IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN:

(1) SAM PRECIOUS METALS FZ-LLC
(2) SAMI RIYAD MAHMOUD ABU AHMAD
(3) ROSYSON FZE

Claimants

and

(1) SNYDER PRIME LIMITED
(2) PHOEBE LEAH TOOKER
(3) SHAKTHI CHAUHAN

Defendants

Hearing :	**27-29 May 2024 and 10-11 July 2024**
Counsel:	Asha Bejoy instructed by Al Hajeya Alnoobi Advocates and Legal Consultants for the Claimants Santanu Ghosh instructed by the Defendants
Judgment :	**23 December 2024**

JUDGMENT OF JUSTICE ANDREW MORAN

UPON consideration of the Case Management Order of 8 May 2024 and the Agreed List of Issues for Trial

AND UPON reading the agreed Trial Bundle and the Supplementary Bundle of Documents for use at the Trial of the matter

AND UPON hearing counsel for the Claimants and counsel for the Defendants and witnesses for the parties at the Trial of those issues held on 27-29 May 2024 and 10-11 July 2024 before Justice Andrew Moran

AND UPON reading written closing submissions and additional and supplementary closing submissions of Counsel for the Claimants and the Defendants

AND UPON reviewing the Court file and submissions contained therein

AND UPON reviewing the Rules of the DIFC Courts 2014 (the "RDC")

IT IS HEREBY ORDERED, DECLARED AND DIRECTED THAT:

1. The Claimant SPM's claim for damages, by reason of SPL's alleged failure to comply with its obligations to provide gold as working capital to SPM, is dismissed.

2. The Claimant SPM's claim for damages for SPL's alleged failure to cooperate with the liquidation procedures of the subsidiary company named M/s. Sam Precious Metals FZE, Sharjah branch is dismissed.

3. As to the effect of the agreement recorded in the shareholder's Resolution dated 31 December 2020, it is ordered and declared as follows:

(a) The Resolution dated 31 December 2020 (the "Resolution") records an agreement between the Parties who have subscribed to it by their signing of it, that is legally valid, binding upon them and enforceable by them.

(b) The terms of the agreement contained in the Resolution are declared to have the following effect:

(i) Provision of Gold:

Claimants No. 2 (Mr Sami) and 3 (Rosy) shall provide 100 kilograms of gold as working capital in equal ratio to Claimant No. 1 (SPM) starting from 1 January 2021 to cover the shortfall created by Defendant No. 1's (SPL's) failure to provide that amount of gold to SPM by that date.

(ii) Ineligibility for Dividends and Fees:

Defendants No. 1, 2 and 3 shall not be eligible for any dividends or fees from Claimant No.1 for twice the number of days they take to cover their shortfall in providing the 100 kilograms of gold, starting from 1 January 2021 and ending on 31 August 2023. So that in the result of Defendants No. 1 and 3 not having provided any of the required 100kgs of gold to SPM by 31 August 2023, SPL shall not be entitled to receive its due share of dividends until 2 May 2026. From and including that date, SPL shall be entitled once again to receive its proportionate share of dividends to which it is entitled, upon any subsequent declaration and distribution of dividends SPM may

make. The dividends that would have been payable to Defendant No. 1 up to and including 1 May 2026, shall be redirected to Claimants No. 2 and 3 as compensation for their contribution of 100 kgs of gold to SPM, instead of by SPL

(iii) Compensation to Claimants No. 2 and 3:

Claimants No. 2 and 3 shall be compensated from Defendant No. 1's dividends (25% and the 5% referred to in (iv) below) in equal shares, for twice the number of days starting from 1 January 2021 until SPL fulfils its obligation, with the last day for this compensation to be provided, being 1 May 2026.

(iv) Defendant No. 3's Consultancy Fees:

Defendant No. 3's consultancy fees, initially set at 10% of Claimant No. 1's profits, shall be revised to 5% payable to Claimant No. 2 and Claimant No. 3 in equal shares of 2.5% as part of their compensation for providing the 100 kilograms of gold.

4. All of the Defendants' claims for relief in the form of declarations, set out at paragraphs (a)-(d) of their written closing submissions are dismissed.

5. Pursuant to Part 27 of the Rules of the Dubai International Financial Centre Courts 2014 (the "RDC") and RDC 27.8 in particular:

(a) On or before the expiry of 14 days from this order, the parties shall exchange lists of 3 qualified mediators who are available to conduct a mediation of their outstanding disputes, in all proceedings before these Courts.

(b) Within 7 days thereafter, the parties shall in good faith endeavour to agree upon a mediator from the lists so exchanged and provided

(c) Failing such agreement, the case shall be re-listed before Justice Andrew Moran to enable the Court to facilitate agreement on a mediator

(d) The parties shall take such serious steps as they may be advised to take, to resolve their disputes by Mediation.

(e) If the case is not finally settled at Mediation, the parties shall inform the Court, by letter, prior to this case and the related cases before the Court being re-listed, what steps towards mediation have been taken and (without prejudice to matters of Privilege) why such steps have failed. If the parties fail to initiate mediation a Case Management Conference is to be listed for further consideration of the case and all related cases.

(f) The Parties shall bear their own costs of the Mediation and shall pay in advance any reasonable fees demanded by the mediator in equal shares.

6. Save in relation to orders for costs already made in favour of any party, the costs of this part of the proceedings so far and the trial, shall be reserved.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 23 December 2024
At: 10am

SCHEDULE OF REASONS

TB/n/n - Trial Bundle/page/paragraph if appropriate

SB/n/n - Supplementary Bundle/page/paragraph if appropriate

T/n/n - Transcript/day/page

A: Introduction and Background

1. The issues presently before the Court for its determination, following a trial which took place before me, between 27-29 May and 10-11 July 2024 (the "Trial"), were originally defined by agreement of the parties and recorded in the Amended Case Management Order of H.E. Justice Nassir Al Nasser of 28 September 2023, along with a number of other issues, trial of which other issues, has been deferred by me in my subsequent Case Management Order ("CMO") of 8 May 2024.

2. That order was made by me following an adjourned and re-convened Pre Trial Review, which adjournment had enabled me to consult with the Deputy Chief Justice H.E. Justice Ali Al Madhani, in relation to the optimal case management of these complex proceedings and related proceedings in cases numbered, CFI-006-2023 and CFI-019- 2023 - the latter then being before him for determination of an application by the Defendants (including all Claimants in these proceedings and three others), for permission to appeal his order granting the First Claimant (the First Defendant in these proceedings) permission to commence a derivative action on behalf of the First Claimant in these proceedings.

3. It serves to import parts of certain paragraphs of the CMO of 8 May 2024, to explain how the Court sought to focus the pleadings and evidence before it during this trial, on the issues to be tried, extracted from the original pleadings and witness statements that had been filed in the case. These had been presented in a seriously non-compliant form, for what is required in pleadings and witness statements in an action before the Court. They were not confined to or focussed on the claim and defence (or the agreed issues for trial) in this action CFI-030-2023, and were comprised of both sides venting and repeating most, if not all of their grievances against each other, that were and are the subject of other proceedings before the Court between them. In order to rectify this incoherent and unhelpful presentation of the case by counsel, the Court directed inter alia, and that by specified dates, the Parties should do as follows:

"(1) [Determined the issues for Trial set out in section C of this Judgment.]

(2) [Adjourned other issues for case management and trial at a later date.]

(3) All pleadings of the parties filed in these proceedings shall be amended forthwith, by temporary striking out of all claims, allegations and defences which are irrelevant and/or immaterial to the issues now for trial at the hearing on 27 May 2024. For the avoidance of doubt, this direction is for clarity and focus on the relevant issues for trial, ...

(4) All witness statements filed in these proceedings shall be edited forthwith, by removal of all evidence given in support or in defence of claims, allegations and defences which are irrelevant and/or immaterial to the issues now for trial at the hearing on 27 May 2024. For the avoidance of doubt, this direction is to confine evidence given to the issues for trial on 27 May 2024, ...

(5) The directions given in paragraphs 3 and 4 shall be achieved by the parties' representatives exchanging and filing redacted and clean versions of all pleadings and witness statements by the date specified in paragraph 6 below. The parties are to strive to redact all material that is irrelevant to the issues now for trial and they are to compile a hearing bundle containing only documents which are necessary and relevant for the determination of those issues..."

Unfortunately, the plain and obvious purpose of these directions was frustrated by the serial failures of the Defendants or their Counsel, to properly plead and provide evidence to support the case, submissions and allegations, they/he ultimately came to advance against the Claimants, without having put them to the witnesses properly or at all, in his written closing submissions. Despite this, and not knowing exactly where the fault lies, the Court makes it clear that it has decided the issues for trial on the evidence that was placed before it, and the submissions from each side grounded on that evidence. It has drawn no adverse inferences against the Defendants, based on the manner in which their case was presented and argued by their counsel. The Court will say more about both counsels' submissions below.

4. All of these cases stem from bitterly contested and closely related shareholder and corporate disputes, arising between the same and other parties to these and the related proceedings. They arise in connection with a joint venture the principal parties have entered into, as shareholders, using the vehicle of the First Claimant, Sam Precious Metals FZ-LLC ("SPM" hereafter) as the joint venture vehicle (the "Joint Venture" or "JV" hereafter).

5. Confining myself in this introduction to outlining the material factual background to the claims and issues for trial now before me, before setting out my findings of fact in detail, and those issues as defined and now determined in this judgment, that background may be described briefly as follows.

6. Using the abbreviated names of the parties adopted at the trial, the First Claimant, SPM, is a precious metals refinery based in Dubai Production City, UAE, providing gold, silver, and other precious metals refining services using advanced facilities. After receiving trade name approval and a registration certificate on 27 February 2018, SPM registered as a Free Zone Limited Liability Company in accordance with the provisions of the Dubai Creative Clusters Private Companies regulation 2016 on 12 March 2018. The Second Claimant Mr. Sami Riyad Mahmoud Abu-Ahmad ("Mr Sami") is the holder of 50% of the shares issued in the First Claimant and the Third Claimant, Rosyson FZE, ("Rosy") a corporate vehicle under the ownership and control of a Mr Anuj Garg ("Mr Garg"), is the holder of 25% of the First Claimant's shares.

7. The First Defendant Snyder Prime Limited ("SPL") is a company incorporated in the Abu Dhabi Global Market and provides investment capital and strategic support for various projects and business ventures. The Third Defendant, Shakthi Chauhan ("Mr Shakthi") was at the time of the various agreements hereafter described and referred to, the holder of shares in SPL which he subsequently transferred to the Second Defendant, Phoebe Leah Tooker. SPL was, until the Share Transfer Agreement (the "STA") hereafter referred to, the holder of 50% of the shares in the First Claimant, half of which shares (25% of the shares in SPM), it transferred to the Third Claimant under the STA, in circumstances and for the reasons hereafter described.

8. The background to the claim herein, is that SPM was established by Mr. Sami on 12 March 2018. On 27 March 2018, a Memorandum of Understanding (the "MOU") was signed between the parties Mr. Sami and SPL, for the purpose of using SPM as a joint venture vehicle to carry out activities related to refining and trading of gold and other precious metals. Under the terms of the MOU (as detailed below) SPL was required, inter alia, to provide SPM with 200kg of 99.99% concentration gold as working capital for a period of five years, in addition to the payment of USD 2 million to it.

9. Under the terms of the MOU, this gold was to be returned by SPM to SPL after five years from the date of advancement. The Proposed Transaction and "Gold Advancement" from SPL, required fulfilment of three conditions set out in the terms of the MOU below, including execution of Definitive Agreements. It is a fundamental issue in this case as to whether the MOU was binding or became binding in accordance with its terms, (despite it containing a provision that it was not legally binding), by means of almost immediate consent and contrary mutual intention of the parties, evidenced by their conduct in reciprocally performing under it, in accordance with its terms, as waived and/or varied, or, more correctly under the applicable law, as modified by them by mere agreement under Article 5 of the Contract Law (vide infra for full and proper citation). This is in circumstances where it is agreed that the Definitive Agreements contemplated were never in fact executed.

10. The MOU required the provision of 200kg of gold as working capital from SPL to SPM as detailed in its relevant term set out below. The Claimants allege that only 100kg of gold, in the form of USD of equivalent value to that amount of gold, with a margin to cater for gold price fluctuations, was supplied by SPL, via Al Aseel FZE, to SPM on 1 September 2018. This supply of only this amount of finance, through the agency and support of Mr Garg, allegedly represented a shortfall of 100kg of gold from the promised advancement and provision of 200kg of gold under the MOU. It is alleged by the Claimants that this shortfall lasted from 1 September 2018 until 4 February 2020, when Al Aseel withdrew the equivalent USD (plus the margin) advanced, to the value of 100kg of gold.

11. Immediately following the withdrawal of that capital, which event was a motivating factor for it, the STA was executed between SPM, Rosy, and SPL on 5 February 2020. It contained terms whereby SPL agreed to transfer 50% of its shareholding in SPM, that is, 50 ordinary shares of SPM to Rosy, in order to discharge its indebtedness to it. This motivation for and purpose of the STA is recorded in its recitals as set out below.

Although there was a lock-in period of five years in the MOU, restricting SPL from selling its shares to a third party, the lock-in or restriction was waived in the interests of preserving the reputation of SPM. From the date of the STA therefore, SPL's infusion or contribution of capital via Al Aseel, of the equivalent amount of USD (with a margin) to 100kg gold was withdrawn from SPM; and SPL was then only required to provide 100kg of gold instead of the initially agreed 200kg of gold, as working capital to SPM, by 31 December 2020. It is not disputed that this substituted contract and obligation (as the Court hereafter finds it was) under the STA, was not performed by SPL. It is alleged by the Claimants that as a direct result of SPL's failure to fulfil its contractual obligations under both the MOU and the STA, SPM has suffered a loss of profit due to the resulting shortfall of 100kg of gold for use as working capital, during its operations. That loss of profit has been calculated by the expert witness, Mr Akash Bassi of Grant Thornton Accountants, in the amount of USD 10,126,813.00. This alleged loss forms the subject matter of the first claim and group of issues for the court's determination in this part of these proceedings.

12. The second discrete claim and group of issues for the court's determination, stems from the First Defendant's alleged failure to co-operate in the closure and liquidation procedures for SPM's subsidiary, known as Sam Precious Metals Sharjah Branch, pursuant to a decision of the Board of Directors of 19 September 2021, which has resulted in continuing losses to date of (allegedly) the running expenses for that Branch, which would have been avoided but for the alleged failure of co-operation.

