- [76] If these documents make no mention of dividends that would tend to show that no such dividends were declared. If they do record that dividends were declared then, obviously, they would constitute documentary proof of that.
- [77] The likely benefit of this specific disclosure is that documents that the Court would expect to go to the core of this issue would make the investigation at trial of this issue shorter and easier and reduce the need to rely upon oral evidence.
- [78] Whilst there is no evidence before me what it is likely to cost for NMH to give specific disclosure of this category of documents, it should not entail disproportionate cost to produce, as they are likely to be limited in number and should normally be quite readily identifiable.
- [79] There is likewise no evidence that NMH's financial resources would in any way be stretched by a requirement to give this specific disclosure.

- [80] I expressly refer to this question of dividends as an issue in the proceedings. The Claimant directly put it in issue that there was a dividend declared for 2015 but he did not receive his *pro rata* share. NMH denied this. That suffices to put in issue whether dividends were declared in relation to 2015. In relation to subsequent years, the Claimant did not raise this as an issue. He merely pleaded that he did not know whether or not a dividend had been declared. He did so in the broader context of an allegation that the declaration of dividends was customary and amounted to an expectation, and that he had unfairly been deprived of a dividend for 2015 whereas other members had received such a payment. A claimant cannot generally base a positive claim on the premise that he does not know something. Here, however, NMH responded in his Defence with a positive assertion that no such dividends had been declared in respect of SOFL. That was sufficient, in the context of the pleadings concerning dividends as a whole, to make it an issue in these proceedings whether or not such dividends had indeed been declared.
- [81] NMH should also disclose documents in this category of PT PDP that are within his personal control, to the extent that he has any. NMH says they belong to and are in the legal possession of PT PDP. I am not in a position to determine whether that is true or not.
- [82] Whether PT PDP paid SOFL dividends for these years is an issue in these proceedings. This is because NMH has asserted that the declaration by SOFL of dividends depended solely upon whether SOFL itself had received dividends from PT PDP and, further, that he asserts an understanding that 'in 2015, 2016, 2017 and 2018, no dividends were paid to the Company [SOFL] by PT PDP'. PT PDP's documents in this category are directly relevant to this issue. The same considerations concerning the benefits of this specific disclosure, the likely cost, and NMH's financial resources apply to these documents as for those of SOFL.
- [83] The documents in this category of PT PDP's operating subsidiaries are not directly relevant to this issue.

Category 2: All financial and accounting documents related to PT PDP and its operating subsidiaries relevant to the issue of the valuation of SOFL prior to the July 2017 disposition beginning at 1st January 2015 and up to the end of the financial year 2018

- [84] Leaving aside the point already made that NMH should not be treated as having these documents in his control merely by dint of his directorship of PT PDP, I am of the view that this category of documents is not 'necessary in order to dispose fairly of the claim or to save costs', pursuant to CPR 28.6(1), at least at this time. In terms of necessity, the value of SOFL is not an issue in the liability phase of the trial process. Although these documents are likely to be directly relevant to the issue of valuation of SOFL's share capital, they are unlikely to be relevant to the issues of liability, nor to the question of which valuation date should eventually be adopted. From the perspective of saving costs, disclosure of this category would not save costs but is likely to increase them and require a considerable amount of work that may not ultimately be necessary. 'Financial and accounting documents' comprise a wide range of materials, and there are several operating subsidiaries involved. The volume of documents could well be substantial.
- [85] If the claim fails at trial no consideration of this documentary evidence would be required. There would simply have been much effort, quite considerable cost and paper expended for no purpose. If the claim succeeds, valuation of SOFL can be assisted with an order for specific disclosure at that point if required.
- [86] I would say further that it would be rather unusual for the value of a company to be the subject of detailed accounting evidence and argument before the Court, with the Court then determining the company's value directly. Generally, the Court would delegate determination of a company's value to a professional valuer, with a regime of directions put in place to regulate a fair determination of this aspect. The valuer can also be conferred with powers to enable him or her to get to the bottom of the company's true value.
- [87] The correct course in respect of this category is, in my respectful opinion, to adjourn this part of the request for specific disclosure *sine die* with liberty to restore.

