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

[2022] SGHC 49

Suit No 844 of 2020

Between

Darco Water Technologies Ltd

… *Plaintiff*

And

Thye Kim Meng

… *Defendant*

JUDGMENT

[Companies — Directors — Duties]

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Darco Water Technologies Ltd
v
Thye Kim Meng

[2022] SGHC 49

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8 March 2022 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 The defendant, Mr Thye Kim Meng, was a former director and chief executive officer of the plaintiff, Darco Water Technologies Limited.

2 At the heart of this dispute are two projects in Vietnam. I shall refer to them as the "Water Project" and the "Solar Project". In managing these projects, the plaintiff claims that the defendant breached duties owed to it, and seeks damages arising from the defendant's breaches. In response, the defendant denies that he was in breach of his duties.

3 Having considered the parties' submissions, I dismiss the plaintiff's claim. These are my reasons.

Background

Parties and other personalities

4 Incorporated on 13 October 2001,[1] the plaintiff was listed on the main board of the Singapore Exchange on 7 May 2008.[2] It is in the business of water and waste-water treatment solutions,[3] and is part of a group of companies known as the Darco Group. The Darco Group is governed by a charter ("Group Charter") which sets out the principles in the management and governance of each company in the group.[4]

5 The defendant is the founder of the plaintiff. He was a director from 13 October 2001 to 31 May 2019. At the material time concerning the projects, he was the managing director and chief executive officer of the plaintiff. He left the company on 31 May 2019.

6 At the material time, Ms Heather Tan Chern Ling ("Ms Tan"), was a director of the plaintiff, as well as its director of finance and corporate affairs.[5] She ceased being a director on 30 April 2019.[6] Mr Teh Chun Sem ("Mr Teh"), was (and remains) the financial controller of the plaintiff. In relation to the Water Project, the defendant worked with Ms Tan and Mr Teh.

7 One of the plaintiff's wholly owned subsidiaries is a Malaysian incorporated entity known as Darco Water System Sdn Bhd ("DWS"). DWS

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1 Thye Kim Meng's affidavit dated 13 September 2021 ("TKM's Affidavit") at para 9.

2 TKM's Affidavit at para 21.

3 TKM's Affidavit at para 13.

4 Agreed Bundle ("AB"), Volume 2, Tab 126.

5 TKM's Affidavit at TKM-27, p 306.

6 TKM's Affidavit at TKM-9, p 149.

was tasked to carry out the Solar Project, and Mr Thye Ze Pin ("Mr Zach Thye") was DWS's managing director.

8 I should also mention Mr Dinh Minh Dao ("Mr Dao"). He was a consultant hired by the plaintiff to pursue business opportunities in Vietnam, including the two projects in question.

The Water Project

9 In October 2017, the defendant contacted Mr Dao regarding a business opportunity in Can Giuoc District, Vietnam.[7] Essentially, it involved the plaintiff's acquisition of 90% of the issued equity interest in a company known as Can Giuoc Water Works Limited ("Canwaco") from CA Trading Co Ltd ("CA Trading"), a company fully owned by Mr Dao. Canwaco was the corporate entity used by CA Trading to build and operate water treatment facilities in Vietnam.[8] This is the Water Project.

10 On 7 November 2017, the defendant, Ms Tan and Mr Dao met in Singapore to discuss the Water Project.[9] On 11 December 2017, the defendant sent Ms Tan the draft terms of a framework agreement for the Water Project to be signed between the plaintiff and CA Trading. Ms Tan formalised the agreement.[10] On 14 December 2017, the agreement was signed ("Framework Agreement").[11] Later that day, pursuant to the terms of the Framework

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7 TKM's Affidavit at paras 63 – 65.

8 TKM's Affidavit at para 71.

9 TKM's Affidavit at para 70.

10 TKM's Affidavit at paras 77 – 78 (at p 20).

11 TKM's Affidavit at para 80; see also AB, Volume 2, Tab 93.

Agreement, Mr Teh remitted US$1m ("the Deposit") to CA Trading.[12] Under cl 5 of the Framework Agreement, this sum is stated to be a refundable deposit recoverable upon the discovery of any negative, unfavourable or adverse findings of a technical or financial nature that renders the plaintiff unable to proceed with entry into a sale and purchase agreement for the acquisition of the 90% equity interest in Canwaco ("Water Project SPA").

11 On 20 April 2018, Mazars LLP ("Mazars") was engaged to carry out a financial due diligence exercise of the Water Project.[13] A draft report by Mazars ("Draft Mazars Report") was sent to Mr Teh on 6 August 2018.[14] The Draft Mazars Report flagged financial aspects of concern pertaining to the Water Project. However, the Draft Mazars Report was incomplete due to unresolved technical issues relating to the salinity of the water source.

The Solar Project

12 Apart from the Water Project, the defendant was interested in solar power generation as a business opportunity and had discussed the possibility of entering the industry with Mr Dao. In October 2018, Mr Dao informed the defendant that he had a joint venture with a Vietnamese company via a corporate entity known as Con Dao Green Energy ("CDGE") to construct and operate a solar power plant on Dat Doc beach on one of the Con Dao islands.[15] This is the

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12 Mr Teh Chun Sem's affidavit dated 13 September 2021 ("TCS's Affidavit") at paras 14 and 18; see also TCS's Affidavit at TCS-1, Tab 3.

13 TCS's Affidavit, TCS-1, Tab 5, at p 52.

14 TCS's Affidavit at para 30.

15 TKM's Affidavit at paras 200 – 204.

Solar Project, and it involved the plaintiff's potential acquisition of CDGE. The defendant then directed Mr Zach Thye to work on the Solar Project.[16]

13 Pursuant to negotiations between DWS and CDGE, three documents were prepared. The first was a draft letter of intent dated 19 October 2018 (left unsigned) that was circulated to the plaintiff's board of directors ("Board") on 24 October 2018 ("19 October 2018 LOI").[17] The second was a letter of intent dated 30 October 2018 entered into by DWS and CDGE ("30 October 2018 LOI"),[18] and the third was a signed document dated 30 November 2018 titled "Request for Advancement" pursuant to the 30 October 2018 LOI entered into by DWS and CDGE ("30 November 2018 Advancement Letter").[19] For convenience, I will refer to them collectively as the "Three Letters".

14 Three payments totalling a US$600,000 were made to Mr Dao under the 30 November 2018 Advancement Letter by the plaintiff on behalf of DWS. The first payment of US$200,000 was made on 30 November 2018 ("First Payment");[20] the second payment of US$300,000 was made on 10 January 2019 ("Second Payment);[21] and the last payment of US$100.000 was made on 15 February 2019 ("Third Payment").[22] I will refer to these payments collectively as "the Payments". By the 30 November 2018 Advancement Letter, these payments are refundable under cl 2, which provides for the recovery of these

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16 TKM's Affidavit at paras 207 – 212.