13. The third discrete claim and group of issues for determination by the court after the trial, stems from the agreements of the shareholders of SPM, at a meeting witnessed by its Board of Directors, which took place on 31 December 2020. These agreements are recorded in a document which has been referred to at the trial as *"The Resolution of 31 December 2020"* or simply *"the Resolution"*, although it is more correctly described in the Trial Bundle Index (page 105-107) as *"Minutes of Shareholders Meeting"*. I will refer to it in this judgment (for consistency with the transcript) by the former descriptions. It is not however disputed that the Resolution records an agreement reached on its date between the shareholders in SPM, at a meeting which was convened to deal with the First Defendant's admitted breach of its obligation under the STA to provide SPM with 100kgs of gold by 31 December 2020, for use as working capital, to be maintained at SPM for a term of five years from the original commencement of the company's operations, i.e. to 31 August 2023.

14. The meaning and common intention of the shareholders in reaching their agreement recorded in the Resolution, was not entirely clear to me upon an initial reading of it; but, as explained in detail below, its meaning and the common intention of the parties in reaching their agreement, was clearly explained to me by Mr Garg when giving evidence. His evidence in this respect of its meaning and the intention of the Parties in agreeing to it, was not challenged by counsel for the Defendants nor contradicted in any evidence given on their behalf. As will become apparent, the effectiveness and binding character of the agreement recorded in the Resolution is now challenged on the basis that it represents or is the unenforceable product of minority oppression of Mr Shakthi/SPL by the Claimant majority shareholders in SPM.

15. There was a suggestion in the Claimants' skeleton argument, that Mr Shakthi was coerced into signing the Resolution. However, at the start of the trial, I raised the suggestion of coercion with counsel for the Defendants, as the basis for it was not clear from the redacted pleadings and evidence filed, or from the issues listed for trial, inquiring whether that suggestion was a matter for trial before me in this part of the proceedings. During the trial competing evidence was given from both sides about how and why the agreement in the Resolution was reached, and what was intended by it, so that it became clear that in order to determine the effect of the agreement, it would be necessary to consider any potentially vitiating factor such as coercion or oppression, if and insofar as it was pleaded and evidenced. At the conclusion of the hearing, upon my further inquiry with counsel, the position was clarified, and it was confirmed by both counsel, that in finding the facts as to how the agreement recorded in the Resolution of 31 December 2020 was reached and its effect, it was for me to determine whether there had been coercion or oppression of a minority in its conclusion, to determine its effect. It was also confirmed by other questioning by me of counsel during the hearing, that what both parties were seeking, was relevant findings of fact and law, which would determine the effect of the shareholders' agreements recorded in the Resolution, the obligations (and implicitly their corresponding rights) of the shareholders under their agreement recorded in the Resolution, and relief in the form of declarations as to its effect, specifying those rights and obligations of the shareholders, arising under and by virtue of it. The Defendants' suggestion of coercion of Mr Shakthi in his signing of the Resolution, now seems to be merged and advanced in the Defendants' written closings (as far is it is possible to comprehend the case being put without pleading or evidence to support it), with the Defendants' lately developed case of minority shareholder oppression, relying largely on cases decided in India under principles of Indian Law. As will become apparent, on the facts as the Court finds them to be, these cases and principles, and the submissions founded upon them, are respectively irrelevant and unsustainable.

16. Although I considered all of Counsels' opening and closing submissions on fact and law before reaching my determination of the issues which follows, save in respect of their supplementary submissions on Articles 100 and 101 of the Contract Law, which are dealt with where I consider the effect of those articles when interpreting the agreements in Section E below, I will deal with the rest of their submissions later in my judgment.

B: The main witnesses, their important evidence and the Court's relevant findings of fact:

17. This section of the judgment sets out the Court's view of the truthfulness and reliability of the main witnesses called before it, together with its key findings of fact by reference to the evidence it accepts and rejects. This will serve to explain and elucidate the formation of, and interpretation of the relevant clauses in, the three consecutive agreements, which have defined the changing rights and obligations of the parties. Rather than providing a bare recital of the relevant terms of the agreements followed by separate interpretation of them, the Court will, in Section E of the Judgment, incorporate its findings of fact with the recital of their terms, which are a part and product of this joint venture story. This is done in order to ascertain and demonstrate the Parties' common intentions in concluding their agreements, and so interpret them properly in accordance with Part 5 of the Contract Law on interpretation. It serves to explain the dynamics behind the changes to the Parties, their rights and obligations under their changing shareholder agreements pursuant to which they have progressed their joint venture. This approach, explained in more detail below, will inevitably result in some duplication of findings, which cannot be avoided.

18. I begin with an overview of the principal witnesses, the evidence they gave on key issues and their truthfulness and reliability.

19. I found Mr Sami and Mr Garg to be witnesses doing their best to tell the Court the truth of their dealings with Mr Shakthi in the establishment and progression of this joint venture and in the series of shareholder agreements pursuant to which it was incepted and developed. In contrast, I found Mr Shakthi to be untruthful in his denials of the promises and representations he made to Mr Sami concerning his ability to inject secure

long-term capital in the form of an investment of 200kgs of gold he had available from his own resources, which would be secure, come at no additional cost beyond his shareholding in the joint venture, and be available to ensure the growth of SPM in accordance with the business plan Mr Sami had created and devised.

20. I found Mr Shakthi's attempts to deny his failure to bring into the enterprise that which he had promised, to be transparently false and contradicted by his own hand and willing agreement to the STA and the Resolution. His evidence was contrived, rehearsed, and consequently delivered in a gabbling, at times incomprehensible fashion, which the Court was unable to restrain, and which it found to be essentially untrue in its important details.

21. His attempts to diminish the value and importance of the skills and enterprise brought into the venture by Mr Sami, which were its very foundation, and to misrepresent his/SPL's deficient substituted performance, by way of introductions of insecure, trading account investments of gold from various sources, at cost, as if they were the contractual performance that he/SPL had promised, were an unedifying and futile attempt to mislead the Court. Whilst it is true that Mr Shakthi did provide some essential seed capital for the business, it was significantly less than he had promised for the 50% share of what he obviously realised would be and became, a profitable venture. Consequently, (including for the reasons given hereafter in relation to particular parts of their evidence), in all instances where the evidence of Mr Sami and Mr Garg diverges from the evidence of Mr Shakthi on the crucial issues for my determination in this case, I prefer and accept the evidence of Mr Sami and Mr Garg and reject the evidence of Mr Shakthi to the contrary.

22. I accept the Claimants' case and evidence that Mr Sami, is a chemist by profession, who is well-known in the gold refining industry for his knowledge, technical expertise and extensive experience in managing and operating gold refineries. I accept that previously, he was a manager of the Al Etihad Gold Refinery, one of the largest gold refineries in the UAE, and prior to that, had held senior positions in other refineries, with 20 years of experience managing and operating refineries in UAE. I also accept that Mr Sami understood certain specific challenges that the industry faced in the UAE and saw a business opportunity that would succeed if he could address these challenges. I accept that one such unique challenge that he needed to address and overcome, was that unlike in other gold hubs in the world, for example, Switzerland, the UAE does not have bullion banks that fund gold purchases for refineries. Mr Sami realised that if in setting up SPM, he could secure sufficient working capital in the form of physical gold available to it; and maintain that gold in the business for an extended period, that would give him a unique advantage in the UAE market.

23. I find and accept that this was a key requirement in the venture that was his conception, and I accept Mr Sami's evidence that his search for, and acceptance of a partner investor, depended on the ability of that investor to deliver on this requirement of a secure physical gold investment, at no additional running cost and without any lien, for a period ultimately fixed at five years from the commencement of refinery operations. In short, Mr Sami recognised the advantage of having a fund of gold working capital to hand, so that he could have an advantage in the purchase of scrap gold metal, to enhance the prospects of his refining business.

24. This primary requirement for working capital of physical gold, to be retained and used for a period of five years, is to be distinguished from gold received on a short-term regular basis that would also come into the business at a cost, for trading on a day to day basis, through affiliated entities. This additional provision of gold was contemplated and provided for under the terms of the initial agreement between the parties (see MOU "Advancement of Gold" section, final paragraph), but that form of provision of gold was additional gold for the purposes of facilitating the operation of the JV business, not the crucial provision of secure physical gold capital, that as intended and calculated by Mr Sami, would give this enterprise its unique advantage in the UAE. I accept and find as a fact, that Mr Shakthi falsely represented to Mr Sami, on behalf of himself and SPL, that he/it was in a position to make available to SPM the vital requirement of working capital of physical gold from sources in countries in Latin America and Africa, which he falsely claimed he had access to. In the event, he never provided that primary requirement of working capital and from the outset, made available in lieu thereof, only currency in the form of USD to the value of 100kg of gold plus a margin. This was borrowed money made available through an associate entity of Mr Garg, Al Aseel. It was an insecure investment, which was liable to be, and in the event was, withdrawn from and had to be paid back by SPM to Mr Shakthi/SPL's creditor Al Aseel, under the terms of the STA. Also, under the terms of that agreement, it was replaced by an equivalent investment of 100kg of gold, provided by Mr Garg's corporate vehicle Rosyson (Rosy) FZE, in return for 50% of SPL's shares - i.e 25% of the issued share capital of SPM.

25. Turning to particular parts of the evidence, I accept Mr Sami's evidence as to how and in what substituted form, SPM received and accepted SPL's investment of the equivalent in USD of 100kgs of the 200kgs of gold it had promised to advance before, and under the MOU, found at [T/1/118-121]. No claim is made in respect this half of the promised advance of gold being provided in the form and manner described in his evidence, but it is important to consider that evidence and identify its legal effect under the Contract Law, to distinguish it from the introduction of gold from third party associates of SPL, to be used in their gold trading accounts with SPM.

26. This half of the promised advance of gold, was not in the form of 100kgs of physical gold from SPL to be held secure for five years from the commencement of operations, but in dollars (USD 4.9m) borrowed from a third party associated company of Mr Garg (Al Aseel) through his agency, as was later revealed to Mr Sami. Mr Sami's evidence was clear, even if delivered in a language that is not his first language, that he/SPM accepted this substituted performance and investment in place of the performance promised in the MOU. It was an agreed amount, with a protective margin added to guard against gold price fluctuation, in excess of the then current price or value of 100kgs of gold. Mr Sami repeatedly told me in the pages of transcribed evidence referred to (and I accept it as the truth) that he ***agreed*** with Mr Shakthi/SPL to accept this mode of performance. Mr Sami gave no evidence of him/SPM reserving any rights of action in respect of Mr Shakthi/SPL's failure to produce and advance the whole 200kgs of physical gold as the MOU had required, nor in respect of the uncontractual mode of providing half of it. What happened and what was agreed and accepted by Mr Sami/SPM is encapsulated in the following short passage of his evidence [T/1/119-120].

> "MR SAMI: If the gold came as a physical 100 kilograms, there is no need for a margin, but because he brought to me in currency, all the fluctuation moving up and down. So like this we are taking a little more money and we agree that money to face total 4.9, the 100 kilograms facing 4.9. My condition is to be bring 100 kilograms but we agree because to protect the fluctuation of gold he has to pay the margin extra and we agree that time it is for the year 2018 and 2019, the range of gold is 4.3, 4.6, 4.7. We agree to place that here at 4.9."

Reference should also be made to his evidence at [T/1/164-167] where Mr Sami explained how he "had no problem" with him bringing in the

equivalent of gold in that manner in the form of currency with a margin of excess, so long as it was advanced into the company's gold investment account, and not just gold brought into a third party trading account with SPM.

27. I accept the evidence of Mr Sami, borne out by the recitals and terms of the STA, that when that agreement was concluded (as dealt with below), there was a clearing of the accounts between SPM and SPL and their associated trading parties, as explained by him at [T/1/125-128], because there was a mutual intention to effect a complete settlement of liabilities between them, to enable all of the parties to the STA to make a fresh start in the financing of, and changed participation in the JV. Mr Sami has given no evidence that at this critical stage of the venture, when then current liabilities inter se the participants were being settled, there was any suggestion or reservation of rights by SPM to claim damages against SPL for its failure to advance the full 200kgs of physical gold. I regard this as further evidence supporting my view and finding, that as to 100kgs of gold, there was, under Article 100 of the Contract Law, accepted substitute performance of the Advancement of Gold obligation in the MOU by Mr Sami/SPM as to that amount. In contrast, there was no evidence of accepted substituted performance of the advancement of the other half of the 200kgs promised, by SPL introducing third party gold into their trading accounts with SPM. To the contrary, I accept Mr Sami's evidence that he was regularly chasing fulfilment of outstanding advancement of another 100kgs of physical gold from Mr Shakthi/SPL, which in the end led to the discovery of Mr Shakthi/SPL's indebtedness to Mr Garg/Rosy and their associates; and thereby, to the STA. As explained in more detail below, this was the agreement of a substituted contract between the Parties, in the terms of the STA, under Article 101 (1) of the Contract Law. It had the effect of discharging Mr Shakthi/SPL's obligation to advance the balance of 100kgs of the 200 kgs of gold promised under the MOU, under Article 101 (2) thereof. Furthermore, by virtue of that Article 101 (2), SPL's breach of the substituted STA obligation to advance 100kgs of gold by 31 December 2020, did not give SPM, as obligee under it, a right to enforce the original obligation in the MOU.

28. I accept the evidence of Mr Sami and Mr Garg in their witness statements and given orally by them (confirmed in the recitals to the STA) as to the substantial indebtedness of SPL to Mr Garg/Rosy and/or its associates (amounting to USD11,875.588 - corrected from AED to USD) at [T/1/123] - and of how Mr Sami learned of it, when seeking advancement of the balance 100kgs of gold promised by Mr Shakthi/SPL under the MOU at the end of 2019, and was then told by Mr Shakthi that he could not "bring it" in [T/1/130]. I am satisfied that accepting the reality of the situation that Mr Shakthi could not perform his obligations under the MOU at that time, and again without reservation of any rights to claim damages in respect of that breach, Mr Sami/SPM agreed to what is contained in, and was given effect to, by the STA. I accept the evidence of Mr Sami at paragraphs 16 and 17 of his statement [TB/340] and at [T1/130] and of Mr Garg to like effect, as to how and why the STA was agreed with Mr Garg and Mr Shakthi. I accept Mr Sami's evidence as to his shock at Mr Shakthi's revelations of his indebtedness and the need to make sure there was a new investor aware of the condition for the provision of 200kgs of gold into SPM. I also accept that Mr Shakthi was seeking time to put in his substituted investment of 100kgs of gold until the end of the year (2020) and that he represented that he was sure "he will bring it in faster". I accept the evidence of Mr Sami in paragraph 19 of his witness statement [TB/341] that it was on the back of this representation and position taken by Mr Shakthi, that the Buy Back provisions in Clause 6 of the STA came to be included. I accordingly find, for those reasons and by that means, it was Mr Shakthi/SPL (who at that time was still 100kg of gold short in breach of his MOU obligation), who sought to bring in a new partner, and sought substitution of the lock-in provisions preventing a sale by SPL of any of its shares in the MOU, together with the provisions of the STA, which allowed him/SPL to transfer half of his shares in SPM to Mr Garg/Rosy, and thereby pay off his/SPL's debts owed to Mr Garg/Rosy. The evidence reveals a JV shareholder, in substantial debt, and in irremediable breach of his/its obligations towards the JV entity and his/its partner, who was striving to preserve and protect his/its investment. It also reveals no doubt commercially motivated indulgence on the part of his/its JV partner and creditor to assist him/it in doing so. I therefore reject any suggestion that at this stage in the Parties' dealings, there was any form of oppression or coercion brought to bear on Mr Shakthi/SPL by Mr Sami/SPM or Mr Garg/Rosy, to cause him/SPL to enter into the STA. The situation that caused Mr Shakthi to promote and execute the STA, was commercial and financial difficulty, entirely of his own making.

29. It is in my judgment, plain and obvious that these truthful witnesses for the Claimants, Mr Sami and Mr Garg, are describing the agreement and acceptance of a substituted contract (the STA) under the Contract Law, between the parties to the MOU, SPM (the JV vehicle for whose benefit it had been concluded), SPL and a new additional party (Mr Garg/Rosy), in place of the MOU.

30. As explained further below, SPL's obligation in relation to its provision of gold under the MOU by the time of commencement of operations by SPM, was discharged upon an acceptance by Mr Sami/SPM of the substituted contract containing an obligation undertaken by Rosy to provide 100kgs of gold immediately; and an obligation undertaken by SPL, to provide 100kgs by 31 December 2020. For reasons of analysis given hereafter, I accept this evidence which is to the effect, and gives rise to the clear inference I draw, that Mr Sami/SPM as obligees under the MOU, accepted the STA in satisfaction of SPL's existing obligation under the MOU for the Advancement of Gold, under Article 101 (1) of the Contract Law, which obligation was thereby discharged by virtue of Article 101 (2) of that law.

31. It should also be noted in passing, whilst dealing with this evidence, that under Article 101 (2) a breach of the STA, the substituted contract, by SPL (which as will become apparent occurred on 31 December 2020 by SPL's breach of Clause 4.2 thereof) does not give SPM a right to enforce the original Advancement of Gold obligation in the MOU, which, by its claim in these proceedings for damages flowing from the failure to bring into SPM 100kgs of gold, it is now misguidedly seeking to do. The evidence of Mr Sami and Mr Garg, makes it plain beyond argument, that the STA (in particular, Rosy's investment under its terms) was necessary for the survival and advancement of the JV. It provided an obvious benefit to SPM, which it accepted without qualification or reservation of any rights of suit it now belatedly seeks to resurrect, in its claim for damages before the Court.

32. Moving to the evidence concerning the next step in the dealings between these Parties, I accept the evidence of Mr Sami at paragraphs 22-23 of his witness statement explaining SPM's success during the covid lockdown, its profits and the dividends paid to, and benefits conferred by it on Mr Shakthi/SPL in accordance with its shareholding entitlements and the STA. These were dividends and benefits being paid to a shareholder from JV profits, who at that stage was not maintaining an investment of any amount of the physical gold (or its equivalent) originally promised to the JV. Insofar as that obligation was varied and in abeyance by virtue of the STA, Mr Shakthi/SPL was, so far as that originally promised gold capital contribution was concerned, getting a free ride and return. In so holding, I do not forget or diminish the fact that he had paid for his shares; and had introduced or arranged, short term investments of gold on various terms - but he had not provided the substantial secure gold capital he had promised - and never has. Understandably, this was not something that the Claimant Parties were prepared to tolerate beyond 31 December 2020, and had provided for that end date in the STA, by when Mr Shakthi/SPL had promised to bring in 100kg of gold. This evidence sets the scene for what next occurred leading to the agreement of the Resolution of 31 December 2020 and in my judgment, serves to explain it coming

into existence and its terms.

33. I accept Mr Sami's evidence at paragraph 24 of his witness statement [TB/342-343] (although it is obvious from the comparison with his oral evidence on the matter that it has been written by a lawyer on his behalf) that Mr Shakthi/SPL, did not provide the 100kgs gold it was now obligated to provide to SPM in Clause 4.2 of the STA, by 31 December 2020. That fact is not in dispute and consequently I find and accept, that Mr Shakthi/SPL was clearly and indefensibly in breach of contract. It is not necessary to outline the available action and remedies that might have been pursued by the coventurers and the execution that could have been levied on SPL's assets, including of course its shareholding in SPM, for it to be readily inferred that Mr Shakthi/SPL was in peril of action against him/it, which might have involved losing its investment in SPM. It can only be inferred, and I find as a fact, that Mr Shakthi wished to avoid that consequence and acted to do so.

34. How he acted on his own behalf and on behalf of SPL was most convincingly deposed to by Mr Sami in his broken English, when he gave evidence before me at [T/1/130 bottom-131]. Although it was difficult to understand at the time it was given, with the subsequent assistance of Mr Garg's evidence explaining the agreement recorded in the Resolution at [T/2/101-107] (which evidence I find and accept was coherent, compelling and true), I also found Mr Sami's evidence in this respect, to be comprehensible and true. In summary, referring back to Mr Shakthi's promises before the STA that things (meaning his 100kgs of gold investment) would come earlier than the 31 December 2020 as stipulated in the STA, he told me that in good faith, they had given Mr Shakthi/SPL "that" - meaning the chance to bring in the gold. But when the due date came, and he could not perform, although not wanting to go into details of how it happened, he continued and explained as follows [T/1/131]:

> "midnight he came to me and said, "Sami, if you can put it and I do [the word `not' is plainly omitted in light of what he said next] want dividend".
>
> Anyhow, I told him, "Now there is a new shareholder. Let's meet. We listen to your offer". We come out. We come with this offer now for the coming period from 1 January 2021 onwards he is not taking his dividend. He receives it but gives it to us if we are going to deploy this obligation from him and we did this."

35. In this passage of evidence, he is, in my judgment, plainly, and truthfully trying to recount, with difficulty in English, precisely what a commercial man would expect from a coventurer, in serial and further breach of his/its obligations to the JV, and in peril of action against him and of losing his participating share. It was an approach by Mr Shakthi to Mr Sami himself, for him, Mr Sami, to put into the venture, the gold it needed to succeed to the full, in his, Mr Shakthi's, stead. If Mr Sami was willing, then he Mr Shakthi/EPL would give his/its dividend to his co-venturers to compensate them, for a calculable period subsequently agreed and recorded in the Resolution. That is the plain sense and meaning of the approach recounted and I accept it as true. I also accept the evidence of Mr Sami in that same passage, that he responded to say, *"there is a new shareholder, lets meet and we listen to your offer."*

36. That, I find, is precisely what happened; and the outcome of that meeting and offer from Mr Shakthi, is, I find, truthfully recounted by Mr Sami, in paragraph 24 of his statement [TB/343] thus:

> "24) I state that, In December 2020, the 1st and 3rd Defendant failed to bring 100 kgs gold and breached the Share Transfer Agreement dated 5 February 2020. When 1st Defendant failed to honour its commitment of bringing in 100 kgs of Gold to 1st Claimant as a working capital facility, a Shareholders Meeting was convened on 31st December 2020 to take a decision on Shortfall to provide 100 kg Gold Working Capital by 1st Defendant. During the meeting, 3rd Defendant proposed to forego his dividend and profits in the 1st Claimant, if the other two shareholders can fulfil his commitment of 100kg gold i.e. through 3rd Claimant and the 2nd Claimant. All shareholders, including 3rd Defendant (100% owner of 1st Defendant) agreed that, with effect from 1st January 2021, 1st Defendant will not get any dividend or fees from 1st Claimant for 2 days' equivalent to every one day of delay from 1st Defendant in bringing the agreed quantity of gold. Thus, as per the agreement between all the shareholders on 31st December 2020, the 25% dividend share of the 1st Defendant is being utilised by 1st Claimant to compensate 2nd and 3rd Claimant for providing the 1st Claimant with 100kg gold as working capital as 1st Defendant failed in its obligation to provide the 1st Claimant with 100kg gold as working capital till now."

37. I find as a fact that this agreement was recorded in the Resolution bearing that date of 31 December 2020. It does not matter precisely when it was perfected and signed, because I am satisfied that it records an agreement around that time, between these coventurers designed to remedy Mr Shakthi/SPL's breach of the STA, by provision of the missing gold to SPM by Mr Sami and Rosy in his/its stead. It was also to compensate them, his/SPL's co-shareholders and co-venturers, for the financial cost to them of providing that remedy to SPM. On the facts as I have found them to be, I am satisfied that Mr Sami, Mr Garg and through them, SPM and Rosy agreed with Mr Shakthi/SPL's proposal for a commercial compromise and solution to be provided to SPM, to remedy Mr Shakthi/SPL's breach of Clause 4.2 of the STA and to compensate them directly for providing that remedy. Mr Shakthi/SPL's 100kgs of gold was only due to be provided or advanced to SPM on 31 December 2020. I find as a fact that shortly after that date, the gold was advanced instead to SPM by Mr Sami and Rosy, as recorded in the Minutes of the Shareholders and Board of Directors Meeting of 25 February 2021 at [TB/220]. They are still, to the date of this judgment, being compensated for that advancement of gold pursuant to the terms of the Resolution of 31 December 2020.

38. It also follows from the evidence I have accepted and my findings of fact, that Mr Shakthi/SPL's claim in their counsel's closing submissions (which I shall deal with further at the end of this judgment), that coercion by some means and/or minority shareholder oppression in the conclusion and operation of the shareholders agreement recorded in the Resolution of 31 December 2020, renders it unenforceable, lacks any factual or legal foundation. It is a case that is not pleaded anywhere in their redacted and later amended defence. It is not contained in Mr Shakthi's redacted statement of 11 January 2024 [TB/474]. His statement in reply to the evidence of Mr Acharya, of 9 February 2024 [TB/549] does not advance or substantiate the case of oppression advanced on behalf of the Defendants in closing. His fourth witness statement of 3 June 2024, which was prepared in breach of my order restricting its contents, during an adjournment pursuant to a direction to properly evidence the Defendants' new grounds of defence being put by counsel fo the Defendants, and does deal with the resolution of 31 December 2020, and how it came about at [SB/118/3]. That evidence, which does not come close to the case of coercion and/or oppression advanced on behalf of the Defendants in written closings, was as follows:

> "I say that the 31st December 2020 Resolution marked as Annexure 4 in the Claimant's Particulars of Claim was initiated by Claimant No. 2 and Claimant no. 3 and not by any of the Defendants. I further state that I refer to the document marked Exhibit SC-7 which shows that the

Claimant No.3 had prepared the draft of the resolution in terms of his convenience and sent it to me for signature. I repeat that neither of the Defendants had proposed such a resolution which has finally been signed off as 31st December 2020 resolution."

39. The late-coming claim and allegation of coercion and oppression in the Defendants' written closing submissions is contradicted by compelling evidence of all the circumstances leading to the Resolution (much under the hand or from the mouth of Mr Shakthi himself). One particular piece of evidence that may usefully be referred to, to demonstrate the fair treatment Mr Shakthi/SPL was given by the Claimants in accordance with the STA and the Resolution, is the Minutes of 25 February 2021 just referred to, at [TB/219-220]. It is there incontrovertibly demonstrated, and subscribed to by Mr Shakthi on behalf of SPL, that despite all of the difficulties confronting it there recorded, SPM had made a substantial profit in excess of USD 10.5m in the year to 31 December 2020. The Minutes refer to the Resolution of 31 December 2020, its purpose and effect, including express reference to the compensation terms of the agreement for Mr Sami and Rosy, literally, stepping into the breach to remedy the failure of Mr Shakthi/SPL to provide 100kgs of gold under the STA until 31 August 2023. The minutes record that an advance dividend of USD 897,209.00 had been paid to SPL following a board resolution of 5 July 2020, and that the Company would distribute accumulated profits of USD 4,340,217.00 in accordance with the shareholders agreement (i.e. the STA). SPL was duly allocated and paid the balance of 25% of that amount, after giving credit for the advance dividend already paid to it. The only pleading of any pressure being exerted by the Claimants, is that Mr Garg was in *"a tearing hurry"* (See the Redacted Amended Defence at paragraph 3 (i)) to get Mr Shakthi to sign the Resolution. Even if that were true, it is a risible basis for a case of coercion and or oppression rendering the agreement it records, invalid and of no effect. The only piece of evidence Mr Ghosh was able to put to Mr Garg [T/2/100-101], remotely related to any pressure to sign the Resolution, was a lately produced WhatsApp exchange between him and Mr Shakthi in which he was seeking a sign off to the agreement reached and recorded in the Resolution, in which Mr Garg was asking him to sign it as already agreed, but giving him an opportunity to make any comments. Mr Shakthi made none; simply saying he preferred to meet on Monday to review it. The suggestion put by Mr Ghosh was no more than Mr Garg was in a hurry to get it signed as quickly as possible. This was a hopeless basis for a case of coercion or oppression, and it was even confused with a suggestion that there was no evidence to prove that Shakthi Chauhan proposed the transaction agreed in the Resolution. All of the evidence before the Resolution of 31 December 2020 explaining how and why it was agreed and the evidence in the Minutes of 25 February 2021, not long after it, without a contemporaneously recorded word of protest or complaint from Mr Shakthi about his treatment under the Resolution, the lack of pleading and filed evidence to support it, stand together as a compelling demonstration that the Defendants' counsel's closing submissions about coercion or oppression by the majority, are pure invention. This includes rejection of Mr Shakthi's attempt when giving evidence before me in chief (which I allowed) [T/3/34-36] to suggest that Mr Sami and Mr Garg forced him to sign the Resolution, by threatening to withdraw the dividend consignment agreed in the Resolution of 27 May 2020 at [TB/306] and the dividend allocated in the Resolution of 5 July 2020 so that SPM would have been bankrupt. I find as a fact there is no foundation to any of that; and can only conclude it has been invented ex post facto, to escape from the agreed consequences of his/SPL's continuing inability to deliver the long-term secure gold capital investment he/it had promised to bring into this JV. I find on the totality of the evidence and my appraisal of the witnesses, that Mr Shakthi suggested and agreed, a means and a price he would pay, for the Claimants to come to his aid in remedying that breach; and he/SPL must now pay that price. This claim or defence to the binding effect of the Resolution of coercion or oppression, is rejected in every facet and detail.

40. I deal finally and briefly with a raft of evidence, which occupied and wasted a substantial part of the Court's time in hearing it. This was the Defendants' false and futile attempt to pass off ordinary trading events, involving third party investment of funds or gold with SPM for trading purposes, arranged by Mr Shakthi/SPL (including through Mr Garg) or other short-term investments, as if it was the contractual performance of Advancement of Gold required under the MOU. See Mr Shakthi's witness statement of 11 January 2024, at paragraph 5 [TB/476] and his subsequent witness statements to like effect, all of which evidence was a transparent attempt to confuse and mislead me into believing that the arrangement of these investments for trading transactions (in addition to the USD 4.9m investment borrowed from Al Assel in lieu of 100kgs of gold which was accepted as substituted performance of part of his obligation), was due performance under the MOU, which attempt I reject.

41. I adjourned the trial for fairness's sake, to ensure the Defendants had every opportunity to put their late-coming case and evidence on this issue, before the Court. In doing so, I admitted what turned out to be a package of evidence from Mr Shakthi designed to deceive and portray transactions as something different than what, upon examination, they transparently were. This necessitated the re-calling of witnesses, further witness statements and pointless and ineffective examination and cross-examination. In those circumstances, I do not intend to unnecessarily lengthen this judgment by referring to any of that evidence in detail, beyond expressing my finding that Mr Dhruva Acharya's technical evidence concerning the nature, purpose, duration, costs to SPM and commercial terms of the transactions (particularly the Vingold transaction) was illuminating. It made it clear beyond doubt to me, that Mr Shakthi's evidence concerning them, was an attempt to mislead me about their nature and purpose. Insofar as evidence was given by any of the witnesses that was consistent with my findings set out briefly below, I have accepted it; and insofar as Mr Shakthi's and Mr Fakhran's evidence was inconsistent with those findings, I have rejected it.

42. I found that Mr Fakhran's evidence (received de bene esse, and subject to objection based on a contractual obligation in the termination of his employment not to give such evidence - which I need not now determine) was contrived and dubious in almost every respect. It was plainly designed, for some reason unexplored by Ms Bejoy, to support Mr Shakthi's attempt to mislead me on the nature of the investment of funds with SPM and that there was compliance with the MOU, and even contained argument about how I should interpret the advancement of gold obligation in it, at [T/5/209-210]. In particular, I found his evidence at [T/5/187-200], concerning the investment of gold by Al Shahir, first that it had not been returned and was still remaining in the company, (later retracted when I put the financial statements to him) and that the documents, showing that it had been returned at [SB/ 91-92] were forgeries, to be a false, gratuitous, serious and unfounded fabrication, invented ex improviso, to serve the cause of Mr Shakthi, which he has adopted. It was a very serious allegation against the Claimants, that was never put by Mr Ghosh to any of the Claimants' witnesses because, as he volunteered, he knew nothing of it; and had no instructions about it. If there had been any basis to it, as Mr Ghosh also volunteered, he would have obtained a statement about it. It was contradicted by abundant evidence to the contrary. I am satisfied from the evidence of Mr Garg and Mr Skandalis that the gold received by SPM from Al Shahir, was paid over and returned as the documents produced demonstrated; that this was confirmed by the Financial Statements for the years 2018 and 2019; and that this Al Shahir gold was not provided by way of any part performance of the Advancement of Gold obligation in the MOU.

43. In the result of the Court's legal analysis of the Parties contractual arrangements and its determination that the STA is a substituted contract for the MOU, which has discharged the obligation to bring in 200kgs of gold from the commencement of operations, and substituted it (inter alia) with an obligation to bring in only 100kgs of gold by 31 December 2020; and its finding that the Claimants' claim for damages is misconceived; it is not strictly necessary for the Court to make findings on this Advancement of Gold issue. It does so briefly, since the obvious truth and reality of Mr

Shakthi's/SPL's failure to perform its obligation under the MOU, is what led to the STA and explains its genesis. Notwithstanding his/SPL's substantial indebtedness to Mr Garg/Rosy, if he/it genuinely believed SPL had complied with its MOU obligation to Advance 200kgs of gold, by means of third party trading investments with SPM, now falsely misrepresented as due performance of that obligation, he/it would not have been parting with 50% of his/its shareholding under the STA to Rosy, for it replacing the USD 4.9m it had borrowed to invest, but which had to be repaid when the facility was withdrawn. Nor would he/it be undertaking, and buying time to meet, his/its new substituted obligation to invest 100kgs of gold by 31 December 2020, if it had been true that he had already invested twice that amount of gold. Findings are also necessary for the Court to make a fair and just order allocating liability for the costs of the proceedings.

44. I refer to this evidence the Defendants relied upon, in support of its case that it had provided 200kgs of gold as the MOU required, as shortly as it justifies and requires. It was first referenced imperfectly and without the evidence claimed to substantiate it, being adduced properly or at all, (resulting in adjournment of the trial, the need for amended pleadings and further witness statements - at the Defendants' cost in any event) in a table starting at page 2 of the Defendants' Skeleton Argument. In its final form, it was presented in the lately produced statement of Mr Shakthi dated 3 June 2024, and his evidence before me in the second part of the trial. This evidence was contrived to substantiate the case that had been put in part, without proper notice, pleading or evidential basis on the record, to the Claimants' witnesses by Mr Ghosh on behalf of the Defendants, in the first part of the trial.

45. The case put was that as shown in the financial statements of SPM for the year ending 31 December 2018 at [TB/792], SPL had invested or introduced capital from other third parties into SPM, in the form of convertible loans amounting to USD 7,999,909.00 (often referred to in evidence and argument as USD 8m or 7.9m), roughly the equivalent amount in currency, to 200kgs of gold (though of course its value varies with the market price). This form of introduction of capital was, it was alleged, continued though 2019 with other alleged investments from other sources, which were or became trading partners of SPL and SPM. Mr Shakthi also contended that these investments of trading capital were the same in kind as the USD 4.9m investment borrowed from Al Aseel at [T/3/29].

46. How this attempt to dress up trading or short-term investment capital brought into SPM and present it as the secure gold investment required by the MOU and mislead the court was conceived, was revealed in the evidence of Mr Skandalis on day 2 of the Trial. Although I have treated his evidence on all issues with a very considerable degree of caution, having regard to his previous role in SPL, his falling out with Mr Shakthi, his evidence given in other proceedings to support him and SPL in their disputes with the Claimants, and his changing of sides in the dispute, I am satisfied that Mr Skandalis was telling the truth about how this false story or narrative by the Defendants of them making or procuring the required investment into SPM in the manner now put forward, was conceived.

47. At [T/2/137], Mr Ghosh unwisely (as it turned out) put to Mr Skandalis the exchange of messages on it seems "Google Meet" starting at TB/600, which, it appears, he misguidedly thought or was falsely instructed, showed, Mr Skandalis sending messages to Mr Shakthi supportive of the Defendants' case. He put to him, at [T/2/142], that it was *"his contribution, his typing"*. Mr Skandalis rejected that suggestion, and went on to demonstrate to my satisfaction that what in fact was occurring in the exchanges, was Mr Shakthi looking to construct a narrative that would be credible (in my judgment a false narrative) to explain that he *"had completely forgotten that we had in fact given 205kg as working capital"* (this information had apparently been put in a slide 9, it seems, for a presentation) and why he had agreed and signed the Resolution of 31 December 2020 without consulting anybody. He was running the narrative by Mr Skandalis, then his ally, and Mr Skandalis was transcribing what he was saying in the message. As Mr Skandalis explained and I accept, Mr Shakthi was looking for a narrative at that stage to bring this matter to a resolution of the dispute. I asked Mr Skandalis about this strikingly improbable feature of the narrative under construction, of forgetting investing 205kgs of gold or USD 8m approximately, in SPM, and was it true that there had been this investment? Mr Skandalis's response was [T/2/145]

> "**MR SKANDALIS:** I mean, obviously, your Honour, that is all the gold we forget, number 1. Number 2, in terms of the actual annual accounts, I had signed the annual audited accounts of SPL for 2018 and 2019, so I have no reference to that figure of giving 200 kg for those two years.
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> **JUSTICE ANDREW MORAN:** That is what I want to get at. This was being suggested to you, but from what you are saying it is not the truth that 205 kilograms of gold had been given as working capital. Because what you have told me is that what is shown in the accounts [later clarified in his evidence as USD4.9m and USD1.041 at T/2/147-151] is the limit of the working capital that SPL invested in Sam; is that the position or not?
>
> **MR SKANDALIS:** That is the position, your Honour. And, as I said, I cosigned the audited financial statements on behalf of -- I cosigned it as a director of Sam Precious Metals, of claimant number 1."

It is a striking feature that in this attempt to create a false narrative to explain why he had entered the agreement recorded in the Resolution of 31 December 2020, there was no hint or suggestion of any coercion or oppression or threats to withdraw funding from SPM by his/SPL's fellow shareholders, being the cause of Mr Shakthi signing the Resolution. I am satisfied that is because this particular false narrative or playbook, was exactly that; and it is clear the false case of coercion or oppression had not been invented, at the time of these exchanges with Mr Skandalis, in November 2022.

48. I find as a fact from this evidence, and from a straightforward review of Mr Shakthi's evidence concerning the trading capital he/SPL may have introduced into SPM up to the signing of the STA, that Mr Shakthi has simply continued before this Court with this false narrative that these were investments that complied with his/SPL's obligation to advance 200kgs under the MOU to be held by SPM for five years from the commencement of its operations. I am satisfied, even if I were to accept Mr Shakthi's evidence in his multiple statements that he/SPL arranged the investments he has relied on, that they did not meet his/its obligations under the MOU. It makes no difference whatsoever, that he may have compensated SPM on a running basis for the cost of the capital so invested for trading purposes by deductions from his consultancy fees of 10% of the net profits of SPM. The fact that he was forced to do so, actually supports the view they were not what he had promised - 200kgs of gold for five years at no cost; and it does not convert these transient, insecure, at-cost investments for trading purposes, into the secure, five year injection of gold that he had promised to bring into this joint venture, in order to be taken on by Mr Sami, as his joint venture partner and investor.

C: The Agreed and Defined Issues for Trial:

49. Against that introduction and background, and findings of fact, the issues agreed for determination are set out in this section. It will be appreciated that in view of both counsels' failure to address the relevant provisions of the applicable law and their misguided view of the facts as I have found them to be, they could have been better defined. With the explanatory answers given to them hereafter, they will however serve the purpose of dealing with the disputes arising on the Parties' pleaded cases, they are intended to represent. The agreed issues are as follows:

(1) Whether the First Defendant has breached the agreed terms and conditions of the Memorandum of Understanding dated 27 March 2018 and Share Transfer Agreement dated 5 February 2020 by not providing the working capital requirements?

(a) Whether the First Defendant's non-compliance and failure in meeting the working capital commitment have caused financial losses to the First, Second and Third Claimants?

(b) Whether the First Claimant has sustained a loss of profit due to the shortfall of 100kg of gold?

(c) What is the effect of signing the shareholder Resolution dated 31 December 2020 and what are the obligations of the parties therefrom?

(2) Whether the First Defendant has violated the decision of the General Assembly dated 19 September 2021 and 14 February 2022 by not cooperating with the liquidation procedures of the subsidiary company named M/s. Sam Precious Metals FZE, Sharjah branch?

(a) Whether the First Claimant has sustained loss due to the non-cooperation of the First Defendant in closing the Claimant's Sharjah branch?

(b) Whether the running cost of the Sharjah Branch affected the profit of the First Claimant?

(6) Liability of the First, Second and Third Defendants to compensate the First, Second and Third Claimants for the loss in (1) & (2)?

D: The main Articles of the DIFC Law No 6 of 2004, The Contract Law, which are applicable on the facts as found, to determination of the issues in the case:

50. These articles are reproduced in their numerical order not in order of importance or them arising in the chronology of events, so that reference may be made back to them when mentioned in Section E of this Judgment.

"PART 4: VALIDITY

35. Validity of mere agreement

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements.

PART 5: INTERPRETATION

49. Intention of the parties

(1) A contract shall be interpreted according to the common intention of the parties.

(2) Subject to Article 49(3), if such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

(3) As regards a Hybrid Contract or Coded Contract, if an intention under Article 49(1) cannot be established, the contract shall be interpreted according to the meaning that a reasonable person with a competent understanding of the relevant Code and having regard to the circumstances under Article 51 shall give to it.

50. Interpretation of statements and other conduct

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) Subject to Article 50(3), if Article 50(1) is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

(3) As regards a Hybrid Contract or Coded Contract, if Article 50(1) is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person with a competent understanding of the relevant Code and having regard to the circumstances under Article 51 shall give to it.

51. Relevant circumstances

In applying Articles 49 and 50, regard shall be had to all the circumstances, including

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned and in the case of a Coded Term, the meaning given by a reasonable person with a competent understanding of the relevant Code; and

(f) usages.

52. Reference to contract or statement as a whole

Terms (including Coded Terms) and expressions (including expressions in Code) shall be interpreted in the light of the whole contract or statement in which they appear.

53. All terms to be given effect

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

81. Additional period for performance

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

100. Substituted performance

(1) If an obligee accepts in satisfaction of the obligor's obligation a performance offered by the obligor that differs from what is due, the obligation is discharged.

(2) If an obligee accepts in satisfaction of the obligor's obligation a performance offered by a third person, the obligation is discharged, but an obligor who has not previously assented to the performance of his benefit may in a reasonable time after learning of it render the discharge inoperative from the beginning by disclaimer.

101. Substituted contract

(1) A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor's existing obligation.

(2) The substituted contract discharges the original obligation and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original obligation.

PART 10: RIGHTS OF THIRD PARTIES

104. Right of third party to enforce contractual term

(1) Subject to the provisions of this Law, a person who is not a party to a contract (a `third party') may in his own right enforce a term of the contract if:

the contract expressly provides that he may; or

subject to Article 104(2), the term purports to confer a benefit on him.

(2) Article 104(1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This Article does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Law to the third party enforcing the term shall be construed as including references to his availing himself of the exclusion or limitation.

(7) In this Law, in relation to a term of a contract which is enforceable by a third party:

(a) `the promisor' means the party to the contract against whom the term is enforceable by the third party; and

(b) `the promisee' means the party to the contract by whom the term is enforceable against the promisor."

E: The Material Terms and Conditions of the MOU, the STA and the shareholders agreement recorded in the Resolution of 31 December 2020 and findings as to their correct interpretation and effect:

51. In my judgment, these three agreements must be read and construed together as they arise from a single course of dealing and agreements between three natural and three corporate persons (I ignore the Second Defendant for present purposes, who played no part in the formation of

any of the agreements), which have interacted and represent the original and developed series of contracts between the parties in their JV engagements. The agreements are all shareholder agreements, which blur the lines between the agreements of personal and corporate entities, the latter being the vehicles of the former; with the agreements being made on each side, for the benefit of the person and his corporate entity, in pursuit of their common JV objectives. That is why I have felt constrained to make references to the human players and their corporate entities together, because these are three men doing business together, acting indistinguishably from and by their corporate entities.

52. While extracting and reciting the relevant clauses, I include relevant findings of fact, and my interpretation of the clauses and the agreements overall, which are reached after considering the Parties' evidence, submissions and the applicable DIFC Laws. The course of contracting between these Parties has been so convoluted, confused and misrepresented by them; and so misunderstood by their counsel, that it is impossible to understand without some running commentary and findings at the point of recitation of the clauses. To the extent the form of this judgment is unusual or unconventional in that respect, it is needed to explain the outcome in a coherent fashion. The commentary and findings lead to the determination of the issues and sub-issues I have identified below, and they do not accord with the positions taken by either party, because, as already explained, I hold those positions to be misconceived, erroneous in fact and law, and, unfortunately, misleading, in various parts.

The MOU dated 27 March 2018:

53. The "Parties" to the MOU are defined as follows:

> "1. **Mr. Sami Riyad Mahmoud Abu-Ahmad** , a Jordanian national with passport number: 0230749 and having his principal address at: Villa 012 District 7, Jumeirah Park, Dubai, United Arab Emirates **("First Party")**;
>
> 2. **Snyder Prime Limited**, a company incorporated in the Abu Dhabi Global Market with company registration number: 000000870
>
> **("Second Party"),**
>
> (together the **"Parties"** or individually a **"Party"**)."

54. Whilst the parties are so defined and limited, the contract the MOU contains is, without doubt, made for the purposes of a joint venture to engage in the business and specific activities described in Annex 1 to it, by using the vehicle of the First Claimant. SPM is, incontestably in my view, a "third party" within the meaning of Part 10 of the Contract Law, DIFC Law No 6 of 2004 (as amended and consolidated), "The Contract Law" as set out above. As a third party SPM may, in its own right, enforce a term of the MOU where the term purports to confer a benefit on it, by virtue of Article 104 (1) (b) (there being nothing to suggest the parties intended otherwise under Article 104 (2)). SPM is therefore, for the purposes of the Contract Law, a promisee or obligee and SPL is a promisor or obligor towards it, in respect of the contractual promises it made in the MOU, to confer benefits upon it.

55. The MOU also serves as a contemporaneous, signed (by Mr Shakthi on behalf of SPL) refutation of his disingenuous attempts before me, to undermine or diminish the evidence of Mr Sami, regarding: the latter's sole vision and conception of the business plan (found in Annex 3 to the MOU) of the joint venture; his particular skills and experience that he brought to it enabling it to function and prosper; his incorporation and whole ownership of the JV vehicle; and the interest of other potential investors and providers of gold, for long-term working capital he had generated. This was all before admitting Mr Shakthi's vehicle SPL into shared ownership of SPM, as an investor and provider of long term capital in the form of 200kgs of gold, by dilution and transfer of 50% of the shares, in return for Mr Shakthi's personal promise of that investment of gold, and consideration of USD 2,000,000.00 through SPL, for the shares.

56. The material terms to the foregoing effect are now set forth as follows.

57. The MOU records Mr Sami's Background thus:

> "The First Party is a chemist by trade and has significant experience in establishing, operating and managing gold and precious metal refineries in the United Arab Emirates (UAE)."

And the rest of the Background thus:

> "The Second Party provides investment capital and strategic support for various projects and business ventures including, but not limited to, those related to the gold and precious metal industry worldwide.
>
> The Parties wish to establish a joint venture in the UAE in order to carry out the Business and the specific activities set out in Annex 1 to this agreement (the "Business") and as otherwise set out in this agreement.
>
> This memorandum of understanding ("MOU") sets out the key terms with respect to the proposed joint venture."

58. The MOU details the establishment of the JV vehicle SPM and the Share Subscription in the following terms:

> "The First Party has established **"Sam Precious Metals FZ-LLC"** a limited liability company incorporated in the Dubai Creative Clusters free zone with commercial licence number: 94562. The Parties agree that this entity shall be used as the joint venture vehicle (the **"JV Company"**).
>
> The First Party owns one hundred percent (100%) of the shares in the JV Company and the issued paid up capital of the JV Company is currently one hundred thousand UAE dirhams (AED 100,000) represented by one hundred (100) shares.
>
> The Second Party wishes to subscribe for a fifty percent (50%) interest in the JV Company (**the "Proposed Transaction"**). Accordingly, in order to effect this transaction, the Parties agree that the JV Company will carry out an increase in share capital such that the Second Party (or an affiliate of the Second Party) will subscribe for and be issued one hundred (100) new shares in the JV Company (the **"Second Party Shares"**) following which the Second Party will own fifty percent (50%) of the issued shares in the JV Company.

As consideration for the Second Party Shares the Second Party will pay two million United States dollars (USD 2,000,000) to the JV Company as follows:

(a) a subscription amount of one hundred thousand UAE dirhams (AED 100,000) (the **"Subscription Amount"**) where the Subscription Amount represents the par value of the Second Party Shares; and

(b) a premium amount of seven million, two hundred forty-five thousand, nine hundred and forty UAE dirhams (AED 7,245,940) for the Second Party Shares (the **"Premium Amount"**).

The Parties agree that a sum equal to the Premium Amount will be transferred by the JV Company to an account called the "share premium account" that will be listed in the JV Company's balance sheet. The Parties agree that that such Premium Amount shall be utilised exclusively by the JV Company as working capital for the day-to-day operations of the JV Company as determined by its board from time to time.

Further, in the event of the winding up or liquidation of the JV Company, and following the repayment of all sums owed to creditors, any remaining portion of the Premium Amount that remains will be distributed equally between the Parties.

The First Party agrees that his shareholding in the JV Company shall be diluted in order to effect the above mentioned transaction.

Alongside the heading **"Conditions"** it was provided:

The Parties acknowledge and agree that completion of the Proposed Transaction will be conditional on the satisfaction of the following conditions:

(a) The establishment of Gulf Precious Metals (CEIC) Limited which will be incorporated in the Dubai International Financial Centre (DIFC) as a Qualified Investor Fund (QIF);

(b) The establishment of P79 Capital Limited which will be incorporated in the DIFC as a regulated QIF manager; and

(c) The execution of the Definitive Agreements (as defined below).

These conditions may be waived by the Parties upon their agreement in writing."

59. The MOU next provides for a formal completion of the share subscription by no later than 10 August 2018, which was defined as the "Long Stop Date", on which it was provided that:

"...each of the Parties (or their representatives) will do all such things necessary to give effect to the registration of the Second Party Shares in the name of the Second Party."

60. In the final clause of the MOU, alongside a heading "Binding Effect" it was also provided:

"The terms of this MOU are not legally binding with the exception of the provisions relating to the following which shall legally bind the Parties:

(a) "Confidentiality";

(b) "Costs"; and

(c) "Governing Law and Jurisdiction of the MOU"

61. It is the Claimants' position, and the facts as I find them to be, that none of the three conditions stipulated above for completion of the "Proposed Transaction" in the MOU were met, but that notwithstanding that failure, and the "Binding Effect" clause just recited, the transaction was completed and, as a matter of fact and law, acquired binding effect. I have no hesitation in accepting the Claimants' position on this issue for the following reasons outlined in this section and in accordance with my findings of fact above.

62. It is undisputed that SPM issued and transferred, and that SPL became the holder of, 50% of the shares in SPM. It is undisputed that SPL paid the consideration of USD 2m for those shares. It is also the Claimants' position and Mr Sami's evidence before me, which I accept, that as the ***"Definitive Agreements"***, contemplated in the clause of the MOU reproduced above, were never drawn up, the parties treated (and intended to treat) the MOU as the definitive record of their binding agreement, which they went on to perform or not perform, in whole or in part, as described in my more detailed findings of fact on the evidence above.

63. I find as a fact and hold as a matter of law, that the MOU was modified to remove the conditions for completion and lack of binding effect, by mere agreement of the parties under Article 35 of the Contract Law, evinced by their conduct. Alternatively, using the common law term employed in the MOU, I find that those conditions were waived, notwithstanding the fact that there was no express waiver in writing, as the contract permitted, but did not strictly require; neither did the MOU contract prohibit modification by parole or conduct.

64. For this reason of my acceptance of Mr Sami's evidence that the parties treated the MOU as binding them in contract, according to its terms, and for the reasons numbered 1-7 and 9, gathered under heading iv. on page 17 of the Claimant's Skeleton Opening Submissions, I am satisfied and hold that the MOU was completed and became a binding agreement between the parties, in accordance with its terms, and the Parties' actual subjective and/or their objectively apparent common intention. This common intention was clearly evinced by the conduct and actions of the Parties in performing under the MOU, to the extent that they did. The Defendants' submissions to the contrary fly in the face of all of the evidence alluded to and are rejected.

65. I reject what I unfortunately find to have been a lie told to me by Mr Shakthi when giving evidence, when I asked him, after he had been arguing about the meaning and effect of SPL's obligations under the MOU, whether therefore, he regarded it as an agreement binding upon him

(meaning SPL), and he told me he did not consider it to be a binding agreement [T/5/148]. I am satisfied that he did consider it to be binding upon SPL, because I find that was his and SPL's actual intention of its guiding mind, i.e. of Mr Shakthi himself and of Mr Sami.

66. I also find as follows that: (i) Mr Shakthi's actions, which were SPL's actions of purported performance under the MOU, including those leading up to the STA (which Mr Shakthi has repeatedly misrepresented before me, as being contractually compliant performance of SPL's obligation to provided investment capital of 200kgs of gold for five years); (ii) his disposal of 50% of SPL's holding in SPM under the STA; (iii) his agreement to the other terms of STA; all stand as powerful testament to Mr Shakthi's, and thereby SPL's intention and recognition, that the MOU would and did have binding effect upon SPL, until substituted by the STA.

67. In my judgment, the whole series of these agreements, their genesis and development, make manifest and clear, the accepted binding nature of the obligations in the MOU by SPL. The series of agreements also makes clear: (i) the fact of non-performance by SPL of its gold investment obligation as defined and required in the MOU; (ii) that there was before the STA a modified and/or substituted performance by SPL as to a moiety (USD equivalent to 100kgs of gold with a margin) of the Advancement of Gold obligation which was accepted by the Claimants; and, (iii) substituted contracting in the form of the STA, in place of SPL's initial undertaking and obligation to provide 200kgs of gold for five years in the MOU, that was never performed. These findings are more fully explained in my review of the evidence and findings of fact and law set out above.

68. After providing for the management of the JV company SPM (on which nothing turns in these proceedings), the MOU next provides for that binding undertaking of **"Advancement of Gold"** by SPL under discussion here, alongside that heading, in the following terms:

> **" The Second Party shall provide** two hundred kilograms (200 kg) of gold (the "Gold") to the JV Company with 99.99% concentration for the purposes of facilitating the operation of the Business (the "Gold Advancement") upon each of the following milestones occurring:
>
> (a) The full commencement of operations at the Business as confirmed in a written notification by the First Party to the Second party;
>
> (b) The provision of ten (10) working days' notice to the Second party from the First Party requesting the activation of the Gold Advancement where such notice may be provided on any working day from 1 July 2018; and
>
> (c) The completion of the Proposed Transaction.
>
> **The Gold shall be returned by the JV Company to the Second Party on the date that is five (5) years from the date of the Gold Advancement.** This period may be extended upon the written agreement of the Parties.
>
> **Further, the Parties may agree upon the advancement of additional quantities of gold by the Second Party to the JV Company for the purposes of facilitating the operations of the Business."**
>
> (Court's emphasis added)

69. The Parties' actual meaning and intention established to my satisfaction in accordance with Article 49 (1) of the Contract Law (and, if it were necessary to identify it, their intention objectively ascertained under Article 49 (2)), by their agreement of this provision requiring "Advancement of Gold" is in my view clear and obvious. It was that SPL assumed a mandatory obligation to provide SPM with a secure, long-term investment for five years, of 200kgs of gold, as part of the agreement for the issue and transfer of shares in SPM to it. This was to be at no cost to SPM and for the purposes and objectives of SPM's business plan of investment and operations conceived and described by Mr Sami in his evidence.

70. It was suggested on behalf of the Defendants that I should not construe the obligation defined in this clause in that manner, because in pre-contractual or preliminary negotiations, the Second Claimant had proposed the use of the term *"Undertaking"* to provide this amount of gold investment and that Mr Shakthi and through him SPL, had rejected that word, had negotiated for the word *"Advancement"* to be used instead and had prevailed with the use of that word in the MOU. It was suggested on behalf of the Defendants, that this made a difference to the interpretation of the obligation and that as a result, what SPL provided in the form of short term trade financing with gold or equivalent amounts of USD from time to time, amounted to a proper performance of the obligation. As to this submission, I first make it clear that whilst in the course of argument, I instinctively mentioned the English common law rule of interpretation of contracts preventing recourse to pre-contractual negotiations as an aid to interpretation, that was an oversight and momentary failure of recollection on my part of Article 51 (a) of the Contract Law. I therefore confirm expressly that I have approached the interpretation of all of the agreements in this case strictly in accordance with Part 5 of the Contract Law.

71. I accept first of all, that preliminary negotiations are relevant circumstances for ascertainment of intention and in the application of Articles 49 and 50 of the Contract Law of the DIFC, by virtue of Article 51 (a). However, whatever debate about semantics and alternative wording may have taken place in preliminary negotiations, and even accepting (as I do for these purposes of interpretation) that "undertaking" was rejected by the Defendants in favour of *"Advancement"* , the meaning of the words finally adopted are crystal clear. The word *"Advancement"* is used only as a descriptive side heading of the obligation and in any event in its ordinary and natural meaning, conveys an intention to loan or provide gold. The operative words defining the obligation, are that SPL *"shall provide"*. These words, used with the words that follow, as highlighted by me in the recital of the clause above, could not be clearer in their imposition of, and a corresponding acceptance by SPL, of an obligation to provide a secure investment of gold at no further cost to SPM, for a period of five years. It is not an obligation that could be performed or discharged by providing cash to an equivalent value in lieu, from different third parties at cost to SPM (even if those financing costs were paid in full or in part by SPL/Mr Shakthi), for shorter periods, that was not securely invested and committed for the stipulated five year period. I have no hesitation in rejecting the Defendants' case to the contrary.

72. I am accordingly satisfied that the First Defendant, acting by the Third Defendant did not perform as it was required to do (and was in breach of) its obligation to provide 200kgs of gold, in accordance with the terms of its obligation under the MOU. I also find it to be the case, that from the very outset, Mr Sami and SPM as third party obligee, accepted a substitute performance for the provision of 100kg of the 200kgs of gold required for five years, in the form of what turned out to be an insecure investment of USD 4,900,000 for less than five years, arranged by Rosy at the request of SPL from one of Rosy's affiliates, Al Aseel Jewellery. It seems from the evidence before me, that at the time when the global

economy was in peril, and investors fearful for the security of their investments due to the effects of the Covid Pandemic; at or about the time of the STA, Mr Garg and Rosy and their affiliate Al Aseel became unwilling to continue to provide Mr Shakthi or SPL with the capital of USD 4.9m the latter had invested in SPM, and were intent upon withdrawing it and securing their investments by other means. This intended withdrawal of the borrowed capital that SPL had been using to provide the equivalent of 100kg of the 200kg of gold it was obliged to provide, under the ***Advancement of Gold*** provision, led with other indebtedness of SPL to Rosy and its affiliates, to the agreement of the STA, as explained below.

73. As for the requirement of the stipulated *"milestones"* occurring before this obligation took effect, it is plain and obvious from the whole course of the Parties' conduct, that even if the milestones did not occur precisely as defined, the obligation to provide this long term investment of gold under the MOU took effect. I find as a fact and hold as a matter of law, that the *"milestones"* in this clause of the MOU were modified or removed by mere agreement of the Parties under Article 35 of the Contract Law, as evinced by their conduct. Alternatively, using the common law term employed elsewhere in the MOU, I find that attainment of the milestones as precisely defined, was waived. There was of course full commencement of the operations of SPM and the Second Party SPL, was notified by its observance on site and being made aware of that fact, in the person of Mr Shakthi. I accept the evidence of Mr Sami, that he was repeatedly requiring performance of the activation of the balance of Gold Advancement obligation, notwithstanding his/SPM's acceptance of the substituted performance by SPL's investment of the USD equivalent (with a margin in excess) in lieu of the advancement of 100kg of the 200kg of gold promised under the MOU. For reasons as given and as already found, I am also therefore satisfied that the Proposed Transaction was completed.

74. The final paragraph of this clause of the MOU, which I have highlighted above, also serves to inform interpretation of the prior and distinct obligation to provide a long term secure investment of 200kgs of gold, by providing for the sort of ad hoc, separate and additional investment of gold by unspecified means and terms, ***"for the purposes of facilitating the operations of the Business"***. SPL did provide such investment from third parties from time to time, which it now attempts to pass off before me, as if it were performance of its prime and different obligation to provide the long term investment of 200kgs of gold, specifically and separately defined. That attempt is seen for what it is and rejected.

75. The MOU also provided for remuneration of the Third Defendant Mr Shakthi alongside the heading ***"JV Company Consultant"*** in the following terms:

> "From the date of the Gold Advancement, Shakti Chauhan shall provide consultancy services to the JV Company on an ad hoc basis and shall be paid a consultancy fee of ten percent (10%) of the JV Company's net profits for each financial year that the JV Company conducts the Business."

It is significant to note, as further evidence of the Parties' recognition and acceptance of both the accepted binding effect of the MOU, and the Claimants' acceptance of substituted performance by SPL of its Gold Advancement Obligation, by short term gold or cash investment arranged by SPL from third parties, at a cost to SPM; that these costs incurred were recouped to a certain extent by deductions from Mr Shakthi's consultancy fees under this clause as already explained in my findings of fact above.

76. Alongside the heading ***"Company Dividends"*** it was provided as follows:

> "If, in respect of any financial year, the JV Company has profits available for distribution, as determined by the auditor and in an amount determined by the board, such profits shall be distributed by way of dividend to the shareholders pro rata to their shareholding in the JV Company. The Parties may agree upon the establishment of a reserve fund."

It is important to note in passing, that this basic provision for the distribution of dividends pro-rata to the shareholders shareholding, had to be and was substituted with a much more complex set of ***"Dividend Distribution Provisions"*** in Clause 5 of the STA, for reasons of the substantial indebtedness of SPL to Rosy and its affiliates subsequently discovered by Mr Sami and SPM. Satisfaction of this indebtedness of SPL, was a fundamental part of the substitute contracting that became necessary, and was adopted between the Parties in the STA, following the failure by SPL to perform its ***Advancement of Gold*** obligations under the MOU.

77. Finally, alongside the heading "Governing Law and Jurisdiction of the MOU" it was provided as follows:

> "This MOU will be governed by the laws and regulations of the Dubai International Financial Centre (DIFC), and any disputes with respect to this MOU and any Definitive Agreements shall be under the exclusive jurisdiction of the DIFC courts."

It is not disputed by any Party in these proceedings that this Court has jurisdiction to determine any dispute with respect to this MOU, any dispute or claim arising out of or in connection with the STA (vide infra Clause 26 thereof) or the Agreement recorded in the Resolution of 31 December 2020, which indisputably arises out of, or in connection with the STA.

The Share Transfer Agreement (STA) of 5 February 2020:

78. By way of preface, it should be noted that determination of the issue of whether the STA is a substituted contract (for the MOU) within the meaning of Article 101 (1) of the Contract Law, has not been assisted by production of any authority of the DIFC Courts, by either counsel, defining the test or requirements, for a contract to be treated as a substituted contract under the Article. That is not a criticism of counsel, as the Court itself (aided by judicial assistants) has not been able to identify any relevant authority giving guidance on the correct application of the Article. Thus, it seems there are no such authorities yet, in the jurisprudence of the DIFC.

79. In those circumstances, it is appropriate for the Court explain its approach. In my judgment, what is required is a straightforward analysis of the contracts in question to determine, whether as a matter of fact and law, the contracts, though obviously not identical, have been, concluded by the parties with the mutual intention of substituting one contract for the other, in accordance with its express or implied terms (ascertained and interpreted in the normal manner under the Contract Law). Particular indicia of that common intention absent express statement of it or excluding it, may be (and the list is not exhaustive or exclusive), whether: (i) the contracts are of the same or similar type; (ii) they were executed for the same or similar purposes; (iii) they deal with the same subject matter overall (in this case the operation of a joint venture pursuant to the contracts which

are shareholder agreements); (iv) they contain the same or similar parcels of mutual obligations and rights inter se the parties; (v) they are made between the same parties as obligors and obligees, though they may include additional parties or proxies, undertaking and acquiring respectively, mutual obligations and rights, provided for between original parties.

80. In this case the MOU and the STA are both joint venture shareholder agreements. They provide in different ways, and in the latter with an additional party, for essentially the same things, being the common stuff of JV agreements. The main elements of each provide for the parties to them, the extent of their required subscriptions for shares and/or contributions to working capital, rights of participation and sharing in the profits and dividends for distribution from the JV. They provide for the management and control of the JV vehicle, financial reporting, restrictions on disposal of shares and rights of preemption etc, with other common ancillary provisions. It is indisputable that they deal with the same subject matter, within the meaning of Clause 25 of the STA (vide infra).

81. There is no doubt in my judgment, adopting the approach I have outlined, and having regard to the facts just mentioned, that these two agreements were designed to serve essentially the same purposes in relation to this joint venture as each other; and that in accordance with the parties intentions, the later of them, the STA, has been substituted for the former, the MOU, within the meaning of Article 101 of the Contract Law. It thereby became the operative joint venture shareholders agreement, pursuant to which the JV was and is to be operated and progressed. The Resolution of 31 December 2020 is different. Although it is a JV shareholders agreement, it is a discrete and separate agreement to deal with a breach by one of the JV partners of its obligation to contribute to the capital of the JV vehicle, for other JV partners to remedy that breach and for them be compensated for providing that remedy. I agree with the Claimants' submissions to that effect in their Supplementary Submissions of 21 August 2024 (hereafter referred to by "SS/n paragraph number) at [SS/7].

82. Parties to the STA agreement are described as follows:

> "PARTIES
>
> (1) Sam Precious Metals FZ-LLC, a free zone limited liability company duly formed and registered in the Dubai Creative Clusters Authority free zone under License No. 94562, with its registered office at: Warehouse B-36, Dubai Production City, Dubai, United Arab Emirates (hereinafter referred to as the "Company");
>
> (2) Rosyson FZE, a free zone limited liability company duly formed and registered in Sharjah Airport International Free (SAIF) Zone under License No. 13978, with its registered office at: SAIF Desk Q1-07-094/C, Sharjah, United Arab Emirates ("Rosy");
> and
>
> (3) Snyder Prime Limited, a company incorporated in the Abu Dhabi Global Market free zone with company registration number: 000000870, with its registered office at: 2404ResCo-work04, Al Sila Tower, Abu Dhabi Global Market Square, Al Maryah Island, Abu Dhabi, United Arab Emirates ("Snyder")."

83. Rosy is the corporate vehicle of Mr Anuj Garg and that corporate entity became a shareholder in the JV company SPM, by virtue of the STA. It was discovered, at or about the time of the STA, although unknown to Mr Sami and SPM before the MOU, that SPL was heavily indebted to Rosy. This discovery was contrary to representations about Mr Shakthi's/SPL's access to gold for long term investment in the JV, made by Mr Shakthi to Mr Sami, (which, as already noted, I find were made and were false and untrue). Rosy, through its associates and affiliates, had provided SPL with long term capital investment in an amount in excess of USD 11.8m. This was in addition to the USD 4.9m arranged by Rosy and provided by Al Aseel, as a working capital facility of equivalent value to 100kgs of gold (with a margin to cater for fluctuations in the price of gold) already explained above.

84. SPM was of course the third party beneficiary and obligee of SPL's obligation under the MOU to provide the secure investment of 200kgs of gold for five years, and it is the first party to the STA. As will become apparent in the recital of, commentary on and findings in relation to the terms of the STA which follows, I find and hold that in accordance with its terms and effect, SPM as a third party beneficiary obligee under the MOU, accepted the STA as a substituted contract under Article 101 (1) of the Contract Law, in satisfaction of SPL's ***Advancement of Gold*** obligation under the MOU. Further, by virtue of Article 101 (2) of the Contract Law, the substituted contract in the STA discharged SPL from its original ***Advancement of Gold*** obligation. The legal effect of the Parties concluding the STA under the Contract Law, corresponds precisely with the intention of the Parties described by the Claimants' witnesses, whose evidence I accept in this respect, of clearing their liabilities and accounts inter se, and starting, as it were, from scratch, with a new substituted agreement. It is impossible to comprehend how the Claimants' legal advisers could have come to the legal conclusion, on the basis of that honest evidence and instructions, that the Claimants intended to preserve, or that under the DIFC Contract Law there was preserved, a claim or entitlement to claim damages for any loss arising from the obligation to provide 200kgs of gold, that they were substituting with a new obligation in a new substituted shareholders agreement. The plain and obvious inference from all of the evidence about the agreement of the STA, is that the parties to it, intended to accept it in discharge of their pre-existing obligations then being substituted by it.

85. The STA came with a new investor/shareholder in the person of Rosy/Mr Garg and a different, or modified obligation as to how much gold SPL was to provide to the JV vehicle, securely at no cost to the end of the five-year term from inception of its operations. There is nothing in Article 101 of the Contract Law or elsewhere in that law which prevents a substituted contract from involving other parties dealing mutually with the same joint venture purpose, and the same type of obligations to achieve that purpose. The Parties agreed under the STA to give SPL until 31 December 2020, to comply with that modified, reduced and substituted obligation as hereafter explained and shown by the recitals. The STA did not require immediate investment of the reduced amount of gold, because it must have been clear and obvious to the other Parties, and was accepted by them, that SPL/Mr Shakthi was not in a position to provide even the reduced amount of gold immediately; and that he needed time to do so. The Claimants at SS/3 (i) and (ii) cannot do other than admit all of this. They there admit and submit:

> "The net effect of this transaction was twofold: (i) it introduced a new shareholder to Claimant No.1, and (ii) it adjusted the requirement under the MOU for Defendant No.1 to provide 200 kg of gold as its working capital contribution. Instead, Claimant No.3 contributed 100 kg of gold, adjusting Defendant No.1's obligation to 100 kg. As part of this arrangement to introduce Claimant No.3, a deadline was set for Defendant No.1 to deliver its revised obligation of 100 kg of gold by 31 December 2020. These terms were formalized in

the STA dated 5 February 2020."

And yet fail to grasp the legal implications of this substitution of a different obligor and a different obligation in a different contract in place of the MOU.

86. The Claimants' submission that there was and remained a continuing obligation on the part of SPL to provide 200kgs of gold, throughout the period of loss identified in the expert evidence, notwithstanding the acceptance of a deficient or lesser performance, and then the agreement of the STA, is therefore misconceived in fact and law, and is rejected. The submission is advanced in the face of conduct clearly demonstrating acceptance of a substituted performance in relation to a moiety of the Advancement of Gold obligation, which differed from what was due, in discharge of the original obligation. This was not the case with the balance 100kgs due. I find that Mr Sami was pressing for the provision of the unadvanced 100kgs of the 200kgs of gold promised, and although they accepted transient additional short term provision of capital from third party providers, which was neither secure nor long term for five years, that can only have been in accordance with the last paragraph of the Advancement of Gold provision in the MOU. I find this was never accepted as substituted performance of the balance of the outstanding obligation under the MOU. Instead, and because it was obvious Mr Shakthi/SPL were not in a position to perform, a different commercial solution was agreed and adopted.

87. This was by modification and substitution of the original Advancement of Gold obligation in a substituted contract, the STA, containing a different and reduced (by 50%) obligation to provide only 100kg of gold for five years from the commencement of operations; and an extension of time, within which SPL was to perform and provide it, to the 31 December 2020. The whole foundation of the claim for loss of profit in these proceedings, stemming from an alleged continuing failure to provide 100kgs of the 200kgs of gold during the loss period, (1 September 2018 - 31 December 2020) is also therefore, misconceived. It is based on an obligation that has been substituted and discharged by the agreement of the STA. The claim for damages representing loss of profit must accordingly be and is dismissed. The Claimants' submission at SS/4 that:

> "The STA merely granted an additional period for Defendant No.1's performance in accordance with DIFC Contract Law, while the underlying obligation to provide the gold remained in force7."

is manifestly incorrect and rejected. What has happened with the substitution of the STA for the MOU goes far beyond an Article 81 (1) grant of additional time for performance. It is a wholly different performance of only half of what the MOU had required and that reduced performance was not required until 31 December 2020. There is also no basis for the suggestion at SS/6

> "At the time the STA was executed, the 100 kg of gold had not been provided and continued to be required; therefore, there was no acceptance of substituted performance as contemplated by Article 100."

which is then contradicted by the footnote 11, *"The introduction of the third party was to substitute the cash element of Defendant No. 1's contribution for Claimant No. 3's gold"*. This is exactly what had happened to the obligation to provide the first 100kgs of the 200kgs the MOU had required. The obligation had been performed by SPL to that extent up to the STA, with an accepted substituted performance in cash of USD 4.9m with a margin as explained above. The substituted contract, in the form of the STA, as admitted in the footnote, provided for that half of the obligation that had been in the MOU, to be assumed by Rosy. It was not *"continued to be required from SPL"*. This substituted arrangement was plainly accepted by the Claimants in agreeing the STA.

88. The recitals are particularly helpful as indisputable marker buoys for navigation towards the correct findings of fact. The most important of them are set out as follows:

> "(6) Rosy through its associates and affiliates provided Snyder with long term investment capital the book value of which, at the date of this agreement amounts to US$ 11,875,888.
>
> (7) Rosy further arranged through its associates and affiliates the provision of a working capital facility with a face value of US$4,900,000 to the Company for the purposes of facilitating the operation of the Business.
>
> (8) The Company was incorporated on 12 March 2018 as a precious metals refining business.
>
> (9) At the date of this Agreement, Snyder owns fifty percent (50%) of the ordinary share capital in the Company amounting to 100 ordinary shares.
>
> (l0) Rosy and Snyder have agreed for Snyder to repay the long term investment capital of US$11,875,888 in kind by way of transferring one half (50 ordinary shares) of its shareholding in the Company to Rosy as per provisions of Clause 3 of this Agreement.
>
> (11) Snyder, after the share transfer contemplated in this Agreement, has agreed to forgo part of its dividend entitlement from the Company for the purposes set out in Clause 5 of this Agreement."

89. As to the Share Transfer it was provided as follows:

> "3. SHARE TRANSFER
>
> 3.1 Snyder agrees to transfer 50 ordinaryshares from its shareholding in the Company to Rosy as payment in kind for the long term capital of US$11,875,888 Rosy provided to Snyder through its associates and affiliates.
>
> 3.2 Immediately upon execution of this Agreement the Company will facilitate the share transfer process with Dubai Creative Clusters Authority ("DCCA") in line with the rules and regulations applicable to the Company.
>
> 3.3 Following the share transfer the Company will provide each of the Shareholders a copy of the revised Register of Members registered with DCCA."

90. In respect of the substituted working capital facility effected by this STA, it was provided as follows:

> "4. WORKING CAPITAL FACILITY
>
> 4.1 The working capital facility with a face value of US$4,900,000 arranged by Rosy through its associates and affiliates will be substituted by them with 100 kg of gold which will continue to be maintained at the Company to a final term of 5 years from original commencement of Company operations in a bona fide manner and exclusively to grow the Company's Business in accordance with best practice and on sound commercial principles.
>
> 4.2 Snyder has separately provided US$ 1,041,711 as a working capital facility to the Company. The Company will repay US$ 291,711 to Snyder following the share transfer referred to in Clause 3. The balance of US$750,000 will be offset against a Company receivable from a Snyder affiliate. Snyder will provide the Company with 100 kg gold by 31st December 2020 to be maintained at the Company to a final term of 5 years from original commencement of Company operations.
>
> 4.3 As part of the effective execution by Snyder of the buyback provisions set out in Clause 6 Snyder will substitute Rosy's 100 kg gold in the Company referred in Clause 4.1 with an equivalent amount to be maintained at the Company for the same final term."

91. The principal and express purpose of the STA, as is clear from its terms and the evidence of the Claimants, which evidence I accept, was to provide for a substituted agreement for the necessary investment of long-term working capital in the form of gold, by transfer of 50% of SPL's shares (25% of the issued shares) in SPM to a new shareholder investor in the person of Mr Garg's corporate vehicle, Rosy. Rosy agreed thereby to substitute that investment which it had arranged for SPL to enable it to acquire its shares in SPM, with its own 100kgs of gold and to maintain it at the company to the end of the five year term from the commencement of its operation. This clause 4.1 records that it was Rosy which had in fact arranged the provision of the amount provided by Al Aseel, which was accepted (by the Claimants) in substituted performance of the promise by SPL to provide half of the 200 kgs of gold required by the ***Advancement of Gold*** provision of the MOU. The end result in relation to that clause, was that Al Aseel was repaid the equivalent of 100kg's of gold in USD (with a margin) and SPL was discharged from providing a moiety of the Advancement of Gold that had been promised under the MOU.

92. As to the other half of the promised gold, Clause 4.2 discharged SPL from providing it as and when it had been required under the MOU, and instead substituted an obligation to provide 100kgs of gold by 31 December 2020.

93. In respect of both sub-clauses 4.1 and 4.2, expressly providing for the substitution of the obligation undertaken by Rosy to provide 100kgs of gold for the obligation on SPL in the MOU to provide that moiety, in consideration (inter alia) for the transfer of 50% of its shares to Rosy; and the substitution of the obligation of SPL to provide the other 100kgs within 10 days of notice of the commencement of JV operations, with an obligation to provide it by 31 December 2020; I find that these substituted contractual provisions, were plainly accepted in satisfaction of SPL's existing obligations under the MOU towards SPM, and they operated to discharge SPL's original ***Advancement of Gold*** obligation under the MOU. I find there is nothing in the terms of the STA or in any evidence before me, to suggest otherwise. There was no reservation of rights of action for the non or deficient performance of the MOU contract and its obligations upon agreement and acceptance of the STA, in it, before it or even after it. In my judgment the STA was a substituted contract accepted by SPM without qualification, in satisfaction of SPL's existing obligations in the MOU. It is untenable to suggest or contemplate otherwise, in circumstances where, without the substituted provision of capital investment by Rosy, SPM might have been forced into liquidation. I therefore reject the Claimants' submissions at [SS/8, 9, 13, 14 and 15, and its worked examples at 16 a) and b)] (as already indicated, I accept the submission at [SS/10] that the Resolution of 31 December 2020 was not a substituted contract for the reasons given). I find that Article 101 of the Contract Law is engaged and operated so that the obligation to provide 200kgs of gold was changed and substituted with a different obligation to be performed by a different time, in a substituted contract, and was far more than a mere extension of time to perform an existing obligation.

94. I am also satisfied that it is correct to infer, and I do so infer, that SPM as a third party obligee under the MOU, accepted the substituted contract in the STA in satisfaction of SPL's obligations under the MOU in relation to Advancement of Gold as part and parcel of getting a new, reliable investor to provide 100kgs of gold immediately for shares in SPM, so that it did have effect to discharge that MOU obligation under Article 101 (2) of the Contract Law. The Claimants have not suggested that the Contract Law provides for a right to damages for loss occasioned prior to the discharge of an existing obligation, by a substituted contract and acceptance of it, in satisfaction of the obligor's existing obligation, arising from non-performance of the discharged obligation. I am satisfied that it does not so provide upon acceptance of a substituted contract discharging the original obligation; and that for there to be such a right to claim damages for a discharged obligation arising before the discharge, it would have to be agreed or at least reserved in the acceptance of the substituted contract.

95. Finally, and if all the foregoing findings and reasoning were not enough, the Parties agreed clause 25 of the STA, which is in the following terms:

> 25. ENTIRE AGREEMENT
>
> This Agreement **constitutes the entire agreement** between the Parties and **supersedes** and **extinguishes all previous** discussions, correspondence, negotiations, drafts, **agreements, promises, assurances, warranties, representations and understandings between them,** whether written or oral, **relating to its subject matter."**
>
> (Court's emphasis added)

96. The Defendants' counsel was correct to rely on this clause 25 in his Additional Closing submissions (page 3 top paragraph) and I accept the submission made there. Whilst the STA does not expressly state that it is a substituted contract for the MOU, to serve as their joint venture shareholders' agreement going forwards (ipso facto relating to the same subject matter) this clause makes crystal clear, the Parties intention that it was intended as such, and was to supersede and extinguish the MOU.

The Resolution of 31 December 2020 ("the Resolution")

97. The Resolution was agreed at a shareholders meeting on the date it bears even if not signed on that date and it expressly records [TB/106] that it is:

> "Based on the shareholders meeting held at SAM PRECIOUS METALS FZ-LLC located at Warehouse 8-36, Production City, Dubai, United Arab Emirates on December 31st, 2020."

98. It was attended by the shareholders and witnessed by members of the Board of SPM, all of whom appended their signatures to it, apart from Mr Skandalis. The subject was to make:

> "Decision on Shortfall to Provide 100kg Gold Working Capital by Snyder Prime Limited"

99. It recites the facts which had led to the meeting being called thus:

> "Referring to the Share Transfer Agreement, dated Feb 5, 2020. Snyder Prime Limited was unable to cover its obligation to provide the 100kg gold as working capital to the company by the deadline of 31st Dec 2020. The following was resolved to cover the shortfall to provide 100kg working capital by Snyder Prime Limited"

100. What was resolved and agreed by the shareholders, including Mr Shakthi/SPL, was as set out below. It is important to record first, that Mr Shakthi has not challenged the fact that he/SPL agreed to what the Resolution contains and records. Nor has he challenged the meaning of its provisions or the intentions of the parties to it in agreeing its effect. This was convincingly explained to me by Mr Garg (as contained in the Transcript at [T/2/25-37] - which evidence I accept as a true and accurate account of the intentions of the Parties to the STA). It is summarised by me in its, genesis, purpose and effect below. Mr Shakthi did not depose to any different meaning and the Defendants' counsel did not challenge that evidence or what the effect of the agreement in the resolution is, and was mutually intended to be, as it was explained to me by Mr Garg. The only challenge to the effectiveness of this agreement in the manner explained, was the suggestion from Mr Shakthi, that there was coercion which forced to him to sign it, or that it amounts to oppression of a him/SPL as a minority shareholder in SPM by the majority, so that it is void and of no effect. I have rejected that evidence and suggestion and case based upon it, for the reasons given above. Thus, what was agreed to deal with SPL's breach of the STA by failing to provide 100kgs of gold by 31 December 2020, was as follows:

> "(i) Mr. Sami Abu Ahmad and Rosyson Fze will provide the company Sam Precious Metals FZ-LLC with 100kg gold as working capital in equal ratio from 1st Jan 2021.
>
> (ii) Snyder Prime Limited and Mr. Shakti Chauhan will not be eligible for any dividend or fees from Sam Precious Metals Fz-LLC for twice the number of days they take to cover their shortfall to bring in 100kg gold as working capital starting 1st Jan 2021 and set to expire on 31st Aug 2023 as per agreement.
>
> Mr. Sami Abu Ahmad and Rosyson Fze will be compensated in equal ratio from the dividend of Snyder Prime Limited (25% + 5%) for twice the number of days starting from 1st Jan 2021, which Snyder Prime Limited takes to replace the working capital obligation temporarily fulfilled by Mr. Sami Abu Ahmad and Rosyson Fze. For example, if SPL brings 100kg on 15th Jan 2021 then number of days for compensation will be calculated as 15 + 15 so total 30 days. The working capital obligation as per agreement is for 5 years from the date of commencement of business for the company which is set to expire on 31st August 2023. If Snyder Prime Limited isn't able to provide 100kg gold as working capital till the date of expiry which is 31st August 2023 then they will not be eligible for the any dividend or fees from the company for twice the number of days counted from 1st January 2021 to 31st August 2023.
>
> 2- The compensation will be as follows: -
>
> (i) The 5% fees of the net profit of the company against the working capital of 100kg gold originally for Mr. Shakti Chauhan if he had bought the working capital of 100kg gold will now be distributed equally (2.5% each) between Mr. Sami Abu Ahmad and Rosyson Fze.
>
> (ii) The 25% dividend share profit against the 25% shareholding of the company originally for Snyder Prime Limited will now be distributed equally (12.5% each) between Mr. Sami Abu Ahmad and Rosyson Fze."

101. It is important to record, for the purposes of interpretation of this agreement, the agreed facts that SPL's obligation to provide the 100kgs of gold to SPM under the STA, was to provide it by 31 December 2020, so that it ran from 1 January 2020 until 31 August 2023. That end date was a carry-over from the MOU, which became a term of the STA in clause 4.2 thereof. The indisputable fact of nature is that the number of days including and between those dates is 973 days. Twice that number of days from and including the start date of 1 January 2021 and the end date, runs to 1 May 2026. It is the Claimants' case that in the events that have occurred, where it is undisputed that SPL did not provide the required 100kgs of gold it was required to provide to SPM under the STA, at any time before 31 August 2023, SPL is not entitled to receive its dividends until 2 May 2026, and they seek a declaration to that effect.

102. For reasons already, given, I am satisfied that Mr Shakthi proposed the solution of a surrender of his/SPL's dividends for a period or method to be calculated and that the result of the Resolution agreement was worked out in discussion between the Parties to it. Their approach and intention is described at [T/2/30] and I find and accept this was a genuine attempt to agree a fair formula (in unknown future circumstances and contingencies) to compensate Mr Sami and Rosy for their assumption of Mr Shakthi/SPL's obligation to invest 100kgs of gold. They did not know how long Mr Shakthi/SPL would remain in breach (he was promising for only a short time) and they did not know what the profits of SPM would be and how long it might take for them to have their gold restored. They were assuming a co-venturer's obligation and risk as entrepreneurs in its stead, and so as explained by Mr Garg, they calculated how much profit the company might make on a yearly basis with 100kgs invested; and how much it might make with 200kgs invested (it might of course have made a loss or less profit than calculated) and they sought to calculate how much time it might take for the 25% dividends otherwise due to SPL, to compensate them for their investment in its stead.
Because of the uncertainties, particularly as they could not be sure how much SPM would make in future, they came up with formula of compensation of payment of two days-worth of dividends for every day's delay in SPL bringing in 100kgs of gold. They were taking on SPL's risk of loss on the investment of their gold and obtaining its chance of a profit on the investment of that gold that SPL could and ought to have made,

but failed to do, for a potentially long period of putting their capital at risk, of 973 days. In the result, they have preserved their gold and made what appears to be handsome profits but that was not guaranteed. Mr Shakthi through his counsel's un-pleaded and evidentially unfounded submissions of oppression, rails against this outcome and prolonged loss of dividends, but I find it is the outcome of a scheme and method for remediation of his/SPL's breach that he suggested, and a formula he willingly agreed to, in his belief and/or protestations that he/SPL would bring in the gold quickly. As Mr Shakthi/SPL did not bring in any of the 100kgs of gold before 31 August 2023, the contractual result is, I find, as was confirmed by Mr Garg in answer to a question from me thus at [T/2/36]:

> **"JUSTICE ANDREW MORAN:** Let me go back to that and change my note. I have changed my note now as follows: the lock-in period is to 31 August 2023. What has happened is a failure to bring in the gold until date you said, so the delay has been from 1 January 2021 to 31 August 2023, which is 973 days. He will be compensating for an equal number of days after 31 August 2023, so after 973 days from that date, SPL will be entitled to receive its full dividend again; is that right?
>
> **MR GARG:** Yes, your Honour."

103. It follows that finding provides the answer, in effect, to issue 1 c. (supra) and that the Claimants are entitled to the declaration (as amended by me) that they seek in this respect.

F: Whether the First Defendant has violated the decision of the General Assembly dated 19 September 2021 and 14 February 2022 by not co-operating with the liquidation procedures of the subsidiary company named M/s. Sam Precious Metals FZE, Sharjah branch? And if so, is SPM entitled to damages from its shareholder SPL for any loss it has proved it has suffered as a result.

104. This claim has been presented in a most unsatisfactory manner. It is advanced against "the Defendant" in paragraph 6 b) and 48 of the Statement of Claim, with the first target of the complaint, being SPL's nominated director of SPM, Mr Skandalis, for his conduct in not signing the Resolution to close the Branch, when requested to do so. It is then pleaded that the matter was escalated to Mr Shakthi, the owner of SPL *"in his capacity as the shareholder of the 1st Claimant through the Defendant"*. There is no articulation of the legal basis of the claim against *"the Defendant"*, which the prayer for relief makes clear is a reference only to SPL. There is no articulation of a duty (or its scope) of cooperation of a shareholder, in the matter of the closure, which is being relied upon, how it arises, or how it has been breached. Likewise, there is no articulation of the basis of a claim concerning Mr Skandalis's conduct or how SPL is liable for any breach of his duty that might have been shown, as a director of SPM. Likewise, there is no articulation of the basis of a duty of Mr Shakthi as the owner of the shareholder of shares in the Claimant, which is not the legal entity that has suffered the loss complained of. On the evidence belatedly put before me, it is only the Sharjah legal entity that has been shown to have suffered the losses claimed, as explained below.

105. There is no case on causation pleaded or evidenced as to how and why the signature of Mr Skandalis was required to close the Branch, and no evidence advanced to prove that it was impossible to do so, without it. It is all mere unsubstantiated assertion. The email correspondence and other documents collected at [TB/195-217] show that Mr Skandalis was asking legitimate questions concerning the decision to close the Sharjah entity and on related issues, that there were some answers given (whether adequate or not has not been explored in the evidence - in particular, no evidence was led from Mr Skandalis, the Claimants' witness about it), and that this controversy then became part and parcel of the raft of issues in dispute between these warring shareholders, which plainly disrupted the management of the JV business. It is impossible having regard to the deficient manner in which this claim has been founded, presented and evidenced, for this Court to be satisfied what if any duty has been breached, in what manner, by which party or persons, and with what effect upon which entity.

106. The claim was advanced up to the trial hearing, without any evidence being submitted to prove any loss; and when that evidence was belatedly produced and admitted by me, all that was produced were financial statements of a separate legal entity registered in Sharjah, formerly Sun Gold Refinery (FZC), the shares in which are owned by the Claimant SPM, with its own separate accounts recording the losses now claimed by SPM. It is not shown or explained in the evidence, how those losses of a separate legal entity, are losses suffered by the Claimant in these proceedings. In the December 2022 accounts for example, the P&L statement, produced at [SB/56] shows that 66% of the losses suffered by this Sharjah entity, stem from depreciation and the rest from unspecified administrative expenses. This is a feature in common with the other financial statements and accounts relied upon. How depreciation of the assets of a separate company in Sharjah, stem from a claimed inability to close it down, are losses suffered by and claimable by SPM, which would not have occurred but for the breach of some unspecified duty owed to it, under some unidentified legal principle of the applicable law, is wholly unexplained or proved.

107. I am therefore not satisfied on the evidence and lack of legal substantiation of this claim before me, that these losses claimed, allegedly due to a failure to co-operate in the closure of the Sharjah Branch, have been so caused or have been suffered by this Claimant. The Claimant SPM has failed to discharge its burden of proof. This claim will accordingly be dismissed.

G: The Residue of the Parties' Closing Submissions not dealt with expressly or by implication of factual and legal findings above:

108. Substantial parts of Counsels' submissions were of little or no assistance to me in making the decisions necessary to determine this case fairly and justly, in accordance with the evidence and the applicable law. Unfortunately, they demonstrated scant appreciation of admitted, obvious and incontrovertible facts, which were evident from the Parties' own redacted witness evidence, including what they had agreed and recited in the relevant sequence of agreements, which they had entered and signed. The submissions also exhibited a lack of knowledge and understanding of the applicable legal rules and principles of the laws of the DIFC, by which this case falls to be determined.

109. In their first set of closing submissions, both Counsel referred to a mass of authorities which are irrelevant and of no assistance to the Court. They failed to identify and address the obvious, potentially relevant articles of the Contract Law, which fell for consideration and application in the proceedings. As a result, the court found it necessary to bring those articles to their attention and give them an opportunity to address them, in fairness to their clients. The result of this failure was that judicial time set aside for preparing the judgment immediately after receipt of submissions, was lost and wasted; considerable delay in rendering this judgment has unavoidably occurred due to other cases being fixed.

110. In the case of the Defendants' counsel, his first set of written closing submissions were, in substantial part, lacking in any factual or legal foundation. It was as if he had begun with a desired outcome for his clients in mind, and had proceeded to erect a case theory to achieve it, that

bore little or no relation to: the Defendants' pleaded case (as redacted) on the agreed and ordered issues for trial; to the evidence that was presented; or to the law to be applied. This resulted in him advancing a spuriously contrived analysis of the shareholders meeting and Resolution of 31 December 2020 (at page 7), with no evidential basis for much of it, and containing irrelevant allegations. Much worse, he made a collection of serious allegations (at page 8) in advancing a case of "blackmail" and minority shareholder oppression, without foundation on the evidence before me at the trial. This included citation of authority dealing with and implying *"fraud, misfeasance and other misconduct"* on the part of the Claimants, without having put any of those serious allegations to the Claimants' witnesses, to give them a chance to respond. It was an egregiously improper disregard of his duty under the rule in Browne v Dunne to put his clients' case, and a misuse of the opportunity given to counsel to make submissions to the Court, on the issues that were for trial. The submissions at Section C, beginning on page 5, concerning a resolution of 27 May 2020, are an invention of a case and argument that was not contained in the Defendants' pleaded case or witness statements; and none of it was put to the Claimants' witnesses when they were cross-examined. I do not know if counsel made those improper submissions on instructions, or on an improper frolic of his own, but I make it very clear again, that I have determined the issues on the evidence placed before me, without regard to submissions improperly made, and without drawing any adverse inference against the Defendants, by reason of them being made.

111. The exception to this sorry account, was Counsel for the Claimants' detailed and accurate analysis of the positions of the Parties and the promises made by the Defendants at sections IV to VI of her first writing closing submissions, and her meticulous analysis of the evidence that emerged at trial in section VIII thereof. The Court has largely accepted this analysis in its findings set out above, as being a true and accurate recounting and interpretation of events. That is the case, save as to the inadequate assertions at paragraph 9 concerning the Sharjah entity loss claim (which fail to demonstrate proof of the claim and that SPM has suffered a loss), paragraphs 11 and 12 which do not arise, and paragraph 14, which flows from the fundamental error made by her in section VII of her submissions. That fundamental error was her complete misunderstanding of what, on her clients' own evidence occurred, as a matter of law, upon agreement of the STA (including its Clause 25) as a substituted contract, as already explained and held above. That fundamental error, on which this whole case of loss stemming from a still subsisting obligation (which the Court has found was discharged by operation of Article 101 (2) of the Contract Law) was founded, can be traced to sub-paragraph c) of her written closing submissions at section VII, page 7, where it was submitted in stark error that:

> "the MOU explicitly states that it incorporates all points of understanding reached between the parties, in furtherance of which STA was executed between the parties. **Therefore, the MOU is an integral and complementary part of the STA, not contradictory. Consequently, the Defendant's argument that STA supersedes the MOU is not maintainable.** In fact, the Defendant No.3 has admitted that there is no such clause in the STA recording that it would supersede the MOU."

112. The highlighted extract is plainly wrong and rejected. The MOU was not expressly or implicitly preserved in effect by the STA. Clause 25 (which cannot possibly have been read or understood or in mind when this submission was crafted) is to expressly contrary effect. The MOU is not an "integral" or complementary part of the STA, which contradicts it in numerous respects of the arrangements made by a new group of shareholders in a new shareholders agreement dealing with the same subject matter of their joint venture. The first sentence of the submission, is nothing more than part of the background which has been superseded; and the third sentence refers to an utterly pointless question and answer, when it is obvious from all of its terms, that the STA was intended to, and did supersede the MOU as the operative joint venture shareholders' agreement, as a substituted contract for the MOU.

113. I have addressed the Claimants' Supplementary Closing Submissions to the extent necessary in my consideration of the effect of the STA above. I deal finally with the Defendants' Additional Closing Submissions only to note the following (the lack of paragraph numbers makes reference to them difficult).

114. Whilst asserting his submissions are without prejudice to the case that the MOU was non-binding and that the Resolution was unconscionable and a clear example of minority oppression, the Defendants' counsel has, in the light of the Court drawing Articles 100 and 101 of the Contract Law to his attention, evidently and wisely changed his tune. Unsurprisingly, he embraces substitution of the binding contract that was the MOU with the STA in the third paragraph on page 2. In the remaining paragraphs on pages 2 and 3, and with a dawning realisation of what the evidence before the Court has shown, counsel broadly articulates the essential findings and determinations the Court has reached in this case. To the extent those submissions do accord with the Court's findings set out above, they are accepted. Whilst this alternative case is advanced with a reservation of the unfounded case and allegations advanced and made in his original written closing, it is strikingly obvious they cannot exist in the same world of evidence and law that is before the Court.

115. Apart from the exception mentioned in paragraph 111 above, the Court has thus been ill-served. It has not received the assistance from counsel registered to appear before it, that it is entitled to expect. Furthermore, I was required to intervene regularly in the examination of witnesses by both counsel, to avoid misleading questions and confusion, to point out the need for, and failures to put a party's case, and to teach and instruct them how to ask their questions. In consequence, achieving the overriding objective has been seriously obstructed in this case.

H: Determination of the issues listed for trial:

116. For ease of understanding the issues are repeated with the Court's answers and determinations immediately following in bold type:

> *(1) Whether the First Defendant has breached the agreed terms and conditions of the Memorandum of Understanding dated 27 March 2018 and Share Transfer Agreement dated 5 February 2020 by not providing the working capital Requirements?*
>
> **The First Defendant has breached both the MOU and the STA, by its failure to provide working capital in the form of gold in the quantity or amount required under those agreements, by the time and for the period specified thereunder.**
>
> **However, this court also finds and holds, that the First Defendant's obligation and failure to do so under each agreement, has been discharged and that no cause of action for those breaches exists. In the case of its obligation under the MOU, by the agreement of a substituted contract in the form of the STA, in accordance with Article 101 (1) of the Contract Law, which was accepted by the Claimants in satisfaction of the obligation under the MOU; and by its discharge under Article 101 (2). In the case of breach of its obligation under the STA to provide gold, that obligation was remedied and discharged under and by virtue of the shareholders agreement recorded in the Resolution of 31 December 2020.**

(a) Whether the First Defendant's non-compliance and failure in meeting the working capital commitment have caused financial losses to the First, Second and Third Claimants?

In the circumstances of the Court's determination of the main issue at 1, it is not necessary for the Court to determine this sub-issue insofar as it concerns the First Claimant, since there is no basis at law for it to claim damages for such loss - even if suffered. Insofar as it relates to the Second and Third Claimants, and by reason of the determination of main issue 1 above, and issue 1 (c) following, they have not been caused, nor would they have any right of action for, any financial loss suffered, in consequence of the First Defendant's breaches, of the MOU or the STA, for the reasons given for those determinations.

(b) Whether the First Claimant has sustained a loss of profit due to the shortfall of 100kg of gold?

In the circumstances of the Court's determination of the main issue at 1, it is not necessary for the Court to determine this sub-issue, since there is no basis in law or contract, to claim damages for such loss.

(c) What is the effect of signing the shareholder resolution dated 31 December 2020 and what are the obligations of the parties therefrom?

The agreement recorded in the Resolution dated 31 December 2020, is a legally valid, binding and enforceable agreement between shareholders, which was entered into willingly by the Third Defendant on the First Defendant's behalf and is not vitiated by any coercion or oppression of a minority shareholder by the majority. In consequence, the Claimants are entitled to the declaration they seek, as granted above in a form modified by the Court.

(2) Whether the First Defendant has violated the decision of the General Assembly dated 19 September 2021 and 14 February 2022 by not cooperating with the liquidation procedures of the subsidiary company named M/s. Sam Precious Metals FZE, Sharjah branch?

The Claimants have failed to discharge their burden of proof in respect of this allegation against the First Defendant and the claim based on it will be dismissed.

(a) Whether the First Claimant has sustained loss due to the non-cooperation of the First Defendant in closing the Claimant's Sharjah branch?

The Claimants have failed to discharge their burden of proof in respect of this allegation against the First Defendant, and the claim based on it, will be dismissed.

(b) Whether the running cost of the Sharjah Branch affected the profit of the First Claimant?

The Claimants have failed to discharge their burden of proof in respect of this allegation of loss of profit suffered by the First Claimant, and the claim based on it, will be dismissed.

6. Liability of the First, Second and Third Defendants to compensate the First, Second and Third Claimants for the loss in (1) & (2)?

This Court holds and determines that there is no such liability of the Defendants.

I: Conclusion and Orders that follow:

117. It follows for all of the foregoing reasons, that the Court has hereby made orders as set out above.

118. As will be obvious, the Claims of, and positions taken by the Parties on each side, have been shown to be misconceived in fact and law. They have all signally failed in equal measure of time and as is likely, money spent and wasted, to achieve their objectives in bringing these bifurcated issues for trial before the Court. The tragedy (for them all and the prospects of success of their promising joint venture) is that their disagreements over these issues now determined, have spawned a plethora of collateral and consequential disputes, proceedings, and all manner and form of cross-allegations of misconduct, concerning a host of actions and reactions, in the management of their joint venture vehicle SPM. A number of consequences flow from this most unfortunate state of affairs, which requires the Court to act in pursuit of the overriding objective.

119. It is important first to make it absolutely clear that the Court has determined only the issues that were before it in this part of the proceedings on the evidence and submissions before it. Whilst it has been required to make findings about witnesses and the evidence they gave on these issues, it has formed no view whatsoever of any of the rest of the myriad of issues and disputes arising between the parties, or of the pleadings and evidence in related proceedings. If and when the need arises, which by its order made above, it seeks to give the Parties' the opportunity to avoid in their joint best interests, the Court will proceed to case manage and determine all outstanding disputes before it, fairly and justly in accordance with the evidence then put before it.

120. Addressing the Parties themselves, the court has now made its findings on the issues, evidence and submissions that were before it at the trial leading to this Judgment. The Court's findings of fact and law, unless set aside, are or will become, res judicata, and should provide the Parties with the basis and opportunity to put these originating disputes to one side, in the understanding that they have all been misguided in their pursuit of their claims and contentions thus far - at great cost and lost opportunities to them all. The court is hopeful that the Judgment will serve as a platform from which they can move forward to a complete settlement of all of their disputes, with the assistance of a respected qualified mediator. In the circumstances that are plainly and unarguably apparent to the Court, and to that end of settlement of their disputes, the court has power under RDC 27.8, and considers it appropriate in this extraordinary case, to make, an Alternative Dispute Resolution order. It has made that order in specific terms requiring the Parties to seek the assistance of a Mediator to avoid further avoidable disputation of claims, to their common cost and detriment.

121. It will be noted that the Court has so far made an order reserving the costs of the proceedings and trial so far, not already ordered in any event. The court has not made up its mind as to the allocation of the costs of the proceedings and trial, not so far ordered, and it will hear the parties on that issue if necessary. However, it must be as plain as a pikestaff to the Parties and their counsel (or at least it now should be to the latter) that the high probability, as things have turned out with both parties losing on their prime cases and the other succeeding, is that the Court will ultimately make an order that the Parties on each side should bear their own costs of these proceedings so far (save as already ordered). That indication is given in order to reduce the scope and uncertainty of outcome of disputes between the Parties, and so facilitate success at the mediation now ordered.