TYC Investment Pte Ltd and others *v* Tay Yun Chwan Henry and another [2014] SGHC 192

Case Number : Originating Summons No 895 of 2013

Decision Date : 10 October 2014

Tribunal/Court : High Court

Coram : Lee Kim Shin JC

Counsel Name(s) : Thio Shen Yi, SC, Lim Shaochun, Freddie and Tan Pei Qian, Rachel (TSMP Law Corporation) for the Plaintiffs; Chelva Retnam Rajah, SC, Sayana Baratham and Megan Chia (Tan Rajah & Cheah) for the 1st Defendant; andEugene Thuraisingam and Jerrie Tan Qiu Lin (Eugene Thuraisingam) for the 2nd Defendant.

Parties : TYC Investment Pte Ltd and others — Tay Yun Chwan Henry and another

Companies – directors – powers – duties

Companies – memorandum and articles of association

Contract – implied terms

[LawNet Editorial Note: The appeal to this decision in Civil Appeal Nos 149 and 150 of 2014 was allowed in part by the Court of Appeal on 13 August 2015. See [2015] SGCA 40.]

10 October 2014

Lee Kim Shin JC:

1 It is a basic principle of company law that a company's powers of management are reserved to its board of directors, and not its shareholders. This principle is encapsulated in s 157A(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act").

2 Section 157A(2) of the Companies Act in turn provides that the directors may exercise all of a company's powers except any power that the Companies Act or the memorandum and articles of association of the company require the company to exercise in general meeting. I will sometimes refer to a company's memorandum and the articles as the company's "constitution".

3 The division of powers between directors and shareholders has given rise to frequent challenges in the courts. These challenges commonly arise when shareholders exercise a management power in circumstances where the directors are either unwilling or unable to act.

4 This present case concerns a family holding company, TYC Investment Pte Ltd ("TYC"), and a deadlocked board comprising just two directors who are also ex-spouses. The two directors are Dr Henry Tay Yun Chwan ("HT") and Ms Jannie Chan Siew Lee ("JC"). HT and JC are also shareholders of TYC.

5 In 2012, HT, JC and TYC entered into an agreement, under which the approval of both HT and JC is required before payments can be made by TYC.

6 For various reasons, JC refused to approve certain payments by TYC. Pursuant to an ordinary resolution passed at a general meeting of TYC in September 2013, TYC commenced this action ("OS 895") against JC on the basis that her refusal to approve these payments constitutes a breach of contract and/or her fiduciary duties.

7 The dispute involves an interesting conflation of contract terms as agreed between ex-spouses in the context of ancillary matters to matrimonial proceedings, and contract terms as agreed between a company and its shareholders.

8 The first plaintiff in this action is TYC, HT is the first defendant and JC is the second defendant. The second, third and fourth plaintiffs ("the 2nd, 3rd and 4th Plaintiffs"), all private companies limited by shares, are wholly-owned subsidiaries of TYC. I shall refer to the four plaintiffs collectively as "the Plaintiffs".

9 The main legal issues arising from this action are as follows:

(a) Can shareholders of a company pass a resolution in a general meeting, held in accordance with the company's articles of association, to approve the commencement of court proceedings to enforce a claim against a director, if such director is able to veto any proposed board resolution to commence such proceedings?

(b) Under what circumstances can a director of a company who has a contractual right to withhold approval of payments by the company, nevertheless be compelled by the court to approve those payments?

Background

The TYC Group Structure

10 The Hour Glass Limited ("THG") is a home-grown but well-known company that grew from a family business into a company listed on the Singapore Stock Exchange. It is a luxury watch retailer with some 30 watch outlets or boutiques across nine cities in the Asia Pacific region.

11 HT and JC are the founders of THG, and they are perhaps as well-known as THG. As husband and wife, they established THG in 1979 and have been responsible for the expansion of its business as described above. Sadly, after 41 years of marriage, HT and JC were divorced in May 2010.

12 HT and JC also established TYC in 1979, as the family holding company of THG and other family assets. These assets are substantial in worth. As at the financial year ended 31 March 2014, TYC held 108,288,397 ordinary shares representing approximately 46% of the issued share capital of THG. TYC also owns two bungalows, at 40A Nassim Road and 40C Nassim Road. The 2nd, 3rd and 4th Plaintiffs each own a condominium unit in the prime Nassim Road location.

13 As mentioned earlier, HT and JC are the only two directors of TYC. In fact, pursuant to Art 8 of TYC's articles of association ("the TYC Articles"), HT and JC are permanent "Governing Directors". The ambit of Art 8 is pivotal to the issues in the present case and the relevant portions of Art 8 are reproduced below:

> Subject to Article 3, ***the said Dr Tay Yun Chwan and Mdm Chan Siew Lee shall be the permanent Governing Directors of the Company until they resign from the office*** , that is they will not whilst they hold such office be taken into account in determining the rotation of

retirement of directors and the provision of Section 153 of the Companies Act will not apply to them ***and whilst they retain the said office, they will have authority to exercise all the powers, authorities and discretion by these Articles expressed to be vested in the directors generally*** including the power to convene a general meeting of the Company, and of all the other directors, if any, for the time being of the Company, shall be under their control and shall be bound to conform to their discretion in regard to the Company's business.

Subject to Article 3, ***the said Dr Tay Yun Chwan and Mdm Chan Siew Lee whilst they hold the office of Governing Directors, may from time to time, and at any time, appoint any other persons to be directors of the Company, and may define, limit and restrict their powers and may fix and determine their remuneration and duties and may at any time, remove any director howsoever appointed*** . Every such appointment or removal must be in writing under the hands of Dr Tay Yun Chwan and Mdm Chan Siew Lee.

Subject to Article 7, in the event of the death of any of the two Governing Directors, the surviving person shall be entitled to exercise all or any of the powers previously held by the Governing Directors jointly.

Subject as aforesaid and to these Articles, the rights of all the shareholders shall be the same in every respect.

[emphasis added in italics and bold italics]

14 In terms of shareholding, HT and JC each hold a founder share giving them 46% and 44% of the voting rights in TYC respectively. Pursuant to Art 7 of the TYC Articles, all issued shares other than these two founder shares are classified as ordinary shares, and no person other than HT or JC may hold these two founder shares.

15 The remaining ordinary shares in TYC are divided amongst HT and JC's three children. Of the three children, it is only necessary to highlight that their son, Michael, holds 5% of the voting rights in TYC. Michael's role will be evident in due course (see [42]–[45] below).

Divorce Settlement Agreements

16 The ancillary matters in HT and JC's divorce were settled amicably. As part of the divorce settlement, three agreements were entered into:

(a) a Deed of Settlement ("the DOS") between HT and JC dated 9 April 2010. The DOS settled the issues relating to the division of matrimonial assets and JC's claim for maintenance;

(b) an Agreement for Amendment to the DOS and Settlement of Litigation between HT and JC dated 15 May 2012 ("the SSD"). The SSD involved amendments to the DOS and matters pertaining to the management of TYC; and

(c) a Deed among HT, JC and TYC dated 11 June 2012 in respect of certain matters relating to TYC as agreed in the DOS and the SSD ("the TYC Deed").

17 In the divorce settlement, the TYC Deed was the only agreement to which TYC was a party. I shall refer to all three agreements as the "Divorce Settlement Agreements".

18 Although divorced, HT and JC continued to be closely involved with TYC. They remained

permanent "Governing Directors" of TYC, and the TYC group continued to hold a substantial part of the family assets. Accordingly, HT and JC sought to bind TYC by way of the TYC Deed, to matters relating to TYC as earlier agreed between HT and JC in the DOS and the SSD.

19 Under cl 15 of the SSD, the SSD would be "ineffective, null and void" if any of the four conditions below were not satisfied:

(a) TYC's shareholders unanimously approve all the matters in the SSD relating to TYC;

(b) TYC enters into the TYC Deed;

(c) the TYC Articles are amended to give effect to the terms of the SSD; and

(d) HT and JC obtain an order of court approving the SSD if the above three conditions are satisfied.

20 It is not disputed that the above four conditions were satisfied. Central to the present dispute is cl 2 of the TYC Deed. Pursuant to cl 2, TYC became entitled to the benefit of the terms and conditions of, and became bound by the obligations in, the DOS and the SSD that relate to TYC, as if it were a party to the SSD.

21 Article 16 of the TYC Articles provides as follows:

> [TYC] may not amend, vary or waive any of its rights and/or obligations under or pursuant to the TYC Deed unless such amendment, variation or waiver has been unanimously consented to by all the shareholders of [TYC].

22 Article 16 itself expressly provides that it can only be amended, varied or repealed with the unanimous consent of all TYC shareholders.

23 In summary, the TYC shareholders had unanimously agreed to the provisions of the SSD; TYC became bound by these provisions by virtue of the TYC Deed; and no provision of the SSD can be amended unless all TYC shareholders agree. The SSD is therefore indirectly entrenched as part of TYC's constitution.

Disputes relating to TYC

JC's refusal to approve payments

24 Clause 10 of the SSD ("the Payment Clause") provides that payments to be made by TYC require the approval of both HT and JC. The exact mechanism provided in the Payment Clause reads:

> Payment voucher system for all future payments for TYC. Neither HT nor JC will sign a cheque on TYC's bank accounts unless the other has signed a voucher approving.

25 Because cheques could only be signed by either HT or JC if there is a corresponding payment voucher approved by the other, HT and JC were in a position whereby each could, by either refusing to sign a payment voucher (or a cheque for a signed payment voucher), prevent the other from causing TYC to make any payment. This arrangement was, perhaps with the full benefit of hindsight (following the breakup of the marriage), a recipe for disaster. TYC was bound by the Payment Clause because of the TYC Deed.

26 In July 2012, shortly after the TYC Deed was entered into, JC refused to approve certain payments by TYC. Initially, only two payments were in issue:

(a) fees ("the KPMG Fees") payable to KPMG Services Pte Ltd ("KPMG"); and

(b) expenses incurred in relation to the properties at 40A Nassim Road and 40C Nassim Road ("the Nassim Road Expenses").

27 By the time TYC had commenced this action in September 2013, JC had refused to approve the payment of numerous other expenses. Two lists of creditors were appended to the Originating Summons filed in this action. However, by the time I first heard OS 895, the dispute over these expenses had been resolved, leaving only the KPMG Fees, the Nassim Road Expenses, and the expenses incurred in connection with the commencement of this action, which I will discuss at [28]–[36] and [49]–[50] below.

The KPMG Fees

28 KPMG were engaged by HT and JC in late 2012 to identify, and advise TYC and its shareholders on, accounting and tax issues arising from the Divorce Settlement Agreements. The scope of KPMG's work, contained in a service proposal, was approved by HT and JC. The fee quoted in the service proposal was $18,000.

29 Upon issuance of its final report in April 2013, KPMG submitted an invoice for $19,424.05 to TYC (which included GST and disbursements).

30 A payment voucher for the KPMG Fees was then prepared on HT's instructions and presented to JC for her approval and signature, as required by the Payment Clause. JC refused to sign the voucher and payment could not be made. Her view was that KPMG had not carried out its work properly because KPMG had not sought her input or comments in the preparation of their report.

31 HT, on the other hand, had no issue with the work done by KPMG or the KPMG Fees. He gave three reasons why JC was wrong in refusing to pay. First, he argued that JC had agreed (and had signed in her personal capacity, and as a director of TYC) KPMG's service proposal containing the scope of work, and letter of engagement. Second, there is no requirement for KPMG to meet with either HT or JC because any advice to be provided by KPMG will be based entirely on the contents of the DOS and the SSD. Finally, KPMG did in fact meet with JC to try and explain the contents of their report to her.

32 HT asserted that "it [was] simply ridiculous" that JC refused to allow TYC to make payment despite KPMG providing its services in accordance with the terms of engagement and making the effort to meet with JC.

33 The KMPG Fees were eventually paid by HT's own company, Amstay Pte Ltd, on 6 August 2013. Amstay Pte Ltd then sought reimbursement from TYC.

The Nassim Road Expenses

34 Pursuant to cl 5(a) of Appendix B of the DOS, ownership of 40C Nassim Road was transferred to TYC. Clause 5(a) expressly provides that TYC would be responsible for all costs, taxes and outgoings on 40C Nassim Road after such transfer. HT had sought reimbursement from TYC the sum of $299,880.56 which he claimed were expenses incurred in respect of 40C Nassim Road for the period

between late July 2011 and late July 2013.

35 HT had also sought reimbursement from TYC the sum of $60,988.02 which he claimed were expenses incurred in respect of 40A Nassim Road. Pursuant to cl 16 of Appendix B of the DOS, ownership of 40A Nassim Road would remain with TYC. Although (unlike cl 5(a) in the case of 40C Nassim Road) the Divorce Settlement Agreements did not expressly provide that TYC should pay for the costs, taxes and outgoings of 40A Nassim Road, HT claimed that TYC should ordinarily be responsible for all such expenses because TYC is the owner of the property.

36 JC, however, refused to approve the payment of HT's reimbursement claims for the Nassim Road Expenses. Why she refused to approve HT's reimbursement claims is now immaterial as this was resolved by way of a Consent Order midway through these proceedings (see [62] below).

The THG share redemption

37 There was a separate, but perhaps more significant (in monetary terms), dispute involving JC's failure to procure the redemption of TYC's shares in THG which were held by Overseas-Chinese Banking Corporation Limited ("OCBC"). JC had previously pledged up to approximately 22m THG shares held by TYC with OCBC in return for personal loans to her and companies under her control.

38 Under cl 11 of Appendix B of the DOS read with cl 8 of the SSD, she was supposed to redeem those pledged THG shares by 9 April 2013. HT reminded JC through a series of letters from his solicitors from April 2013 to August 2013 that she was obliged under the DOS to fully redeem the pledged THG shares by 9 April 2013.

39 However, as of 20 September 2013, there were still approximately 6.53m THG pledged shares that had yet to be redeemed ("the Outstanding THG Shares").

40 The DOS contemplated the possibility that the THG pledged shares might not be fully redeemed by 9 April 2013. Clause 11(d) of Appendix B of the DOS provides:

> In the event that [JC] fails to procure the redemption and return of all of TYC's approximately 22 million shares in THG… [by 9 April 2013]:
>
> (i) ……..
>
> (ii) ***TYC*** *shall be entitled (A) to apply any dividend payments due to be paid to [JC] towards redemption of its THG shares and/* ***or (B) to immediately redeem its THG shares*** whereupon the redemption shall be a debt due from [JC] to TYC on demand and TYC may, *inter alia*, set off any future dividend payments due to be paid to [JC] against this debt.
>
> [emphasis added in italics and bold italics]

41 A self-help remedy was therefore available – TYC could itself utilise its own funds to redeem the Outstanding THG Shares, if JC failed to do so by 9 April 2013. However, all payments by TYC required approval from both HT and JC, as per the Payment Clause (see [25] above). In short, TYC could avail itself of the self-help remedy only if JC approved. According to HT, TYC was hamstrung because JC had consistently ignored the issue of the Outstanding THG Shares; and JC had not, despite the letters from HT's solicitors, indicated how and when she intended to procure redemption of the Outstanding THG Shares.

The EGM

42 HT called an extraordinary general meeting of TYC ("the EGM") because of JC's refusal to approve payment by TYC of various expenses and her apparent indifference to fulfilling her obligation to redeem the Outstanding THG Shares.

43 In HT's words, the purpose of the EGM, which was held on 4 September 2013, was to pass resolutions to "deal with JC's obstructive conduct" which had created the "administrative deadlock".

44 The other shareholders of TYC, being JC and the three children, were notified of the EGM by post. However, only HT and Michael turned up. A total of 18 resolutions were tabled and passed by HT and Michael who, as indicated in [15] above, collectively hold 51% of the voting rights in TYC. Only two shareholders are required under the TYC Articles to form a quorum.