17 AB, Volume 2, Tab 88.

18 AB, Volume 2, Tab 89.

19 AB, Volume 2, Tab 90.

20 TCS's Affidavit at para 48.

21 TCS's Affidavit at para 52; see also TCS's Affidavit at TCS-1, Tab 19.

22 TCS's Affidavit at para 53; see also TCS's Affidavit at TCS-1, Tab 20.

payments in the event that any one or more of the conditions outlined therein were not fulfilled.[23] To proceed with Solar Project, it was anticipated that there would be a sale and purchase agreement to acquire CDGE ("Solar Project SPA"), as well as a power purchase agreement entered into by the parties ("Power Purchase Agreement").[24]

Outcomes of the projects

15 Unfortunately for the plaintiff, neither the Water Project nor the Solar Project materialised. As at the time of the trial, the plaintiff was unable to fully recover the Deposit and the Payments.

The parties' cases

The plaintiff's case

16 As pleaded in the Statement of Claim, the plaintiff alleges that the defendant, as a director of the plaintiff, owed a range of overlapping statutory, fiduciary, and common law duties to the plaintiff as follows:[25]

> (a) Duty to act *bona fide* in the plaintiff's interests. This includes ensuring that the plaintiff's affairs are properly administered, and that the plaintiff's assets and property are not dissipated or exploited to its prejudice. Also, each transaction is to be entered into at arm's length in fulfilment of the corporate objective of the plaintiff to maximise profits and to promote the plaintiff's business.

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23 AB, Volume 2, Tab 90.

24 AB, Volume 2, Tab 90.

25 Set Down Bundle ("SDB"), Statement of Claim dated 4 September 2020 ("SOC") at paras 7 and 8.

(b) Duty to exercise his powers for a proper purpose.

(c) Duty to avoid conflicts of interests. The defendant should not place himself in a position of conflict, or profit from his position of trust. The defendant should also not advance or promote his personal interests or external interests over that of the plaintiff's interests.

(d) Duty not to disclose or make any improper use of confidential information belonging to the plaintiff.

(e) Duty to act with reasonable care and diligence.

17 For the Water Project, the plaintiff contends that the defendant breached his duties as follows:

(a) by failing to obtain approval from the Board prior to entering the Framework Agreement;[26]

(b) by failing to obtain approval from the Board prior to the payment of the Deposit to CA Trading;[27] and

(c) by failing to exercise the plaintiff's contractual right under the Framework Agreement to seek a refund of the Deposit when the Draft Mazars Report contained negative findings.[28]

18 For the Solar Project, the plaintiff's claim centres on the Payments.[29] The plaintiff's contentions are that the defendant authorised the Payments:

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26 SDB, SOC at para 15.

27 SDB, SOC at para 16.

28 SDB, SOC at paras 18 – 21.

29 SDB, SOC at para 31.

(a) without authorisation from the Board;

(b) despite there being no contractual obligation for the plaintiff to do so;

(c) without ensuring the contractual milestones for payments set out in the Three Letters were met;

(d) without ensuring that DWS obtained the necessary documents to perform due diligence on the Solar Project as required by the Three Letters; and

(e) without ensuring that DWS completed satisfactory due diligence for the Solar Project.[30]

19 The plaintiff further alleges that the defendant failed to take any steps to recover the Payments even though no due diligence was completed on the Solar Project and the Solar Project SPA was not entered into.[31]

20 Accordingly, the plaintiff seeks a declaration that the defendant breached his fiduciary duties to the plaintiff and claims losses amounting to US$1.6m, comprising US$1m for the Water Project and US$600,000 for the Solar Project.

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30 SDB, SOC at para 32.

31 SDB, SOC at para 34.

The defendant's case

21 I now turn to the defendant's case as pleaded in the Defence (Amendment No 1). The defendant denies breaches of his fiduciary, common law or statutory duties.

22 For the Water Project, as the executive chairman of the Board, and the managing director and chief executive officer of the plaintiff, the defendant had the authority of the Board to enter into the Framework Agreement and to make payment of the Deposit.[32] It was also his *bona fide* belief that the acquisition of Canwaco would be for the benefit of the plaintiff, and that the entry into the Framework Agreement and the payment of the Deposit would further the plaintiff's interests.[33]

23 As for the Draft Mazars Report, the defendant contends that he was not responsible for the conduct of the due diligence of the Water Project, and that other members of the Board and/or employees were responsible for carrying out the Water Project (including the conduct of the due diligence exercise, the further conduct of the negotiations, finalising the Water Project SPA or asking for the refund of the Deposit).[34]

24 For the Solar Project, the defendant pleads that he was not responsible for the day-to-day management and or oversight of the operations of DWS, other than his general duties as a member of the Board.[35] Regarding the First Payment and the Second Payment, the defendant avers that Mr Zach Thye

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32 SDB, Defence (Amendment No. 1) dated 16 June 2021 ("DA1") at paras 33 and 37.

33 SDB, DA1 at para 24.

34 SDB, DA1 at paras 41 – 42.

35 SDB, DA1 at para 48.

authorised the payments within his authority as the managing director of DWS.[36] For the Third Payment, the defendant authorised the payment in his capacity as managing director and chief executive officer of the plaintiff.[37] The defendant further contends that the Payments were made in furtherance of the plaintiff's commercial interest.[38]

25 For both the Solar Project and the Water Project, the defendant contends that even if he is found to be in breach of his duties, he should be excused of liability under s 391 of the Companies Act 1967 ("CA") as he acted honestly and reasonably.

The issues

26 Based on the contentions between the parties, the main issues of fact for determination for the Water Project are:

(a) whether the entry into the Framework Agreement and the payment of the Deposit required the approval of the Board; and

(b) whether the defendant was responsible for the due diligence of the Water Project, and relatedly, whether the findings within the Draft Mazars Report required the defendant to proceed to obtain a refund of the Deposit.

27 Broadly, there are also two issues of fact for determination for the Solar Project as follows:

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36 SDB, DA1 at para 53A.

37 SBD, DA1 at para 53C.

38 SDB, DA1 at para 54A.

(a) Whether the defendant properly authorised the Payments. Within this issue, there are several sub-issues. These are whether Board authorisation was required; whether there was any contractual obligation requiring the defendant to make the Payments; whether the plaintiff failed to ensure that the contractual milestones set out in the Three Letters were met; and in particular, whether the defendant failed to ensure that DWS obtained the necessary documents to perform due diligence on the Solar Project and if DWS completed satisfactory due diligence for the Solar Project.

(b) Whether the defendant should have procured the recovery of the Payments.

28 Before dealing with these issues in turn, I briefly set out the law concerning a director's duties to a company.

The analysis

Breach of director's duties

29 The company-director relationship is a well-established category of fiduciary relationship. A director is to act honestly and *bona fide* in the interests of the company: see *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at para 8.16. The test in respect of this duty is both subjective and objective. The subjective element lies in the court's consideration of whether the director had exercised his discretion *bona fide* in what he considered was in the interests of the company while the objective test requires an assessment of whether an intelligent and honest man in the position of a director of a company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the

benefit of the company: see *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [35] and [36].

30 Directors also owe a duty of care, skill and diligence to their company. These duties are not core fiduciary duties the way that the duties of honesty, fidelity and loyalty are: see *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 ("*Then Khek Koon*") at [104]. The standard of care, skill and diligence expected of a director is subject to a minimum objective standard which entails the obligation to take reasonable steps to place oneself in a position to guide and monitor the management of the company: see *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [137].