Category 3: Schedules detailing sale of palm fruit shells for the years 2000 to 2012

- [88] This is a category of documents that is directly relevant to an issue in the proceedings. Clearly, also, disclosure is necessary in order to dispose fairly of the claim. Schedules sought are a minimum of relevant documents pertaining to the allegations surrounding sale of fruit shells. Doing so would be less onerous than producing primary documentation such as tally sheets, consignment notes and sales vouchers.
- [89] To the extent that NMH desires to persist with his allegations that SL sold palm fruit shells and failed to account for the proceeds, he will have to produce the relevant documents. I agree with the Claimant that the one-page list of information disclosed by NMH in this category does not provide adequate details. If this is all NMH has to show by way of relevant documents for this part of his case, then it is at serious risk of failure. It is hard to see how such a case can be prosecuted on the basis of oral evidence alone, although it is technically possible.
- [90] NMH has argued that this documentation requested belongs to and is in the legal possession of two of PT PDP's operating subsidiaries and that they are in hard copy and located in a warehouse a five hour drive from his location in Medan. He urges that giving specific disclosure would be disproportionately costly. These submissions find no sympathy with me. This part of the matter is his claim. It is his responsibility both to particularize it (so that his opponent can know what the case is he has to answer) and to lay the direct evidence concerning it fairly and fully on the table. It does not sit well for a claimant to bring a claim and then complain that it would cost him too much to have proper conduct of it or that he cannot get the papers because someone else controls them. He should have looked into such matters before bringing the claim. Indeed, it is well known that the introduction of the CPR changed the practice of litigation to 'front-loaded preparation', as opposed to the previous practice of *ad hoc* preparations following the issuance of a writ.
- [91] I would also observe that whilst the Court has inherent jurisdiction to control its own processes and power to control evidence, it would be wrong for the Court in effect to imply that NMH's disclosure on this issue so far has been adequate by excusing him from further disclosure. Ultimately if NMH is content to proceed with the information he has disclosed so far he must be prepared to face the eventual consequences.

[92] I do not know how much producing these documents will cost. I will leave it up to NMH to decide whether he thinks disclosing them is worth the cost. I will also leave it up to him to determine whether he can, in fact, obtain these documents from their legal owner(s) to the extent that he does not have access to them personally. This is not an instance where NMH appears to have an interest in suppressing documents. His interests would very much be served by giving proper disclosure. I think the ends of justice will work themselves out if I refrain from making any order in respect of this category. In short, I do not think an order in respect of this category is necessary.

Category 4: The Tax Amnesty Declaration to the Indonesian government dated 1st April 2017

[93] NMH does not deny that he controls documents in this category. He contends rather that any documents that may exist in connection with his tax affairs are confidential and personal. It is trite law that this is not a good reason for withholding documents for disclosure. It is equally not a good reason why specific disclosure should not be ordered.

[94] NMH contends that it is 'unclear' why disclosure of this category would be appropriate, 'given' lack of direct relevance to the issues to be decided in the case. This line of argumentation finds no favour with me. Lack of direct relevance is not a 'given' here at all. On the contrary, it is crystal clear to me that if the transfer of SOFL's shareholding in PT PDP to Grahaidea was indeed done pursuant to the Tax Amnesty Programme as NMH claims, then some form of declaration of the transfer to the tax authorities would have been required. I am not aware that NMH contends otherwise. I ask myself rhetorically how else such a programme could be made to work and its effectiveness measured. Equally, if no such declaration was made, this suggests that the disposal was not made pursuant to such a Programme. It will be important for the Court to know what it was that NMH did declare. Whether that transfer was made pursuant to the Tax Amnesty Programme is an issue in these proceedings.

[95] I have considered whether it is appropriate to impose some kind of limit upon the class of persons who should see this material, or other limits, in the interests of balancing NMH's interests in this confidential and private information against the degree of relevance of the document(s) concerned and the benefits of disclosure, following the approach of the English

Commercial Court in **Premier Profiles Ltd v Tioxide Europe Ltd**.¹⁷ I have decided that no such limit is needed, as the Claimant is already bound by an implied undertaking of confidentiality to use the information only for the purposes of these proceedings, except with the express permission of the Court. Moreover, NMH has not identified why the information in question needs protecting other than in the most general terms that it is personal and confidential.

[96] Moreover, the Request for Further Information no. 20.1 specifically asked NMH 'Please...identify the date or dates when on which NMH made a declaration(s) to the Indonesian Government in respect of the 2,052,631 shares in PT PDP pursuant to the Indonesian Government's Tax Amnesty Programme'. In answering '1 April 2017' NMH must be taken to admit and aver that he did make a declaration concerning this information on that date. What NMH in fact declared is thus directly relevant to an issue in these proceedings. As I explain further below, I am satisfied that there must exist one or more documents in this category.

[97] The benefits of specific disclosure of this category are that the Court is likely to be able to see with reference to direct documentary evidence whether or not the transfer was indeed made pursuant to the Programme as alleged. This would go directly to the heart of one of the core issues in dispute in these proceedings.

[98] In terms of costs and effort required to produce the disclosure, the document(s) in this category is/are unlikely to be voluminous. Thus, they are not likely to require significant expense to produce.

[99] I conclude that specific disclosure of this category of documents should be ordered.

