

**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE**

[2021] SGHC(I) 1

Suit No 5 of 2019

Between

Carlsberg Breweries A/S

... Plaintiff

And

CSAPL (Singapore) Holdings
Pte Ltd

... Defendant

JUDGMENT

[Contract] — [Breach]

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

[2021] SGHC(I) 1

Singapore International Commercial Court — Suit No 5 of 2019
Jeremy Lionel Cooke IJ
4, 5, 8–11 February 2021

12 March 2021

Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 In this suit, the plaintiff (“Carlsberg”) claims against the defendant (“CSAPLH”) for the repayment of a loan extended by Carlsberg to CSAPLH under a loan agreement concluded on 23 December 2010 and subsequently amended by addenda dated 24 September 2013 and 31 October 2013 (“the Loan Agreement”). Carlsberg’s claim for repayment of the loan is based on alleged breaches of a Deed of Undertaking dated 12 April 2018 (“the Deed of Undertaking”) which would entitle Carlsberg to terminate a Deed of Release of the same date (“the Deed of Release”) and to declare all outstanding amounts under the Loan Agreement immediately due and payable.

2 Carlsberg claims repayment of the balance of what was originally a US\$40 million loan extended to CSAPLH under the Loan Agreement to enable

the latter to pay the former for a 40% shareholding in a joint venture vehicle, namely, Carlsberg South Asia Pte Ltd (“CSAPL”).

(a) CSAPLH is an entity ultimately controlled by Mr Chandra Prakash Khetan (“CPK”), a member of the Khetan family with extensive business interests in a business empire founded by the now deceased Mr MG Khetan. Those interests, since the founding father’s death in 2007, have been the subject of some dispute between the two sons, CPK and Rajendra Kumar Khetan (“RKK”) and their cousin who was brought up as a son, Prem Prakash Khetan (“PPK”).

(b) CSAPL was incorporated in 2010 as part of a restructuring process to consolidate Carlsberg’s and the Khetan family’s interests in the brewery businesses in India and Nepal into a single joint venture entity. 60% of the shares in CSAPL were held through a subsidiary by Carlsberg and the remaining 40% were held by CSAPLH.

(c) As hereafter appears, CSAPL owns shares in an Indian subsidiary and a Nepali subsidiary, the latter being Gorkha Breweries Pte Ltd (“GBPL”).

(d) 90% of the shares in GBPL are held by CSAPL and a 9.94% holding is registered in the name of RKK. The small balance of shares is held by individual Nepali shareholders who do not feature in the material events with which this court is concerned.

(e) By virtue of their respective shareholdings in CSAPL, Carlsberg was entitled to nominate four directors and CSAPLH was entitled to nominate one director, each through CSAPL, to the board of GBPL. In this judgment, the directors nominated through CSAPL to the GBPL

board by Carlsberg are referred to as “the Carlsberg-nominated directors” whilst the CSAPLH-nominated director at the material time was Mr Pawan Jagetia (“Mr Jagetia”).

3 In 2018, as part of a wider settlement to resolve differences that had arisen between the parties to this suit, Carlsberg agreed to write off the balance of moneys owing under the Loan Agreement pursuant to the Deed of Release, provided that CSAPLH complied with its obligations under the Deed of Undertaking. Carlsberg alleges breaches of CSAPLH’s obligations under clauses 2(a) and 2(c) of the Deed of Undertaking. CSAPLH has raised defences and cross-claims. The amount said to be outstanding under the loan, as at 8 May 2017 when the loan allegedly fell due for repayment, was US\$36,743,478.34. Interest runs on that figure under the Loan Agreement.

4 The court ordered a stay of all matters in the suit pending the final determination of disputes in a related arbitration between the parties, save for Carlsberg’s allegation that CSAPLH breached clause 2(c) of the Deed of Undertaking (hereafter referred to as “clause 2(c)”), which clause imposed an obligation on CSAPLH that “it shall use its best efforts to ensure that the director appointed by Rajendra Kumar Khetan to the board of directors of Gorkha attends all meetings of the board of directors of Gorkha”.

The nature of the obligation

5 The effect of clause 2(c) as a matter of law is not in dispute, being settled by the decision of the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 (“*KS Energy*”) at [47] and [93] and other authorities.

(a) The phrase “best efforts” is synonymous with “best endeavours”, which requires the obligor to do everything reasonable in good faith with a view to procuring the contractually stipulated outcome within the time allowed. This means taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually stipulated outcome within the available time, would have taken.

(b) This is an objective test to be applied by reference to all the surrounding circumstances.

(c) It is accepted here by CSAPLH that, although the obligor may in some circumstances take into account its own interests when taking such steps, that qualification has no application here.

(d) The obligor is not entitled to sit back and allege that it could not reasonably have done more where, if it had asked the obligee, it might have discovered other steps that could have been taken. If the obligee points to steps which the obligor could have taken to procure the relevant outcome, the evidential burden of proof ordinarily shifts to the obligor to show that: it took those steps; or that those steps were not reasonably required; or that those steps would have been futile in achieving the desired result.

6 The provision in clause 2(c) is to be contrasted with the undertaking in clause 2(b) of the Deed of Undertaking, whereby CSAPLH undertook to “ensure that at least one (1) of its nominated directors attends all meetings convened by the Board or any Subsidiary Board with at least 14 days’ prior written notice”. The reason for the difference is apparent in as much as clause

2(b) referred to directors nominated by CSAPLH itself, whereas clause 2(c) referred to the director appointed by RKK.

7 The parties adduced some evidence of the reason for incorporation of clause 2(c) but that amounted to no more than evidence of subjective intention on the part of each party and was not only inadmissible, as they accepted, but could be of no assistance in determining the meaning of the clause (the effect of which is settled) or its application.

The issues in contention

8 At all material times, the director appointed by RKK to the board of GBPL was PPK who did not attend the board meetings of GBPL on 26 February 2019, 25 March 2019, 26 April 2019 and 1 July 2019 (referred to as “the 26 February meeting”, “the 25 March meeting”, “the 26 April meeting” and “the 1 July meeting” respectively). The central issue between the parties which I have to determine is whether or not CSAPLH complied with clause 2(c) by using its best efforts to ensure that PPK attended the meetings in question.

9 Under the GBPL shareholders’ agreement dated 1 November 2010 (“the GBPL SHA”) made between CSAPL, its parent company and RKK, to whom the definition the “Khetan Family” was given in the agreement itself:

(a) GBPL was to have a board consisting of up to six directors, up to five of whom were to be nominated by CSAPL and one by the Khetan Family.

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

- (c) Each party had the right to nominate an alternate director if a director was prevented from attending board meetings.

10 Although RKK was the registered owner of the 9.94% shareholding in GBPL, the evidence suggests that it was CPK who put forward PPK as the nominated director for the Khetan Family (as defined in the GBPL SHA). It was also CPK who, on 7 June 2012, informed the GBPL board that Arun Adhikary (“Arun”) had joined the Khetan Group as business development director, that Arun would work closely with him in Nepal and India, and that Arun would be the alternate director to PPK in GBPL.

11 The extent to which CSAPLH, in the person of CPK, could and did control or influence PPK, as the director nominated by RKK/the Khetan Family is hotly disputed in the light of the less than straightforward relationships between the two brothers and the cousin. CPK’s evidence was that differences arose between them and in 2010 he decided to emigrate to Singapore and that their inter-relationship reached a nadir in 2014 when PPK filed a police report in Nepal against him alleging assault. On 23 October 2014, a written family settlement agreement was concluded which essentially resulted in CPK giving up his claim to the family assets in Nepal, whilst RKK was to transfer the 9.94% shareholding in GBPL in his name to CPK. In addition, large sums of money were to change hands. CPK’s evidence was that he and RKK are still hostile and their relationship was finished, whilst he and PPK are on somewhat better terms in an up-and-down relationship which has improved since 2014. They trust what the other says. On PPK’s evidence, there is currently an uneasy peace amongst the three of them and he was and remains anxious not to upset the 2014 deal concluded with CPK, before the deal is finally consummated and the 9.94% shareholding is transferred to CPK, although the time for that to be done expired at the end of March 2019. In his testimony, PPK said that he saw himself as the

director nominated by RKK and as representing RKK's interests as the registered owner of the minority shareholding which has yet to be transferred to CPK.

12 CSAPLH was, at the time the Deed of Undertaking was made, and still is, the owner of a reduced holding of 33% of the shares in CSAPL, the joint venture company in which Carlsberg has a 67% interest. As set out at [2(d)] above, CSAPL owns 90% of the shares in GBPL, whilst RKK is the registered owner of 9.94% of GBPL shares, which have not been transferred to CPK nor to his nominated company, Amazonia Capital Pte Ltd ("Amazonia"), for reasons which are disputed. It is perhaps worth pointing out at this juncture that when the GBPL SHA was concluded on 1 November 2010 and RKK was referred to throughout as the "Khetan Family", the three Khetan protagonists each claimed a third of MG Khetan's estate, with no agreement as to who was to take what. It is common ground, however, that Carlsberg has always dealt with CPK in relation to GBPL, of which CPK was managing director until 2010, before he focused more on CSAPL's Indian subsidiary.

The parties' respective cases

13 It is CSAPLH's case that PPK did not attend the board meetings for the following reasons:

- (a) He did not attend the 26 February meeting because he had an engagement elsewhere which he considered more important and it was not possible for him to participate by telephone or video link. It was equally not appropriate for him to appoint an alternate director because there were matters which he wished to deal with at any such meeting.

(b) He did not attend the 25 March meeting because he was unwell and had to attend hospital that morning.

(c) He did not attend the 26 April and 1 July meetings because of his concerns about the management and governance of GBPL and/or the unilateral conduct of Carlsberg in their decision-making and/or the failure of Carlsberg's nominated directors to address his concerns about such management and the treatment of the minority shareholder, *ie*, RKK.

(d) More fundamentally, however, CSAPLH in its Defence and Counterclaim (Amendment No 4) at paragraph 86(h)(ii) and in particulars given thereunder, stated that it had done everything it could to ensure that PPK attended the four board meetings in order to set out his concerns and to persuade him that this was the appropriate course of action, notwithstanding his concerns about doing so. It alleged that on numerous occasions, both verbally and in writing, it sought to persuade PPK to attend the board meetings and ventilate his concerns at those meetings, and attempted to mediate differences between PPK and Carlsberg's nominated directors on the GBPL board by proposing informal meetings and/or without prejudice meetings, but its efforts were blocked or hindered by Carlsberg which failed to address PPK's concerns in any adequate manner. Reliance was placed on requests made by CPK, Mr Jagetia and Mr Surendra Silwal ("Mr Silwal", who was the GBPL company secretary, chief financial officer and deputy managing director) seeking to persuade PPK to attend the meetings, as set out in a table referring to more than 18 such occasions.