31 Section 157(1) of the CA also imposes duties on directors. These statutory duties to act honestly and reasonably are largely similar in content and scope as the abovementioned duties.

32 As set out at [16] above, the plaintiff pleads a wide range of duties owed by the defendant. However, based on the nature of the alleged breaches, it is primarily the duty to act *bona fide* in the interests of the company, and the duty of care, skill and diligence, which are engaged. In particular, while a director is clearly proscribed from profiting from his fiduciary position, and from putting himself in a position where his own interests and his duty to his principal are in conflict (*Ho Yew Kong* at [135]), there is no allegation that the defendant did so. With that, I turn to the allegations in relation to the Water Project.

Whether the defendant breached his duties in respect of the Water Project

The Framework Agreement and the payment of the Deposit

33 It is undisputed that the defendant caused the plaintiff to enter the Framework Agreement as well as make payment of the Deposit. Parties, however, disagree on whether Board approval was required for these acts.

(1) Whether Board approval was required to enter into the Framework Agreement

34 The plaintiff contends that Board approval was required because the Framework Agreement was a binding agreement that obligated the plaintiff to proceed with the Water Project in the absence of any negative, unfavourable, or adverse financial or technical findings.[39] Moreover, the defendant could not rely on the Group Charter as it was not effectively implemented.[40]

35 In response, the defendant argues that the Group Charter only requires approval from the Board for transactions that involve acquisitions or disposals.[41] The Framework Agreement was not one such transaction. Instead, it was an agreement to enable the plaintiff to demonstrate good faith and to perform due diligence checks. Accordingly, no approval from the Board was required to enter into the Framework Agreement.

36 I agree with the defendant for the following reasons. Contrary to what the plaintiff contends, I find the Group Charter to have been effectively implemented. The Group Charter features in the plaintiff's Annual Reports from

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39 Plaintiff's closing submissions dated 16 December 2021 ("PCS") at para 29.

40 PCS at para 33.

41 Defendant's closing submissions dated 20 December 2021 ("DCS") at paras 13 – 28.

2017 to 2020.[42] Across all four years, the reports highlight the role of the Group Charter, stating that the "Group Charter sets out the Group's internal guidelines for material contracts and investments exceeding specified amounts". Second, in an Internal Audit Report prepared by BDO LLP dated 22 May 2020 ("Internal Audit Report"), several references to the Group Charter were made by the plaintiff.[43] By way of example, under a section pertaining to the Water Project, the plaintiff commented under a section titled "Management Comments" at point (iv) that "Fund transfer will strictly follow the authorisation limit that approved in Group Charter". I should highlight that the Internal Audit Report is a document released after the defendant's departure from the plaintiff.

37 In this connection, I reject the plaintiff's reliance on Ms Tan's evidence that the Group Charter did not operate on her mind when she dealt with the Framework Agreement to support its position.[44] I do not see how this aspect of Ms Tan's evidence supports the plaintiff's contention especially if the requirements within the Group Charter did not govern the Framework Agreement in the first place. In fact, Ms Tan's evidence is that the Group Charter sets out important limits and parameters regarding investments and funding and was operative in the plaintiff at the material time.[45] Similarly, I reject the plaintiff's reliance on Mr Teh's evidence.[46] The reason Mr Teh agreed that the Group Charter was not so relevant to him was because he did not play

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42 AB, Volume 5, Tab 222 (p 2871), Tab 224 (p 3062), Tab 226 (p 3264), and Tab 227 (p 3448).

43 AB, Volume 2, Tab 116 (p 1197).

44 PCS at para 33(b).

45 Transcript, 3 November 2021, page 47, lines 26 – 30.

46 PCS at para 33(a).

a direct role in managing the company. He agreed that the Group Charter, however, applied to other individuals such as the defendant.[47]

38 Therefore, the evidence shows that the Group Charter was operative and applicable. In turn, the terms of the Group Charter provided guidance on when Board approval would be required.[48] Of particular relevance is cl 2(iv) which states that Board approval is required for contracts which are "BOO/BOT/Other Investments" that exceed S$20m in value. As the Water Project is a "BOT" project, being a project which involves the building, operation and transfer of the plant, this would be the relevant provision if the Group Charter were to apply to the Framework Agreement.

39 In my view, the Group Charter, and consequently cl 2(iv), only applies to contracts involving *acquisitions* that exceed S$20m in value. This is the defendant's evidence.[49] This is also Ms Tan's evidence.[50] As pointed out by Ms Tan, the Group Charter relies on the total construction costs for "BOO/BOT" contracts to determine what level of approval is required (as set out in cll 2(iv) and 2(iii) of the Group Charter). A holistic examination of cl 2 of the Group Charter bears out Ms Tan's contention. References are made to "Investment Consideration" (see cl 2(iii)) as well as payment terms which designate the delivery of equipment and plant as milestones (see cl 2(i)).

40 The issue therefore turns on whether the Framework Agreement involves an acquisition. In my view, the Framework Agreement does not.

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47 Transcript, 2 November 2021, page 32, lines 15 – 19.

48 AB, Volume 2, Tab 126 (p 1435).

49 TKM's Affidavit at para 158.

50 Transcript, 2 November 2021, page 70, lines 24 – 25.

41 First, the payment of the Deposit under the Framework Agreement merely entitles the plaintiff to exclusively negotiate in good faith for the purchase of 90% of equity interest in Canwaco, subject to certain requirements. The Framework Agreement does not mandate the purchase of Canwaco. Clauses 4 and 6 make clear that the Framework Agreement does not involve the acquisition of equity interest in Canwaco from CA Trading, and that such an acquisition will be carried out by way of a separate agreement (*ie,* the Water Project SPA).

42 Second, I refer to the comments by the plaintiff's management in the Internal Audit Report.[51] The auditors noted that it was unclear whether the Framework Agreement created a binding agreement on the terms of the acquisition. In response, the plaintiff clarified that the moneys disbursed under the Framework Agreement indicated good faith and enabled them to conduct further due diligence prior to the signing of any binding agreement, that being, an agreement involving an acquisition. In the plaintiff's subsequent announcement dated 7 August 2020 regarding the plaintiff's withdrawal from the Water Project,[52] at paragraph 2.1, the plaintiff stated that the acquisition of an equity interest in Canwaco is subject to the entry by parties into a "definitive sale and purchase agreement". By the above, it is clear that the plaintiff acknowledged and recognised that the Framework Agreement is *not* the acquisition agreement for the equity interest in Canwaco.

43 Third, it is the evidence of all the witnesses that the Framework Agreement does not involve an acquisition. The defendant stated that the

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51 AB, Volume 2, Tab 116 (p 1193).

52 AB, Volume 3, Tab 196 (p 1936).

Framework Agreement is not a definitive agreement to purchase Canwaco[53] and maintained this position under cross-examination. Ms Tan testified that the Framework Agreement does not concern a disposal or acquisition as entry into it was a "tentative step to discover whether or not this acquisition will be undertaken by the company or not".[54] Mr Teh also agreed that the Framework Agreement is a "non-binding agreement" with the aim of obtaining more detailed information regarding the transaction.[55]

44 Accordingly, I find that the Framework Agreement does not involve an acquisition or disposal. This means that the defendant was not required under the Group Charter to obtain approval from the Board to enter into the Framework Agreement. I would further add that even if it were the case that the Group Charter did not only apply to contracts involving acquisitions (*ie*, that it applies to the Framework Agreement), it remains the case that Board approval would not be required because the value involved in Framework Agreement did not exceed S$20m (see [50] below).