[100] For completeness, I do not think that NMH 'mentioned' a document in his response 20.1. The Request for Further Information was put in terms of when NMH 'made' the declaration. Reference to making the declaration could be construed as referring to the time when NMH imparted the requisite information to the tax authorities, that is, effected the transaction. That would not necessarily refer to a document. It could also refer to when NMH lodged a tax

¹⁷ [2003] FSR 20.

declaration document. I accept that it must be almost entirely certain that NMH lodged a tax declaration document, whether in on-line, or soft-copy or hard copy format. It is a notorious (in the sense of well known) fact of modern life that tax declarations are not made *viva voce*. There had to have been a tax declaration document. But the question was not put in terms of 'when did you, NMH, lodge your tax declaration document?' Had NMH then responded simply with the date, I would have had little hesitation finding that he had mentioned the document, because the context made it obvious and unambiguous that it was the lodging of the document that NMH would then have been referring to, and a free-standing date, stripped of context, is devoid of meaning. Here though, the Request stopped short of directly alluding to a document. That is a matter of the words chosen by the Claimant. They can equally be taken as referring simply to the transaction, as NMH contends. The ambiguity should, I think, be resolved against the party who has proffered the wording – here the Claimant.

Category 5: Amendments to PT PDP's Articles of Association dated 20th June 2017, 20th December 2017, 30th August 2018, 18th September 2018, 22nd November 2018 and all minutes of General Meeting of Shareholders approving the same

[101] I am satisfied this category is not liable to be disclosed as these documents are not directly relevant to an issue in the proceedings. At the hearing Learned Counsel for the Claimant argued that the 2017 – 2018 amendments to PT PDP's articles are directly relevant in that if they relaxed the directors' duties then that could operate to mitigate the culpability of breaches of duty committed under the previous version of the articles. The main flaw in this argument is that the standard of duty that the Claimant is said to have breached up until 2015 falls to be determined in accordance with the terms of the previous version of the articles. If such breach is found to be made out, it will not be a matter of 'culpability' or 'mitigation' but of identifying and ascertaining the loss and damage, if any, caused by the breach(es). That is an enquiry which can be carried out without reference to how subsequent articles might treat directors' duties. As such, this category is not directly relevant and its disclosure is not necessary in order to dispose fairly of the claim.

[102] I should say further that I am not aware of any evidence suggesting that the amended articles do contain any adjustments to directors' duties. This appears to be pure and creative speculation on Counsel for the Claimant's part. It appears to me to be no more than an attempt to justify a fishing expedition.

Category 6: Any General Shareholders Meeting invitation to SOFL on the rights issue of PT PDP in 2018

- [103] The Claimant contends that this category goes to an issue for expert evidence of Indonesian law whether PT PDP had complied with all legal requirements relating to pre-emption rights.
- [104] NMH argues that these documents belong to and are in the legal possession of PT PDP.
- [105] That apart, I am of the view that this category of documents is not necessary for the fair disposal of the claim presently before the Court. The complaint SL makes against NMH is that NMH manipulated the rights issue and subsequent subscriptions to dilute the value of SL's shareholding in SOFL, by deliberately having SOFL not participate in the rights issue/subscription. That complaint is a core issue in these proceedings. It derives from the end result of the rights issue and subscriptions and the general surrounding circumstances. It does not derive from any known or suspected failure to comply with Indonesian legal requirements concerning rights issues.
- [106] The question whether PT PDP had complied with all legal requirements relating to preemption rights was raised by the Claimant in his Amended Statement of Claim at paragraph 40. The first sentence asserted that the rights issue triggered pre-emption rights in favour of all shareholders including SOFL. That sentence is not problematic. Then, in the second sentence, the Claimant pleaded this:
- “Pending disclosure herein, it is unclear to SL whether or not the Indonesian law requirements relating to preemption rights were complied with by PT PDP.”
- [107] Distilled to its essence, the Claimant made no allegation of non-compliance with legal requirements and was saying ‘I do not know if there is an issue here.’ The pleading does not explain the alleged significance of compliance or lack thereof. I presume it is that non-compliance might be additional proof of an abusive purpose behind the rights issue/subscriptions. If that is right, this would depend upon the type of non-compliance, if any, and the gravity to be ascribed to it.
- [108] NMH pleaded to this in terms that all the Indonesian requirements had been complied with..