(e) Whilst CSAPLH recognises that Carlsberg had no obligation to ensure the attendance of PPK at those meetings, it contends that Carlsberg hindered and/or blocked and/or frustrated CSAPLH's attempts to resolve the situation by failing or refusing to address PPK's concerns and not taking up any of the suggestions made by it. It is said that PPK's concerns could only have been addressed with the assistance of Carlsberg's nominated directors, which was not forthcoming.

14 In circumstances where the pleadings, including the further and better particulars given by each party, set out the steps which CSAPLH says it took and those which Carlsberg contends it should have taken, the battle lines were clearly drawn and factual issues arise for the court to determine as to the genuineness and reasonableness of the efforts made by CSAPLH. It is Carlsberg's pleaded case that the efforts which CSAPLH says it took were not genuine efforts made in good faith at all but were made for show in order to create a paper trail suggesting that it had fulfilled its obligations under clause 2(c). Alternatively, Carlsberg contends that CSAPLH did not take all the steps which were reasonably required in order to comply with the test set out in *KS Energy*.

15 Put shortly, Carlsberg alleges that CSAPLH and CPK should have:

- (a) made greater efforts to persuade PPK to attend each of the four board meetings;
- (b) made arrangements in advance for PPK to attend the board meetings by way of phone or video conference if there were issues about attending in person, or proposed in advance that the board meetings be rescheduled;

- (c) addressed PPK's alleged concerns about attending the board meetings;
- (d) discussed with PPK the merits and strengths of his alleged concerns and obtained Mr Silwal's and Mr Jagetia's views of the same;
- (e) highlighted the gravity of the situation engendered by PPK's refusal to attend the board meetings, including the paralysis caused to GBPL in its business;
- (f) informed PPK that his alleged concerns did not justify his non-attendance of the board meetings;
- (g) engaged with RKK to find solutions to the problem;
- (h) taken steps to persuade RKK to replace CPK as his nominated director, or persuaded RKK and/or PPK to appoint an alternate director to attend the board meetings;
- (i) kept Carlsberg informed about the efforts being made to procure PPK's attendance;
- (j) followed up on their failed efforts to procure PPK's attendance, particularly following the 25 March meeting;
- (k) grappled with PPK's justifications for non-attendance;
- (l) informed Carlsberg, through CPK, timeously as to PPK's intention not to attend the board meetings and his purported reasons for such non-attendance;

- (m) obtained such legal opinions as were necessary to show PPK that those he had obtained were in error; and
- (n) set up a meeting amongst CPK, RKK and other CSAPLH representatives to discuss how to ensure PPK's attendance.

16 In closing submissions, the emphasis of the parties changed somewhat to focus on the possibility of informal meetings between the Carlsberg-nominated directors, the CSAPLH-nominated director and PPK prior to board meetings, of the kind which all parties said had habitually taken place between them where they would consult and seek agreement on controversial issues prior to the formal board meetings themselves. It was common ground that, as a matter of history, there were usually informal meetings which took place before and even during the formal board meetings to seek “alignment” of the differing views. The board meetings took place in the offices of GBPL which were in the same building as the office of PPK himself, albeit on different floors. Those attending would often spend two days in such pre-meetings and opportunities for discussion were taken in meetings on the rooftop of the building and in the dinner for all board members the night before a board meeting. Both CSAPLH and Carlsberg in their closing submissions contended that not enough had been done by the other to persuade PPK to attend such “alignment” conversations or to make them a possibility.

The witnesses

17 Two witnesses gave evidence on behalf of Carlsberg, namely Mr Soren Hansen (“Mr Hansen”) and Mr Peter Steenberg (“Mr Steenberg”). The evidence of the former was largely directed to the period in which he had direct dealings with the Khetan family from 2005 onwards, including his time as a director of GBPL between 2010 and 16 December 2013. He gave evidence, which was

challenged, of previous failures by PPK to participate in GBPL board meetings in the period from May 2012 to the end of 2013, which had resulted in the inability to declare dividends and the need for three annual general meetings (“AGMs”) to take place in December 2013. Mr Steenberg gave evidence of the events surrounding the four board meetings in 2019 and PPK’s absence therefrom, which I deal with later in this judgment in conjunction with the evidence of other witnesses thereon. I found both witnesses to be honest and straightforward.

18 In the only area where Mr Hansen’s evidence was of significance in relation to PPK’s previous failures to attend GBPL board meetings, his evidence in cross-examination differed from his affidavit of evidence-in-chief (“AEIC”) in relation to PPK’s absence from physical board meetings and failure to sign circular resolutions which were agreed without such physical meetings. Nonetheless, I was satisfied, despite the general absence of documents showing what he said to be true, that his evidence was essentially correct when saying that PPK failed to respond to attempts to schedule physical board meetings or to circular resolutions for a period of about a year and a half. I accepted Mr Hansen’s evidence that there was “radio silence” from PPK over that period, during which there were ongoing disputes between Carlsberg and the Khetan family, and that this resulted in GBPL’s inability to transact important elements of its business, and in particular, two AGMs when dividends that were intended to fund CSAPL’s Indian subsidiary would have been declared. It was only once the dispute was resolved that PPK signed circular resolutions and minutes. There was some support for this in an e-mail from Jorn Jensen to CPK dated 30 May 2013 and neither CPK, PPK nor Mr Silwal gave any genuine contradictory evidence, although Mr Silwal’s evidence sought to suggest that PPK did not act as described. Despite the measure of confusion in Mr Hansen’s

evidence, his evidence rings true in relation to the AGMs in particular, which would not have been delayed in the way they were without some extraordinary occurrence of the kind he described.

19 The consequence of this is that Carlsberg had reason to fear that PPK’s absence from board meetings could be “weaponised” as a form of leverage or pressure to achieve other ends.

20 CSAPLH adduced evidence from four witnesses. Apart from CPK and PPK, evidence was given by Mr Silwal and Mr Jagetia. As mentioned at [13(d)] above, Mr Silwal was the deputy managing director of GBPL (nominated by CSAPLH) as well as its chief financial officer and company secretary. Mr Jagetia was not only a director of CSAPLH throughout, but also CSAPL’s senior vice president between 1 April 2018 and 26 June 2019 and a director of GBPL from September 2014 onwards. I consider that both were somewhat partisan in seeking to advocate CSAPLH’s case, where possible.

(a) Mr Silwal had little evidence of value to give, save in relation to the timing of payments of dividends in early 2019, which was one of PPK’s concerns. He was evasive about a meeting of 4 January 2019, where he had drafted the minutes showing that a decision was taken to replace the head of human resources (“HR”) because of issues with her performance. There was a question as to whether this was technically a board meeting because no proper notice had been given but it was clear from the minutes that all the directors present, including PPK, had reached a decision on such termination. PPK accepted this in his oral testimony, although he expressed his grievance that the matter should have fallen for reconsideration when the HR head alleged that she and

two other female employees had been verbally harassed by GBPL's managing director, Mr Ajith Babu ("Mr Babu").

(b) Mr Jagetia, plainly an able man, came across as something of an advocate for CSAPLH and PPK. In relation to paragraph 49 of his AEIC, I was troubled by his answers in cross-examination which, at least on one view, contradicted that paragraph. He was likewise not a dishonest witness.

21 The key evidence at the trial was inevitably always going to be that of CPK and PPK since Carlsberg maintained that PPK's non-attendance at the board meetings was wholly unjustifiable, that his concerns were contrived and that CPK had procured his non-attendance in order to increase CSAPLH's leverage on Carlsberg in relation to the other areas of dispute which are the subject of the ongoing arbitration. Carlsberg's primary case was that CPK and PPK colluded in the latter's non-attendance of the board meetings and that the efforts made by CSAPLH to procure his attendance were a sham. The integrity of these two witnesses was therefore of paramount importance.

22 CPK, when asked in cross-examination if he always told the truth, disarmingly answered "mostly", but stated that he always did so when under oath. PPK had difficulty in answering questions directly, being keen to justify his concerns and his stance in not attending the board meetings, particularly the last two meetings where he had specifically refused to do so. I did not find either of these witnesses to be deliberately dishonest in their evidence, nor that they had manufactured documents to show sham efforts on CSAPLH's part to procure PPK's attendance at the meetings. Whilst it was said by Carlsberg that e-mails of the kind that were exchanged between CPK and PPK were unusual, since they would ordinarily deal with each other in a more informal manner,

CPK’s evidence was of much informal contact by telephone which led nowhere and of difficulty in getting PPK to answer, with a consequent need for some e-mail contact.

23 If I were to conclude that CPK could exercise sufficient control or influence over PPK to “ensure” the latter attended board meetings, I would have to conclude that the e-mails which were exchanged between them were a contrivance designed to deceive the court, should the matter ever come before it. Having examined the e-mails, I do not so conclude. Their timing and contents suggest otherwise and I was satisfied, on the evidence of both CPK and PPK, that their relationship was not such that PPK would simply do what CPK told him to do, whether out of family loyalty or otherwise. The history of their past hostility made that an impossible finding to make, even taking account of the likelihood of family “closing ranks” against a foreign investor.

24 What also appeared from PPK’s evidence is that he is a man with his own strong views, a considerable ego and a strong sense of the rightness of his opinions. He is a proud Nepali businessman in his own right, who does not kowtow to either of his “brothers”, to international businessmen, to Danes or to Indians.

25 In closing submissions, Carlsberg’s case was that the concerns raised by PPK were not genuine and that they were part of a “put up job” – a conspiracy between CPK and PPK to manufacture excuses for the latter not attending the board meetings. According to Carlsberg, this was evident from the fact that there was never any suggestion on the part of either CPK or PPK that the latter should attend “alignment” meetings of the kind referred to earlier in this judgment at [16].

(a) For reasons which appear below, I conclude that the concerns expressed reflected genuine grievances on PPK's part. If I had not concluded that his views were genuinely held, that would have been a strong factor in favour of Carlsberg's case. However, I have concluded, based on the evidence which PPK gave from the witness box, that he held such views, whether those views were justified or not.

(b) It is undoubtedly true that, on the evidence, PPK made no effort to contact any of the Carlsberg-nominated directors to arrange informal discussions. When refusing to attend the board meetings, PPK must be taken to have refused to attend the attendant pre-meetings, rooftop meetings and dinner. That does not, however, amount to showing that he did not have real concerns nor that CPK/CSAPLH did not try to persuade him to attend board meetings and what invariably occurred alongside them.

26 I do not therefore consider that there is any evidence which would support a finding that CPK effectively controlled PPK's actions or actively persuaded or influenced him not to attend any of the four meetings, or that PPK acted at CPK's behest in not attending them. I reject the allegation that the apparent attempts to persuade PPK to attend were shams perpetrated in order to create a paper trail intended to show compliance with the clause 2(c) obligation.

(a) Whilst this allegation was maintained throughout the trial, the cross-examination of the two witnesses concerned on this aspect of the case was realistically limited in the light of the evidence about their difficult relationship and the lack of sympathy which CPK had for some of the concerns raised by PPK to justify his position.

(b) CPK was well aware of the clause 2(c) obligation and the impact of any breach thereof in relation to the outstanding loan under the Loan Agreement. It would have been foolhardy deliberately to seek to exert leverage against Carlsberg in the manner suggested in the face of the potential consequences. Doing so whilst creating a paper trail designed to deceive would have been a high-risk strategy.

(c) Moreover, if the effect intended was to induce paralysis on the part of GBPL because PPK's presence was needed at any physical board meeting, that would cause serious damage to CSAPLH's own interests because of its 33% interest in CSAPL, which in turn owned 90% of GBPL. That would not constitute a rational course of action on CPK's part, regardless of the nature of the dispute between CSAPLH and Carlsberg.

27 Whilst I therefore do not accept Carlsberg's primary case that, far from attempting to procure PPK's attendance at the meetings, CSAPLH and CPK procured his non-attendance, the question still remains as to whether or not CSAPLH used its "best efforts" to ensure that he attended all the meetings. I also reject the suggestion made by Mr Jagetia that Carlsberg sought to induce a breach by CSAPLH of clause 2(c), a case which was never pleaded or made by CSAPLH.

PPK's alleged concerns

28 Whilst the legitimacy of PPK's concerns is not directly in issue, once it is concluded that the concerns were not a sham, they fall to be considered in the light of the efforts that could or should have been made by CSAPLH to procure his attendance at the board meetings, since they provided the ostensible reasons for his non-attendance.

(a) If they were trivial or “relatively minor” (in the words of Mr Steenberg), it could reflect on the strength of the views held by PPK and the ease with which he might have been persuaded to attend the meetings.

(b) PPK’s concerns were set out in two e-mails sent by him on 24 March 2019 (although this sometimes appeared as an e-mail of 25 March 2019 owing to time differences) and 25 April 2019 (“the 24 March e-mail” and “the 25 April e-mail” respectively). Each was sent the day before a board meeting which he failed to attend, although the reasons advanced for such non-attendance differ on each occasion.

29 The 24 March e-mail was addressed to CPK and was copied to the GBPL board of directors. It is worth setting it out in full:

Dear CP,

I hear your several communications and concerns to resolve matters related to GBPL by discussions in the board. But at the same time, I want to share my frustrations on the way some directors of GBPL board are directing GBPL, without a formal discussion and decision of the board, on matters which may violate local laws and potentially undermine the existence and rights of local investor. In particular, I have the following questions:

1. Who stopped dividend payments for [RKK’s] shares when AGM approved the dividend in January
2. Who will be liable given [GBPL’s managing director] is working without valid work permit
3. Why GBPL has not provided new [Route to Market Key Performance Indicators] despite several requests
4. What is the definition of a “failed” board meeting as termed by some of the board directors. Is it a term as defined by Nepal law or is it self-dictated definitions on how board meetings are to be defined?

On your repeated insistence to attend the board meeting of GBPL, I would attend the board meeting, but if I feel that there

is still intentions [sic] to not follow the rule of law of the country and trying to ignore the local investor [sic], I will have to take corrective measures.

Best regards

P.P. Khetan

30 In the 25 April e-mail, which was sent by PPK to the GBPL board, CPK and some (if not all) of the board members of CSAPL, the following appeared:

Dear all,

I am very concerned the way [GBPL] is being managed by individual representatives of CSAPL representing [sic] in the board of GBPL (and also sometimes by non board members). I had expressed my concerns in my email to all on the 24th March, which is still not addressed to. As a local director representing local and minority shareholder, I am worried and scared that the unilateral way to manage the company and disrespect of local laws and corporate governance norms, could lead to a situation wherein the local director is penalized as the first impact of any action taken by authorities here will be hard hitting on me as I am a resident here.

I see that in the proposed agenda below, instead of impartially investigating the complaint of HR head, she is being victimized by being asked to take garden leave.

Seeing the proposed agenda below, I fear that directors representing CSAPL are trying to force decisions by way of majority against the interest of the company and not addressing the issues of minority shareholder, hence to protect the interest of minority shareholder and the company, I will not be attending the meeting, however I am always available to support the business and any business critical decision can be made through resolution by circulation

Best regards

P.P. Khetan

31 Having heard the evidence of PPK, I have no doubt that his concerns were genuine, whether they were misguided or justifiable. As a proud and successful businessman, with a sense of his own importance and the rightness of his opinions and business judgment, he did not take naturally to decisions with which he disagreed. As a national and resident of Nepal, he considered that

both the Carlsberg-nominated directors, most of whom were Danish, and the Indian managing director of GBPL (*ie*, Mr Babu) all sought to conduct GBPL's business without regard for his expertise in business in Nepal and with little or no regard for Nepali law, Nepali customs, Nepali mores and Nepali employees. He considered that the registered minority shareholder, RKK, as a man of Nepali origin was also the subject of discrimination in the late receipt of dividends. From his evidence and that of other witnesses, the critical element appeared to me to be that he considered that, as a Nepali businessman with local knowledge, his views were ignored by the GBPL board and that he was disrespected in putting forward those views. He felt humiliated when decisions were taken against his strong view to the contrary. He took the view that the majority shareholder in CSAPL, with its majority on the board of GBPL, effectively took decisions and pushed them through the board meetings, riding roughshod over his views and therefore the minority shareholder's interests which he represented. He also considered that Mr Babu, the Indian managing director of GBPL, conducted himself in a manner which was abusive and oppressive to Nepali female employees. None of the concerns expressed in PPK's e-mails represented the real problem that he had, however.

32 I have come to the clear conclusion, based on PPK's own evidence and that of CPK and Mr Jagetia, that PPK had a fundamental issue about the new marketing model that Mr Babu, the GBPL managing director, was seeking to introduce and that this lay at the heart of his expressed general concern about the way in which the Carlsberg-nominated directors and Mr Babu behaved, as set out in the opening paragraphs of his e-mails of 24 March 2019 and 25 April 2019. Mr Jagetia was not aware of PPK's other concerns, as set out in the 24 March e-mail, before it was received: nor was anyone else on the board. The evidence showed that, following his appointment as managing director in 2018,

Mr Babu sought to institute a fundamental change in the way GBPL did business. He wanted to cut down on distribution costs by cutting out a number of middlemen wholesalers who were taking a 4–5% margin; although the other directors were won over to this view, after some (namely, Mr Graham Fewkes (“Mr Fewkes”) and Mr Jagetia) had expressed doubts, PPK, as the only Nepali national, did not agree. Mr Jagetia’s evidence was that PPK had very strong views about this and considered that the proposed course was “suicidal” for GBPL. The board agreed that pilot projects should be put in place but PPK continued to press for more information about how the new model would work or was working, and in particular, about the Route to Market Key Performance Indicators (“the RTM KPIs”). There were continuing discussions between Mr Babu and PPK, both of whom were resident in Nepal and in the same office block (on different floors), but PPK put detailed questions on various aspects, which Mr Babu sought to answer in November/December 2018 and January/February 2019. Mr Babu produced the sales teams KPIs but issues remained over the return on investment and some of the key elements of the RTM KPIs.

33 It is apparent to me that PPK considered that his views on this major issue should have prevailed and that the majority on the board who considered otherwise were wrong. He resented the fact that the decision was taken to move ahead on the new model and this coloured his views about other matters, including those other issues which he raised in the 24 March e-mail, which Mr Jagetia described as non-issues and many of which CPK regarded in a similar light. The bottom line is that he did not accept the rule of the majority for which the GBPL SHA provided and therefore wished to make his point on the grievances he had by exercising an effective veto through his non-attendance at meetings, where he anticipated that his views on other matters that would be

raised would not carry the day. He could pick and choose what the board could resolve by approving only the circular resolutions with which he agreed, since unanimity was required for this process, whilst his non-attendance at physical board meetings would prevent any majority decisions from being taken there, because the meetings would be inquorate.

34 Without wishing to denigrate PPK in any way, the description given by two of CSAPLH’s witnesses in relation to one of the issues raised by him as being an “ego war” or an “emotional issue” applies with some force to the other issues raised by him in his two e-mails of concerns. The issues were real, so far as he was concerned, but largely because his prior history with the GBPL board made them so for him. Each was seen through the filter of the rejection of his views on the new sales model. He regarded the contestation of his views and the vote of the majority against his business judgment as bullying and oppressive behaviour on the part of the Carlsberg-nominated directors.

35 Once it is accepted that these views were genuinely held by PPK, whether or not they were justifiable is of limited importance, save in so far as he could be persuaded out of them or could be persuaded to raise them at board meetings. Whether or not they could justify non-attendance at board meetings is also of limited significance, the only real question being whether or not CSAPLH and CPK could, and should, have persuaded him that he ought to attend the board meetings in order to raise his concerns. Notwithstanding his evidence at trial that he felt some of these matters were not appropriate for airing at directors’ board meetings, in my judgment, the graver the concerns, the more important it was that these matters be discussed at that level of formality with those responsible for the running of GBPL. I can think of no valid reason why a director, acting in the best interests of the company and in accordance with his duty to the company, should not raise those matters for consideration by the

board and, where necessary, for decision-making or implementation of remedial action. Even where no decision was required by the board, such as in relation to the delayed dividend payment, it was a matter for consideration by the board if there had been nefarious reasons or ulterior motives in delaying payment to the minority shareholder, as PPK suggested.

36 Furthermore, as mentioned above, the practice of the Carlsberg-nominated directors of GBPL had historically always been to hold informal meetings prior to the board meetings, and even during the board meetings, to resolve matters before they were put to a formal vote. The evidence of all the witnesses who had attended such meetings was uniform on this. There would be scheduled sessions prior to the board meetings for “alignment” purposes. There would be a dinner on the evening prior to each meeting. There would be informal discussions on the rooftop of the building to iron out the way forward in order to avoid confrontation. Efforts were made, specifically between CSAPLH and Carlsberg, to manage by consultation. Mr Jagetia’s evidence was that these efforts continued after December 2018 when CSAPLH threatened arbitration proceedings against Carlsberg; after a notice of material breaches of the amended and restated CSAPL shareholders’ agreement was served by CSAPLH on Carlsberg on the day following the 26 February meeting; and even after CSAPLH commenced arbitration on 18 April 2019. Mr Jagetia considered, however, that the attitude of the Carlsberg-nominated directors towards PPK changed for the worse in February/March 2019 following PPK’s non-attendance at the board meetings scheduled for those months and that they were not prepared to meet informally with PPK outside the board meetings at all thereafter. Whether that was a justified conclusion to reach depends upon the e-mail exchanges between those concerned.

37 PPK’s own evidence on this aspect appears at paragraph 77 of his AEIC where he said that, prior to 2019, the CSAPL-nominated directors would consult him on any issues relating to the management of GBPL and they would resolve any disagreements informally prior to the board meetings at “alignment” meetings over dinners or in his office on the fourth floor of the building (which also housed GBPL’s offices). He said (at paragraph 78 of his AEIC) that, since early 2019, the conduct of those directors appeared to be a departure from the spirit of co-operation previously shared. He gave no evidence in support of this conclusion, which therefore appears to be based upon the fact that his views relating to the new business model were not accepted by the majority of the board, whether in informal meetings or in board meetings.

38 It is convenient, for the purposes of this judgment, to consider the individual concerns in the context of the history of the board meetings which PPK failed to attend.

39 However, in order to understand the significance of PPK’s absence at the meetings, it should be recalled that the GBPL SHA of 1 November 2010 (referred to at [9] above) provided that the GBPL board should consist of up to six directors, with up to five nominated by CSAPL and one nominated by the Khetan Family (defined in the GBPL SHA as RKK).

(a) Clause 1.7 provided that the board should meet at least twice in any financial year and upon requisition of any director, with any such requisition being made with a minimum of two weeks’ notice. Clause 1.7 further stated: “Every Director of the Board may put matters on the agenda and the Board of Directors will consider [the] same.”

(b) Clause 1.8 provided that “[r]esolutions of the Board of Directors shall be passed by a simple majority”.

(c) Clause 1.9 provided that “[t]he quorum for all meetings of the Board of Directors shall be more than half of the number of appointed Directors present in person, of which as a minimum 1 (one) shall be a Director nominated by the Khetan Family”.

(d) Clause 1.10 provided that minutes of all meetings of the board were to be prepared and that such minutes were to be signed by the 60% of the directors present, including at least one director nominated by CSAPL and one director nominated by the Khetan Family.

40 The result of these provisions was that any director could insist on a matter being discussed at board meetings. It was always open to PPK to raise any concerns that he had, which would then be put on the agenda for discussion and, if required, decision. If the director nominated by RKK did not attend a scheduled board meeting, there could be no quorum and no decisions of the board could be taken. By an amendment to clause 1.9 in an addendum to the GBPL SHA dated 31 October 2013, it was provided that, notwithstanding the terms of clause 1.9 set out in the preceding paragraph of this judgment, “[t]he quorum for any board meeting required to declare or disburse dividend shall be more than half of the number of appointed Directors present in person (i.e. the Director of the Khetan family is not required to attend)”. This amendment relating to decisions to recommend the payment of dividends at AGMs was apparently designed to overcome the problem which had emerged in 2011–2013, to which reference was made earlier in this judgment.

41 Although the GBPL SHA made no express provision in this regard, it was common ground between the parties that, as a matter of the law of Nepal, the board could pass resolutions by circulating a written form of resolution for unanimous approval by all the directors. This was commonly done because many of the CSAPL-appointed directors travelled extensively and it was not necessarily easy to call physical meetings at which all could be present. According to Mr Silwal, such resolutions were ordinarily signed on the next occasion when the directors met physically, or at least by a sufficient number of directors to satisfy the terms of clause 1.10 of the GBPL SHA.

42 The result, therefore, of PPK's absence from any physical board meeting was that no directors' resolutions could validly be passed as there was no quorum. If he was present, as decisions were to be made by a simple majority, he could be outvoted by the other directors, which was his major ground of complaint. If resolutions were to be passed by circulation of a written document, unanimity was required, which meant that, once again, PPK could prevent any valid decisions from being taken by the board. By not attending the board meetings, therefore, PPK was able to exercise an effective veto over any decisions which the board wished to take. It was plain from his evidence that he considered that the effect of the GBPL SHA was to give him this right of veto, notwithstanding any duties that he may have owed to the company. He also considered that he was justified in exercising this right of veto where the board might otherwise, by a majority vote, pass a resolution which he considered as not being in the best interests of the company or the minority shareholder.

The four board meetings

The 26 February meeting

43 Following the conclusion of an amended and restated CSAPL shareholders’ agreement on 12 April 2018, together with the Deed of Undertaking and the Deed of Release referred to above on the same date, there were four quorate GBPL board meetings on 23 April 2018, 25 June 2018, 18 September 2018 and 3 December 2018. The date of the 26 February meeting was agreed at the last of these meetings. In late 2018/2019, new disputes arose between Carlsberg and CSAPLH with the result that the former regarded PPK’s non-attendance at board meetings with considerable suspicion in the light of its perception that he had refused to co-operate in passing board resolutions in 2012–2013 in order to improve the negotiating position of the Khetan family.

44 On 7 February 2019, PPK sent an e-mail to Mr Babu relating to the company’s sales marketing strategy and the RTM KPIs. He wanted the point addressed at the upcoming meeting without further deferment and asked for the KPIs to be circulated in advance for consideration. On 10 February 2019, the draft agenda for the 26 February meeting was sent out by Mr Silwal, together with the draft itinerary for the Commercial Review (“CR”) meeting. The board agenda included the following items:

- (a) at item II(D) – “Sales and Trade Marketing Organization (This agenda has been moved to CR [*ie*, Commercial Review] on 25 Feb and the pre-read for this agenda is part of the pre-read deck circulated on 19 Feb by [Mr Babu])”;
- (b) at item III(A) – “CR Update”;
- (c) at item III(D) – “Update on [Dividend] Payout Process”;

(d) at item III(E) – “Status on Share [transfer] from RKK to Amazonia Capital Pte”; and

(e) at item III(F) – “Status on MD’s work permit and registration at Labor Department”.

45 On 15 February 2019, Mr Steenberg asked for additional items to be placed on the board agenda as well as in the pre-read material. In relation to “item 3 Functional Reviews”, he included: “Finance: Dividend 2018 pay out status. Please provide an update on the dividend payout process and the board should also get an update on the transfer from [RKK] to Amazonia”.

46 The Board Meeting Deck and the CR Deck (*ie*, the pre-read material) were sent out on 19 February 2019, including, in the latter, all materials relating to RTM/Sales Structure/Sales KPIs/Sales team training and the Channel Marketing Plan for 2019. These matters, following discussion at the CR meeting of 25 February 2019, would then come before the board on 26 February 2019. Although PPK said he was not aware of it, the managing director’s work permit issue had first been raised by Carlsberg in December 2018, so there is no basis for suggesting that there was any attempt to sweep this issue under the carpet. This issue was also to be discussed at the 26 February meeting, along with the other two inter-connected items set out at [44] above relating to the share transfer and the dividend payout.

47 It was on 20 February 2019 that PPK e-mailed the GBPL board to say: “Due to some urgent and unavoidable circumstances, I need to travel and won’t be attending the upcoming board meeting, hence request you to plan it for March end as convenient to all”. Mr Steenberg’s response the following day was to say that the board meeting had been validly convened and that there were

urgent and pressing matters to discuss. In cross-examination, PPK accepted this was so. Mr Steenberg went on to say in his e-mail: “I trust that there will be ways for you to join from your location by phone or VC or alternatively that you discuss with [RK] to ensure an alternate or other ways for the board meeting to go ahead. I will be attending the board meeting and so will other directors I have spoken to”. At the same time, he asked Mr Silwal to circulate any remaining pre-read items and to assume that the board meeting would go ahead as planned. PPK did not respond to this e-mail at all but he testified that it was impossible for him to rearrange his other engagement or to attend the board meeting by phone or video conference while attending to his other engagement. Appointing an alternate would not suffice since there were matters which he wanted to raise at the board meeting. He did not think that any of the agenda items was so urgent that it could not wait until the end of March, as he suggested in his e-mail.

48 PPK’s evidence was that sometime before 20 February 2019, an issue arose with regard to Hari Khetan Campus, a community college in Birgunj that is named after his father. He therefore had to attend to the Hari Khetan Campus meeting, which would take place over 100km from Kathmandu where the board meeting was scheduled to take place in CSAPLH’s offices. Urgent and sensitive issues were up for consideration and the Hari Khetan Campus meeting would be attended by local dignitaries and politicians. It would not have been practicable to join the 26 February meeting by telephone or video conference. PPK considered his stand to be reasonable and the refusal of the board and Mr Steenberg to reschedule the board meeting to be unreasonable.

49 CPK’s evidence and that of Mr Jagetia was that on 20 February 2019, Mr Jagetia telephoned CPK and informed him of PPK’s e-mail of that day. According to CPK and PPK, CPK telephoned PPK the following day and asked

him to reschedule his trip and attend the 26 February meeting. PPK replied that he could not change his travel plans. CPK requested PPK to send an alternate but PPK replied that he was not willing to do so and it was not viable for an alternate to step in at such short notice. Later that day at 12.27pm, CPK e-mailed PPK to say: “Reference our discussion earlier today, I hope you still try to make it to the GBPL board meeting.” The following day, PPK replied: “I have tried my best but it doesn’t look possible”. None of these exchanges were made known to the GBPL board.

50 The position thus appeared to be that PPK had given priority to another meeting in preference to the 26 February meeting which had been fixed back in December 2018. Despite being reminded of the meeting on 10 February 2019, he had delayed in stating that he could not make himself available and was vague in his e-mail of 20 February 2019 explaining his “need to travel” due to “some urgent and unavoidable circumstances”.

51 It appears that no one other than PPK considered his sense of priorities to be justified because of the trouble taken to seek his attendance at the next board meeting scheduled for 25 March 2019. Nonetheless, he had not indicated unwillingness to attend the meeting and had only sought to have it re-scheduled. He took umbrage at the refusal to do so, which he regarded as a personal slight (hence his later grouse at Mr Steenberg’s use of the words “failed board meeting” to describe the 26 February meeting).

The 25 March meeting

52 On 8 March 2019, Mr Steenberg sent an e-mail to Mr Silwal, copying in the rest of the GBPL directors, requesting that a meeting be convened on 25 March 2019. It was CPK’s and PPK’s evidence that “[o]n or around

19 March 2019”, PPK called CPK, expressing concerns about the way in which GBPL was being run. He was upset by the conduct of the directors appointed by Carlsberg and was concerned about his own personal liability as the only director who was resident in Nepal. (In fact, Mr Babu, the managing director, although Indian by nationality, was also resident in Nepal.) Although it was neither CPK’s nor PPK’s evidence that the latter had stated that he would not appear at the scheduled board meeting, they gave evidence that CPK had been insistent that PPK should raise his concerns at that meeting and followed this up with a series of further telephone calls between 19 March 2019 and 25 March 2019. CPK stated that he reminded PPK that the board meeting had been scheduled for the end of March 2019 at PPK’s request, and that PPK eventually “relented and told [CPK] that he would attend the GBPL board meeting at [CPK’s] request”.

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

meeting scheduled for the next day but RKK gave no assurances that this would happen.

54 On 20 March 2019, ABT Legal and HR Consultancy wrote an opinion for PPK. The opinion stated that, under various pieces of legislation, the chief executive officer, managing director and directors could be held liable for the acts of the company and that whoever was available locally was likely to be the first in line for any prosecution. PPK understood this to mean that he could be liable for any decisions in which he had participated as a director, but he did not go so far as to say that the lawyers had advised him that absenting himself from board meetings would exempt him from responsibility.

55 It was on the night before the 25 March meeting that PPK sent the e-mail set out in [29] above. The opening paragraph of that e-mail expressed his frustrations at the way that some directors of the board were acting outside formal discussions and decision-making of the board itself, and at the way that the actions of those directors could violate local legislation and undermine the rights of the minority shareholder, RKK. The four specific areas where PPK said he had questions related to the delayed dividend payment to RKK, Mr Babu's (*ie*, the GBPL's managing director's) need for a work permit, the absence of new RTM KPIs and the use of the word "failed" to describe the scheduled 26 February meeting.

56 On PPK's evidence, he did not attend the 25 March meeting because he was taken ill that morning and went to the hospital with heart palpitations and dizziness. He did not attend the meeting of the Avsar Foundation that afternoon and sent an e-mail to its representatives at 1.46pm to explain his absence. No such explanation was given to GBPL, but he was not cross-examined with any

suggestion that his hospital trip was unnecessary or that his symptoms were fictional.

57 The history in relation to the payment of dividends can be stated as follows:

- (a) A dividend was declared at the AGM on 13 January 2019.
- (b) The approval of the Central Bank was needed for payment to CSAPL as a foreign investor. Permission was given for payment in two tranches, by 12 February 2019 and 14 March 2019.
- (c) Preferential payment to one shareholder over another was impermissible, as all recognised.
- (d) 50% of the dividend payments due to CSAPL were made on each of 10 February 2019 and 13 March 2019.
- (e) A payment of approximately 17.74% of RKK's dividend was made on 10 February 2019, with a further payment of approximately 23.65% made on 19 March 2019 and the balance paid on 25 March 2019.

58 It was on 11 February 2019 that one of the GBPL directors, Mr Roland Lawrence ("Mr Lawrence"), sent an e-mail to Mr Babu and Mr Silwal, stating that there were cash flow issues which created difficulties in paying the dividend. In the same e-mail, Mr Lawrence expressed doubt about the identity of the minority shareholder entitled to the dividend payment because of the share purchase agreement dated 1 April 2018 between RKK and Amazonia (which was CPK's company) of RKK's 9.94% holding in GBPL. E-mail exchanges show that Mr Babu decided that all the shareholders would be paid 50% that same day and the other 50% at the end of March 2019, whilst

investigation would be carried out to confirm the identity of the minority shareholder. As a matter of law, the dividend payment was due to the shareholder on the register at the date of the AGM, but further payment was held back pending confirmation that the sale had not been completed, which was forthcoming from Mr Jagetia on 17 February 2019. It is clear that the balance of the first 50% should have been paid at that point and the remaining 50% on 13 March 2019, which was when the balance dividend was paid to CSAPL. In fact, what happened was that the balance dividend payments to RKK were not made until 19 March 2019 and 25 March 2019. The cheques had to be signed by Mr Silwal (as the chief financial officer) and Mr Babu, and the intention to pay shareholders at the same time was clearly expressed. Mr Silwal's evidence was that he was asked by Mr Babu on 13 March 2019 to prepare the cheque for RKK "after a few days" but gave no explanation for that.

59 PPK's first question as to who stopped the dividend payments was, in itself, not one which required an answer since he knew full well from the e-mail exchanges that Mr Lawrence had given the instruction to do so. The delay in paying RKK was something which all recognised should not have happened once it was clear that he was the owner of the 9.94% shareholding, but by the time that PPK sent the 24 March e-mail, the instructions had been given and the last payment was on its way. It was not unreasonable of PPK to want to know why there had been this delay, but had he asked Mr Silwal, he would have been given the history of events; and had he turned up at the 25 March meeting, the matter would have been aired there. It would also have been the subject of informal meetings for the purposes of "alignment". Whilst what had happened was unsatisfactory, the reality was that payment had been made by 25 March 2019. That was no longer a live issue, unless there had been deliberate discrimination against the minority shareholder, which PPK suspected but

which, when viewed objectively, was not in fact the case. That was once again a matter which would have been discussed at the 25 March meeting.

60 The agenda for the 25 March meeting, sent out on 22 March 2019, included the items deferred from the 26 February meeting. The issue of a work permit for Mr Babu, the managing director, would therefore have been the subject of discussion, had PPK attended the 25 March meeting. On 8 February 2019, Mr Troels Libak Stollberg (“Mr Stollberg”) of Carlsberg had obtained a legal opinion from Pioneer Law Associates (“Pioneer”) in which they expressed the view that a work permit was not necessary for Mr Babu, an Indian national, to serve as the managing director, but that GBPL was required to record Mr Babu’s details at the Department of Labour and Occupational Safety (“the Department”). Following receipt of PPK’s 24 March e-mail, Mr Steenberg circulated that legal opinion on 26 March 2019. On 3 April 2019, Pioneer confirmed that it had completed the process of recording Mr Babu’s employment at the Department. In his evidence, PPK stated that the legal opinion from Pioneer was wrong, that he knew better and that he had obtained an opinion from President Law Firm dated 12 April 2019 to confirm his view. Whilst that opinion was produced in evidence, it was not at any time sent to the GBPL board.

61 That opinion also related to the due process of termination of an employee such as an HR director as well as setting out the time limits for distribution of dividends following their declaration at an AGM. It is clear that PPK obtained this opinion to support his position on, *inter alia*, both of those issues, but he never made it available to the board. Once again, if he had real doubts as to the legal advice from Pioneer, this is something which could and should have been raised by PPK at a board meeting.

62 The same point holds good for the RTM KPIs. Information was provided about them in the pre-read material for the 26 February meeting and could have been the subject of discussion at that meeting or at the 25 March meeting. PPK, in evidence, said that the information he sought was not given in that pre-read material. However, it would have been open to him to ask for what he required at any board meeting and he did not suggest that such an enquiry would have been refused. There is no evidence to suggest that these matters could not also have been the subject of discussion at informal meetings for “alignment” purposes prior to the 25 March meeting. PPK’s fundamental opposition to the new business model meant that he continued to raise issues about elements of it and to seek more information about it, which he was entitled to do and which he could always have done at the board level, informally as well as formally. Being a director and in the same office, he could always have approached Mr Babu or the company secretary for information.

63 The last point raised in PPK’s 24 March e-mail was the definition of a “failed” board meeting. This, as CPK described it, was a non-issue, or at best an “ego match” for PPK. The 26 February meeting did not happen because of PPK’s absence and was therefore an unsuccessful attempt at a meeting. PPK was defensive and oversensitive in objecting to the use of the terminology employed. Directors had showed up for a board meeting which ultimately did not happen because of his absence, after he had been asked to reschedule his other engagement or to attend the board meeting by telephone or video conference.

64 On 27 March 2019, Mr Jagetia wrote an e-mail to the CSAPL board proposing that PPK’s 24 March e-mail be the subject of consideration at CSAPL’s board meeting that day. The CSAPL board adjourned the matter – it

took the view that the appropriate forum for those matters to be considered was the GBPL board.

65 When asked for his view on the concerns which PPK had raised, CPK did not see any real cause for concern in terming the 26 February meeting as a “failed” board meeting; in the work permit issue, where he considered that the Pioneer legal opinion was sufficient; or in the issue of the delayed dividend payment to RKK, as payment had been made and the principle of treating shareholders alike was universally acknowledged. He thought there was some reason to pursue the questions relating to the RTM KPIs, but what became apparent from PPK’s evidence, as set out at [32] above, was that PPK disagreed root and branch with the sales model and the abandonment of middlemen wholesalers. CPK nonetheless sympathised with the overarching concern as to the way in which the CSAPL-nominated directors had acted and opined that the fundamental problem was that PPK felt disrespected and humiliated. From the other evidence which I heard later, I take this as a tacit acceptance that PPK’s real complaint related to the new sales and marketing model, in respect of which his views had not been accepted.

The 26 April meeting

66 After receipt of PPK’s e-mail of 25 March 2019 saying that he was unable to attend the Avsar Foundation meeting that afternoon due to his ill health, CPK said that he called PPK to enquire after him. During the call, PPK apologised for missing the 25 March meeting, said he would have attended had he not been ill, and assured CPK that he would attend the next meeting.

67 On 9 April 2019, a proposed agenda was sent out for the 26 April meeting. Agenda items included:

- (a) “Noting failed quorum for board meetings duly called for 26 February and 25 March – vote if needed on making such note in the board”;
- (b) “HR Director replacement – get a status from GBPL management – vote to put current HR Director on garden leave within a week from the board meeting and immediately start recruiting a new local HR director for GBPL”; and
- (c) “Dividends – explanation by GBPL management, also answering the questions raised by [PPK] in this matter – Carlsberg supports that dividend is paid out timely [*sic*] to all shareholders”.

68 On the same day, Mr Jagetia met with PPK briefly to ask him about his concerns, as expressed in his 24 March e-mail. Mr Jagetia testified that he gained no insight into these concerns, but at paragraph 49 of his AEIC, he said that PPK “was quite adamant that he would not let the Carlsberg nominated directors make the decisions through majority vote on the topics which he had raised”. According to the same paragraph of Mr Jagetia’s AEIC, PPK considered that there had been a change in attitude by the other directors with respect to his concerns and a lack of willingness on their part to resolve disagreements informally prior to board meetings, as had previously occurred. PPK “stated that after his concerns [were] addressed and an alignment [was] reached among the directors, he would attend the GBPL board meetings and that in the meanwhile, the GBPL Board could make decisions which [were] in the interests of the company by passing resolutions by circulation”. Whilst Mr Jagetia denied this in cross-examination, it is clear that he was effectively saying he was told by PPK that he (*ie*, PPK) would not attend board meetings unless his concerns had been addressed and “alignment” reached. That does not mean

that PPK was saying he would not attend the board meetings or the pre-meetings set for the end of April 2019, at which “alignment” was hypothetically possible. It could be inferred that he was saying he would attend such meetings to seek alignment first, although it could also be inferred from paragraph 49 of Mr Jagetia’s AEIC, taken as a whole, that PPK was saying that he would not participate in board meetings unless there was prior agreement to his views.

69 On 20 April 2019, the Board Meeting Deck was sent to the board members. A further e-mail from Mr Babu that day included additional pre-read material. In his e-mail, Mr Babu wrote:

Dear Board Directors,

Pls find attached additional pre reads/addl pre reads for the following agenda items for the Board meeting on 26th April

1. Section 2 D: Sales and Trade Marketing Organisation
Attached file: Nepal Sales organization.pdf
Attached file: Nepal Trade Marketing Organisation.pdf
2. Section 3 F: MD’s work permit status
Attached: Peter’s mail dated 8th April and attachment in that mail [*ie*, the Pioneer legal opinion].

70 There was obvious concern on the part of the GBPL directors about the potential non-attendance of PPK at the scheduled 26 April meeting. No reason had been given for his non-attendance on 25 March 2019. Two “alignment” meetings were scheduled prior to the 26 April meeting, including one on 25 April 2019. At the meeting for the Indian subsidiary on 23 April 2019, Mr Jagetia suggested that Mr Silwal write to PPK in advance to confirm his participation at the scheduled 26 April meeting. Whilst he maintained that he had no prior indication of PPK’s non-attendance at that meeting, in my

judgment, it is clear that Mr Jagetia was aware of the potential problem as a result of his meeting with PPK. Mr Stollberg, by e-mail, asked Mr Silwal to check whether PPK would be attending. On 24 April 2019, Mr Silwal forwarded Mr Stollberg’s e-mail to PPK saying: “Pls let me know on your participation of the 26th April Board Meeting.”

71 On 25 April 2019, PPK wrote the e-mail set out in [30] above, sending it both to the GBPL board and to Mr Stollberg. The terms of that e-mail raised a new complaint in relation to the treatment of the HR director, as well as reiterated grievances about the “unilateral” management of the company by the Carlsberg-nominated directors and his potential exposure to the authorities in Nepal by reason of their disrespect for local laws. The final paragraph of that e-mail made it plain that he was not prepared to abide by majority decisions at a physical board meeting and that he would absent himself from the meeting for that reason “to protect the interest of minority shareholder and the company”. He said that he remained available to support the business through the process of resolution by circulation, where unanimity was required.

72 Upon receipt of that e-mail, Mr Fewkes replied on 25 April 2019 in the following terms:

Dear PP,

Thank you for reaching out to us.

Obviously I cannot speak for CSAPL in its entirety, but please reconsider your participation in tomorrow’s board meeting, as we highly value your opinions and the board meetings is *[sic]* the right forum to discuss.

On the issue of the HR director, the GBPL board members unanimously, including yourself, agreed she needs to be replaced due to performance issue. [Mr Silwal] noted from a call [on] 4 January 2019 the unanimous conclusion: ‘Finally, the Board decided to replace the existing HR head as soon as possible in line with the discussion’. As far as we understand,

there is nothing under local law which prevents the HR director's dismissal for performance issues.

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

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

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

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

73 PPK accepted in cross-examination that he was invited to attend this board meeting and to express his views for consideration, but maintained that the reality was that decisions had already been taken, that his input would be

ignored as it always had been, and that the majority on the board would pass the resolutions they wanted regardless of anything he said. He did not reply to this e-mail, and in accordance with his stated intention in his own e-mail, he did not attend the 26 April meeting.

74 CPK, to whom the HR director had complained on 22 February 2019 about Mr Babu, and who had then forwarded that complaint to Mr Lawrence and Mr Jagetia, which had led to the setting up of an investigation, stated in his evidence that he agreed with the contents of the e-mail sent by Mr Fewkes. Whatever gripes that PPK had with the handling of the HR director's complaint ought to be raised at the board meeting. He tried to call PPK, but the latter would not pick up his call or call him back. He therefore wrote to Mr Fewkes on 25 April 2019, with PPK and the board copied, stating that he agreed that PPK should attend the board meeting and discuss his issues there. PPK's concerns could be included in the agenda and a proper way forward could be discussed. He asked PPK to reconsider. CPK also e-mailed Mr Silwal on 26 April 2019 (copied to Mr Fewkes) to ask if he would meet with RKK and convince RKK to send PPK to the board meeting. On the same day, CPK asked Mr Jagetia if he had any ideas as to how to make PPK join the meeting. Mr Jagetia's response, again copied to Mr Fewkes, was to say that addressing PPK's concerns through e-mail might help and that he would propose a communication on behalf of the CSAPL-nominated directors, which could then be sent to PPK.

75 Mr Silwal's evidence was that, following receipt of PPK's 25 April e-mail, he met with RKK that day to ask him to convince PPK to attend board meetings but RKK had said that he was unwilling to do so and would not interfere with any decision made by PPK. On the morning of the meeting, Mr Silwal then tried to call PPK with the intention of seeking to persuade him to attend, but he received no answer.

76 What emerges from PPK’s 25 April e-mail is his essential difficulty in accepting majority decisions of the board. He wanted to be able to veto any decision with which he disagreed and the expressed reason for not attending meetings was “to protect the interest of minority shareholder and the company” by preventing resolutions with which he disagreed from being passed. By not attending, he rendered any board meeting inquorate and arrogated to himself the ability to refuse to agree with any circular resolution for which unanimity was required. He was thus able to hold the board to ransom. It is significant that not only did he fail to attend the 26 April meeting and the 1 July meeting, he has also failed to attend every meeting since, although the other meetings were scheduled for dates following the commencement of arbitration and these proceedings and therefore play no part in the matters I have to determine.

77 In his AEIC, PPK said that it was sometime in April 2019 that he decided not to attend the 26 April meeting; in cross-examination, he said it was on 25 April 2019, the day he sent the e-mail. He decided “no more nonsense, no more humiliation, no more oppressions”, which gives a good insight into his thinking at the time. Later in his AEIC, he said:

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

...

107. In my view, the requirement of my attendance as [RKK’s] nominee director for quorum to be reached at GBPL board meetings was designed so that I could protect myself, the minority shareholder [RKK], and employees of GBPL where necessary and to prevent the majority shareholder from forcing their decisions through majority vote. To this end, I believe that my non-

attendance at the board meetings was completely justified.

108. While [CPK] and Mr Jagetia had repeatedly asked me to attend the GBPL board meetings, I was unwilling to even consider this until my concerns had been addressed. There was nothing that [CPK] and Mr Jagetia could offer me to assuage my concerns and persuade me to attend the GBPL board meetings. It was really up to the Carlsberg nominated directors to do so and they refused to do so.

The 1 July meeting

78 On 28 April 2019, Mr Jagetia e-mailed the four Carlsberg-nominated directors, recommending that “we” respond to PPK on the commercial and legal issues raised by him in his 24 March and 25 April e-mails; and, following that, ask him to confirm that he would make himself available for the physical board meeting scheduled for 1 July 2019 and for resolutions by circulation in the interim on important business topics. He then summarised the topics and suggested what ought to be done in order to respond appropriately to PPK. He listed the five areas of concern which had been advanced in PPK’s e-mails.

(a) With regard to the delayed dividend payment to RKK, he suggested that Mr Silwal detail all the steps taken to pay the dividends on time and the communication/instructions from directors and non-directors on withholding the payments.

(b) With regard to the legal status of the managing director (*ie*, Mr Babu), he suggested that Mr Silwal detail the legal position, the communications on the matter over the last 12 months, the latest status of registration/approval from the Nepali authorities and the implications for the directors, both legally and reputationally.

(c) On the RTM KPIs, he suggested that Mr Babu detail the RTM initiatives taken in the last 12 months, the objectives and targets, the investments made and the achievements obtained thus far, and the way forward. This was to be done at a very granular level with relevant supporting data.

(d) With regard to the definition of “failed” board meetings, he suggested that the CSAPL-appointed directors detail their motivation and the legal basis for using that terminology instead of the phrase “inadequate quorum”, which was said to be a more commonly known term.

(e) With regard to the HR director being put on garden leave, he suggested that the CSAPL-appointed directors who put forward the agenda item for the 26 April meeting detail their motivation and the Carlsberg group policy on treatment of the claimant versus the accused during an investigation. He also suggested that Mr Silwal clarify the status of the 4 January 2019 decision to remove her and reconsider the merit of that decision in the light of her harassment claims dating back to early 2018 and the lack of intervention by senior Carlsberg personnel.

79 Mr Steenberg’s evidence was that Mr Jagetia’s suggestion was very odd since all the questions raised were, in his view, without merit. According to him, if CSAPLH had considered PPK’s concerns to be valid in any way, Mr Jagetia himself could have provided the information, as part of CSAPLH’s obligation to use its best efforts to procure PPK’s attendance at the board meetings; however, it was not a matter for the Carlsberg-nominated directors to do so in circumstances where PPK was refusing to attend board meetings and the accompanying informal meetings. He saw no reason why these concerns, which

were agenda items for the board meetings, should be dealt with in e-mails rather than in the usual way at “alignment” meetings and physical board meetings.

80 By this time, there can be little doubt that the Carlsberg-nominated directors saw PPK as intransigent and acting in dereliction of his duties as a director in failing to attend the board meetings or any other meetings to resolve his supposed concerns. If PPK chose to be un-cooperative, they saw no reason to go out of their way to accede to the request from the CSAPLH-nominated director, when it was for CSAPLH to procure his attendance if it could. They suspected that his absence was a deliberate replay of the events in 2012–2013 and that it was being effected in the context of the wider disputes between Carlsberg and CSAPLH. No reply was forthcoming from any of the Carlsberg-nominated directors. Mr Jagetia considered his e-mail proposals to be “neutral” but his suggestions appeared designed to justify PPK’s stance and to defend CSAPLH’s position. The tone of many of Mr Jagetia’s proposals implied criticism of the Carlsberg-nominated directors, which could only have exacerbated their impatience with the stance adopted by PPK and their suspicions that CSAPLH was collaborating with him.

81 On 29 April 2019, Mr Jagetia again sought to raise these issues with the CSAPL board, proposing that it “take note of the email from [the] director of the minority shareholder at GBPL dated 25 March 2019” as well as the subsequent 25 April e-mail. Mr Steenberg, who sat on both the CSAPL and GBPL boards, asked what the purpose of bringing this issue to the CSAPL board was, given that the right forum for the issues raised was the GBPL board.

82 On 6 May 2019, CPK and Mr Jagetia met with PPK in Singapore. Their evidence was that PPK provided them with a medical certificate at that meeting in relation to his non-attendance of the 25 March meeting and regaled them with

his concerns about the governance of GBPL and his potential liability as a resident director in Nepal. On that occasion, he provided the two legal opinions he had received which are referred to earlier in this judgment at [54] and [60]. CPK told PPK that he ought to attend the board meetings to raise his concerns and offered to indemnify him for any financial losses he might suffer in relation to his expressed concerns about the governance of GBPL. CPK told him that his non-attendance would not be in the interests of CSAPLH but he replied that he did not want to attend the board meetings until his concerns had been addressed by the board of directors and that an indemnity was insufficient in the face of potential criminal liability. In CPK's AEIC, he said that when he told PPK that CSAPLH had an obligation to use its best efforts to ensure PPK's attendance at the board meetings, PPK's response was to say that he should buy out RKK's shares in GBPL as had been agreed in April 2018.

83 On 10 June 2019, Mr Jagetia met with PPK in the GBPL office in Nepal and asked him to attend the meeting scheduled for 1 July 2019. He told PPK of his intention to get the directors of GBPL and/or CSAPL to respond to the concerns which PPK had raised. That meeting was also attended by PPK's lawyer. It was on 23 June 2019 that Mr Jagetia sent a copy of his earlier e-mail of 28 April 2019 (see [78] above) to the Carlsberg-nominated directors seeking a response to the suggestions he had made. Once again, no response was forthcoming.

84 CPK's evidence was that, between May and June 2019, he continued his attempts to change PPK's mind with more than ten telephone conversations in which he repeatedly asked PPK to attend the board meetings and raise matters there. On 28 June 2019, he flew to Phuket for a family gathering which was also attended by PPK, where he renewed his requests to PPK and in particular asked PPK to join the 1 July meeting by video conference or by telephone. He offered

to be with PPK during the video conference or telephone call in order to give him support, if necessary. PPK would not agree to this. When it was suggested to PPK that perhaps a “pre-board meeting” with the GBPL directors could be arranged to discuss his concerns “off the record” and without him having to formally attend the 1 July meeting, PPK said that while he might be open to the idea, he needed to consult with his lawyers before agreeing. He never did agree.

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

86 In response, RKK wrote back to say: “Me as a part of Khetan [f]amily and participant party of the agreement of 2010 I never appointed PP Khetan as Board Member of GBPL. He is not trustworthy for me. We should meet to discuss this”.

87 This led to a meeting between Mr Hansen and the Carlsberg Vice President, Head Legal, Asia, with RKK on 21 June 2019. Mr Hansen made notes of the meeting that evening on the plane and recorded a summary in an e-mail to RKK dated 26 June 2019, which the latter then corrected and amplified. This read as follows, so far as material:

Generally, you have not been involved in the beer business of Nepal at least since 2010 after agreement with Singapore based company (and never involved in India).

Based on understanding with mother around mid June 2014 of formal sep[aration] between [RKK] & [PPK]/[CPK] with painful, depressing & frustrating situation finally on 1 April 2018, it was formally agreed in contract format to sell the 10% stake in GBPL to Amazonia, that is controlled by [CPK]. This sale of the 10% stake never took place and the contract made in April 2018 has expired. However as per the contract the other part of business is gradually and partly being t[r]ansferred by [PPK]/[CPK] to [RKK].

This sale was part of a wider settlement of various family shareholdings ...

With regards to the appointment of PP Khetan to the GBPL Board, you stressed that you have never signed any formal papers to appoint of [PPK] to that Board. You have had no direct contact with [PPK] & [CPK] since 22 June 2014 relating to any matter including Board matters in GBPL. In reality, [PPK] reports to [CPK], who depends on [PPK] to look after [CPK's] interests in Nepal. Hence, you have at no point in time asked PP Khetan to stay away from the Board meetings. ...

I mentioned when we met that GBPL had important decisions to take ... We both agreed that it was in the company's best interest to have a Board that works efficiently, and where the board members show up to take the right decisions. If you were to appoint a director, you prefer that you are not appointing yourself. You would prefer to appoint e.g. Surendra Silwal since you are confident that you will be able to convince him to show up at the Board meetings if it is not against the contract that is signed with [PPK]/[CPK] on 1st April 2018. Silwal is honest to GBPL & to [RKK] too but he is personally bonding with [CPK]. Since other businesses are part wise being transferred to [RKK] by [PPK]/[CPK], it is not clear if [RKK] can take any decision as a shareholder of GBPL being obligatory to sale [sic] it to [CPK].

88 In his evidence, Mr Hansen said that RKK had said that he could not get involved as he was morally committed to giving up his 10% share in GBPL already as part of the family settlement and would therefore not intervene where PPK was concerned. If at any time he felt that he could participate, then he would appoint Mr Silwal, as set out in the note. This explanation tallies with his response to the approaches made to him by Mr Silwal on 24 March 2019 and

25 April 2019 respectively (see [53] and [75] above). This combination of evidence shows that an approach to RKK to do anything in relation to PPK’s attendance at the meetings was never going to bear any fruit.

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

- (a) “Note of the failed quorum for the BM of Feb 26, 2019, Mar 25, 2019 and Apr 24, 2019”;
- (b) “Sales and Trade Marketing Organization”;
- (c) “HR Director Status”;
- (d) “Update on Dividend Payout Process/Payout Status”;
- (e) “Status on Share transfer from RKK to Amazonia Capital Pte”;
- (f) “Status on MD’s work permit and registration at Labor Department/Updates on Pioneer Law Associates Legal Opinion”; and
- (g) “Communication of Corporate Governance Principles”.

90 Each of the areas of concern which had been mentioned by PPK was therefore on the agenda for discussion; moreover, had there been pre-meetings for “alignment” purposes, such matters would have been open for discussion there. Mr Steenberg himself had proposed that all these issues be placed on the agenda. The attachments to Mr Silwal’s e-mail of 24 June 2019 included an item entitled “Sales RTM KPIs”.

91 On 28 June 2019, PPK sent an e-mail to the GBPL board stating that his e-mail was in continuation of his 25 April e-mail. He went on to say in his e-mail:

In all the recent communication being floated around about the upcoming board meeting on the 1st of July, I don't see any concern or effort by any of the board directors to resolve the issues related to protection of interest/rights of minority shareholder and have good governance in GBPL management wherein a tainted MD is still protected.

Hence I would like to express my inability to join the meeting unless the above issues are resolved.

But as committed earlier as well, I am always available to support the business and any business critical decision can be made through resolution by circulation

92 Mr Fewkes responded to ask PPK if he had cleared this with RKK and to do so if he had not. He said that it would be in the best interest of GBPL and all its shareholders if PPK attended the GBPL board meeting that coming Monday. He added: "Then we can hear and discuss your viewpoints in the right forum. Already 3 times you have chosen not to attend. If more convenient, you can dial in or RK[K] could appoint an alternate director for the meeting." No response was received from PPK and no justification for his absence at the first two meetings was given.

93 There were further exchanges between CPK and PPK and between CPK and Cees Hart ("Mr Hart"), the most senior figure in Carlsberg, but as they occurred after 1 July 2019, they assist little in the matters I have to decide, save for CPK's statement that he was trying to get PPK to attend an informal, "without prejudice" pre-meeting on 12 August 2019 for the Carlsberg-nominated directors to address PPK's concerns. This is a strong indicator that, in refusing to attend board meetings, PPK had also not been prepared to attend the antecedent pre-meetings, as would appear from his e-mails. CPK asked if

such a pre-meeting could take place so that he could press PPK further to attend. Mr Hart's response was to say that PPK's duty was to attend board meetings or resign; that matters could be raised at the board, which was the right forum; and that PPK's actions demonstrated that he would not attend board meetings until he got what he wanted.

94 With regard to the concern raised about the HR director, there is little point, once again, in exploring in full the merits of the rival positions.

(a) It is clear that a decision was taken on 4 January 2019 to replace the HR director because of her poor performance. Notwithstanding the evidence of Mr Silwal, it is clear that this decision was based on her poor performance as HR director and the decision was wholly unrelated to any allegations which had yet to be made against GBPL's managing director.

(b) It was only in February 2019 that her complaints about the managing director's harassment of her and others became known to CPK, who immediately contacted the managing director and told him not to conduct her pre-exit interview.

(c) The matter was promptly brought to the attention of the board. An investigation committee consisting of Mr Lawrence and Mr Jagetia (*ie*, a Carlsberg-nominated director and a CSAPLH-nominated director) was immediately formed to interview the alleged victims.

(d) Following the investigation committee's interviews, but prior to interviewing the managing director, Mr Babu, the question of suspension of the HR director arose for consideration. It was considered by the Carlsberg-nominated directors that suspension would be in her

own interests pending the conclusion of the investigation, particularly bearing in mind the earlier decision for her removal and replacement. Her belated complaint against the managing director reinforced their view of her poor performance since the harassment complaints went back to early 2018 and nothing had been done by her about it for the intervening period. PPK's view was that the managing director ought to be suspended as the alleged perpetrator of the harassment.

(e) This was obviously a sensitive issue and one where PPK could consider that his reputation could suffer by reason of his connection with a company which might be thought not to have acted appropriately in the face of the allegations made.

(f) The harassment was of a verbal nature, in particular, shouting at employees and the use of bad language.

95 The issue of suspension of the HR director was an agenda item for the 26 April meeting and the issue had been explained in Mr Fewkes's e-mail the previous day, to which reference is made at [72] above.

PPK's justification for non-attendance at the four board meetings

96 I am driven to the conclusion that, apart from the 25 March meeting which PPK did not attend because of his visit to the hospital, he could not be said to be justified in failing to attend any of the other meetings. It is clear to me that he accorded the Hari Khetan Campus meeting priority over the 26 February meeting, which had been scheduled since December 2018. It is hard to believe that he could not have made some accommodation in joining the meeting by telephone or video conference, although this would have meant an inability to join other informal meetings. He expressly refused to attend the 26 April and

1 July meetings when, as a director, his duty was to be present, regardless of the likelihood of him being outvoted on any matter where he disagreed with the approach likely to be taken by the Carlsberg-nominated directors.

97 As I have already said at [35] above, the graver his concerns, the more important it was for him to be present at the board meetings so that these could be recorded. It appears to me that there was little reality in his alleged concerns about criminal exposure, as CPK effectively accepted in his evidence. In cross-examination, PPK limited this exposure to the HR director's harassment allegations. Once again, if there was such a risk, it was his duty either to attend the board meetings and resist the proposed decisions which he regarded as unlawful or, at worst, to resign from his position as director if he considered that the risk of participating in meetings was too great. Failure to attend meetings was dereliction of his duty as a director and, if there was ever any risk of exposure to liability as a director, his absence would not be a ground for exculpation.

98 He was largely driven out of pique that his strongly-held view on the new marketing/sales model was not accepted by the other members of the board, including the CSAPLH-nominated director. His general view of the approach taken by the Carlsberg-nominated directors was a distorted one in consequence of this disagreement. Their approach had always been to seek to agree on matters with the other shareholders in an informal way prior to board meetings in what were described as "pre-board meetings" or "alignment meetings", which included discussions over dinner and informal chats of many kinds over the two days or so in which the various meetings were scheduled. The evidence did not establish to my satisfaction that the attitude of those directors towards holding such informal meetings prior to the board meetings had changed. However, once PPK had failed to attend three board meetings in a row, without adequate

justification, the Carlsberg-nominated directors saw no reason to go out of their way to produce the kind of information which Mr Jagetia suggested they produce. Moreover, that information was largely available to CSAPLH and could all be obtained from Mr Silwal, or from Mr Babu by Mr Silwal for transmission to Mr Jagetia, who was entitled to see it as a director. Mr Jagetia could have provided such information to PPK, but he did not. I conclude that the reason he did not do so, nor prevail upon Mr Silwal to do so, was because he knew, from conversations with PPK and CPK that it would make no difference.

99 The reality is, in my judgment, that none of the concerns which PPK raised created a significant risk of exposure to criminal prosecution, and that whatever differences there might have been about the course of action to be adopted in relation to those concerns, none could justify his failure to attend the board meetings. It is ironic that his complaint that decisions were taken outside board meetings is inconsistent with his complaint that he was not consulted adequately prior to board meeting decisions being taken and that his own action in boycotting board meetings made board resolutions impossible unless he agreed with them.

CSAPLH's efforts

100 Having taken the view that I have of PPK and of his relationship to CPK, I consider that he was not a man who was capable of being persuaded to attend the board meetings, once he had decided not to do so. Whilst his evidence was that it was not until sometime in April 2019 that he decided not to attend further board meetings until his concerns had been properly addressed, the seeds of his refusal to attend the 26 April and 1 July meetings were present long before and in truth emanated from the major difference that he had with Mr Babu and the

other members of the board who had approved the new model of sales/marketing. He was a man who felt that his own view was right and was unable to accommodate himself to the fact that the majority of the board thought differently. Whilst he may not have specifically looked for concerns to raise and causes to fight, he was keen to take up the cudgels when issues of much lesser importance arose where he could make a fuss about the actions of the Carlsberg-nominated directors and effectively veto a decision with which he thought he was unlikely to agree.

101 The result is that I consider that, once he had made a decision not to attend the 26 February, 26 April and 1 July meetings, he was unpersuadable. Nothing that CPK or CSAPLH did would have made any difference to his decision. He was set on attending the Hari Khetan Campus meeting and not putting himself out to phone in or attend by video conference. An alternate would not suffice because he wished to pursue his grievances.

102 Furthermore, in my judgment, CSAPLH, in the persons of CPK and Mr Jagetia, did all that they could to seek to procure PPK's attendance in the light of the knowledge they had in all the circumstances. I have already concluded that their efforts were genuine and even where there is no documentary record of the attempts to persuade him to attend, I have no difficulty in accepting their evidence of telephone calls and meetings where they persistently asked him to do so. There is an air of unreality about some of the allegations made by Carlsberg as to what CSAPLH could and should have done.

103 Having set out at some length the steps which were taken, I do not consider that CSAPLH and CPK could realistically have made greater efforts to persuade PPK to attend each of the four board meetings nor made advance arrangements for him to attend the board meetings by way of phone or video

conference if there were issues about his attending in person, in the light of his decision not to attend. They did seek to address his concerns about attending the board meetings. The gravity of the situation engendered by his refusal to attend was self-evident, as he knew and intended that it should stymie the business of the board. Mr Jagetia did his part in seeking to persuade the Carlsberg-nominated directors to produce detailed answers and information in writing to allay PPK's expressed concerns. That may have been for show, if he realised that it would not make any difference and thought it likely that the Carlsberg-nominated directors would refuse the request. The fact that he made no effort to supply the information himself or with the aid of Mr Silwal demonstrates, to my mind, that he knew it would make no difference. He realised that PPK would only respond if the Carlsberg-nominated directors gave way to PPK's demands.

104 There was no possibility of CPK approaching RKK to remove PPK as his nominated director because of the difficulties in their relationship. In any event, the approaches of Carlsberg show that RKK would not interfere, whether by removal of PPK or by appointment of an alternate. RKK considered the 9.94% shareholding, whilst still registered to him, to be part of the overall family settlement which, when completed, ought to have resulted in the shares being in the ownership of CPK or his company, Amazonia. There was nothing that CSAPLH or CPK could do to persuade either RKK or PPK to act any differently from the way they did, particularly because of the difficult relationships between CPK, PPK and RKK. Informing Carlsberg of the details of their efforts would have made no difference to what occurred and it is wholly unreal to suggest that CSAPLH or CPK should have entered into all the rights and wrongs of the concerns and pointed out to PPK the error of his ways, since that would have damaged his bruised and sensitive ego further. PPK would not have been satisfied unless Carlsberg had eaten humble pie and had come cap in

hand with a fulsome apology and acceptance that he was right on all the issues he felt strongly about, including the sales and marketing model in particular.

105 The test to be applied to the obligation to use “best efforts” is synonymous with the test for “best endeavours”, which requires the obligor to do everything reasonable in good faith with a view to procuring the contractually stipulated outcome within the time allowed. This means taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually stipulated outcome within the available time, would have taken.

106 In circumstances where PPK made known his stance on the 26 February meeting only on 20 February 2019 and had sought a postponement with at least an arguable reason for not being present, I consider that the efforts made by CSAPLH in the time available, where his antipathy to attendance was not known, do satisfy that test.

107 With regard to the 25 March meeting, I am satisfied that PPK told CSAPLH that he would attend, so that there was no reason for CSAPLH, having made the efforts they did, as set out earlier in this judgment, to think he would not. Even if there was reason to think at the time of the 25 March meeting that he had wilfully chosen not to attend, or even if it was later suspected that his hospital trip was an excuse, it cannot be said that CSAPLH failed to do all that was reasonably necessary in good faith to achieve the desired result.

108 The same is true in relation to the 26 April meeting, though there is less certainty about CSAPLH’s state of knowledge. Even if there were grounds for thinking on 9 April 2019 that PPK might not attend the upcoming meeting, there was no reason to think that any further efforts to procure his attendance would

make any difference and I find that they would not have caused him to act any differently than he did. Considerable and apparently successful efforts had been made to persuade him to attend on 25 March 2019, only to be superseded by his hospitalisation. When on 25 April 2019 his e-mail arrived, stating that he would not attend on 26 April 2019, it must have been increasingly obvious that, even if further efforts were made to persuade him to attend, they would be futile. Mr Fewkes’s response of 25 April 2019 was as reasonable and conciliatory a response as he was ever likely to get from Carlsberg, expressly stating the value placed on his views, but this did nothing to satisfy him. Efforts then made by CSAPLH in requesting that he attend or pleading with him to attend could not achieve the desired result.

109 By the time that PPK had reached a firm decision in relation to the 26 April meeting and the succeeding 1 July meeting, there was nothing that could be done to change his mind despite the significant and personal efforts further made by CPK in May 2019 and June 2019, as set out above. The bottom line is that after 25 April 2019, all efforts were futile.

110 CSAPLH did, however, continue to make efforts in the period leading up to both the 26 April and 1 July meetings, as outlined above. I consider those steps, as with the efforts preceding the other meetings, to be all that a prudent and determined man, acting in the interests of Carlsberg and anxious to procure the contractually stipulated outcome, would have taken.

111 As to the changing focus of the parties on the informal “alignment” pre-meetings, and the suggestion that CSAPLH could and should have persuaded PPK to attend those (since he had indicated that he would attend the board meetings if his concerns were properly addressed), the facts are against Carlsberg. On Carlsberg’s own case, the invitation to the board meetings always

carried with it the implicit invitation to such informal conversation, discussions and consultation, which had not yielded the results that PPK wanted. In refusing to attend the board meetings, PPK was also refusing to attend the antecedent discussions because he considered that those discussions would achieve nothing as the Carlsberg-nominated directors would always carry the day when it came to board resolutions by reason of their majority on the board. The post 1 July 2019 exchanges between CPK and Mr Hart are significant in that respect, in as much as CPK was hoping to persuade PPK to attend such pre-meetings and even then on a “without prejudice” basis, but by then the die was cast and it seems that Carlsberg itself may have closed the door at that point.

Conclusion

112 I find therefore that CSAPLH did not fail in using its best efforts, within the meaning of the test as set out in the authorities, to ensure the attendance of PPK at the four board meetings. CSAPLH was therefore not in breach of clause 2(c) of the Deed of Undertaking and the claim made by Carlsberg for the repayment of the outstanding loan based on that particular alleged breach must fail.

113 Other issues in relation to the outstanding loan remain for determination in these proceedings and/or in arbitration, although the claims and cross-claims in this action remain stayed pending the determination of the arbitral tribunal.

114 Whilst I have heard no submissions on the subject of costs, absent any special considerations, it appears to me that, having sought and obtained an order for this particular element of the dispute to be determined here and not to be stayed pending arbitration, Carlsberg should pay the costs of the action since that order was made. Costs ought ordinarily to follow the event. I make no order

without hearing further from the parties but give this indication in the hope that time and additional costs might be saved if there is no real purpose served in further argument on the subject. The parties should seek to reach agreement, failing which I will make any necessary ruling which ought to be capable of determination on paper, without the need for an oral hearing.

Jeremy Lionel Cooke
International Judge

Chew Kei-Jin, Yeo Chuan Tat, Tan Silin Stephanie, Ervin Tan and
Lam Yan-Ting Tyne (Ascendant Legal LLC) for the plaintiff;
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