(2) Whether Board approval was required for the payment of the Deposit

45 I now turn to the payment of the Deposit as required under the Framework Agreement. I will deal with this issue briefly. The payment of the Deposit is contingent on the Framework Agreement. If the Framework Agreement did not require Board approval, there is no reason why the payment of the Deposit requires Board approval. After all, the payment of the Deposit flowed from the entry into the Framework Agreement. Indeed, the plaintiff's case is as such. Having found that Board approval was not required for the

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53 TKM's Affidavit at para 101.

54 Transcript, 3 November 2021, page 69, lines 28 – 29.

55 Transcript, 2 November 2021, page 35, lines 11 – 18.

Framework Agreement, I find that no Board approval was required for the payment of the Deposit.

(3) Matters that were not pleaded

46 I note two related submissions advanced by the plaintiff regarding the Deposit. The first pertains to the quantum of the Deposit being unreasonable,[56] and the second focuses on how the defendant recognised that it was a huge risk to pay the Deposit to CA Trading but proceeded to do so anyway.[57]

47 As argued by the plaintiff, these constitute further allegations of breaches of duties by the defendant (distinct from those set out above at [17]). Both contentions should have been but are not pleaded in the Statement of Claim. It is trite that the court may not allow a party to pursue a certain line of argument if pleadings are not sufficiently specific: see *Tan Kia Poh v Hong Leong Finance Ltd* [1993] 3 SLR(R) 429. Also, the matters contended were not contained in any of the affidavits of evidence-in-chief filed by the plaintiff's witnesses. The plaintiff's counsel only alluded to these issues during his cross-examination of the defendant. When the problem was highlighted by the court and counsel for the defendant, counsel for plaintiff acknowledged this issue and stated that rectification steps may be taken if needed.[58] Yet, no steps were taken to obtain leave of court to amend the Statement of Claim to include these allegations. As such, I find that the plaintiff should not be allowed to rely on these arguments.

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56 PCS at paras 38 – 39.

57 PCS at paras 40 – 46.

58 Transcript, 5 November 2021, page 63, lines 3 – 10.

48 However, for completeness, I deal with them. In relation to the quantum of the Deposit, the plaintiff refers to the Framework Agreement which valued the 90% of the equity interest in Canwaco at US$2.97m.[59] Therefore, the plaintiff contends that the quantum of the Deposit is far too high. In response, the defendant explains that the value of Canwaco is greater than just the MyLoc Drinking Water Plant.[60] Apart from the MyLoc Drinking Water Plant, there were two other "greenfield" projects, *ie,* projects which have not been built by Canwaco, that went towards the defendant's estimation of the value of Canwaco to be worth over US$13m. The Deposit, being between 5% to 10% of the total value of the Water Project, was appropriate.

49 I accept the defendant's explanation. The Framework Agreement was for the intended purchase of equity interest in Canwaco and not just the MyLoc Drinking Plant. Canwaco's value could therefore include the two "greenfield" projects. This coheres with cl 5 of the Framework Agreement that provides for technical due diligence. As the defendant explains, this necessarily refers to the two "greenfield" projects because the MyLoc Drinking Water Plant was already in operation and would not require due diligence.[61] I also note that the defendant's explanation is consistent with Mr Teh's understanding of the Water Project to not only entail the acquisition of an existing operating plant but to also involve future expansions.[62]

50 As for the defendant's estimation of the value of two "greenfield" projects, this is based on his commercial experience and expertise, something

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59 PCS at para 38.

60 Transcript, 5 November 2021, page 49, lines 22 – 23.

61 Transcript, 5 November 2021, page 50, lines 9 – 22.

62 Transcript, 2 November 2021, page 82, lines 9 – 22.

the plaintiff accepts. The defendant provided a lengthy explanation regarding his methodology in his evaluation of the "greenfield" projects.[63] Indeed, the plaintiff does not dispute the propriety of the defendant's methodology. I also note that the defendant's estimation of Canwaco is also consistent with the evidence of Ms Tan who stated that the entire project amount was in "the ballpark of US$13 to 15 million".[64] Accordingly, I find that the quantum of the Deposit, which was derived from the value of Canwaco, was not unreasonable.

51 I move on to the recipient of the Deposit. The plaintiff contends that the defendant acted recklessly by making payment to CA Trading on the basis that it is a Vietnamese company. I find insufficient basis for the plaintiff to make this allegation. I note the commercial relationship between the defendant, Mr Dao and CA Trading. Mr Dao was a consultant for the plaintiff and worked with the plaintiff on four to five separate projects apart from the Water Project at the material time.[65] This forms the backdrop against which the defendant stated that he trusted Mr Dao and that he was confident that he could recover the Deposit if the need arose. In any event, the plaintiff failed to adduce any evidence to suggest that Mr Dao and CA Trading were unreliable partners. It seems to me that the plaintiff's position was quite untenable. With that, I turn to the second aspect in relation to the Water Project.

The Draft Mazars Report

52 The contents of the Draft Mazars Report are undisputed. There are two issues for my determination. First, whether the defendant was responsible for

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63 Transcript, 5 November 2021, page 44 line 8 to page 45 line 3.

64 Transcript, 3 November 2021, page 56, lines 1 – 6.

65 Transcript, 3 November 2021, page 104, lines 26 – 28.

the due diligence exercise; and second, whether the defendant should have sought a refund of the Deposit based on the findings in the Draft Mazars Report.

(1) Whether the defendant was responsible for the failure to complete the due diligence

53 The plaintiff's claim is that the defendant is responsible for the failure to complete the due diligence process.[66] In response, the defendant maintains that the due diligence exercise was delegated to the Board, specifically, the Investment Committee ("IC").[67]

54 Once again, I agree with the defendant. The Water Project would have fallen within the remit of the IC even though the IC was formed on or about 3 April 2018, after the plaintiff entered into the Framework Agreement.[68] Clauses 9.2(A) and 9.2(B) of the terms of reference of the IC exclude projects that the plaintiff had already invested in.[69] However, the Water Project was still in the business development phase.[70] No investments had been made. The Water Project would thus have come under the purview of the IC. This is also internally consistent with the defendant's narrative that the Framework Agreement was an agreement designed to ensure commitment to the eventual acquisition of Canwaco. I further note the email correspondence between members of the IC and Mazars. The defendant was not copied on any correspondence between 18 April 2018, the date on which Mazars provided a signed copy of the finalised engagement letter to Mr Teh, to 6 August 2018,

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66 PCS at para 47.

67 SDB, DA1 at para 41.

68 Defendant's reply submissions dated 6 January 2022 ("DRS") at para 74.

69 AB, Volume 6, Tab 228 (p 3615).

70 Transcript, 5 November 2021, page 70, lines 19 – 25.

when the Draft Mazars Report was provided.[71] Accordingly, I find that the plaintiff has not shown that the defendant was responsible for the due diligence exercise.

(2) Whether the defendant should have procured the plaintiff to exercise its rights to seek a refund of the Deposit

55 The Draft Mazars Report flagged several areas of financial concern and was incomplete due to technical issues relating to the salinity of the water. The issue is whether this warranted the defendant's intervention to seek a refund of the Deposit.

56 The plaintiff contends that the defendant was aware of the issues and should have intervened.[72] In response, the defendant submits the Draft Mazars Report was not so damning to require the defendant's intervention.[73] The defendant also highlights that the due diligence process was incomplete up till August 2020 (well after he left the plaintiff).[74]

57 The technical issues impeding the completion of the Draft Mazars Report related to the salinity of the water source. I accept the defendant's explanation that he did not intervene because he thought that the due diligence process was ongoing.[75] That this was his state of mind is borne out by the following. In an email correspondence dated 28 December 2018, which the defendant was copied on, Ms Tan requested Mr Dao to provide more data

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71 AB, Volume 1, Tabs 13 – 15.

72 PCS at para 55.

73 DCS at para 35.

74 DCS at para 36.

75 TKM's Affidavit at para 142.

regarding the salinity of the water.[76] Subsequently, on 25 February 2019, at an audit committee meeting, the defendant explained that the due diligence process for the Water Project was ongoing.[77] In any event, the evidence of Ms Tan suggests that the technical issues faced were not so severe to warrant the defendant's intervention at that point in time. Ms Tan opined that the salinity of the water would have become a dealbreaker only after 2020. By then, the salinity of the water should have been mitigated by measures implemented.[78] This, in fact, appears to be what happened. On 7 August 2020, the plaintiff withdrew from the Water Project on the basis that technical issues could not be resolved. This connotes that due diligence was not completed until well after the defendant's departure from the plaintiff. Given the plaintiff's own treatment of the technical issue, it cannot be said that the defendant was unjustified in allowing the due diligence process to continue at the material time.

58 As for the financial findings of Draft Mazars Report, I agree that they were not so damning to require the defendant to obtain a refund. Mr Teh, who received the Draft Mazars Report, thought that findings were not so severe that he had to inform the management of the Draft Mazars Report.[79] In fact, Mr Teh did not even bring the Draft Mazars Report to the defendant's attention. At that point, Mr Teh was more concerned about the salinity problem as it had a material bearing on the costings of the water plant.[80] Accordingly, I disagree that the defendant should have intervened to seek a refund of the Deposit.

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76 AB, Volume 1, Tab 43.

77 AB, Volume 2, Tab 108 (p 1043).

78 Transcript, 3 November 2021, page 76, lines 6 – 16.

79 Transcript, 2 November 2021, page 25 line 27 to page 26 line 5.

80 Transcript, 2 November 2021, page 23, lines 10 – 19.

Conclusion

59 Based on the discussion above, I find that the plaintiff has not established the alleged breaches against the defendant. Accordingly, I do not find the defendant to be in breach of his duties in respect of the Water Project.

Whether the defendant breached his duties in respect of the Solar Project

60 Turning to the Solar Project, by way of reminder, DWS, a subsidiary of the plaintiff, was tasked to execute the Solar Project. Therefore, DWS was the signatory for the relevant documents with CDGE, especially the 30 October 2018 LOI and the 30 November 2018 Advancement Letter. Mr Zach Thye is the managing director of DWS.

61 For the purposes of the Solar Project, essentially, the defendant had approved an inter-company loan of US$1m from the plaintiff to DWS. This was based on the corporate structure of the Darco Group where the plaintiff, as a holding company, would raise funds to be channelled to subsidiaries for investment purposes.

62 Against this backdrop, the extent of the defendant's involvement in the Solar Project is disputed. The plaintiff asserts that the defendant retained control over the Solar Project.[81] The defendant, however, disagrees, and argues that Mr Zach Thye, and not him, played the central and pivotal role in the Solar Project. During cross-examination, the defendant explained that his involvement in the Solar Project was tangential, with Mr Teh and Ms Tan updating him on certain matters when necessary.[82] This is consistent with Mr Teh and Ms Tan's

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81 PCS at para 58.

82 Transcript, 5 November 2021, page 74 line 28 to page 75 line 1.

evidence, who both state that Mr Zach Thye was the key person in charge of the Solar Project.[83] Crucially, Mr Teh understood that Mr Zach Thye was "leading the team to do some due diligence internally."[84] I should also add that while all Payments were routed through the defendant, the documentary evidence shows that the Payments were only disbursed upon Mr Zach Thye's instructions.

63 With the context in mind, I turn to the issues of whether the defendant properly authorised the Payments and whether the defendant should have procured a refund of the Payments.

Authorisation of the Payments

64 A total of US$600,000 was paid to Mr Dao's personal bank account from the plaintiff in three separate tranches. Each payment was authorised by the defendant and Mr Zach Thye.

(1) Whether Board approval was required for the authorisation of the Payments

65 It is undisputed that the defendant did not obtain approval from the Board before authorising the Payments. Parties disagree as to whether the defendant required approval from the Board. Based on my observations concerning the Group Charter at [38], I find that that no approval was required. As stated, the Group Charter is operative. By the Group Charter, Board approval is required for contracts involving acquisitions of a value greater than S$20m. The Payments were made pursuant to the 30 November 2018 Advancement Letter, which is a preliminary agreement to facilitate the entry into the Solar

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83 Transcript, 2 November 2021, page 67, lines 5 – 15; see also 3 November 2021, page 18, lines 5 – 15.

84 Transcript, 2 November 2021, page 68, lines 18 – 21.

Project SPA. By itself, it does not involve any acquisitions. Accordingly, I find that Board approval was not required for entry into the 30 November 2018 Advancement Letter or for the Payments to be made.

(2) Whether there were any contractual obligations requiring the defendant to make the Payments

66 The plaintiff's position is that the defendant authorised the Payments in the absence of any contractual obligations requiring him to do so.[85] The plaintiff's argument, however, is unmeritorious. It erroneously assumes that contractual obligations arise only with the Solar Project SPA. However, payments may be legitimately made to a counterparty in the early stages of a project as a demonstration of good faith or commitment, as was done in the Water Project, by way of the Framework Agreement, and in the Solar Project by way of the 30 November 2018 Advancement Letter.

67 Indeed, the Payments were made to facilitate processes such as due diligence with the aim of assessing whether to proceed with the Solar Project. The defendant's argument is borne out by the evidence. In fact, in cross-examination, Ms Tan stated that the signing of the letters of intent began the "tentative step to discover whether or not this acquisition will be undertaken by the company or not".[86] The defendant's position is also consonant with the plain language of the Three Letters. I, therefore, disagree with the plaintiff's contention.

68 Further, I observe that the basic requirements for a legally enforceable agreement are present in the 30 November 2018 Advancement Letter.

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85 SDB, SOC at para 32(b).

86 Transcript, 3 November 2021, page 69, lines 20 – 31.

Pertinently, there is consideration. For the provision of documents for review and the opportunity to enter into the Solar Project SPA, DWS is to pay a commitment fee. In fact, in arguing that the defendant should have recovered the Payments, the plaintiff is relying on DWS's rights under cl 3 of the 30 November 2018 Advancement Letter, which is an obligation imposed on CDGE, and thus contrary to this argument.