- [109] The Claimant probed this with a Request for Further Information to elicit what each of the pertinent requirements were and how they had been complied with. This was met with a spectacularly unenlightening non-answer.
- [110] The Claimant now says that it is an issue in these proceedings whether the Indonesian legal requirements had been complied with. Strictly as a matter of pleading he is right. There is, however, as yet no dispute over what the requirements were, nor whether there was compliance. The Claimant still does not know if there is an issue here. And neither does the Court. The Defendants may know, but they are not letting on. They do not have to. This exchange in the pleadings does not elevate the question of compliance into an issue that necessitates a specific disclosure order. The claim can proceed perfectly well on the basis of the end result of the rights issue and general surrounding circumstances. Whether the rights issue and subscriptions complied with legal requirements is not necessary for the fair disposal of the Claimant's present case as pleaded.
- [111] The request for this category of documents appears to me to be an attempt to rake over the embers of the rights issue in an effort to find material that would provide new grounds supporting the Claimant's allegation that the rights issue and subscriptions had been abusive. In other words, I think this is a fishing expedition.
- [112] This is different from the issue concerning the possible withholding of dividends from 2015 onwards. That issue was started in the pleadings in a similar way. But the context for that issue had already been well defined in terms of an allegation that the Claimant had been denied dividends contrary to an established practice and expectation and that the Claimant had unfairly been deprived of a dividend payment in 2015 whilst other members had received payment. The question whether dividends had been declared for subsequent years flowed from that. Here, on the other hand, the Claimant's allegation that SOFL had been deliberately held back from taking part in the rights issue/subscription does not depend upon whether PT PDP had complied with all the legal requirements. Non-compliance by PT PDP would be an entirely new basis for challenging the rights issue.

Category 7: Any deed or shareholders' resolutions approving the rights issue of PT PDP in 2018 (including the approval/receipt of notification from Minister of Law and Human Rights (MOLHR) and Investment Coordinating Board (BKPM))

- [113] The Claimant likewise contends that this category goes to an issue for expert evidence of Indonesian law whether PT PDP had complied with all legal requirements relating to pre-emption rights.
- [114] NMH again argues that these documents belong to and are in the legal possession of PT PDP.
- [115] That aside, he also argues that the Claimant has given no reasoned basis for suggesting that the approval/receipt of notification from Minister of Law and Human Rights (MOLHR) and Investment Coordinating Board (BKPM) exist. This however misses the point. If they exist, then all else being equal, they would be liable to be disclosed. But, as I have sought to explain in relation to Category 6 above, all else is not equal. The same reasoning as for Category 6 applies. It is not necessary for the fair disposal of the claim before the Court for specific disclosure of this category to be ordered.

Affidavits of compliance by NMH

- [116] Whilst this Court deprecates in the strongest terms SOFL's refusal to comply with this Court's standard disclosure order, I think it is correct that this Court has no power to order NMH to file an affidavit outlining steps (if any) he has taken to procure SOFL's compliance with its disclosure obligations. If I do have such a power, it would be inappropriate for me to use it. Such an order would pre-suppose that NMH as the majority member of SOFL has *de facto* control over it and its documents. Since NMH's good faith or otherwise goes to the heart of that issue, it would be wrong of the Court to make that presupposition, short of being able to test the allegations through oral evidence. I will therefore not order such an affidavit to be filed.
- [117] The Court will require NMH to file and serve an Affidavit attesting to his compliance with the disclosure orders made herein. Whilst the Court cannot determine the veracity of his assertions concerning disclosure to date, an Affidavit is an important tool to establish accountability.

Variation of the case management timetable

[118] At the hearing of the Applications, the Court was informed that agreement had been reached between the parties in relation to various case management issues. These are the subject of a separate order.

Disposition

[119] The order of the Court will therefore be as follows:

- (1) The First Defendant/Respondent shall forthwith disclose and produce for inspection and copying by the Claimant the following documents:
 - a. Category 1: All minutes (Annual General Shareholders Meeting, Extraordinary General Shareholders Meeting), resolutions and directors' reports of SOFL and PT PDP for the period 1st January 2015 to 31st December 2018, to the extent the First Defendant/Respondent controls such documents within the meaning attributed to the term 'control' in CPR 28.2(2);
 - b. Category 4: The Tax Amnesty Declaration to the Indonesian government dated 1st April 2017.
- (2) The application for specific disclosure of Category 2 documents, being all financial and accounting documents related to PT PDP and its operating subsidiaries relevant to the issue of the valuation of SOFL prior to the July 2017 disposition beginning at 1st January 2015 and up to the end of the financial year 2018, is adjourned *sine die* with liberty to restore.
- (3) The First Defendant/Respondent shall file and serve an Affidavit attesting to his compliance with the above specific disclosure orders.
- (4) The costs of the application are reserved.

[120] The Court will hear the parties further in relation to costs. The application was partially successful and partially not. I will also hear the parties on an appropriate time limit for the disclosure to be given and for the Affidavit of compliance to be filed and served.

[121] I take this opportunity to thank learned counsel for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar