Sembcorp Marine Ltd *v* PPL Holdings Pte Ltd and another and another appeal [2013] SGCA 43

Case Number : Civil Appeals No 75 and 77 of 2012

Decision Date : 25 July 2013

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Judith Prakash J

Counsel Name(s) : Davinder Singh SC, Vanathi S, Jackson Eng and Isaac Lum (Drew & Napier LLC) for the appellant in Civil Appeal 75/2012 and the 1st respondent in Civil Appeal 77/2012; Lee Eng Beng SC, Disa Sim, Jonathan Lee and Fu Qui Jun (Rajah & Tann LLP) for the respondents in Civil Appeal 75/2012 and the appellants in CA 77/2012; Alvin Yeo SC, Monica Chong, Koh Swee Yen and Toor Simran (WongPartnership LLP) for the 2nd respondent in Civil Appeal 77/2012.

Parties : Sembcorp Marine Ltd — PPL Holdings Pte Ltd and another

Contract – Contractual terms – Admissibility of evidence

Contract – Implied terms

Companies – Memorandum and articles of association

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 801.]

25 July 2013 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 In this judgment, we give our decision on two related appeals, namely, Civil Appeal No 75 of 2012 ("CA 75") and Civil Appeal No 77 of 2012 ("CA 77") (collectively "the present appeals"). The present appeals arise out of Suit 351 of 2010 ("Suit 351"), which was an action commenced by Sembcorp Marine Ltd ("Sembcorp") against PPL Holdings Pte Ltd ("PPL Holdings") and E-Interface Holdings Limited ("E-Interface") over the corporate affairs and management of their joint venture company, PPL Shipyard Pte Ltd ("PPL Shipyard"). In his judgment in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another* [2012] 3 SLR 801 ("the Judgment"), the High Court judge ("the Judge") who heard the trial of the matter dismissed Sembcorp's claims and allowed in part the counterclaim brought by PPL Holdings and E-Interface against Sembcorp and PPL Shipyard (which had also been named as a defendant in the counterclaim). CA 75 is Sembcorp's appeal against the Judge's dismissal of its claims, while CA 77 is the appeal of PPL Holdings and E-Interface against the Judge's partial dismissal of their counterclaim.

2 The present appeals raise a number of issues of company law and contract law. In particular, lead counsel for Sembcorp, Mr Davinder Singh SC ("Mr Singh"), and lead counsel for both PPL Holdings and E-Interface, Mr Lee Eng Beng SC ("Mr Lee"), had much to say on the proper approach to the implication of terms as well as to the interpretation of contractual terms under our law. In this judgment, we address these points raised, as well as the construction of contracts in general.

Facts

3 Most of the relevant facts have been set out at [3] to [25] of the Judgment. We therefore only recite the facts to the extent necessary.

Parties

4 Sembcorp is engaged in the business of constructing oil rigs and ships. In or around late 2000, one of Sembcorp's wholly-owned subsidiaries, Jurong Shipyard Pte Ltd, submitted a tender pursuant to an invitation issued by Santa Fe International Corporation for the construction of certain drilling rigs ("the Santa Fe Projects"). PPL Shipyard, which was also carrying on the business of designing and constructing offshore drilling rigs, had likewise put in bids for the Santa Fe Projects. At some point, the management teams of Sembcorp and PPL Shipyard came to learn about their mutual interest in the same Santa Fe Projects. The idea of an alliance was mooted, and a joint venture quickly materialised with the signing of a Sale and Purchase Agreement ("the SPA") on 29 March 2001, and a joint venture agreement ("the JVA") on 9 April 2001. Prior to the SPA, PPL Shipyard was effectively owned by PPL Holdings as 97% of PPL Shipyard's issued share capital was held by PPL Holdings in its own right while the remaining 3% was held by E-Interface, a wholly-owned subsidiary of PPL Holdings.

5 The only two directors of PPL Holdings are Dr Benety Chang ("Chang") and Mr Anthony Aurol ("Aurol"). In addition, Aurol was the Executive Director of PPL Shipyard, as well as the Chief Operating Officer and a director of Baker Technology Ltd ("Baker"), a public company listed on the Stock Exchange of Singapore. Baker owned 100% of the shares of PPL Holdings and as will become apparent, was an important player in the background to the present dispute. Chang is the Executive Deputy Chairman of PPL Shipyard as well as a director and the Chief Executive Officer of Baker. Between them, Chang and Aurol managed the day-to-day operations of PPL Shipyard.

Background

The JVA

6 Under the SPA, Sembcorp purchased 50% of the issued share capital in PPL Shipyard from PPL Holdings. As a result, Sembcorp and PPL Holdings (together with E-Interface) each had an equal interest in PPL Shipyard. The terms on which the joint venture between Sembcorp and PPL Holdings was to be carried out were set out in the JVA.

7 The key terms of the JVA which are in dispute in the present appeals include the following:

> **4. SHARE CAPITAL**
>
> **...**
>
> 4.2 Unless otherwise agreed to in writing between the Parties hereto, the share capital of [PPL Shipyard] shall be held in the following proportions:
>
> Name of Party Percentage of shareholding
>
> | | |
> |---|---|
> | Sembcorp | 50 per cent |
> | PPLH | 50 per cent |

4.3 The percentage proportion of the Parties shall be maintained for the duration of this Agreement unless otherwise agreed in writing.

5. BOARD OF DIRECTORS

5.1 Unless otherwise agreed, the Board of Directors of [PPL Shipyard] shall comprise of six (6) Directors who shall be appointed by the Parties as follows:

SembCorp 3 Directors

PPLH 3 Directors

so long as they shall hold such number of shares for the time being in the capital of [PPL Shipyard] as are not less than the proportions set out herein. Any member of the Board may appoint an alternate to attend Directors' meetings and otherwise act as a Director in his absence.

The Parties shall appoint directors to all the subsidiaries of [PPL Shipyard] on the same proportion and basis as set out above and these subsidiaries shall be operated on the same basis and in accordance with the terms as set out in this Agreement.

5.2 Any vacancy in the Board will be filled by the Party that nominated the Director who is retiring or ceasing for whatever reason to be a Director. Each of the Parties agree that they shall cause their nominee members of the Board and their representative at a shareholders' meeting to support and vote for the other Party's nomination or removal upon receipt of advice in writing to such effect from the party nominating or removing such Director.

5.3 The quorum for the meeting of the Board of Directors shall be two (2) directors present in person or by the duly appointed alternatives provided that at any such meeting at least one director nominated by each of the Party [*sic*] shall be present as otherwise there shall be no quorum. At any meeting of the Board of Directors, provided a quorum is present, each party will have three (3) votes irrespective of the number of directors present ...

5.4 A resolution signed by all the Directors for the time being shall be valid and effectual as if it had been passed at a meeting of the Board duly convened and held. For the purpose of this Clause, "in writing" and "signed" include by telex, cable, telegram or telefax.

5.5 The Chairman of the Board of Directors shall be nominated by SembCorp. If the person nominated as Chairman is for any reason unable to attend a Board or shareholders meeting, he shall nominate a member of the Board to replace him and failing which, the Deputy Chairman shall act as Chairman. The Chairman shall not have a casting vote.

5.6 The Deputy Chairman shall be one of the Directors nominated by PPLH.

5.7 [PPL Shipyard]shall be managed by the Board but the day-to-day administration or management of [PPL Shipyard] shall be vested in the Managing Director for the time being of [PPL Shipyard] who shall at all times be subject to the control of the Board. The Managing Director shall be nominated by PPLH and approved and appointed by the Board. The authority and responsibility of the Managing Director shall be approved by the Board. A Deputy Managing Director of [PPL Shipyard] shall be nominated by SembCorp and approved and appointed by the

Board. The authority and responsibility of the Deputy Managing Director shall be approved by the Board.

5.8 There shall be an Executive Committee of the Board comprising four members. Two of the members shall be nominated by SembCorp and the other two by PPLH. The Executive Committee will be responsible for the matters relating to the management of [PPL Shipyard] as delegated by the Board.

6. SHAREHOLDERS' MEETING

6.1 All general meetings of [PPL Shipyard] shall be held at such places as may be decided by the Board of Directors. Subject to the provision of the Act as to special resolutions, special notice and short notice, at least 14 days' notice in writing of each general meeting of [PPL Shipyard] shall be given to all Shareholders. The contents of such notice of general meeting shall comply with the Articles of Association. The quorum necessary for meetings of Shareholders of [PPL Shipyard] shall be the two Shareholders. Each Shareholder shall only appoint one representative who shall have only one vote. The Chairman of the meeting will be a nominee of SembCorp. The Chairman will not have a casting vote.

…

8. OPERATIONAL SUPPORT

8.1 The Parties agree that they will endeavour to provide reasonable assistance and support which a Party in its sole discretion deems fit and with the consent of the other Party for the operations and activities of [PPL Shipyard] including, but not limited to, arranging for the Parties and their affiliates, partners and agents to assist such operations where possible and appropriate.

8.2 The Parties agree that they will support [PPL Shipyard] in the expansion of its activities by providing [PPL Shipyard] on a reasonable basis with such goods, services and equipment as the Parties normally provide in the course of their business.

…

11. TRANSFER OF SHARES

…

11.10 Upon the completion of the sale of the shares in accordance with the terms of this Clause 11, and unless otherwise agreed to by the Parties, the Directors nominated by the Party which has sold its shares shall immediately resign from the Board. If only a portion of the shares held by a Party are sold by a Party pursuant to this clause 11, the Parties shall agree on the Directors, if any, nominated by that Party which has sold a part of its shares, who shall continue to remain on the Board of [PPL Shipyard] and the terms of such tenure as Director on the Board of [PPL Shipyard].

…

13. CONFIDENTIALITY

13.1 All communications between the Parties and [PPL Shipyard] and all information and other material supplied to or received by any of them from the others which is either marked

'confidential' or is by its nature intended to be exclusively for the knowledge of the recipient alone and any information concerning the business or trading transactions or the financial arrangements of the Parties or [PPL Shipyard] or of any person with whom any of them is in a confidential relationship of the recipient shall be kept confidential by the recipient (except for such relevant information as may be required by the parent company of a Party for purposes of consolidation of the accounts and to satisfy various group policies and procedures) unless or until the recipient can reasonably demonstrate that it is or part of it is, in the public domain, whereupon, to the extent that it is public, or in the event that the recipient is requested or required by a judicial, administrative or governmental body to disclose any such confidential information, or where such confidential information is already known to the recipient ... then this obligation shall cease.

...

24. GOOD FAITH

24.1 Each of the Parties undertakes with each of the others to do all things reasonably within its power which are necessary or desirable to give effect to the spirit and interest of this Agreement and the Memorandum and Articles of Association of [PPL Shipyard].

...

26. AMENDMENTS

26.1 No amendment of this Agreement shall be valid and enforceable unless they shall have been agreed to in writing by the Parties hereto.

...

3 1.CONSTITUTION OF THE COMPANY

...

31.2 The Parties hereto shall after the execution of this Agreement exercise, as soon as possible, their voting rights in [PPL Shipyard] and take all necessary steps to amend the Memorandum and Articles of Association to incorporate the terms of this Agreement. In the event of any conflict between the terms of this Agreement and the Memorandum and Articles of Association, the terms of this Agreement shall, as between the parties hereto, prevail unless the contrary to the laws in force in Singapore and the parties hereto shall forthwith cause such necessary alteration to be made to the Memorandum and Articles of Association as is required so as to resolve conflict.

...

8 Pursuant to cl 31 of the JVA, some of PPL Shipyard's Articles of Association were amended on 26 September 2001 with the general aim of bringing them into conformity with the terms of the JVA, although it should be noted that the amended articles were not identical to the terms of the JVA. The specific articles of association of PPL Shipyard which were amended are hereinafter referred to as the "the Consequential Articles", and references herein to the Articles of Association of PPL Shipyard refer to the version of the Articles of Association post 26 September 2001.

The Supplemental Agreement and the change in shareholding

The Supplemental Agreement and the change in shareholding

9 On 5 July 2003, Sembcorp and PPL Holdings entered into an agreement supplemental to the JVA ("the SA"). The SA provided, amongst other things, for the sale of 35% of PPL Holding's shareholding in PPL Shipyard to Sembcorp. Following this, Sembcorp owned 85% of PPL Shipyard while PPL Holdings (together with E-Interface's 3%) owned the remaining 15%. The SA, which took the form of a letter from Chang on behalf of PPL Holdings to Sembcorp's then President, Mr Tan Kwi Kin, also provided for a "put" option in favour of PPL Holdings enabling it to sell its remaining 15% in PPL Shipyard to Sembcorp within a period of 36 months ("the Put Option"). Sembcorp had actually wanted a "call" option entitling it to purchase the remaining 15% of PPL Shipyard from PPL Holdings, but Chang did not agree to this.

10 The SA is a brief document. Despite the change in the shareholding of PPL Shipyard following the SA, no specific changes were made to the JVA, and in particular, to those provisions which regulated the management of PPL Shipyard such as cll 5.1 to 5.8. Nor were any amendments made to PPL Shipyard's Articles of Association. Notwithstanding this however, subsequent to the SA, Sembcorp appointed three more directors to the PPL Shipyard board, such that there were then six Sembcorp-appointed directors and three PPL Holdings-appointed directors. There was and is no dispute between the parties as to the validity of these appointments.

11 It is evident from the Put Option that the possibility of PPL Holdings and E-Interface eventually exiting from the joint venture was contemplated. This possibility, however, did not eventuate as the Put Option was never exercised. Instead, PPL Holdings and E-Interface continued with the joint venture on the basis of the revised shareholding structure. As for Sembcorp, although it had a majority interest in the equity of PPL Shipyard and majority board representation after the SA, the real limits of its power as the majority shareholder were not tested until several years later. In the meantime, the parties proceeded more or less as they had from the outset, working consensually to address the issues that arose from time to time.

Yangzijiang's bid for Baker's shares in PPL Holdings

12 On 16 April 2010, almost seven years after the SA, Baker received a "binding" letter of offer from Yangzijiang Shipbuilding (Holdings) Limited ("Yangzijiang") to purchase all its shares in PPL Holdings for an aggregate sum of US$155m. Yangzijiang's offer was calculated using, *inter alia*, the net book value of PPL Shipyard based on the latter's full year accounts for 2009 ("the 2009 Accounts"). As at the date of the offer, PPL Shipyard's 2009 Accounts had not been published. It later emerged that Aurol had furnished a copy of the 2009 Accounts to a broker for Yangzijiang on 13 April 2010. Sembcorp took an adverse view of these developments when it learnt of them.

Sembcorp's response

13 At a PPL Shipyard quarterly board meeting that was held on 28 April 2010 which all the directors attended, the Chairman, who was a Sembcorp-nominated director, tabled three resolutions for approval under "Other Matters". These resolutions sought to appoint:

(a) a new designated Managing Director to phase in and succeed the incumbent who was a PPL Holdings-nominated director;

(b) a new Chief Financial Officer; and

(c) two Joint Company Secretaries to replace the existing one.

None of these resolutions ("the 28 April 2010 resolutions") were listed on the agenda for that board meeting; nor were the PPL Holdings-nominated directors given notice that these resolutions would be tabled. The three PPL Holdings-nominated directors voted against the 28 April 2010 resolutions, while the six Sembcorp-nominated directors voted in favour of them. The 28 April 2010 resolutions were thus purported to have been passed by a vote of 6 to 3. Clause 5.3 of the JVA, which on one reading appears to provide that each party shall have three votes at board meetings regardless of the number of directors present, was brought to the attention of the Sembcorp-nominated directors by the PPL Holdings-nominated directors, but the clause gained no traction with them at that meeting.

14 Several other resolutions were subsequently passed on 11 May, 3 June, 14 June and 21 June 2010. These revolved primarily around the appointment of a firm of solicitors, WongPartnership LLP, to act for PPL Shipyard and to receive instructions from the Chairman of PPL Shipyard (a Sembcorp-nominated director) on matters pertaining to Suit 351 which was commenced on 15 May 2010 ("the WongPartnership resolutions"). The WongPartnership resolutions were passed at board meetings at which no directors nominated by PPL Holdings were present.

15 On 8 June 2010, the six Sembcorp-nominated directors sent a letter to Aurol ("the 8 June 2010 letter"). The letter, amongst other things, invited Aurol to vacate his office as a director of PPL Shipyard pursuant to Art 90(g) of the Articles of Association in the light of his admission that he had disclosed the 2009 Accounts of PPL Shipyard to Yangzijiang.

16 On 15 June 2010, the six Sembcorp-nominated directors commenced proceedings against the three PPL Holdings-nominated directors in Originating Summons No 590 of 2010 ("OS 590"). Pursuant to OS 590 (Amendment No 1) dated 26 August 2010, the six Sembcorp-nominated directors sought, amongst other things, a declaration that the WongPartnership resolutions were valid pursuant to s 392(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). This was heard by a High Court judge who declared that some but not all of the resolutions were invalid: *Tang Kin Fei and others v Chang Benety and others* [2011] 1 SLR 568 ("*Chang Benety (HC)*"). On appeal, the Court of Appeal held that the resolutions which the High Court judge had found to be valid were in fact invalid: *Chang Benety and others v Tang Kin Fei and others* [2012] 1 SLR 274 ("*Chang Benety (CA)*").

Suit 351

17 In Suit 351, Sembcorp asserted that PPL Holdings had breached the following two express terms and three implied terms in the JVA and the SA:

(a) Express Terms

(a) Clause 13 of the JVA ("the Confidentiality Clause"), on the ground that Aurol had wrongfully disclosed the 2009 Accounts to Yangzijiang in order to enable Yangzijiang to refer to PPL Shipyard's net book value for the 2009 financial year in calculating its offer price.

(b) Clause 24 of the JVA ("the Spirit Clause"), on the ground that PPL Holdings failed to exercise reasonable efforts to uphold the "spirit" of the JVA and to ensure that the offer from Yangzijiang was rejected by Baker.

(b) Implied Terms

(c) That such of the provisions of the JVA and the SA, as were premised upon the existence of the equal shareholding interest of Sembcorp and PPL Holdings (together with E-Interface) in PPL Shipyard, would cease to subsist or apply upon either party acquiring a majority of the issued

and paid-up share capital in PPL Shipyard, and the JVA itself would terminate and the Consequential Articles would no longer subsist or apply upon either party ceasing to hold any beneficial interest in PPL Shipyard ("the Equality Premise Clause").

(d) That neither party will, without offering its shares to the other, act in any manner which would cause the other to be a "partner" in PPL Shipyard together with a party owned or controlled by someone other than the principals of the parties to the JVA ("the Change of Control Clause").

(e) That each party will ensure that its wholly owned subsidiary, its holding company and/or the wholly owned subsidiaries of its holding company would not do anything which would undermine the benefits conferred on the parties by cl 11.7 of the JVA ("the Benefits Guarantee Clause").

18 PPL Holdings and E-Interface counterclaimed, seeking, *inter alia*:

(a) a declaration that the 28 April 2010 resolutions were invalid;

(b) a declaration that the removal of Aurol as a director of PPL Shipyard was invalid and that his employment as an executive of PPL Shipyard had not been terminated;

(c) a declaration that PPL Holdings and E-Interface are entitled to seek the reliefs in (a) and (b) on the grounds of minority oppression under s 216 of the Companies Act;

(d) a declaration that PPL Holdings and E-Interface are entitled to mount a statutory derivative claim under s 216A of the Companies Act to invalidate the WongPartnership resolutions;

(e) a declaration that PPL Holdings has the right to nominate the Managing Director of PPL Shipyard; and

(f) an order compelling Sembcorp to join PPL Holdings and E-Interface in passing a special resolution to resolve and remove any conflicts between the JVA and the Consequential Articles.

19 In essence, Sembcorp by these proceedings sought to establish that it was in a position to exercise effective control over the management of PPL Shipyard, whereas PPL Holdings and E-Interface through their counterclaim sought to establish that they continued to retain equal voting rights at board meetings as well as executive control of PPL Shipyard.

The decision below

The Judge's decision on Sembcorp's claim

20 The Judge made the following findings on Sembcorp's claim:

(a) The Equality Premise Clause could not be implied into the JVA or the SA because of the absence of any mechanisms to effect the changes in management once the equal proportions of shareholding were disturbed. Furthermore, Sembcorp's subsequent conduct in appointing three more directors to the board of PPL Shipyard after the parties entered into the SA was not sufficiently compelling to warrant the implication of the term.

(b) The Change of Control Clause could not be implied into the JVA or the SA because of the

"black holes in the factual matrix" that Sembcorp put forth. It was not clear that a change of the principals who controlled the parties was thought to be an issue which needed resolution by a share offer.

(c) The Benefits Guarantee Clause could not be implied because it was to the same effect as saying that no party should breach cl 11.7 and was therefore superfluous.

(d) There was no breach of the Confidentiality Clause because the information contained in the 2009 Accounts was not confidential at the time of release. In any event, the breach was not repudiatory since the clause was neither a condition nor was it one which would deprive Sembcorp of substantially the whole benefit of the JVA if it was breached.

(e) There was no breach of the Spirit Clause because the identity of the parties to the JVA had not changed, even though PPL Holdings was now owned by Yangzijiang.

The Judge's decision on PPL Holding's counterclaim

21 As for PPL Holdings and E-Interface's counterclaim, the Judge held that:

(a) The 28 April 2010 resolutions were invalid because they were passed at a meeting without the necessary quorum.

(b) The removal of Aurol was invalid because it was not effected at or pursuant to a properly constituted directors' meeting.

(c) However, PPL Holdings and E-Interface were not entitled to seek the reliefs in (a) and (b) under s 216 of the Companies Act on the basis of minority oppression because this would amount to a circumvention of their lack of standing to do the same under s 216A.

(d) PPL Holdings and E-Interface were not entitled to seek relief under s 216A of the Companies Act to invalidate the WongPartnership resolutions because they were shareholders and had no standing to pursue a claim on behalf of the company.

(e) It was not necessary to compel Sembcorp to work with PPL Holdings to iron out any inconsistencies between the JVA and the Consequential Articles as this was a matter of contract.

Issues before this Court

22 In CA 75, Sembcorp pruned its arguments and submitted that the Judge erred in finding that:

(a) the Equality Premise Clause could not be implied into the JVA or into the Articles of Association of PPL Shipyard;

(b) there was no breach of the Confidentiality Clause;

(c) the 28 April 2010 resolutions were invalid because they were made at a meeting without the necessary quorum; and

(d) the removal of Aurol was invalid because it was not made at a properly constituted directors' meeting.

23 In CA 77, PPL Holdings and E-Interface submitted that the Judge erred in:

(a) finding that PPL Holdings and E-Interface were not entitled to seek relief under s 216 of the Companies Act to invalidate the 28 April 2010 resolutions, the removal of Aurol, and two of the WongPartnership resolutions;

(b) finding that independently of s 216 of the Companies Act, PPL Holdings and E-Interface were not entitled to a declaration that the WongPartnership resolutions are invalid under s 392(2) of the same;

(c) not dealing with the issue of whether PPL Holdings in its own right has the right to nominate any successor as the Managing Director of PPL Shipyard; and

(d) not making an order compelling Sembcorp to join with PPL Holdings to iron out any inconsistencies between the JVA and the Consequential Articles and further, in not granting liberty to apply for the said order.

Analysis

Interpretation, implication and construction

24 After a detailed analysis of the law on implied terms, the Judge adopted the position in *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 1 WLR 1988 ("*Belize*"), holding (at [60] and [64] of the Judgment) that "[i]f a term is thought fit for implication on the satisfaction of either of the traditional tests, *Belize* demands that the term implied must be checked for consonance with a reasonable interpretation of the contract", based on the "*particular* factual matrix before [the court]" [emphasis in original]. It should be noted that the Judgment pre-dated our judgment in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 ("*Foo Jong Peng*"), where we declined to follow *Belize*.

25 *Belize* belongs to a pentalogy of English cases including *Investor Compensation Scheme Ltd v West Bromwich Building Society and Others* [1998] 1 WLR 896 ("*ICS*"), *Jumbo King Ltd v Faithful Properties Ltd and others* [1999] 3 HKLRD 757 ("*Jumbo King*"), *Belize*, *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61 ("*The Achilleas*"), and *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] 1 AC 1101 ("*Chartbrook*") that has brought about significant developments in contract law. The leading judgments in all of these cases were either delivered by Lord Hoffmann or referred to a leading judgment of his. We have already commented, in some detail, on *The Achilleas* which deals with the law on remoteness of damage in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 and in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363. In the present judgment, we will consider in particular *ICS, Jumbo King* and *Belize*, as these cases address issues relating to the implication of terms and the construction of contracts.

26 Before turning to consider the approach to be taken in Singapore law, it would be helpful first to set out precisely the meaning to be ascribed to the key terms used in this discussion. Words such as "interpretation", "implication" and "construction" despite being loaded with legal meaning, have generally been used loosely. Oftentimes, the level of specificity in terminology that is suggested below is not necessary. But occasionally, as in the present appeals (see [78]–[81] below), it may be beneficial and desirable to pay attention to these details.

Interpretation of terms

27 First, by "interpretation", we refer to the process of ascertaining the meaning of expressions in a contract. The presence of expressions, primarily in the form of words constituting an express term, is an essential prerequisite to invoke the process of interpretation. This view (*ie*, that interpretation concerns the meaning of *words*) is supported by academics in the United States of America such as Professor Allan Farnsworth, Professor Arthur Corbin ("Prof Corbin") and Professor Samuel Williston: Allan Farnsworth, "'Meaning' in the Law of Contracts" (1966-1967) 76 Yale LJ 939 at 939–940. We find Prof Corbin's explanation of the process of interpretation particularly apt (Margaret N Kniffin, *Corbin on Contracts* vol 5 (Joseph M Perillo ed) (LexisNexis Law Publishing, 1998 Rev Ed)) at para 24.1:

> Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person. *The symbols most commonly in use are words*, appearing singly or in groups, oral or written; but acts and forbearances are also symbols of expression requiring interpretation. [emphasis added]

28 Since the process of interpretation entails ascribing meaning to the parties' contractual or contractually relevant *expressions*, there cannot be interpretation of a non-expression, *ie* a non-existent expression. As Lord Steyn observed in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 ("*Hyman*") at 458, the purpose of interpretation is "to assign to the *language of the text* the most appropriate meaning which *the words* can legitimately bear" [emphasis added]. It is through such a process of interpretation that the parties' intentions as *expressed* in the contract are objectively ascertained.

Implication of terms in fact

29 The interpretative process does not *always* provide a complete picture of the parties' intentions. Such a process necessarily falls short where there is a gap in a contract arising from its silence on a particular issue, because where a contract is silent on a particular issue, there will plainly be no language to which an appropriate meaning can be ascribed. There is no principle of contract law that every gap must be filled; but the law provides that in some cases, the gap ought to be filled because the parties are presumed to have intended that to be so. In the words of Lord Wright in *Luxor (Eastbourne) Ltd and others v Cooper* [1941] AC 108 at para 10.04, "what is sought to be implied is based on an intention imputed to the parties from their actual circumstances". The implication of terms in fact is the process by which the court fills a gap in the contract to give effect to the parties' presumed intentions.

30 None of this is especially new. We refer to Goh Yihan, "Terms Implied in Fact Clarified in Singapore" (2013) 2 JBL 237 ("*Goh (JBL)*") where Assistant Professor Goh Yihan ("Asst Prof Goh") highlighted (at p 244) the views of Professor Gerard McMeel ("Prof McMeel") and Sir Thomas Bingham MR (as he then was) on the distinction between the interpretative and implication process, both of whose views we agree with. Prof McMeel proposes that the process of implication "goes further [than interpretation] and permits the court to plug what it perceives to be gaps in the express terms or explicit language of the parties' agreement": Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 2nd Ed, 2011) ("*McMeel*") at p 315. Similarly, Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 ("*Philips Electronique*") observed (at 481):

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the *true meaning to the* ***language*** *in which the parties themselves have* ***expressed their contract*** . ***The implication of contract terms involves a different*** *and altogether more ambitious undertaking*: the interpolation of terms to deal with

> matters for which, *ex hypothesi*, the parties themselves have made no provision. ... [emphasis added in italics and bold italics]

Construction of a contract

31 Next, the "construction" of a contract refers to the composite process that seeks to ascertain the parties' intentions, both actual and presumed, arising from the contract *as a whole* without necessarily being confined to the specific words used. Construction, in this sense, encompasses both the interpretation of express terms as well as the implication of terms to fill gaps. Rectification too may be seen as part of the process of construction as it is a mechanism by which the parties' true common intentions are given effect to.

32 That the word "interpretation" has been used interchangeably with the word "construction" is unsurprising. It might be somewhat more unusual for the implication of terms to be mentioned in the same breath. Nonetheless, the place of implied terms within the concept of the construction of contracts is not without sound authority: *Hyman* at 459, and *McMeel* at para 1.17. In *Liverpool City Council v Irwin and another* [1977] 1 AC 239 ("*Liverpool City Council*"), Lord Wilberforce stated (at 253):

> To say that the construction of a complete contract out of these elements involves a process of "implication" may be correct; it would be so if implication means the supplying of what is not expressed.

So too in *South Australia Asset Management Corporation v York Montague Ltd* [1997] 1 AC 191, Lord Hoffmann stated (at 212) that "[a]s in the case of any implied term, the process is one of *construction of the agreement as a whole* in its commercial setting" [emphasis added].

33 It follows then that the first of Lord Hoffmann's five principles in *ICS* (at 912) that "[i]nterpretation is the ascertainment of the meaning which the *document* would convey to a reasonable person" [emphasis added], can be restated in terms that interpretation is the ascertainment of the meaning which the *expressions in a document* would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract.

The contextual approach revisited

34 Having clarified the scope of the relevant terminology, we turn to consider the contextual approach to the interpretation of terms as encapsulated by Lord Hoffmann's five principles in *ICS.* The philosophy that underlies the contextual approach is one that seeks the common intention of the parties, even if, occasionally, this might yield an understanding that departs from the literal meaning of the words used in the contract. We have largely adopted the contextual approach to interpretation under our law in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"), where this court held (at [132(d)]) that extrinsic evidence is admissible if it "[goes] towards proof of what the parties, from an objective viewpoint, ultimately agreed upon", subject only to the limitation that the extrinsic evidence "is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context". As we shall later see, in many respects, the adoption of the contextual approach to interpretation might entail a migration towards the principles adopted in civil law jurisdictions.

The robust approach to the admissibility of extrinsic evidence

35 In *ICS*, Lord Hoffmann explained that the factual matrix to be considered when construing a contract could include "absolutely anything" other than evidence as to previous negotiations and declarations of subjective intent, such evidence being admissible only in an action for rectification (see *ICS* at 913). This was emphasised in *Jumbo King* where Lord Hoffmann explained (at 773) that "[t]he court is not privy to the negotiation of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession" (see also *Chartbrook* at [30]).

36 This court hinted of a possible willingness to venture further than Lord Hoffmann in *Jumbo King* and *Chartbrook* by observing in *Zurich Insurance* (at [132(d)]) that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in a normal case, such evidence is likely to be inadmissible". The New Zealand Supreme Court has gone even further by holding that evidence of both pre-contractual negotiations and subsequent conduct may be admissible to aid in contractual interpretation: see *Wholesale Distributors v Gibbons Holdings* [2008] 1 NZLR 277 ("*Gibbons*") and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 ("*Vector Gas*"). We refer to the New Zealand approach as the "robust approach".

37 The robust approach towards the admissibility of extrinsic evidence bears a strong resemblance to the civil law approach which allows contracts to be proven by "any means" (see Art 1341 of the French Civil Code (consolidated version of 2 June 2012) read with Art 110-3 of the French Commercial Code (Rev Ed 2010)), and this includes the examination of "all the corresponding circumstances", including pre-contractual negotiations and correspondence, business practices and customs, and subsequent conduct (see Art 431 of the Russian Civil Code (enacted 18 December 2006)). This is also similar to the position in German law *viz*, the German Civil Code (promulgated on 2 January 2002) (see Stefan Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations" in *Contract Terms* (Oxford University Press, 2007) (Andrew Burrows and Edwin Peel eds) ("*Contract Terms*") ch 7 at pp 137–139) and Chinese law *viz*, the Contract Law of the People's Republic of China (enacted on 15 March 1999) (see Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia, 2002) at para 5.007; and Mo Zhang, *Chinese Contract Law: Theory and Practice* (Martinus Nijhoff, 2006) at p 137). Transnational conventions dealing with contractual construction also permit the admission of such evidence, including pre-contractual negotiations, business practices and subsequent conduct (see Art 4.3 of the UNIDROIT Principles of International Commercial Contracts (Rev Ed 2010); Art 5:102 of the Principles of European Contract Law (Rev Ed 2002); and Art 8(3) of the United Nations Convention on Contracts for the International Sale of Goods (enacted on 11 April 1980)).

38 The fact that the robust approach is prevalent in the civil law legal systems and transnational conventions is of course not a reason for a common law system such as ours to eschew it. Indeed, at a conceptual level, harmonization and convergence in commercial laws is generally to be welcomed. But at the practical level of implementation, this must be assessed in the round taking into account how this dovetails with our legal system and our laws on the admissibility of evidence and the litigation process in general. In this regard, there are at least two noteworthy aspects of the Singapore legal system that bear on this. First, the law of evidence in Singapore is governed primarily by the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), and secondarily by the common law. Second, the common law adversarial litigation process which is adopted under our system is structurally different from the inquisitorial process of the civil law system. These differences warrant a careful examination of the extent to which we should adopt the robust approach. We elaborate on the significance of both these differences below.

The EA

39 The law governing the admissibility of extrinsic evidence in Singapore is primarily statutory in

the form of the EA. Since jurisdictions such as the United Kingdom, Hong Kong, and New Zealand do not have equivalent provisions of the EA, the cases of *ICS*, *Chartbrook*, *Jumbo King*, *Gibbons* and *Vector Gas* must be treated with a degree of caution. As was observed by Lord Hoffmann in *Chartbrook* (at [39]), courts should be careful about transposing rules formulated by and for a particular legal system operating under a particular philosophy into another legal system premised on another philosophy.

(1) Rules of evidence and rules of contractual construction

40 We begin with a fundamental, even obvious, proposition of law. The EA only governs the *admissibility* of evidence. It is not concerned with and so does not prescribe rules of contractual construction. The province of the EA is the treatment of evidence, and this is conceptually independent and distinct from rules of contractual construction. Of course, rules of *evidence* under the EA may affect the *application* of specific rules of contractual interpretation; but they do not prescribe how a contract should be interpreted and construed.

41 Sir James Fitzjames Stephen ("Sir James"), the drafter of the Indian Evidence Act of 1872 (Act I of 1872) ("Indian EA") – from which the Singapore EA was derived – was also very much alive to this distinction, as recorded in his book, *A Digest of the Law of Evidence* (Sir Harry Lushington Stephen and Lewis Frederick Sturge eds) (MacMillan and Co Limited, 12th Ed, 1936) ("*Stephen's Digest*"). *Stephen's Digest* provides significant insight into the thinking behind the drafting of the Indian EA as it was a commentary on an English Bill similar to the Indian EA (which Bill was never passed in England despite being the subject of a few words in Parliament). Sir James explained in the Introduction (at p xviii) that he was conscious of the overlap between the law of evidence and the law of contract while drafting the Indian EA and strived to keep the two separate.

42 Using s 94(*f*) of the EA – which has been held to embody the contextual interpretation approach (see [45]–[48] and [63] below) – as an example, *Stephen's Digest* supports the view that the predominant purpose of the provision is to address the question of *when* (and what type of) evidence may be admissible, as opposed to *how* a document is to be construed. As was noted in *Zurich Insurance* at [73], the rule in s 94(*f*) was classified in *Stephen's Digest* (at pp 115–117) under the heading "What evidence may be given for the interpretation of documents". The illustrations to s 94, and indeed to ss 93 to 101 are therefore, unsurprisingly, centred on the *type of evidence* that may be given, and not on the meaning to be ascribed to the expressions for which the evidence may be admitted.

43 It is also not coincidental that s 94(*f*) is in Part II of the EA which Sir James stressed was concerned with "the *mode* of proving relevant facts" [emphasis added]: James Fitzjames Stephen QC, *An Introduction to the Indian Evidence Act* (Thacker, Spink & Co, 1904) ("*An Introduction to the Indian Evidence Act*") at p 8. Most significantly, Sir James himself explained the true role of the law of evidence in *An Introduction to the Indian Evidence Act* in these terms (at pp 10-11):

> All rights and liabilities are dependent upon and arise out of facts.
>
> Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability ...
>
> In order to effect this result, provision must be made by law for the following objects:—*First, the legal effect of particular classes of facts in establishing rights and liabilities must be determined. This is the province of what has been called substantive law*. Secondly, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases.

> The law of procedure includes, amongst others, two main branches,—(1) the law of pleading, which determines what in particular cases are the questions in dispute between the parties, and (2) *the law of evidence, which determines how the parties are to convince the court of the existence of that state of facts which, according to the provision of substantive law*, would establish the existence of the right or liability which they allege to exist.
>
> [original emphasis omitted; emphasis added in italics]

The distinction between rules of contract law *viz*, the substantive law which determines rights and liabilities, and rules of evidence, *viz*, the procedural law which determines what and how facts may be proved, could not be clearer.

44 Having regard to this distinction between the rules of evidence and the rules of contract law, the question that then arises is whether the EA affords the sort of latitude in the admissibility of extrinsic evidence that would be necessary in order to give full mileage to the robust approach?

(2) Sections 94, 95 and 96 of the EA

45 This brings the interaction between the contextual approach and ss 93 to 100 of the EA to the fore. In *Zurich Insurance*, this court considered the effect of ss 93 to 100 on the admissibility of evidence for the purposes of the contextual approach. After a comprehensive survey of the relevant provisions in the EA, we concluded (at [121]) that the contextual approach is "statutorily embedded in proviso (*f*) to s 94", even though we also cautioned (at [122]) that extrinsic evidence cannot be employed "as a pretext to contradict or vary" the contractual language. We went on to hold (at [125]–[128]) that under s 94(*f*), extrinsic evidence which was relevant and reasonably available to all the contracting parties and which would go towards establishing the relevant context of the contract would be admissible.

46 There is no doubt that our decision in *Zurich Insurance* on the compatibility of the contextual approach with the provisions of the EA is correct. Here, we supplement our earlier observations in *Zurich Insurance*.

(A) Section 94 of the EA

47 Section 94 of the EA reads:

> **Exclusion of evidence of oral agreement**
>
> **94.** *When the* ***terms*** *of any such contract*, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, ***have been proved*** *according to section 93*, ***no evidence of any oral agreement or statement shall be admitted*** as between the parties to any such instrument or their representatives in interest *for the purpose of contradicting, varying, adding to, or subtracting from its terms* ***subject*** to the following provisions:
>
> (*a*) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is

silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) *any fact may be proved which shows in* ***what manner the language of a document is related to existing facts*** .

[emphasis added in italics and bold italics]

48 Unlike the other provisos under s 94 of the EA which serve as specific exceptions to the general rule in s 94 that no evidence of an oral agreement of statement is admissible for the purpose of contradicting, varying, adding to or subtracting from the terms of the instrument, proviso (*f*) is of *general* application. It permits the admission of *any fact* which shows in "what manner the language of a document is related to existing facts". It is, so to speak, a general rule which seems to permit wide recourse to extrinsic evidence. However, we recognised in *Zurich Insurance* that the scope and limitation of s 94(*f*) is delineated by ss 95 to 100. In our view, ss 95 and 96 are of particular interest and importance because of their exclusionary effect.

(B) Sections 95 and 96 of the EA and admissible extrinsic evidence

49 Sections 95 and 96 of the EA read:

Exclusion of evidence to explain or amend ambiguous document

95. When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

…

Exclusion of evidence against application of document to existing facts

96. When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

…

50 Since the exclusionary nature of ss 95 and 96 pulls in the opposite direction to the permissive nature of s 94(*f*), it is arguable that when s 94(*f*) is read with ss 95 and 96 as it must be, the extent of extrinsic evidence that may be admitted under s 94(*f*) is not as extensive as one might otherwise expect.

51 It must be recalled that the rules contained in the EA were intended to be a codification of the common law in 1872, that being the year of the enactment of the Indian EA. Sir James's view on the admissibility of extrinsic evidence to influence the interpretation of a written document was generally strict (*An Introduction to the Indian Evidence Act* at p 178):

> One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should whenever it is possible be put before the Judge for his inspection, and that if it purports to be a final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final; and shall not be varied by word of mouth. *If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never known when a question was settled, as they would be able to play fast and loose with their writings*.
>
> By bearing these leading principles in mind the details and *exceptions* will become simple*. Their practical importance is indeed as nothing in comparison to the importance of the rules which they qualify.*
>
> [emphasis added]

This excerpt should be taken to be referring to ss 93 to 100, even if Sir James did not give a section-by-section commentary on the Indian EA. The reference to "exceptions" is likely a reference to the provisos in s 94, as well as ss 97 to 100, which permit the admission of extrinsic evidence to a limited degree.

52 What exactly did Sir James intend to be caught by the exclusionary provisions, *viz*, ss 95 and 96 of the EA? In his commentary on Art 98 of the Bill (see [41] above) which is substantively similar to ss 94 to 99 of the EA, Sir James referred to several English cases to explain his concerns, and two of these are instructive in ascertaining not just his stance generally towards the admissibility of extrinsic evidence, but also and more pertinently, the main type of extrinsic evidence that he had intended to preclude by way of ss 95 and 96.

(C) Parol Evidence of subjective intent and other Extrinsic Evidence

53 In the first case, *Charter v Charter* (1871) 2 LR 2 P & D 315 ("*Charter*"), a testator appointed as his executor "[his] son Forster Charter". However, at the time of the making of the will, he had no son of that name. He had two sons. The older son was William Forster (who was always addressed as "William"), and the younger son was Charles Charter. The testator did have a son called Forster Charter, but that son had died in infancy many years before the will was made. When the testator died, probate was granted to the older son. The younger son challenged this, seeking to admit extrinsic evidence, which included an affidavit made by family members and independent witnesses setting out declarations of the testator made at the time of and subsequent to the date of the making of the will. The older son objected to the admission of such evidence on the ground that there was no ambiguity, and absent this, parol evidence could not be admitted.

54 Lord Penzance rejected this contention. Referring to a principle laid down by Lord Abinger in *Doe D Simon Hiscocks v John Hiscocks* (1839) 5 M & W 363 ("*Hiscocks*"), Lord Penzance held (at 317–318):

> It is beyond dispute, that *evidence as to the circumstances* under which the testator wrote his will, as to the different names and circumstances of the people about him, and other surrounding matters, *is admissible* in such a case. ... so that I am at liberty to put myself in the position of the testator in order, from the surrounding circumstances, *to judge under what state of things he wrote his will*. [emphasis added]

However, Lord Penzance did not stop there, for this principle by Lord Abinger was one of general application rather than one governing the admissibility of the declarations of the testator, which was the real issue in the case. As to that, Lord Penzance held (at 324):

> And if there has been a mistake, whether of omission or otherwise, in consequence of which neither of the two sons is distinctly or accurately described, *is not an ambiguity created*; and is any other course open to the Court, *if the rest of the will and the surrounding circumstances do not solve the difficulty*, ***than to admit parol evidence of the testator's intention?*** [emphasis added in italics and bold italics]

55 Three points are clear. First, the admissibility of surrounding circumstances to place the court in the position of the party which drafted the instrument (dealt with in the first extract quoted at [54] above) is a separate and distinct question from whether parol evidence of the drafter's subjective intention (dealt with in the second extract quoted at [54] above) may be admitted. Evidence of surrounding circumstances is admissible without restriction. Second, ambiguity is required before the court would be permitted to admit parol evidence of the drafter's intentions. Third, if surrounding circumstances are sufficient to resolve the interpretative exercise, there would be no ambiguity and such parol evidence should not be admitted.

56 Even so, Sir James had misgivings over Lord Penzance's decision to admit the declarations of the testator's intentions: *Stephen's Digest* at pp 210–211. He contrasted *Charter* to a subsequent case, *Allgood v Blake* (1873) LR 8 Ex 160 ("*Allgood*"), and also pointed out that when *Charter* went on appeal (*William Forster Charter v Charles Charter* (1874) LR 7 HL 364 ("*Charter (HL)*"), the House of Lords unanimously disapproved of Lord Penzance's decision to admit evidence of the testator's declarations of intention.

57 In *Charter (HL)*, Lord Chelmsford (at 370) rejected evidence of the testator's intentions on the basis that this was not a case that featured the sort of ambiguity that would be required for such evidence to be admitted. Citing Sir James Wigram, *An Examination of the Rules of Law Respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills* (Butterworths, 4th Ed, 1858) ("*Wigram*") at p 160, Lord Chelmsford held (at 370–371) that extrinsic evidence "including proof of declarations of intention" was only admissible when the description of the person or thing in the written instrument was applicable to each of several subjects. To Lord Chelmsford, the kind of ambiguity, which was necessary before extrinsic evidence that goes to proof of intention would be permitted, is *latent* ambiguity. In Lord Hatherly's words (at 375), no "doubt or ambiguity exists in applying the words of the will, so as to authorize *(sic)* the introduction of parol evidence to solve that doubt". There was no doubt or ambiguity because one son had the name "Forster" and the other did not. He went on to explain (at 376) that Lord Penzance had miscarried in admitting "evidence of declarations of intention by the testator".

58 Lord Cairns LC too held (at 376– 377):

> … [T]his is not a case in which *any parol evidence of statements of the testator*, as to whom he intended to benefit, or supposed he had benefited, by his will, can be received. The learned Judge of the Probate Court, Lord Penzance, appears to have admitted evidence of this

description, although he states that his judgment would have been the same if the evidence had been excluded. I am of opinion that it ought to have been excluded. *The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things*. That clearly cannot be said of the present case. [original italics omitted; emphasis added]

59 Therefore, under the common law in the late 19th century, the parol evidence rule precluded admissibility of evidence of the *intention* of the drafter save where the expression in the instrument was latently ambiguous. That there was this distinction between latent and patent ambiguity is unexceptional, as the textbooks of that time also confirm: Joseph Chitty, *Treatise on the Law of Contracts, and upon the Defences to Actions Thereron* (John Archibald Russell ed) (H. Sweet, 9th Ed, 1871) ("*Chitty*") at p 98; C G Addison, *Addison on Contracts Being a Treatise on the Law of Contracts* (Lewis Cave ed) (Stevens, Sons & Warwick, 7th Ed, 1875) ("*Addison*") at pp 165–166.

60 This is an apposite point at which to return to *Allgood*, which Sir James thought was inconsistent with Lord Penzance's holding in *Charter*. Quoting Blackburn J's judgment in *Allgood*, Sir James said (*Stephen's Digest* at p 211):

> ... No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. *But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean*. [emphasis added]

61 It might at first be thought that the italicised portion in the latter part of the excerpt at [60] above reflects Sir James's preference for a more restrictive approach to the admissibility of extrinsic evidence so as to also exclude evidence of surrounding circumstances. However, one must not lose sight of the context in which Sir James referred to *Allgood*. He was only concerned with evidence of *expressions of intentions* and not extrinsic evidence in the general sense. This is unmistakable as he had prefaced his discussion on *Charter*, *Allgood* and *Charter (HL)* with the opening observation (*Stephen's Digest* at p 210) that "[i]t is difficult to justify the line drawn between the rule as to cases in which evidence of *expressions of intention* is admitted and cases in which it is rejected". Nowhere in his judgment in *Allgood* was Blackburn J suggesting that background circumstances are inadmissible. On the contrary, he said (at 162):

> As is said in Wigram on Extrinsic Evidence, p. 9: "The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." *But we think that the meaning of words varies according to the circumstances of and concerning which they are used*. [emphasis added]

62 Sir James was cognisant of the principle espoused *in Allgood*, as evidenced by his observation below which prefaced the excerpt at [60] above (*Stephen's Digest* at p 211):

> [T]he rule is stated by Blackburn J., as follows: "In construing a will, the Court is entitled to put itself in the position of the testator, and to *consider all material facts and circumstances known to the testator* with reference to which he is to be taken to have used the words in the will, and then to *declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator* when he used those words". ... [emphasis added]

63 Our view that the common law at that time permitted the admission of extrinsic evidence of surrounding circumstances to aid in the interpretation of words used in a contract is confirmed by both contract and evidence law textbooks of that time: *Chitty* at p 72; *Addison* at pp 164–165; John William Smith, *The Law of Contracts* (Vincent T Thompson ed) (Stevens and Sons, 6th Ed, 1874) at pp 484–486; Simon Greenleaf, *A Treatise on the Law of Evidence* vol I (Charles C Little & James Brown, 3rd Ed, 1846) at para 277; *Wigram* at pp 95–95. There is therefore no doubt in our minds that the EA, which codified the common law position at that time, also permits the admissibility of extrinsic evidence of surrounding circumstances. This is effected by s 94(*f*) of the EA.

64 A lingering question remains: what exactly is extrinsic evidence of surrounding circumstances that is admissible without restriction under s 94(*f*) of the EA? The short answer, as suggested by the cases referred to by Sir James, would be such extrinsic evidence of "facts and circumstances which were (or ought to have been) in the mind of the [drafter] when he used those words" (see [62] above). Parol evidence of the drafter's subjective intention does not constitute such surrounding circumstances. Of course, the line between these two types of evidence may not always be clear, but that is an issue that can be developed through case-law.

65 Where then does this leave us in relation to the robust approach? The following propositions seem clear:

(a) First, the admissibility of extrinsic evidence generally is governed by the rules of evidence and not by the rules of contractual interpretation (which are governed by the substantive law of contract).

(b) Second, the rules governing the admissibility of extrinsic evidence in Singapore are to be found first in the EA, then in the common law.

(c) Third, the general admissibility of extrinsic evidence under s 94(*f*) of the EA must be read together with the exclusionary provisions of the EA, in particular, ss 95 and 96.

(d) Fourth, extrinsic evidence of surrounding circumstances is generally admissible under s 94(*f*). However, it was and properly remains the position that extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can in some way be brought within the exceptions in ss 97 to 100.

The common law litigation process

66 As alluded to earlier at [38] above, the EA is not the only constraint on the wholesale adoption of the robust approach in Singapore law. In our view, there are significant features of the common law litigation process which also militate against the unqualified acceptance of the robust approach. Specifically, the adversarial process leaves it to the parties to seek to admit any evidence which they think might be helpful to their case. This can induce the parties to seek to admit a tsunami of evidence, leaving it to the judge to sift through what is relevant or irrelevant, admissible or inadmissible, useful or useless. In *Zurich Insurance*, we referred to *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244 ("*CableTel*") where Lightman J lamented (at 257):

> A very large part of the flood of evidence in this case on the factual matrix in which the agreement is to be construed was legally inadmissible and the greater part of the remainder was totally unhelpful. I had to spend over half a day hearing argument as a prelude to striking out the bulk of the witness statements before me as containing material ... which should never have been or remained there.

67 Indeed, Lord Hoffmann himself recognised the practical knock-on effects of an overly robust approach towards admitting extrinsic evidence. In *Chartbrook*, he explained (at [34]–[38]) that it was pragmatism and policy considerations which militate against the admission of evidence of pre-contractual negotiations and subsequent conduct under English law:

> 34 It therefore follows that while it is true that, as Lord Wilberforce said, inadmissibility is normally based in irrelevance, there will be cases in which it can be justified only on pragmatic grounds. I must consider these grounds, which have been explored in detail in the literature and on the whole rejected by academic writers but supported by some practitioners.
>
> 3 5 *The first is that the admission of pre-contractual negotiations would create greater uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration. Everyone engaged in the exercise would have to read the correspondence and statements would have to be taken from those who took part in oral negotiations. Not only would this be time-consuming and expensive but the scope for disagreement over whether the material affected the construction of the agreement ... would be considerably increased...*
>
> 36 There is certainly a view in the profession that the less one has to resort to any form of background in aid of interpretation, the better. *The document should so far as possible speak for itself*. As Popham CJ said in the *Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a:
>
> > "[I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."
>
> ...
>
> 3 8 *Like Lord Bingham, I rather doubt whether the ICS case produced a dramatic increase in the amount of material produced by way of background for the purposes of contractual interpretation*. But pre-contractual negotiations seem to me capable of raising practical questions different from those created by other forms of background. Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, *statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations of one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded. But the imprecision of the line between negotiation and provisional agreement is the very reason why in every case of dispute over interpretation, one or other of the parties is likely to require a court or arbitrator to take the course of negotiations into account.* Your Lordships' experience in the analogous case of resort to statements in Hansard under the rule in *Pepper v Hart* [1993] AC 593 suggests that *such evidence will be produced in any case in which there is the remotest chance that it may be accepted and that even these cases will be only the tip of a mountain of discarded but expensive investigation. Pepper v Hart* has also encouraged ministers and others to make statements in the hope of influencing the construction which the courts will give to a statute and it is possible that negotiating parties will be encouraged to improve the bundle of correspondence with similar statements.
>
> [emphasis added]

68 There is considerable force in these concerns. The Honourable James Jacob Spigelman, then Chief Justice of the Supreme Court of New South Wales ("Spigelman CJ"), quite recently echoed these concerns. Having noted the common law's drift towards the civil law approach to contractual construction, he argued forcefully that, from a practical and economic perspective, there is cause to reconsider its wisdom (James Spigelman, "Contractual Interpretation: A Comparative Perspective", 3rd Judicial Seminar on Commercial Litigation (Sydney, 23 March 2011) ("*Spigelman*") at pp 58–60):

> **Cost and Efficiency**
>
> The expanded scope for introducing evidence of the factual matrix happened to coincide with technological developments which reduced the cost of multiple photocopying and, soon thereafter, the introduction of word processing, which multiplied the number of drafts, followed by the adoption of email which multiplied the number of written communications and the comparative indestructibility of hard drives which meant that no draft or communication was ever lost. Lord Wilberforce could not have anticipated this.
>
> The combined effect of these developments led to an explosion in the documentation involved in litigation, so that, in Australia, barristers, who even in 1980 would receive commercial briefs wrapped in pink ribbon, were soon presented with multiple spring back folders and, subsequently, trolley loads of documents. The costs of litigation escalated accordingly, to a degree which, in my opinion, is not sustainable.
>
> ...
>
> Of all the arguments against maintaining a restrictive approach to the extrinsic material available for contractual interpretation on practical grounds of cost and delay, it is the proliferation of these alternative means for altering the effect of a written contract that I find the most compelling.

69 Spigelman CJ further explained that there are inherent "control valves" within the civil law system that allow an expansive approach to construction to work (*Spigelman* at pp 61–63):

> However, as a matter of civil justice practice the potentially adverse effects of the civil law subjection [*sic*] intention theory, together with the adoption of good faith as a term of all contracts, is substantially mitigated by two considerations. *First, in practice civil law courts appear to be reluctant to go behind a written contract, as discussed above. Secondly, a party to a dispute resolution process is generally confined to its own documents, including anything exchanged with the other party. General discovery is not available, let alone the intrusive interrogation of hard drives in the search for deleted drafts and emails which has become common practice in Australian commercial dispute resolution.*
>
> ...
>
> I have no difficulty with a contextual approach to interpretation which restricts the relevant background to what was in the mutual contemplation of the parties as evidenced by communications between them or by what must have been obvious to both of them. The practical difficulties that have emerged arise primarily from adversarial litigation attempting to prove what was in such mutual contemplation by evidence of the knowledge of each, even if uncommunicated. *Discovery is used, relevantly, to reveal the internal communications of the other side and thereby establish parallel, albeit uncommunicated, knowledge. Contemporary practice, at least in Australia, has rendered that process too expensive. In this, as so often, the*

perfect is the enemy of the good.

Those jurisdictions which have moved close to the civil law subjective intention theory should carefully consider adopting the related aspects of civil law practice. This may not be limited to abolition of a right to discovery but extend to other aspects of the adversarial system.

[emphasis added]

70 We find Spigelman CJ's words of caution cogent and relevant. The shaping of the law is an exercise that must not lose congruence with its surrounding social, political and economic context. The shift towards an expansive theory of contextual construction has not always been accompanied by evidentiary discipline and procedural rigour. Not infrequently, we see litigants seeking to admit all manner of evidence under the guise of the context without any governing rules of engagement. Of course, one would expect judges to have varied experiences with the incidence of overwhelming documents. For instance, Lord Bingham of Cornhill and Arden LJ thought that Lightman J's experience in *CableTel* (see [66] above) was the exception rather than the norm: see Lord Bingham of Cornhill, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS Decision" [2008] 12 Edin LR 374 at 387–388 and *Egan v Static Control Components (Europe) Ltd* [2004] 2 Lloyd's Rep 429 at [29]. So too does Rajah JA, writing extra-judicially in "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" [2010] 22 SAcLJ 513 at para 39.

71 In our judgment, courts must achieve justice and fairness by protecting the individual against an unduly strict construction of a document that does not fairly represent the intentions of the parties. However, this worthwhile objective can be perverted if the proverbial grain is not separated from the chaff. As Spigelman CJ has cautioned in another article, "Extrinsic Material and the Interpretation of Insurance Contracts" (2011) 22 Insurance Law Journal 143 at 145, the greater the scope of materials relevant to an issue of construction that can be taken into account, the greater the scope for differences between legal advisors charged with the task of construing a contract when a dispute is looming. This, in turn, causes greater uncertainty for the parties and increases the time and cost of legal proceedings.

72 From this perspective, a robust approach unaccompanied by sufficient safeguards may be counterproductive. More fog, not less, might ensue. In our judgment, it is time to refine our approach by synchronising our rules of pleading and evidence with the contextual approach to contractual construction laid down in *Zurich Insurance*. This is necessary because the broad language associated with the contextual approach is susceptible to being misunderstood and misapplied. The utility of the contextual approach is to place the court in the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by the parties in the relevant instrument in their proper context; it is not a licence to admit all manner of extrinsic evidence. To do otherwise would be to ignore the salutary words of caution in *Zurich Insurance* (at [127] and [129]):

127 Thus, the extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. ... *[T]he focus on the narrow task of ascertaining the parties' objective intention ought to prevent parties from adducing or trawling through large amounts of allegedly useful background material, often in misguided Micawberian attempts to persuade a court to favour their subjective interpretations of the contract*. ...

129 We have already emphasised the importance of contractual certainty ... In our view, the benefits of adopting ... the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased

uncertainty and added litigation costs) minimised if, as a threshold requirement for the court's adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious. ... *It is necessary and desirable to lay down this threshold requirement in order to achieve the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties*.

[emphasis added]

73 We hasten to add that although the contextual approach is most frequently engaged in the context of interpretation, this is not to say that the contextual approach is irrelevant when it comes to other aspects of construction such as implication or rectification. Indeed, it is trite that the court must have regard to the context at the time of contracting when considering the issue of implication. Therefore, to buttress the evidentiary qualifications to the contextual approach to the construction of a contract, the imposition of four requirements of civil procedure are, in our view, timely and essential:

(a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;

(b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;

(c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and

(d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

74 These four requirements are entirely consonant with the limits prescribed in *Zurich Insurance* at [132(d)] that for extrinsic evidence to be admissible, it must be "relevant, reasonably available to all the contracting parties and [must relate] to a clear or obvious context". Further, this would go some way towards ameliorating the practical concerns we have traced above. In general, extrinsic facts that are placed before the court in a manner that is not consistent with the above requirements will not be accorded any weight when a court is construing a contract. Adverse cost consequences may also be imposed, where appropriate. We are mindful that the courts cannot actively police the parties in the documents that they voluntarily disclose. Conversely, we should not be thought, in any way, to be inviting parties or their counsel to withhold relevant documents. The key point is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on. These pleading requirements should result in the evidence on the record being aligned accordingly.

75 Before leaving this issue, we make one final observation. Asst Prof Goh has, after a comprehensive survey of the historical literature on the law governing the admissibility of prior negotiations, argued that the seemingly blanket exclusionary rule against the admissibility of prior negotiations was a product of a historical misstep by the courts and is inconsistent with the EA: Goh Yihan, "The Case for Departing From the Exclusionary Rule Against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182. We prefer to leave for another occasion the consideration of whether this argument is to be accepted in principle; and if so, whether evidence of prior negotiations should nonetheless be excluded as irrelevant or unhelpful for the policy reasons set out by Lord Hoffmann in *Chartbrook* at [34]–[38]; or on the ground that it may amount to

parol evidence of subjective intent and not fall within ss 97 to 100 of the EA. Whichever way that may eventually be resolved, any future attempt to rely on such material should be made with full consciousness of the concerns already expressed and in compliance with the pleading requirements we have just prescribed.

Implication of terms in fact

76 We turn to the analysis of the law on the implication of terms in fact in Singapore. This was the subject of our very recent decision in *Foo Jong Peng* where we made several important observations, most notably rejecting the approach taken by Lord Hoffmann in *Belize*. We recognise that there are still some doubts over this difficult and controversial area of contract law. Before *Belize*, there was little doubt over the applicable test for the implication of terms in fact. However, *Belize*, as Asst Prof Goh has pointed out, has introduced conceptual uncertainty and its application has not been uniform in the English courts: *Goh (JBL)* at 240–242. We therefore take this opportunity to supplement what we have said in *Foo Jong Peng*.

Foo Jong Peng and Belize revisited

77 Lord Hoffmann's propositions in *Belize* have often been cited as representing an "interpretative" approach to the implication of terms: Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140; Lord Grabiner QC, "The Iterative Process of Contractual Interpretation" (2012) LQR 41 at 59; *Crema v Cenkos Securities plc* [2011] 1 WLR 2066 at [37]–[39]; *Chantry Estates v Anderson* [2010] EWCA Civ 316 at [14]–[16]. On the premise that *Belize* subsumes implication within the process of interpretation as we have defined (see [27]–[28] above), we reiterate our position in *Foo Jong Peng* that *Belize* is not part of Singapore law.

78 In *Foo Jong Peng*, we recognised (at [31] and [36]) that it is possible to fit the implication of terms within the concept of interpretation "in a more general sense", which is what we have referred to above as construction of the document as a whole. This may be contrasted with "the interpretation of the express terms of a particular document":

> 31 As we shall see, the observations in *MFM*, although rendered by way of *obiter dicta*, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the *Belize* test. And it is that *whilst the process of implication (of terms) is, when viewed in a more general sense*, ***also a process of interpretation*** , *the process of implication itself is, in the final analysis, just one specific conception of the broader concept of "interpretation"*. In particular, the process of implication is separate and distinct from the more general process relating to the interpretation of documents. ... Hence, the implication of a term, whether in fact or in law ... involves tests as well as techniques that are not only specific, but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular ... The (general) concept of "interpretation" has much in common with the implication of terms inasmuch as both entail an objective approach. *However, it is, in our view, incorrect to conflate the tests as well as techniques which accompany both the aforementioned processes*. ...
>
> 36 In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a *specific form or conception of interpretation* which is *separate and distinct from the more general process of interpretation* (in particular, interpretation of the express terms of a particular document). ...
>
> [original emphasis omitted; emphasis added in italics and bold italics]

79 In our judgment, it is possible to bridge the gap with *Belize* on this point, if one concludes that Lord Hoffmann was saying that the implication of terms is to be seen as part of the overall process of *construing the document as a whole*, and no more. In this regard, it is pertinent that the relevant passages in *Belize* do not use the word "interpretation", but rather, "construction". Moreover, they also speak of the construction of the instrument or document as a whole rather than of specific express terms: see especially *Belize* at [16]–[19], [21], [25] and [27].

80 Indeed, this seems to be how Lord Clarke of Stone-Cum-Ebony MR explained *Belize* in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The "Reborn")* [2009] 2 Lloyd's Rep 639 ("*Seamar Trading*") at [9] and [15]:

> 9. It repays detailed study but for present purposes it is I think sufficient to say that *the implication of a term is an* ***exercise in the construction of the contract as a whole*** : see *Trollope & Colls Limited v North West Metropolitan Hospital Board* [1973] 1 WLR 601, 609 per Lord Pearson, with whom Lord Guest and Lord Diplock agreed and *Equitable Life Assurance Society v Hyman* [2002] 1 AC 405, 459 ...
>
> 15. It is thus clear that the various formulations of the test identified by Lord Simon are to be treated as different ways of saying much the same thing. Moreover, as I read Lord Hoffmann's analysis, *although he is emphasising that the process of implication is* ***part of the process of construction of the contract*** , *he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. ...*
>
> [emphasis added in italics and bold italics]

81 As Lord Clarke noted in [9] of *Seamar Trading*, Lord Hoffmann in *Belize* had referred approvingly to *Hyman*, where Lord Steyn had categorically held (at 458) that the processes of interpretation and implication must be distinguished:

> *It is necessary to distinguish between the processes of interpretation and implication. The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear*. The language of article 65(1) contains no relevant express restriction on the powers of the directors. It is impossible to assign to the language of article 65(1) by construction a restriction precluding the directors from overriding GARs. ... The critical question is whether a relevant restriction may be implied into article 65(1). ... If a term is to be implied, it could only be a term implied from the language of article 65 read in its particular commercial setting. *Such implied terms operate as ad hoc gap fillers*. [emphasis added]

82 But this does not help us with the other parts of *Belize*. In so far as Lord Hoffmann in *Belize* proposed a standard of reasonableness for the implication of terms, we had respectfully registered our disagreement in *Foo Jong Peng* (at [36]), and we reaffirm that disagreement here. The standard for the implication of terms remains one of necessity, not reasonableness. Reasonableness is a necessary but insufficient condition for the implication of a term: *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Dyeing Company, Limited* [1918] 1 KB 592 ("*Reigate*") at 605.

The business efficacy and officious bystander tests

83 We turn now to consider the business efficacy and officious bystander tests, articulated in *The Moorcock* (1889) 14 PD 64 ("*The Moorcock*") at 68 and *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 ("*Shirlaw*") at 227 respectively.

84 The business efficacy test is applied to identify gaps in the contract that need to be filled for it to be commercially workable. This much was established in *The Moorcook*, where the plaintiff's vessel was damaged when docking at the defendant's jetty. The contract required the plaintiff to bring his vessel alongside the wharf but said nothing about any warranty that the riverbed at that location would permit this. It was argued that a term should be implied imposing on the defendant wharfingers a duty to exercise reasonable care to ascertain that the riverbed adjacent to the jetty would not damage the vessel. The court implied the term, and the business efficacy test as conceived by Bowen LJ in the following formulation was birthed (at 68):

> … Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that *in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances*. [emphasis added]

(1) Limitations of the business efficacy test

85 The business efficacy test has its share of criticism. Indeed, MacKinnon LJ in *Shirlaw* expressed concern (at 227) at the trend of over – and seemingly undue – reliance on *The Moorcock*. First, it must be remembered that the test was propounded in the context of what must have been intended by parties to a business transaction. But not all contracts involve commercial transactions between businessmen. Depending on the nature of and the parties to the contract, for instance one between family members, there could conceivably be some other external normative standards which may be more appropriate than business efficacy in distilling the parties' presumed intentions.

86 Second, the business efficacy test suffers from an inherent blind spot: what does it mean to invoke business efficacy? The efficacy of a contract or a transaction invariably straddles a spectrum. Many contracts might, to some degree, be efficacious and inefficacious at the same time. This explains why the contracting parties often end up in disagreements and disputes. Even if a contract or transaction can be said to be efficacious, there might be room for it to be *more* efficacious. Where then should the line be drawn? Indeed, this was alluded to by Bowen LJ himself in *The Moorcock* (at 69):

> Now the question is how much of the peril of the safety of this berth is it *necessary* to assume that the shipowner and the jetty owner intended respectively to bear – *in order that a* ***minimum of efficacy should be secured for the transaction*** , *as both parties must have intended it to bear?* ... [emphasis added in italics and bold italics]

87 What is the "minimum of efficacy" and why should the court stop there? Is it the bare minimum without which, as Bowen LJ said (at 71), "business could not be carried on"? It is also useful to note the oft-overlooked judgment of Lord Esher MR in *The Moorcock* in which he justified (at 67) the

implication of the term on the basis that "honest business could not [otherwise] be carried on". In the same breath, he framed the term necessary to be implied as the "least onerous" one that could be implied. But why should the court stop at implying the "least onerous" outcome or the "minimum of efficacy"? If the court is presuming what the parties must have intended, might it not be sensible to transpose the *most* efficacious outcome that the parties must have sought or could have secured?

88 The answer to these questions, we think, is to be found in the conservatism which ensures that the court will not rewrite the contract for the parties based on its own sense of what is fair and just: *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [8]. As Lord Pearson said in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 ("*Trollope*") at 609, the court will not improve the contract which the parties have made for themselves, however desirable the improvement might be. But the fact remains that a rewritten bargain is a rewritten bargain, and business efficacy, as a normative concept, is inherently imprecise. On its own, it might help identify a gap, but it cannot supply the answer to whether a *specific* term should be implied. This is where the officious bystander test is instrumental.

(2) Relevance of the officious bystander test to the business efficacy test

89 We appreciate that there persists much debate amongst commentators on the interaction between the two tests. On one end of the spectrum, as John McCaughran QC has argued, the implication of a term to give effect to the parties' commercial expectations is intrinsically different from the implication of a term which both parties would have agreed to had that term been proposed by an officious bystander: John McCaughran QC, "Implied Terms: The Journey of the Man on the Clapham Omnibus" (2011) 70(3) CLJ 607 at 612. On the other hand, Professor Andrew Phang ("Prof Phang"), as he then was before his elevation to the bench, has argued that the officious bystander test is "the practical mode for effecting the general principle [of the business efficacy test]": Andrew Phang, "Implied Terms Revisited" [1990] JBL 394 at 397. Dr Richard Austen-Baker characterises the officious bystander test as an "explanatory gloss" to the business efficacy test: Richard Austen-Baker, "Implied Terms in English Contract Law: The Long Voyage of *The Moorcock*" (2009) 38 Common Law World Review 56 at 70.

90 Nor do the judicial authorities sing a common tune, as Phang J (as he then was) illustrated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 ("*Forefront Medical*") at [34]–[39]. In so far as the law in Singapore is concerned, we affirm the "complementarity" characterisation of the business efficacy and officious bystander tests in *Forefront Medical* at [35]–[38], for the reasons provided by Phang J. As Phang J observed at [35] of *Forefront Medical*, Scrutton LJ in *Reigate* clearly had in mind business efficacy as the *basis* for the implication of a term (*Reigate* at 605):

> A term can only be implied if it is ***necessary in the business sense to give efficacy to the contract*** ; ***that is*** , if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said of the parties, "What will happen in such a case", they would both have replied, *"Of course, so and so will happen; we did not trouble to say that; it is too clear"*. [emphasis added in italics and bold italics]

Not only was business efficacy at the forefront of Scrutton LJ's mind, it is also telling from the use of the words "that is" that Scrutton LJ's articulation of the officious bystander yardstick was intended to serve as an elaboration of the business efficacy test. We find the following excerpt from Jacob Petrus Vorster, "The Bases for the Implication of Contractual Terms" (1988) Journal of South African Law 161 illuminating (at p 171):

> ... The absence of business efficacy is at best an indication that the parties may have intended to agree on some unexpressed term. More than one term may conceivably render a contract which contains a *lacuna*, efficacious. *Whereas the* ***business efficacy test may indicate the existence*** *of a lacuna*, *it* ***cannot*** *necessarily be used to* ***define the term*** *with which the parties intended to fill the gap*. [original emphasis omitted; emphasis added in italics and bold italics]

91 In our judgment, this excerpt precisely isolates the core of the officious bystander test: it is the device that enables the court to define that term which can be said to reflect the parties' presumed intention *vis-à-vis* the gap in the contract. While the business efficacy test is helpful to identify the existence of a *lacuna*, that is to say that for the sake of the efficacy of the contract something more needs to be added into the contract, it does not assist in identifying what that "something more" is with any degree of precision. That is where the officious bystander test serves an instrumental function.

92 The business efficacy test nonetheless reminds the court that the implementation of the officious bystander test must be conducted within the normative framework of business efficacy as its overarching theme. In this regard, we adopt the cogent explanation of Phang JA and Asst Prof Goh in *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012) at para 1063:

> ... [I]f the 'officious bystander' test is the 'practical mode' by which the 'business efficacy' test is implemented, then it seems that the 'business efficacy' test is the rationale behind the 'officious bystander' test. An application of the 'officious bystander' test needs to be informed by the necessity for business efficacy. In fact, the 'officious bystander' test itself *refers back* to the 'business efficacy' test because it does not matter what the officious bystander thinks about the implication of the term. The role of the officious bystander is simply to suggest a term, and the true test is whether the parties *themselves* would suppress that suggestion with a common 'Oh, of course!'. ***Whether the parties would so suppress the officious bystander can only be decided with a normative reference point*** , and it is suggested that the 'business efficacy' test here *guides* the parties' response to the officious bystander. ***Thus, only if a court thinks that the parties would, out of necessity for business efficacy, suppress the officious bystander's suggestion with those famous words, would the court imply the term concerned*** . ... [emphasis in original in italics; emphasis added in bold italics]

(3) The law on implied terms in Singapore

93 In the light of these observations, we summarise our views on the implication of terms into a contract. First, this process is best understood as an exercise in giving effect to the parties' *presumed* intentions. It is presumed because the parties have not expressed any words, which are capable of bearing the meaning sought to be achieved by the implied term. Were there to be any express words, that would be a matter of interpretation, not implication: see [27]–[30] above. It is thus an exercise in filling the gaps in the contract. But in doing so, it is of paramount importance that the courts do so with due regard to what the *parties* would be presumed to have intended.

94 This leads us to the second point. Although the prayer to imply a term might imply that there is a gap in a contract, which needs to be filled, not all gaps in a contract are "true" gaps in the sense that they can be remedied by the implication of a term. There are at least three ways in which a gap could arise:

(a) the parties did not contemplate the issue at all and so left a gap;

(b) the parties contemplated the issue but chose not to provide a term for it because they

mistakenly thought that the express terms of the contract had adequately addressed it; and

(c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.

95 In our view, scenario (a) is the only instance where it would be appropriate for the court to even consider if it will imply a term into the parties' contract (see *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* [2008] 1 Lloyd's Rep 558 at [105]). This pertains to what the parties would be presumed to have agreed on had the gap been pointed out to them at the time of the contract. Scenario (c) is not a proper instance for implication because the parties had actually considered the gap but were unable to agree and therefore left the gap as it was. To imply a term would go against their *actual* intentions.

96 Scenario (b), also, is not a proper situation in which to imply a term. What drives this scenario is not the parties' *presumed* intentions, but rather their objectively ascertained *actual* intentions. Oftentimes, what is sought to be corrected through the process of implication is the mistaken belief that "the document accurately records the transaction" (see for instance, *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The "Olympic Pride")* [1980] 2 Lloyd's Rep 67 at 72). The proper remedy for such a situation is the rectification of the instrument in equity: see *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348.

97 We note the suggestion of some commentators that rectification has been swallowed up by the contextual approach to interpretation, following *ICS* and *Chartbrook*: Andrew Burrows, "Construction and Rectification" in *Contract Terms* ch 5 at pp 90–91; and Sir Richard Buxton, "Construction' and Rectification after Chartbrook" [2010] CLJ 253 at 260–262. It follows from the analytical clarification we have restated above, that in our judgment, rectification continues to serve a useful role and purpose in the common law. We note that the English Court of Appeal recently expressed similar views in *Cherry Tree Investments Ltd v Landmain Ltd* [2013] 1 Ch 305 at [73], [98] and [120].

98 Third, the business efficacy and officious bystander tests used in conjunction and complementarily remain the prevailing approach for the implication of terms under Singapore law. We note that the multi-pronged formulation advanced in *BP Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 ("*BP Refinery*") which builds on these tests has gained some favour: see *Philips Electronique* at 481. In *BP Refinery*, the court held (at 282–283) that in addition to business efficacy and obviousness, the implied term must be reasonable and equitable, capable of clear expression; and not contradict any express term of the contract. But these additional requirements – if they may be called that – simply restate the basic overriding principle that a term is not to be implied into a contract lightly. It goes without saying that a term that is not reasonable, not equitable, unclear, or that contradicts an express term of the contract, will not be implied. Such a term will necessarily fail the officious bystander test.

99 Fourth, there may be more than one legal basis on which it may be determined that a particular term accords with the parties' presumed intentions. The external normative basis that the court usually has recourse to is business efficacy, but the door might not be closed to other bases. Business efficacy is clearly favoured in the commercial context as it is safe to assume that commercial parties are rational, and as such, seek business efficacy in their transaction.

100 Fifth, the threshold for implying a term is necessarily a high one. The law remains that a term will only be implied if it is *necessary*. In so far as necessity is a concept that is already built into the business efficacy and officious bystander tests (*Foo Jong Peng* at [33]), our decision does not alter the high threshold required to imply in a term under existing law.

101 It follows from these points that the implication of terms is to be considered using a three-step process:

(a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.

(c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

Our decision in CA 75

The implication of the Equality Premise Clause into the JVA and PPL Shipyard's Articles of Association

The first step

102 Applying the first step of the approach that we have set out above (at [101]), it is firstly necessary to ascertain whether there is a gap that is sought to be filled by the Equality Premise Clause (see [17(c)] above) and if so, whether it exists because the parties did not address themselves to this.

(1) Scope of the Equality Premise Clause

103 It can be inferred from the Equality Premise Clause that the gap in the contract, at least on Sembcorp's case, is the absence of any provision(s) in either the JVA or in PPL Shipyard's Articles of Association which sets out the consequences, if either Sembcorp or PPL Holdings ceased to hold at least 50% of share capital of PPL Shipyard, on "such provisions that are premised upon the existence of equal shareholding of Sembcorp and PPL Holdings in PPL Shipyard".

104 As a preliminary observation, the JVA and PPL Shipyard's Articles of Association are two separate instruments. Although the former prompted the amendments in the latter, *ie* the Consequential Articles, the provisions, substantially similar as they are, are not identical. Nevertheless, both sides in the present appeals have approached their submissions on both instruments on the same footing. Although the bulk of the parties' submissions are devoted to the JVA, it is evident to us that the conclusion which they have respectively put forth on the implication of the Equality Premise Clause covers both the JVA and PPL Shipyard's Articles of Association. In other words, if the Equality Premise Clause can be implied into the JVA, it will concomitantly be capable of being implied into the PPL Shipyard's Articles of Association, and vice versa. We also note that PPL Shipyard and E-Interface have correctly refrained from contending that a term may not be implied into a company's articles of association (see *Belize, Hyman* and Robin Hollington QC, *Shareholders' Rights* (Sweet & Maxwell, 6th Ed, 2010) at para 3-09).

105 Against that background, we turn to the facts. We had some difficulties with the framing of the Equality Premise Clause. Sembcorp in this appeal as well as in the proceedings below did not spell out clearly what the affected provisions are. The Judge found (at [101] of the Judgment) that "such

provisions" are those set out at paragraph 15 of the Statement of Claim (Amendment No 3) dated 29 July 2011 ("Statement of Claim") and called these the "Equality Provisions" (at [100] of the Judgment). However, if the Equality Provisions are indeed those contained in paragraph 15 of the Statement of Claim, it is clear that some of the Equality Provisions would not be affected by a change in shareholding. For instance, one of the Equality Provisions is said to be cl 4.2 of the JVA (see [7] above). But cl 4.2 simply provides that the share capital shall be held in the proportions of 50% each unless otherwise agreed to in writing. If there is a change in shareholding because Sembcorp agrees to purchase shares from PPL Holdings, it is difficult to conceive why cl 4.2 would cease to apply and subsist as a result of the unequal shareholding. The clause would still subsist though in fact the parties would have "otherwise agreed".

106 Next, it would be odd if the remaining ten Equality Provisions identified by Sembcorp were the *only* provisions in the entire JVA subject to the Equality Premise Clause. For instance, cll 8.1 to 8.7 which come under the title "Operational Support" might equally be said to rest on equal shareholding and on that basis the same argument might be mounted that they are "such provisions" that should cease to apply in the event of unequal shareholding. On a closer examination of the Statement of Claim, the uncertainty in the scope of the Equality Premise Clause comes yet more forcefully to the fore. Sembcorp pleaded (at paragraph 37) that upon acquisition of a total of 85% in the issued and paid up share capital of PPL Shipyard:

> … The provisions of the Joint Venture Agreement that ceased to apply and subsist *included, but were not limited to, the following*: Clauses 4.2, 5.1, 5.2, 5.3, 5.5, 5.6, 5.7, 5.8, 6.1, 6.3, 7, 9, 12, 12.2, 12.3, 12.4, 12.5, 12.6, and 18.1. [emphasis added]

107 If paragraph 37 of the Statement of Claim represents the full extent of the Equality Provisions, it is noticeably wider than that which the Judge found. The words "included but not limited to", paragraph 37 of the Statement of Claim suggests that there are *more* clauses of the JVA which could be affected by the Equality Premise Clause. In the end, there are at least three possible characterisations of the Equality Provisions: (i) that found by the Judge, *ie* the terms in paragraph 15 of the Statement of Claim; (ii) the terms in paragraph 37 of the Statement of Claim; and (iii) the terms in paragraph 37 of the Statement of Claim and other unidentified terms in the JVA.

108 The intended scope of the Equality Premise Clause only became somewhat clearer in the course of the oral arguments at the hearing before us. Both Mr Singh and Mr Lee focused on four aspects of the board's control of PPL Shipyard in the event that the equal shareholdings of the parties changed: (i) the composition of the board; (ii) the number of votes each party would have in board meetings; (iii) the quorum requirement for board meetings; and (iv) the appointment of the Chairman, Deputy Chairman, Managing Director and Deputy Managing Director. Since the parties were content to confine their arguments on the Equality Premise Clause to these four aspects which are reflected in cll 5.1 to 5.3 and 5.5 to 5.8 of the JVA, we have proceeded on the same basis notwithstanding our observations as to the uncertainty of the scope of the Equality Premise Clause.

(2) Interpretation of cl 5.1

109 We begin with the interpretation of cl 5.1. We note at the outset that both parties referred extensively to extrinsic evidence including subsequent conduct as well as prior negotiations, to justify their respective contentions as to the proper interpretation of the express terms in the JVA. As stated earlier (see [49]–[65] above), there may be difficulties with the unrestrained admissibility of such evidence under the EA. Neither party provided submissions on the precise nature or limits of the extrinsic evidence which they were relying on; nor did they set out whether or why this court should have recourse to such extrinsic evidence. Nor for that matter were we really assisted as to what light

this evidence was thought to shed upon the issues. In these circumstances, we reject both parties' references to such extrinsic evidence for the purposes of interpreting the express terms in the JVA.

110 It seems clear that the JVA was entered into in the context of securing the rights of parties who were about to embark on this venture as equal partners with equal interests. This much was plainly part of the relevant factual matrix and the express terms in fact wholly bear this out. It was equally clear that the SA was entered into at a time when PPL Holdings and E-Interface wanted to exit the joint venture but had been persuaded to and did agree to retain a 15% shareholding in PPL Shipyard while transferring the other 35% to Sembcorp. There was no discussion at the time of the SA as to how the calibrated balance of rights reflected in the JVA would be affected by this development.

111 For ease of reference, we reproduce cl 5.1 of the JVA here:

> 5.1 ***Unless otherwise agreed*** , the Board of Directors of the Company shall comprise of six (6) Directors who shall be appointed by the Parties as follows:
>
> Sembcorp 3 Directors
>
> PPLH 3 Directors
>
> ***so long as*** *they shall hold* ***such number of shares*** *for the time being in the capital of the Company* ***as are not less than the proportions set out herein*** . Any member of the Board may appoint an alternate to attend Directors' meetings and otherwise act as a Director in his absence.
>
> [emphasis added in italics and bold italics]

The reference to "proportions set out herein" must, in our judgment, be taken to be a reference to cl 4.2 of the JVA, which specifically states that the share capital of PPL Shipyard shall be held by Sembcorp and PPL Holdings in the respective proportions of 50% each. Further cl 4.3 states that this proportion shall be maintained unless otherwise agreed in writing.

112 Mr Lee submitted that there was no gap in cl 5.1 of the JVA because it contemplates that the parties may vary the composition of the board at any time. He built his case around the opening words "unless otherwise agreed" in addition to the general amendment provision contained in cl 26.1 of the JVA. He submitted that Sembcorp could, at any time, have agreed with PPL Holdings to change the ratio of directors each party was entitled to appoint under cl 5.1 and this is what they should have done but did not do at the time of the SA. It is evident to us that Mr Lee's argument stands on two premises. The first, which Mr Lee placed emphasis on, is that it was always open to the parties to agree to change what had originally been reflected in the JVA. This is uncontroversial. But it is the second (implicit) premise of the argument which contained the bite of Mr Lee's case: that until and unless a new or revised arrangement was concluded, the default position which would prevail regardless of what else might have transpired is that which was reflected in cl 5.1. In a sense this loaded the dice in favour of the *status quo* as to the parties' legal rights, even though their factual position relative to one another might change.

113 We do not agree with Mr Lee that the words "unless otherwise agreed" reflect such an understanding. All that these words suggest is that the initially agreed arrangements as to the size of

the board and the rights of the parties to appoint members to the board are not immutable and *may* be changed by agreement. Indeed, the parties had agreed after the SA that Sembcorp could appoint three more directors to the board.

114 But there is a more fundamental point. In our judgment, the key part of cl 5.1 of the JVA is found in the second portion of that clause beginning with the words "so long as". By virtue of these words, the parties have subjected the opening words of cl 5.1 to the qualification that they must each be holding 50% of the share capital of PPL Shipyard for the stated distribution of board seats to apply as a matter of legal entitlement. The phrase "so long as" in the second part of the clause makes it clear that the qualification that is contained there limits or supersedes the understanding reflected in the first part of cl 5.1. In short, the second part of cl 5.1 provides that when the shareholding is no longer split equally, neither party can, by reference to cl 5.1, claim to have a right to nominate three directors to the board of PPL Shipyard. Hence, PPL Holdings ceased to have a right to have three nominees on the board of PPL Shipyard when the parties entered into the SA.

115 In our judgment, this is the only sensible interpretation of cl 5.1. If we were to agree with Mr Lee's suggested interpretation, it would follow that each party would be entitled to have three directors on the board regardless of what their shareholdings were. This would render wholly superfluous and otiose the second part of cl 5.1. As we put it to Mr Lee in the course of his arguments, on his construction of the clause, the words that conditioned the right to have and appoint the prescribed number of directors to their shareholding in equal proportions would be robbed of any meaning and Mr Lee could offer no convincing response to this.

116 If, then, a party lost its right to have and appoint three directors (out of a total of six) under cl 5.1, what right, if any, did it have to appoint any directors? The short answer in our view is that it had none. It is a basic rule of company law that no shareholder has a *right* to board representation by virtue of being a shareholder. Sembcorp and PPL Holdings had agreed that they would have the equal right to nominate three directors each *subject* to the proviso that they each maintained their 50% shareholding. The parties had in cl 5.1 already considered and provided that their right to the stated board representation would not apply if they no longer had an equal 50% shareholding. It follows from this that there is no necessity to imply the Equality Premise Clause in respect of the issue of board representation. It is irrelevant in this regard that PPL Holdings did continue to have three nominees on the board. The question is whether it had such a *right* under cl 5.1, and in our judgment it did not.

(3) Interpretation of cll 5.2, 5.3, and 5.5 to 5.8

117 Unlike cl 5.1 of the JVA, cll 5.2, 5.3 and 5.5 to 5.8 (see [7] above) are silent as to how the voting rights of the directors appointed by the parties, the quorum requirements, and the parties' rights to appoint directors to specific positions would be affected if either party obtained more than 50% of PPL Shipyard's share capital. Mr Lee argued that this did not mean that there was a gap which invited consideration of whether a term should be implied. He again submitted that the general amendment clause, *viz*, cl 26.1, evinced the parties' intentions that they could (and would have to) agree on new terms whenever they wished to change these arrangements. Failing that, the existing provisions would continue to apply by default.

118 We disagree. Clause 26.1 of the JVA provides that the parties may amend the JVA, but this does not mean that the parties had considered particular contingencies and then agreed that if those contingencies materialised, their only recourse would be to amend the JVA under cl 26.1. In fact, there was nothing to suggest that the parties had even addressed their mind to this issue. This, of course, does not in and of itself mandate the implication of a term. We therefore proceed to consider the second and third steps of the implication process which we have outlined above at [101].

The second and third steps

119 The second step need not detain us unduly. The nature of the transaction between the parties was commercial. There is thus no reason to even consider departing from the general presumption that the parties contracted on the basis of business efficacy. In this light, the question is whether it is necessary as a matter of business or commercial sense to imply a suitable term to give the contract as a whole efficacy. In our judgment, the answer to that is 'yes'. This follows from the fact that these clauses all relate to the powers and mode of operations of the directors of PPL Shipyard who had been nominated by each of the shareholders pursuant to their entitlement under cl 5.1 of the JVA. So long as the situation contemplated in cl 5.1 prevailed and the parties in fact retained an equal shareholding interest in the company, no issue or difficulty would arise. But on a true construction of cl 5.1, as we have held, once the premise of equal shareholding is displaced, then the party that no longer has at least 50% of the equity interest has no right to appoint or nominate *any* directors to the board. It follows then that in principle it is necessary to imply a term to deal with the provisions of cll 5.2, 5.3 and 5.5 to 5.8, which concern how the directors appointed pursuant to cl 5.1 are to interact and operate in a situation where a party no longer has a right to make any such appointment under cl 5.1, so as to render the JVA as a whole efficacious.

120 This leads us to the third and final step. In these circumstances, if the officious bystander asked Sembcorp and PPL Holdings whether cll 5.2, 5.3 and 5.5 to 5.8 would cease to apply in the event that one party obtained more than 50% of the share capital, would the parties have responded "Oh, of course!"?

121 Mr Singh argued that the Equality Premise Clause is the "only mechanism" which can sensibly have been intended to plug this gap if one party obtained more than 50% of PPL Shipyard's share capital. The gist of his argument was as follows:

(a) cll 5.2, 5.3 and 5.5 to 5.8 of the JVA are premised on each party having an equal 50% shareholding;

(b) the commercial logic and business purpose of those provisions is evidence that the intention was to establish a joint venture of equal participants in the company; and

(c) that business purpose would be frustrated if those provisions continued to apply where the parties were no longer equal partners.

122 In response, Mr Lee argued that the express terms contemplated a *change* of shareholding, and that the Equality Premise Clause would be inconsistent with those express terms. He also relied heavily on the conduct of the parties after entering into the SA. As we have alluded to above, Mr Lee did not explain why it was appropriate for us to have regard to the subsequent conduct of the parties in this context. But in any event, this conduct was not such as would only be consistent with the interpretation urged on us by Mr Lee. For instance, as we have already observed, in the immediate aftermath of the SA, Sembcorp had appointed three additional directors without demur from Mr Lee's clients.

123 Mr Lee's remaining arguments as to why the Equality Premise Clause should not be implied were these:

(a) it is not necessary for business efficacy because it is not inconceivable for minority shareholders to enjoy equal management rights;

(b) it would fail the officious bystander test as the parties would not want to be shackled to each other in their exact shareholdings;

(c) if asked what would happen if one party obtained more than 50% of the share capital, the obvious answer would be that the parties would have to renegotiate cll 5.2, 5.3 and 5.5 to 5.8 of the JVA; and

(d) there are multiple possible ways of dealing with cll 5.2, 5.3 and 5.5 to 5.8, and there is no one way which the parties can be presumed to have agreed was the obviously right way.

124 In our judgment, both Mr Singh and Mr Lee's arguments missed the mark somewhat. Turning to Mr Singh's arguments first, we do not think that these clauses were specifically premised on each party having an equal shareholding. While that was explicitly the case in relation to cl 5.1 of the JVA, the other clauses did not reflect such intent. In so far as the commercial logic of those clauses is concerned, it was self-evidently the case that they were structured on the premise of equal shareholding because *that* was precisely the deal when the parties entered into the JVA. But the question presented is a different one: does the change in the shareholding structure *necessarily* require the repeal of those provisions? However reasonable a conclusion this might be, we do not see why it must necessarily be so if we leave aside cl 5.1 for the moment.

125 As to Mr Lee's arguments, we agree that it is conceivable that a minority shareholder might negotiate for itself to retain management control, but again that is not the question presented. While it may well be the case that as a matter of theory, there might be many ways of dealing with the issues in cll 5.2, 5.3 and 5.5 to 5.8 of the JVA, in fact and in substance the central question that we were presented with had to be considered against the following parameters:

(a) the express terms of the JVA as a whole which included cl 5.1, and on a true interpretation of which, as we have just held, a party would no longer have a right to have and nominate *any* director to the board of PPL Shipyard once it ceased to hold 50% of the share capital of that company; and

(b) the presumed intention of the parties was to be assessed at the time they entered into the JVA and having regard to the prevailing matrix of facts.

126 In our judgment, cll 5.2, 5.3 and 5.5 to 5.8 are parasitic upon cl 5.1. These clauses were structured on the premise of the parties having the right to appoint directors under and in accordance with cl 5.1. The point simply is that once it becomes apparent on a true construction of cl 5.1, that a party who ceases to hold an equal proportion of the shares ceases to have any *right* to have a nominee director on the board of PPL Shipyard, then if the parties were asked at the time of the contract whether these other provisions would cease to apply if one party no longer had the right to appoint any director, the only answer they could have given was an emphatic affirmation. For this reason, we agree that cll 5.2, 5.3 and 5.5 to 5.8 were all to be read subject to the implied term that those provisions would no longer apply once either Sembcorp or PPL Holdings ceased to hold 50% proportion of the share capital of PPL Shipyard.

127 Finally, what should we make of the fact that after the SA was entered into and cll 5.2, 5.3 and 5.5 to 5.8 supposedly ceased to have effect, the board of directors continued, at least in some respects, as if these clauses persisted? In our view, nothing turns on this. Even if the parties and their nominees were under a misapprehension as to the legal effect of the SA on the applicability of these clauses, this does not preclude the implication of a term that unravels or is inconsistent with that misapprehension. The reference point for the implication of a term is at the time of contracting.

Any term which is implied forms part of the JVA from that point. The parties' subsequent conduct is only relevant if PPL Holdings and E-Interface are relying on waiver or estoppel, which they have not raised.

128 Therefore, for these reasons, we allow Sembcorp's appeal on the implication of the Equality Premise Clause in the JVA and by extension, PPL Shipyard's Articles of Association, albeit in this more limited and somewhat recharacterised form.

The alleged breach of the Confidentiality Clause

129 There are two issues concerning the alleged breach of the Confidentiality Clause. The first is whether the 2009 Accounts retained its confidential character at the time that Aurol released it to Baker and Yangzijiang on 13 April 2010. The second issue is whether, assuming the Confidentiality Clause was breached, Sembcorp was entitled to terminate the JVA. Obviously, the second issue is moot if the Confidentiality Clause had not been breached.

Whether the 2009 Accounts were confidential at the time of disclosure

130 The Judge held (at [135] of the Judgment) that there was no breach as the 2009 Accounts had lost their quality of confidence by 12 April 2010 at the latest by virtue of the approval of the resolutions that took place on 12 April 2010. Mr Singh argued that this was erroneous because the 2009 Accounts were only approved by the shareholders at the Annual General Meeting ("AGM") held on 16 April 2010. The thrust of his argument was that because the Minutes of the AGM ("the Minutes") which contained the resolution approving the 2009 Accounts was dated 16 April 2010, the 2009 Accounts were only approved and authorised for publication from 16 April 2010.

131 Mr Lee, on the other hand, adopted the reasoning of the Judge. He noted that the 2009 Accounts had *in fact* been approved by the members of PPL Holdings before 12 April 2010. The Judge found (at [132] of the Judgment) that this was not disputed by Sembcorp. Even before us, Mr Singh did not dispute this. The fact is that no AGM was held, or even intended to be held, on 16 April 2010. The intention, as Mr Lee pointed out, was always for the AGM to be a "paper" AGM. Thus, for all intents and purposes, by signing the Minutes by 12 April 2010, the Chairman and members had authorised and approved the 2009 Accounts. Mr Lee also argued that the AGM was, in the final analysis, irrelevant because the directors alone are collectively responsible for the accuracy of the 2009 Accounts: *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Ed, 2009) ("*Walter Woon*") at para 10.53. Since PPL Shipyard's directors had already signed the directors' resolution approving the 2009 Accounts by 12 April 2010, the 2009 Accounts were authorised and approved at that date even if the AGM was only "held" on 16 April 2010.

132 We agree with the Judge's conclusion, albeit for different reasons. First, if the issue is whether there had been a breach of a *contractual* right to confidentiality, the starting point must be the promise in the contract. In this case, that would be cl 13 of the JVA. The Judge did not consider the wording of cl 13, and went straight into the question of whether the 2009 Accounts had lost its quality of confidentiality by the time that Aurol furnished a copy of the 2009 Accounts to Yangzijiang on 13 April 2010.

133 In our judgment, while cl 13.1 of the JVA imposes a duty of confidentiality on the parties to the JVA, *ie* Sembcorp and PPL Holdings, this does not extend to third parties not bound by the contract. In the present case, it was Aurol who disclosed the 2009 Accounts, not PPL Holdings. In fact, Sembcorp's pleaded case was that "Mr. Aurol, in his capacity as director of Baker", had passed a copy of the 2009 Accounts to Yangzijiang. Mr Singh's submission in this appeal was that the 2009

Accounts were "disclosed by Aurol and Baker ... to a representative of Yangzijiang". There was no accompanying pleading of alter ego or the attribution of Mr Aurol's acts to PPL Holdings. If anything, Aurol's acts were attributed to Baker. In these circumstances, even though Mr Lee only alluded to and did not develop this argument fully, we find that Sembcorp's pleaded case on a breach of cl 13.1 by PPL Holdings must fail.

134 For completeness, we observe that the JVA had provided a mechanism to minimise the risks of disclosure of confidential information by third parties. That is found in cl 13.2 which reads as follows:

> The Parties shall procure the observance of the abovementioned restrictions by [PPL Shipyard] and shall take all reasonable steps to minimise the risk of disclosure of confidential information, by ensuring that only their employees and directors and those of [PPL Shipyard] whose duties will require them to possess any of such information shall have access thereto, and that they shall be instructed to treat the same as confidential.

135 Sembcorp's case was not pleaded on this basis but even if it had been, we doubt that Sembcorp would have been able to make out a breach of cl 13.2. Clause 13.2 in fact contemplates that directors of Sembcorp and PPL Holdings may have access to confidential information. Thus, the mere fact that Aurol, who is a director of PPL Holdings, had access to the 2009 Accounts would not, in itself, have been a breach of cl 13.2. There might have been an argument that PPL Holdings was obliged to but had not instructed Aurol to treat the 2009 Accounts as confidential. However, this was not pleaded and there was no evidence of the steps that were or were not taken by PPL Holdings in this connection.

Did the breach justify termination of the JVA

136 Given our finding that there was no actionable breach of the Confidentiality Clause, we do not need to consider whether such a breach would have justified termination of the JVA. In any case, even if a breach of cl 13.2 was made out, we would not have found that this would have justified the termination of the JVA.

137 Both Mr Singh and Mr Lee agree that the law on this issue is as stated in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") and *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663. In our judgment, any breach of cl 13.2 would not have fallen within any of the situations justifying termination under the principles laid down in *RDC Concrete*. First, cl 13.2 of the JVA is not a clause, which was "so important that any breach, regardless *of the actual consequences* of such a breach, would entitle the innocent party to terminate the contract" [emphasis in original]: see *RDC Concrete* at [97]. There was simply no intention evinced in cl 13.2 that a failure by either Sembcorp or PPL holdings to instruct their employees to treat certain information as confidential would have entitled the other party to terminate the JVA even though the information had not in fact been circulated. We do not think that this is the correct or even a sustainable view of the intended effect of the clause.

138 Nor would an alleged breach of cl 13.2 have given "rise to an *event* which *will deprive* the party not in default [*viz*, the innocent party] of *substantially the whole benefit* which it was *intended* that he should obtain from the contract" [emphasis in original]: *RDC Concrete* at [99]. Mr Singh argued that such a breach would have occasioned the destruction of the relationship of trust and confidence between Sembcorp and PPL Holdings, which had formed the basis of the parties' joint venture. However, even assuming such a proposition was well-founded in principle, which we doubt, this would have had to be predicated on the factual premise that there was a wilful and deliberate disclosure of

such confidential information by a party to the JVA. For the reasons we have articulated, this was not tenable. The only possible finding of a breach would have consisted of a failure by PPL Holdings to duly instruct its employees. Such a failure in itself would not have deprived either party of substantially the whole benefit of the JVA.

139 For these reasons, we dismiss Sembcorp's appeal on this issue.

Validity of the 28 April 2010 resolutions

140 The next issue concerns PPL Holdings and E-Interface's counterclaim that the 28 April 2010 resolutions relating to the appointment of certain individuals were invalid. The Judge (at [162] of the Judgment) held that they were invalid as they had been passed contrary to cl 5.3 of the JVA and Art 98 of PPL Shipyard's Articles of Association in that each party's directors could only exercise three votes but the six Sembcorp-nominated directors had purported to pass these resolutions by six votes to three. Mr Singh based Sembcorp's appeal on the outcome of our decision on the implication of the Equality Premise Clause. Mr Lee for his part adopted the reasoning of the Judge.

141 Since we have found that cl 5.3 of the JVA ceased to have effect once the SA was entered into, it follows that the corresponding portion of Art 98 of the Articles of Association to the extent it replicates the voting restrictions and quorum requirements in cl 5.3 also ceased to operate. That being the case, there is no basis for PPL Holdings and E-Interface to contend that the 28 April 2010 resolutions were passed in contravention of the voting restrictions in Art 98, and it follows that these resolutions were therefore validly passed.

142 However, in our view, Art 98 of the Articles of Association is wider than cl 5.3 of the JVA. This brings us to a reservation which we have over one of the Judge's findings. In arriving at his conclusion that the Sembcorp-nominated directors only had three votes and not six, the Judge interpreted Art 98 as bearing precisely the same meaning as cl 5.3. In our view, there is a substantial difference between Art 98 and cl 5.3. Unlike cl 5.3, Art 98 confers one vote on each director voting at a board meeting:

> ... At any meeting of the Board, provided a quorum is present, *every Director shall be entitled to one vote* save that (a) if less than three [PPL Holdings] Directors are present, all the [PPL Holdings] Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of [PPL Holdings] Directors present, and (b) if less than three SembCorp Directors are present, the SembCorp Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of SembCorp Directors present. ... [emphasis added]

143 This is not the case in cl 5.3 of the JVA. Indeed, this was raised by Mr Singh before the Judge below. The Judge recognised that there was an appreciable difference in the wording between cl 5.3 and Art 98, but held at [162] of the Judgment that cl 5.3 simply captured "the essence of the agreement" more succinctly than Art 98. In our view, this is incorrect. It is not uncommon for the terms of a shareholders' agreement or joint venture agreement and a company's Articles of Association to be different in wording and effect, and this might be due to a variety of reasons: Ian Hewitt, *Hewitt on Joint Ventures* (Sweet & Maxwell, 5th Ed, 2011) at para 9-33. Typically, the parties would have stipulated a mechanism to resolve such inconsistencies. Indeed, cl 31.2 of the JVA (see [7] above) serves just such a purpose *if* it were thought that there was an inconsistency.

144 In our judgment, as at the date of the 28 April 2010 resolutions, each director was entitled to cast one vote and these resolutions were therefore validly passed. For these reasons, we allow

Sembcorp's appeal on this point.

Validity of the removal of Aurol

145 It will be recalled that the 8 June 2010 letter was sent to Aurol by the six Sembcorp-nominated directors after he disclosed the 2009 Accounts to Yangzijiang. The Judge held (at [152] of the Judgment) that under Arts 98 and 102 of PPL Shipyard's Articles of Association, a director of PPL Shipyard could only be removed by his fellow directors if they took such action pursuant to a meeting at which there was the requisite quorum, *ie* at least one PPL Holdings-nominated director and Sembcorp-nominated director. On this basis, he held that the letter from the six Sembcorp-nominated directors, which was written without a directors' meeting having been convened with the requisite quorum, did not constitute a valid request for Aurol to vacate his office as director of PPL Shipyard.

146 Mr Singh argued that the Judge had misinterpreted the effect of Arts 90(g), 98 and 102 of the Articles of Association. According to Mr Singh, there is no rule that the directors can act in their capacity as directors only at or pursuant to a meeting with the requisite quorum. If the Judge was right, Mr Singh argued, that would mean that a director would not be permitted to sign a contract on behalf of the company, or affix the company's seal to a document unless he did so at a meeting convened with the requisite quorum. Moreover, if the Equality Premise Clause is an implied term of the JVA, then cl 5.3 of the JVA requiring at least one PPL Holdings-nominated director to be present would no longer apply and there would not be a deficiency in the quorum.

147 The essence of the position advanced on behalf of PPL Holdings was that in the final analysis, Aurol's removal was impeachable because it would not have been impossible to secure a resolution effecting this at a quorate board meeting. In view of the conclusions we have already expressed on the implication of the Equality Premise Clause in its modified form and the consequences that flow from that, we can dispose of this issue in Sembcorp's favour on the basis that there was no deficiency in the quorum. It is therefore unnecessary to evaluate the merits of Mr Singh's remaining arguments.

Our decision in CA 77

148 It will be recalled that PPL Holdings and E-Interface had two avenues to challenge the validity of the WongPartnership resolutions. The first was to seek a declaration under s 392(2) of the Companies Act. The second, which is limited to the WongPartnership resolutions that were passed on 11 May 2010 and 3 June 2010, is premised on an action under s 216 of the Companies Act (see [153] below). We will address each avenue below.

Declaration that the WongPartnership resolutions are invalid pursuant to s 392(2) of the Companies Act

149 Turning first to s 392(2) of the Companies Act, it will be recalled that the WongPartnership resolutions were invalidated under this provision in OS 590 on the grounds that the resolutions were passed at an inquorate meeting and had caused substantial injustice *to the directors* (see [16] above). Mr Lee argued that PPL Holdings and E-Interface were simply seeking a declaration to the same effect, and that they have the requisite standing to do so in their capacity as members of PPL Shipyard. Mr Singh was content to rest his case on the efficacy of the Equality Premise Clause, to render that aspect of Art 98 of PPL Shipyard's Articles of Association which sets out the quorum requirement inapplicable at the time that the WongPartnership resolutions were passed.

150 As stated earlier (see [141] above), the quorum requirement in Art 98 of the Articles of Association ceased to have effect by virtue of the term that was implied in the JVA and with it, PPL Shipyard's Articles of Association. In these circumstances, PPL Holdings and E-Interface can no longer rely on the quorum requirement in Art 98 to found their case that the WongPartnership resolutions were passed at an inquorate meeting and hence invalid.

151 Our conclusion is not at odds with the decision in OS 590. Each case turns on the pleadings and issues raised by the parties to that case. In OS 590, the applicability of the quorum requirement in Art 98 of the Articles of Association was not in issue. The parties in that case – the respective nominee directors of Sembcorp and PPL Holdings, none of whom are parties to the present appeals – had accepted that the relevant meetings were inquorate. They were only disputing the *effect* of the inquorate meetings: see *Chang Benety (HC)* at [41]–[45]; and *Chang Benety (CA)* at [38]–[39]. Crucially, there was no dispute as to whether the quorum requirement in Art 98 had ceased to apply after the SA had been entered into. If the six Sembcorp-nominated directors in OS 590 were willing to accept that the meetings were inquorate and resist invalidation of the WongPartnership resolutions solely on the basis that the inquorate meetings amounted to a procedural irregularity which could be validated under s 392 of the Companies Act, that was their prerogative. It does not bind Sembcorp; nor does it preclude a subsequent court from adjudicating on whether the relevant meetings were indeed inquorate. No estoppel can arise from OS 590 to preclude Sembcorp from litigating this issue, and indeed none was advanced by PPL Holdings and E-Interface.

152 We therefore dismiss PPL Holdings and E-Interface's first challenge against the WongPartnership resolutions.

Relief under s 216 of the Companies Act

153 Next, the second avenue of challenge against two of the WongPartnership resolutions also overlapped with the challenge to the validity of the 28 April 2010 resolutions.

Lack of standing

154 The Judge held (at [179] of the Judgment) that PPL Holdings and E-Interface could not obtain relief under s 216 of the Companies Act in respect of the 28 April 2010 resolutions and the WongPartnership resolutions as they did not have standing. The Judge then went on to state that on the merits of the challenge against the 28 April 2010 resolutions, PPL Holdings and E-Interface have not shown how those resolutions were unfair or oppressive. As for the WongPartnership resolutions, the Judge held that the substantive issue had already been determined in OS 590.

155 We respectfully disagree with the Judge on this point. Section 216(1) of the Companies Act clearly provides that *any member* of a company may bring an action under one of the grounds in the section:

> **Personal remedies in cases of oppression or injustice**
>
> **216.**—(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —
>
> (*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders

of debentures of the company; or

(*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

156 Whatever the merits of their case, PPL Holdings and E-Interface are members of PPL Shipyard and it is undeniable that their claim *prima facie* falls within the grounds in s 216 of the Companies Act. This is so even if PPL Shipyard can avail itself of a remedy for the same claim. As Mr Lee rightly pointed out, the English Court of Appeal decision in *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 affirmed (at 488-489) that a case which falls within s 216 may be brought notwithstanding the rule in *Foss v Harbottle* (1843) 2 Hare 461:

> ... If the board act [*sic*] for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. As a matter of ordinary company law, this may or may not entitle the individual shareholder to a remedy. It depends upon whether he can bring himself within one of the exceptions to the rule in Foss v Harbottle (1843) 2 Hare 461. *But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of [the English equivalent of s 216]. Enabling the court in an appropriate case to outflank the rule in Foss v Harbottle was one of the purposes of the sectio*n. [emphasis added]

Merits of the s 216 action

157 The two grounds which Mr Lee then relied on to contend that PPL Holdings and E-Interface were entitled to seek relief under s 216 of the Companies Act are first, that Sembcorp's actions breached the parties' legitimate expectations as to the management of PPL Shipyard, and second, that the actions of the Sembcorp-nominated directors were for a collateral purpose.

158 It is unnecessary to reach a decision on whether the substantive grounds under s 216 of the Companies Act are established because the specific relief sought, namely the invalidation of the resolutions, is not an appropriate remedy in this case. Although s 216(2) confers on the court an extensive discretion to "make such order as it thinks fit", and s 216(2)(*a*) expressly permits the court to cancel any resolutions, any order granted must be made with a view to bringing an end to or remedying the matters complained of: *Walter Woon* at para 5.96. The purpose of s 216 is to relieve minority oppression, not to proscribe majority rule. It is for that reason that in most cases, the only practical mechanism to end minority oppression is a corporate divorce where one party buys the other out. As *Walter Woon* explains (at para 5.97):

> *… [I]f the majority and minority cannot get along, litigation is not likely to improve matters between them. Anything short of a divorce is an invitation for repeat litigation in future*. Thus, although the court may 'direct or prohibit any act or cancel or vary any transaction or resolution' or 'regulate the conduct of the affairs of the company in future', such orders are likely to provide only temporary relief. [emphasis added]

159 *Gower & Davies' Principles of Modern Company Law* (Paul L Davies & Sarah Worthington eds) (Sweet & Maxwell, 9th Ed, 2012) also describes (at para 20-35) the buyout as the "only effective remedy" in such situations. A key consideration is the effectiveness of the remedy on the future conduct of the parties and the company. As the English Court of Appeal held in *Grace v Biagioli* [2005] EWCA Civ 1222 at [75]:

> *In cases of serious prejudice and conflict between shareholders, it is unlikely that any regime or safeguards which the court can impose, will be as effective to preserve the peace and to safeguard the rights of the minority*. Although, as Lord Hoffmann emphasised in O'Neill v Phillips, there is no room within this jurisdiction for the equivalent of no-fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene. [emphasis added]

160 In the present circumstances, given the gravely deteriorated state of the relationship between the parties, we do not see how an order of the sort sought by PPL Holdings and E-Interface could possibly be appropriate, even assuming that the grounds were made out. The court must look at all the circumstances in the round at the time the remedy is granted: *Re A Company* [1992] BCC 542. In the present circumstances, there is a real and present risk of further disputes, amongst other things, over the validity of resolutions owing to the fractious relationship between the parties. Invalidating the 28 April 2010 resolutions and the two WongPartnership resolutions will not go very far in redressing PPL Holdings and E-Interface's underlying complaint of minority oppression.

161 Having said this, on the view we have taken on the substantive issues, we do not in any event see how it could be said that Sembcorp's actions had breached the parties' legitimate expectations or that those actions were undertaken for some improper or collateral purpose. Accordingly, we dismiss PPL Holdings and E-Interface's appeal on this issue.

PPL Holdings' right to nominate the Managing Director

162 This issue, as presented by both sides, hinges on the applicability of Art 95 of PPL Shipyard's Articles of Association. PPL Holdings and E-Interface contend that Art 95 gives PPL Holdings the right to nominate the Managing Director. Although Art 95 is not identical to cl 5.7 of the JVA, the former is essentially a reflection of the latter. It follows from our decision on the implication of the Equality Premise Clause that cl 5.7 and that part of Art 95 which reflects cl 5.7 both ceased to have effect when the parties entered into the SA. PPL Holdings and E-Interface therefore cannot rely on Art 95 to found their claimed entitlement to appoint the Managing Director. Accordingly, we dismiss the claim by PPL Holdings and E-Interface in this regard.

163 PPL Holdings and E-Interface also sought an injunction restraining PPL Shipyard acting by a majority of directors from requesting any of the PPL Holdings-nominated directors to vacate his office ("the Injunction"), unless PPL Holdings has (a) given its consent, or (b) the majority of directors includes a PPL Holdings-nominated director. The Injunction, according to Mr Lee, is premised on Art 86(2) of PPL Shipyard's Articles of Association which, it was argued, contemplates that the decision to remove a director will be taken by the party who nominated the director, not by the other party or by the directors nominated by the other party.

164 We are unable to see how Mr Lee's argument is supported by Art 86(2) of the Articles of Association which reads:

> Notwithstanding Article 86(1), any vacancy on the Board will be filled by a Director nominated by the member that nominated the Director who is retiring or ceasing for whatever reason to be a Director. Each of the members agree that they shall cause their nominee members of the Board and their representatives at a general meeting to support and vote for the other member's nomination or removal upon receipt of advice in writing to such effect from the member nominating or removing such Director.

Ostensibly, Art 86(2) is a provision concerned with the filling of a vacancy on the board. It says

nothing of who may make a decision to remove directors. For completeness, we would in any event have held that Art 86(2) is also subject to the Equality Premise Clause. As Mr Lee rightly submitted, Art 86(2) mirrors cl 5.2 of the JVA. To that end, because of the Equality Premise Clause, Art 86(2) ceased to apply once the SA was entered into and it cannot now found the Injunction sought by PPL Holdings and E-Interface.

165 Mr Lee next argued, referring to Art 90(g) of PPL Shipyard's Articles of Association, that the majority vote required to remove a director pursuant to that provision must include at least one PPL Holdings-nominated director. Art 90(g) provides:

> **DISQUALIFICATION OF DIRECTORS**
>
> 90. The office of a Director shall *ipso facto* be vacated:-
>
> ...
>
> (g) if he is requested in writing by a majority of the other directors for the time being to vacate office.

166 Mr Lee's contention that the reference to "majority" must include at least one PPL Holdings-nominated director stems from his argument that the quorum requirement in Art 98 continues to subsist notwithstanding the SA. As we have already explained, the quorum requirement ceased to exist after the SA was entered into (see [146] above). We are therefore unable to accept Mr Lee's reliance on Art 98 as a basis for the grant of the Injunction. Accordingly, we reject PPL Holdings and E-Interface's application for the Injunction.

Inconsistencies between the JVA and the corresponding provisions in PPL Shipyard's Articles of Association

167 We come to the final issue. Mr Lee submitted that as this court is already seised of the inconsistencies between certain clauses of the JVA and the corresponding provisions in PPL Shipyard's Articles of Association, it would be just and convenient for this court to ensure that the inconsistencies are properly resolved. To that end, Mr Lee sought an order requiring the parties to reconcile the inconsistencies pursuant to cl 31.2 of the JVA. This is effectively an order for specific performance.

168 We have some difficulty with this argument because it is unclear what cause of action PPL Holdings and E-Interface would be relying on in seeking such a remedy. We recognise that cl 31.2 of the JVA provides that in the event of an inconsistency between the terms of the JVA and PPL Shipyard's Articles of Association, the parties shall cause such necessary alteration to be made so as to resolve the conflict. This is patently a contractual obligation. Yet, PPL Holdings and E-Interface have not pleaded: (a) that Sembcorp has breached cl 31.2 of the JVA; (b) in what manner the breach had occurred; and (c) why the remedy for such a breach should be specific performance. Indeed, as a result of our findings on the Equality Premise Clause, we are not persuaded that many of the inconsistencies alleged by PPL Holdings and E-Interface in fact remain.

169 We therefore decline to order specific performance of cl 31.2 of the JVA.

Conclusion

170 For the reasons set out above, we allow in part Sembcorp's appeal in CA 75 and dismiss the

appeal of PPL Holdings Pte Ltd and E-Interface in CA 77. Sembcorp will have 90% of its costs in CA75 and 90% of its costs below. Sembcorp will also have its costs in CA 77. There will be the usual consequential orders.

Copyright © Government of Singapore.