(3) Whether the defendant ensured the contractual milestones in the Three Letters were met before authorising the Payments

69 I begin by determining what contractual milestones are imposed by the Three Letters. Presumably, by contractual milestones, the plaintiff is referring to any conditions or obligations to be fulfilled before authorising the Payments. In my view, only the 30 November 2018 Advancement Letter is relevant. The 19 October 2018 LOI is an unsigned document which bears no weight in the legal relationship between DWS and CDGE.[87] The 30 October 2018 LOI, which was signed by DWS and CDGE, contains a payment schedule which sets out the payment of US$1m over five tranches with the requisite conditions.[88] It suffices to note at this point that it was then varied by the 30 November 2018 Advancement Letter.

70 The 30 November 2018 Advancement Letter was signed by DWS and CDGE.[89] The defendant suggests that the 30 November 2018 Advancement Letter is focused on facilitating the process of preliminary verification which would lead to obtaining Board approval for the Solar Project SPA, while the 30 October 2018 LOI is focused on the verification of conditions precedent and

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87 AB, Volume 2, Tab 88.

88 AB, Volume 2, Tab 89.

89 AB, Volume 2, Tab 90.

conditions subsequent in the Solar Project SPA.[90] On the other hand, the plaintiff argues that the 30 November 2018 Advancement Letter modified the payment schedule set out in cl 5 of the 30 October 2018 LOI.[91]

71 In my view, the 30 November 2018 Advancement Letter clearly *modifies* the payment schedule set out in the 30 October 2018 LOI. The conditions set out for the fourth and fifth tranches of payment under the 30 October 2018 LOI are identical to the conditions set out for the fifth and sixth tranches of payment under the 30 November 2018 Advancement Letter. Moreover, both letters deal with the sum of US$1m. This is not to say that the defendant's interpretation of the two letters of intent is incorrect. It is right in so far as the 30 November 2018 Advancement Letter does not vary the conditions precedent or conditions subsequent in the Solar Project SPA, and only sets out a new payment schedule for the payment of US$1m. In other words, the conditions precedent and conditions subsequent in the 30 October 2018 LOI ought to be read together with the payment schedule set out in the 30 November 2018 Advancement Letter. Indeed, the defendant's understanding is that the 30 November 2018 Advancement Letter had the effect of "fine-tuning" the 30 October 2018 LOI and the two should be read together.[92] Read together, the only requirements concerning the Payments are set out in the payment schedule of the 30 November 2018 Advancement Letter.

72 I reproduce the three clauses from the 30 November 2018 Advancement Letter relevant for present purposes:[93]

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90 DCS at para 92.

91 PRS at para 20.

92 Transcript, 9 November 2021, page 19, lines 1 – 10.

93 AB, Volume 2, Tab 90.

(a) **Mode of Advancement**

The Advance Sum shall be payable to you in Six (6) tranches in the following manner and priority: -

a. The **first tranche** advancement of USD200,000.00 only upon acceptance of the terms and conditions herein;

b. The **second tranche** advancement amounting USD300,000.00 (US Dollars Three Hundred Thousand) only, upon our legal representative receipt of all relevant legally binding agreements, legal title, licenses, approval, permits from the relevant authorities and other relevant documents related to the Company and its assets to enable our legal representative to conduct a complete legal due diligence. Refer to due diligence list.

c. The **third tranche** advancement amounting to USD100,000.00 (US Dollars One Hundred Thousand) only upon completion of due diligence exercise to the satisfaction of the Purchaser.

73 I now turn to the issue of whether the defendant ensured that the conditions set out for the Payments were met. It is apposite to reiterate that the plaintiff's case against the defendant relates to his conduct in his capacity as a director of the plaintiff. In other words, it is about his actions *qua* director in a holding company in relation to a subsidiary which the holding company had agreed to lend monies to for the purpose of executing a project.

(A) FIRST PAYMENT

74 The plaintiff argues that the defendant authorised the payment without a signed copy of the 30 November 2018 Advancement Letter, as well as that the defendant failed to conduct any due diligence.[94] The defendant does not dispute these omissions[95] but takes the position that Mr Zach Thye authorised the payment.

75 The plaintiff relies on the observations of the High Court in *AMG Global Investments & Holdings Pte Ltd (in Liquidation) v Ong Kee Ming Richard and another* [2021] SGHC 222 ("*AMG Global Investments*") at [29] for the proposition that "a director who authorises a payment must believe that the payment is for a proper purpose of the company, and in forming that belief, he needs to take reasonable steps to understand the transaction, and *to have sight of supporting documentation*" [emphasis added]. To this end, the plaintiff appears to suggest that the defendant should have obtained a signed copy of the 30 November 2018 Advancement Letter.[96]

76 In *AMG Global Investments*, the directors authorised payments out of a company directly to third parties purportedly for various company purposes. In contrast, the present case involves authorisation of payments in the nature of an inter-company loan provided by a holding company to a subsidiary for a specific project executed by the latter. Read in context, it is not apparent to me that the plaintiff may rely on *AMG Global Investment* without more to contend that the

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94 PCS at paras 79 and 81.

95 Transcript, 9 November 2021, page 24 line 31 to page 25 line 1; see also Transcript, 9 November 2021, page 17, lines 3 – 9.

96 PCS at para 81.

defendant had to obtain a signed copy of the 30 November 2018 Advancement Letter.

77 The fact of the matter is that the 30 November 2018 Advancement Letter was signed and Mr Zach Thye received a copy of the 30 November 2018 Advancement Letter *before* authorising the payment.[97] For all intents and purposes, the First Payment was entirely in accord with cl 1(a). Further keeping in mind that the Solar Project was to be executed via DWS, of which Mr Zach Thye was the managing director, I find that the defendant was entitled to rely on Mr Zach Thye to ensure that cl 1(a) was met.

78 As for the defendant's failure to conduct due diligence, it is unrealistic to expect the defendant to have done so before authorising the First Payment. The purpose of the 30 November 2018 Advancement Letter is to, among other things, facilitate due diligence, as evinced from cll 1(b) and 1(c). Against this backdrop, the defendant cannot be faulted for not conducting due diligence by then.

(B) SECOND PAYMENT

79 The plaintiff argues that the defendant authorised this payment knowing that an entity known as Terrawood, and not CDGE, was in possession of certain critical documents for the Solar Project.[98] The plaintiff also suggests that the real reason the defendant authorised the payment was for Mr Dao to pay one "Mr Luc" for his shares in CDGE, as opposed to the fulfilment of cl 1(b).[99] The defendant's position, again, is that Mr Zach Thye authorised the payment. The

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97 AB, Volume 2, Tab 40.

98 PCS at para 87.

99 PCS at para 84.

defendant also accepts that he was aware as of 28 December 2018 via email correspondence that Terrawood held certain critical documents.

80 From the outset, the plaintiff's argument suffers from a lack of particularity. The plaintiff grounds their argument in the defendant's authorisation despite his knowledge that Terrawood held certain documents. Yet, it is unclear what was expected of the defendant in these circumstances. During the cross-examination of the defendant, the plaintiff intimated that the defendant should have reviewed certain documents. Yet, nothing more was pleaded or argued on this front. It remains unclear what the defendant should have reviewed. For instance, would an update from Mr Teh informing the defendant that all relevant documents were received have sufficed? Or would the defendant have been required to review all documents personally? The point here is that the plaintiff has not shown what the defendant failed to do.

81 The plaintiff also fails to demonstrate that the conditions in cl 1(b) were not met. The Second Payment was made on 9 January 2019. This is approximately two weeks after the defendant learnt via email correspondence that certain documents were not held by CDGE. It is unclear what happened in the intervening period. Critically, no evidence was led by the plaintiff to show that these critical documents remained missing by 9 January 2019. In fact, the documentary evidence appears to suggest otherwise. Following the email dated 28 December 2018, Mr Dao replied on 29 December 2018 stating that two out of three key requirements for the Solar Project, namely the in-principle approval to purchase electricity from EVN, the electric authority in Vietnam,[100] and the clearance of the land, have been fulfilled. Mr Dao further suggested that DWS acquire both CDGE and Terrawood to acquire the documents held by

[100] Transcript, 9 November 2021, page 46, lines 24 to 28.

Terrawood and indicated he would refund the moneys if parties were unable to agree.[101] Thereafter, there was no further email correspondence on this issue and Mr Teh complied with Mr Thye's instructions to make payment to Mr Dao.

82 I would further highlight the role of Mr Zach Thye in the email correspondence concerning the Second Payment. In response to inquiries raised by Mr Dao on 26 December 2018, Ms Tan indicated that Mr Zach Thye would be providing the input for the Solar Project. On 29 December 2021, Mr Zach Thye, again, took the lead in seeking further documents from Mr Dao in respect of cl 1(b).[102] This demonstrates his oversight and management of the Solar Project. That this is so is unsurprising given the evidence of both Ms Tan and Mr Teh that Mr Zach Thye took charge of the due diligence process as well as that cl 1(b) concerns the provision of documents to DWS, not the plaintiff. Based on the above, I find it was not unreasonable for the defendant to rely on Mr Zach Thye to ensure that all documents required under cl 1(b) were received.

83 As for the plaintiff's claim that that the real reason the defendant authorised the payment was to fund Mr Dao's buyout of "Mr Luc", I find this to be a bare assertion. While the defendant was aware of Mr Dao's intention, this does not mean that he authorised the payment for this reason. There is no evidence to that effect. Instead, the defendant steadfastly stated that the payment was authorised because Mr Zach Thye was satisfied with the list of documents required for due diligence. For the remaining issue concerning the proposed acquisition of Terrawood and CDGE, in so far as the defendant is concerned, he understood the nature and consequence of the proposal, and was able to explain the commercial basis for such a move in the context of the Solar Project. The

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101 AB, Volume 1, Tab 46.

102 AB, Volume 1, Tab 45.

plaintiff has insufficient basis to dispute that the defendant approved the release of the payment for DWS to carry on with the Solar Project.

(C) THIRD PAYMENT

84 The plaintiff contends that the defendant failed to ensure that due diligence was fulfilled despite having oversight of the Solar Project.[103] Consequently, the defendant cannot rely on Mr Zach Thye and should have taken steps to satisfy himself that the payment was proper.[104] The defendant, again, argues that Mr Zach Thye was in charge of the due diligence of the Solar Project, and that he relied on Mr Zach Thye to ensure that cl 1(c) was fulfilled.[105] In any event, the subsequent conduct of the plaintiff suggests that nothing untoward was uncovered by the due diligence.[106] The defendant further argues that his authorisation of this payment was in good faith and within his authority.

85 To demonstrate that the defendant had oversight of the Solar Project, the plaintiff relies on the following undisputed sequence of events which is supported by documentary evidence. On 14 February 2019, Mr Teh received a WhatsApp text message referencing an agreement on the payment of US$100,000 with one "Mr Thye" for the Solar Project from Mr Dao.[107] The defendant accepts that Mr Dao is referring to him.[108] Thereafter, Mr Teh called the defendant to seek authorisation for the payment of moneys. On obtaining the defendant's approval, Mr Teh emailed Mr Zach Thye on 14 February 2019

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103 PRS at paras 26 and 27.

104 PRS at para 29.

105 DCS at para 109.

106 DCS at paras 114 – 118.

107 AB, Volume 1, Tab 54.

108 Transcript, 9 November 2021, page 36, lines 2 to 6.

stating that the defendant has agreed to Mr Dao's request to release US$100,000. Mr Teh also asked if Mr Zach Thye needed to do any checks with his legal counsel.[109] On 15 February 2019, Mr Zach Thye gave Mr Teh the go-ahead and payment was disbursed.

86 The foregoing does not show that the defendant had oversight of the Solar Project and that the defendant should be responsible for due diligence.[110] While the defendant gave authorisation on 14 February 2019, Mr Teh did not immediately release the moneys to Mr Dao. Instead, Mr Teh checked with Mr Zach Thye whether payment could be made to Mr Dao. Only upon Mr Zach Thye's approval did Mr Teh prepare the payment. This suggests that Mr Zach Thye's, and not the defendant's, authorisation was critical. This is also consistent with the First and Second Payments where payments were only made *after* Mr Zach Thye gave authorisation, as well as Mr Teh's evidence that he was instructed to *defer* to the instructions of Mr Zach Thye for the Payments.[111] In this respect, I find the defendant's response in cross-examination helpful:[112]

> Q: Right. And, in other words, would you agree with me that Mr Zach Thye was the last person who knew about the 100,000 that was supposed to be disbursed to Mr Dao?
>
> A: Disagree, disagree. You are already too much on the word (indistinct) I can agree to it. *I agreed to the principle*

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109 AB, Volume 1, Tab 55.

110 PRS at para 27.

111 TCS's Affidavit at para 48.

112 Transcript, 9 November 2021, page 37, lines 11 – 16.

> *that if conditions are satisfied, they will release the money.*
>
> [emphasis added]

87 In other words, the nature of the defendant's prior authorisation was akin to an in-principle approval for the moneys to be disbursed in so far as the conditions are satisfied. Ultimately, it was up to Mr Zach Thye to request the payment of moneys if he was satisfied that the conditions were met. As such, I disagree that the defendant was responsible for due diligence.

88 I now turn to the issue of whether the defendant did enough to ensure that cl 1(c) was fulfilled. The plaintiff's argument suffers, once again, from the same deficiencies as highlighted in relation to the Second Payment. It is unclear what is required of the defendant in this particular instance. The plaintiff has not demonstrated what the defendant has *failed* to do. This is especially so given that DWS is clearly front and centre in the due diligence process. Clause 1(c) requires DWS to be satisfied with the due diligence process while cl 1(b), which cl 1(c) is predicated on, requires documents necessary for due diligence to be provided to DWS.

89 Moreover, there is no evidence to show that cl 1(c) was not fulfilled, *ie*, that DWS was not satisfied with the due diligence conducted on the Solar Project. In the Internal Audit Report concerning the Solar Project, the plaintiff explained that they sought to sell the Solar Project because of a change in management and that the "withdrawal was not due to unsatisfactory [sic] of the due diligence".[113] This was understood by Mr Teh and Ms Tan to mean that nothing unsatisfactory was found in the due diligence process. I note that it can also be inferred from the plaintiff's attempt to sell their interest in the Solar

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113 AB, Volume 2, Tab 116 (p 1206).

Project that the due diligence process was satisfactory. For a sale to occur, the plaintiff must necessarily acquire an interest in the Solar Project. This suggests that the plaintiff was ready to enter into the Solar Project SPA as per cl 1(d) of the 30 November 2018 Advancement Letter, which indicates that cl 1(c) was fulfilled.

(D) CONCLUSION

90 In sum, I find that the plaintiff has failed to prove that the defendant did not discharge his duties in authorising the Payments.

91 The Payments were objectively in the best interests of the plaintiff. They were meant to facilitate the eventual entering of the Solar Project SPA and the Power Purchase Agreement by DWS. They were not meant to benefit Mr Dao (to enable him to pay one "Mr Luc" for his shares in CDGE). As the defendant highlights, the Power Purchase Agreement is essential to the success of the Solar Project as it would be the primary means of revenue. In turn, the success of the Solar Project would generate a new stream of revenue for DWS (and therefore for the plaintiff). Accordingly, I find both the objective and subjective elements of the duty to act honestly and *bona fide* in the best interests of a company to be fulfilled.

92 The defendant's reliance on Mr Zach Thye to ensure that the conditions were met is also reasonable. This is especially so given that the evidence shows that the conditions for all Three Payments appear to be fulfilled and no allegations have been raised against Mr Zach Thye, who was primarily responsible for the Solar Project, for authorising these payments in breach of the 30 November 2018 Advancement Letter. Thus, the defendant has also acted reasonably, and with due care, skill and diligence.

93 Even if, *arguendo*, the defendant was in breach of his duty to act reasonably, or with due care, skill and diligence, when he authorised the payments, the plaintiff would have to demonstrate an unbroken chain of causation leading from the defendant's breach to the losses suffered: see *Then Khek Koon* at [142]. The loss of US$600,000 suffered by the plaintiff was caused by its withdrawal from the Solar Project. Had the Solar Project continued, the Payments would have gone towards the acquisition of CDGE and not materialized as losses. Eventually, the withdrawal was not due to any of the breaches of the conditions in the 30 November 2018 Advancement Letter, such as dissatisfactory due diligence. Instead, it was based on commercial reasons. In this connection, it seems to me that the defendant's breaches would have been immaterial as the losses were independent of them, and accordingly, the plaintiff cannot show an unbroken chain of causation.

Recovery of the Payments

94 I turn next to the plaintiff's contention that the defendant should have recovered the Payments as no due diligence was conducted and no Solar Project SPA was entered into.[114] In making this argument, the plaintiff is referring to purported breaches of cl 1(c) (completion of due diligence exercise) and cl 1(d) (signing and completion of the Solar Project SPA) of the 30 November 2018 Advancement Letter which would thereby trigger DWS's right to seek a refund of the Payments under cl 2.

95 I disagree that the defendant was required to recover the Payments. As observed earlier, the conduct of the plaintiff and the evidence of Ms Tan and Mr Teh show that due diligence was conducted and nothing untoward was

114 SDB, SOC at para 34.

uncovered. There was therefore no basis for the defendant to recover the Payments. As for the failure to enter into the Solar Project SPA, the defendant may only be faulted, if at all, up to the date of his departure from the plaintiff. This was on 31 May 2019, approximately three months after the Third Payment. The plaintiff therefore has to demonstrate that DWS should have entered into the Solar Project SPA within that brief period of three months. Short of that, the defendant should have sought recovery of the Payments. However, the plaintiff has not furnished any evidence why this should have been the case. Indeed, as pointed out earlier, the plaintiff eventually decided against proceeding further with the Solar Project (although there was no indication that due diligence was unsatisfactory). In any event, it is unclear why the defendant, and not DWS, would be expected to seek a refund of the Payments given that DWS was the contracting party to the 30 November 2018 Advancement Letter.

Matters that were not pleaded

96 Again, I note that the plaintiff raises a host of other allegations against the defendant that were not pleaded. These mainly pertain to the defendant's conduct concerning the 19 October 2018 LOI and the 30 October 2018 LOI. The Statement of Claim, however, centres solely on the defendant's conduct concerning the Payments. Based on my observations earlier at [47], the plaintiff cannot rely on these allegations. In any event, these allegations are also unsustainable.

97 The plaintiff argues that the defendant did not respond to comments posed by Mr Wang Zhi, a member of the Board, after the 19 October 2018 LOI was circulated. The plaintiff avers this is because the defendant wanted to keep the Board out of the Solar Project as the Solar Project would not pass muster as

a valid commercial transaction.[115] I disagree. Had the defendant intended to keep the Board out of the Solar Project, he would not have even circulated the 19 October 2018 LOI. This is especially so given that the Group Charter did not require him to obtain Board approval at this juncture. Moreover, the plaintiff's suggestion that the Solar Proect was not a valid commercial transaction is premised on the concerns raised by Mr Wang Zhi, which involved, among other things, the plaintiff's lack of expertise in the solar power industry. These concerns, while legitimate, were not so damning that the validity of the Solar Project as a commercial transaction was placed in question. Without more, the plaintiff's allegation is untenable.

98 The plaintiff also argues that the defendant misled the Board with a press release dated 31 October 2018. The press release caused the Board to believe that due diligence would be carried out prior to the signing of a sale and purchase agreement and that no payment would be made at that time.[116] This, however, differed from the contents of the 30 October 2018 LOI which had then superseded the 19 October 2018 LOI. I disagree that the press release conveyed the impression that no payment would be made. The press release was silent about whether any payments would be made and does not suggest that no payment would be made.

Conclusion

99 Based on the above, I find that the defendant was not in breach of any of his duties in respect of the Solar Project.

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115 PCS at para 73.

116 PCS at para 76.

Conclusion

100 Before I conclude, I observe that commercial decisions made *bona fide* by directors may (for any number of reasons) turn out to be poor loss-making ones. This aptly captures the situation at hand. In this connection, I am perturbed that the plaintiff's only two witnesses, Ms Tan and Mr Teh (who worked on the two projects), were not able to testify with any degree of conviction that there was anything seriously wrong with the defendant's actions at the material time. It appears to me that it is the Board which has become aggrieved with the outcomes of the two projects. It is trite that the court is slow to interfere in commercial decisions which have been made honestly even if they turn out, on hindsight, to be financially detrimental: *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [37]. As I explained above, I do not find any breaches of director's duties by the defendant. Accordingly, I dismiss the plaintiff's claim. Parties are to provide their costs submissions by letter to the court within 2 weeks.

Hoo Sheau Peng
Judge of the High Court

Yeo Lai Hock Nichol and Qua Bi Qi (Solitaire LLP) for the plaintiff;
Aqbal Singh s/o Kuldip Singh, Wong Yiping and Cheng Cui Wen
(Pinnacle Law LLC) for the defendant.