45 Of the 18 resolutions passed, the ones most relevant to the dispute are:

(a) Resolutions 1(1), 1(2) and 3(6), approving that TYC, and HT, as director of TYC, take such steps and actions, including appointing solicitors to act for TYC and commencing court proceedings against JC, in connection with procuring the redemption and return of the Outstanding THG Shares;

(b) Resolutions 4(1), 4(2), and 5(1), 5(2), approving the payment to HT of the Nassim Road Expenses, and authorising HT to unilaterally sign the cheques and vouchers to effect the reimbursement;

(c) Resolutions 4(3) and 5(3), authorising HT, as director of TYC, to take all steps and actions on TYC's behalf as may be necessary or desirable in relation to the payment of the Nassim Road Expenses;

(d) Resolutions 6(1) and 6(2), approving the reimbursement to HT's own company the amount of the KPMG Fees (see [33] above), and authorising HT to unilaterally sign the cheques and vouchers to effect the reimbursement; and

(e) Resolution 6(3), authorising HT, as director of TYC, to take all steps and actions on TYC's behalf as may be necessary or desirable in relation to the payment of the KPMG Fees to HT's own company.

Appointment of TSMP

46 On 9 September 2013, HT appointed TSMP Law Corporation ("TSMP") as solicitors for TYC. In his affidavit, HT claimed that TSMP was appointed as solicitors for all four Plaintiffs but this is not borne out by the letter of engagement; the letter was signed by HT "for and on behalf of TYC Investment Pte Ltd". As it turned out (see [57]–[58] below), the issue of whether TSMP was acting for the 2nd, 3rd and 4th Plaintiffs in OS 895 became immaterial.

47 HT informed TYC's other shareholders of TSMP's appointment by email on 11 September 2013. Through her then solicitors, JC informed HT and TSMP that she did not recognise TSMP as having any authority to act on behalf of TYC. In particular, JC argued that:

(a) the management and administrative powers of TYC vest with its board of directors, and therefore, HT's unilateral appointment of TSMP as TYC's solicitors on the basis of "purported shareholders' resolutions" passed in the EGM was "wholly improper"; and

(b) a director's meeting, not a shareholders' meeting, ought to have been convened to decide on TSMP's appointment. JC proposed that Mr Michael Hwang, SC, be appointed as TYC's solicitor.

48 HT rejected JC's argument that the resolutions were improperly passed. Through his own solicitors, Tan Rajah & Cheah, HT stated that JC had the requisite notice of the EGM. As for JC's proposal to appoint Mr Michael Hwang, SC, HT simply replied that TSMP had already been appointed. TSMP, on behalf of TYC, also rejected JC's argument that TSMP's appointment was improper. TSMP stated that the powers of management rest with shareholders when there is a deadlock in the board.

49 Expenses were incurred in connection with the EGM, and the appointment of TSMP. These included:

(a) legal fees payable to TSMP; and

(b) corporate secretarial fees payable to Express Co Registration & Management Ltd ("Express Co").

50 JC refused to approve payment by TYC for TSMP's legal fees ("the TSMP Fees") because these arose from TSMP's appointment by HT on behalf of TYC, and pursuant to the resolutions passed at the EGM. JC likewise refused approval for Express Co's corporate secretarial fees, which amounted to $321 ("the Express Co Fees"), because these were for expenses incurred for the EGM, which she argued had not been validly convened.

OS 895: The proceedings

The reliefs sought by the Plaintiffs

51 On 24 September 2013, the Plaintiffs commenced OS 895 seeking two declarations:

(a) that the cheques signed by HT on behalf of the Plaintiffs for payment to the Plaintiffs' immediate and long-term recurring creditors (two lists of which were appended) and TSMP for legal services rendered to the Plaintiffs (for the TSMP Fees) are valid, binding and are to be honoured by the Plaintiffs' banks (a list of which was appended), notwithstanding that the cheques are not accompanied by a supporting payment voucher signed by JC; and

(b) that TYC's cheques to be signed by HT for payment of all such amounts and to all such parties as necessary for TYC to procure the complete redemption, return and/or recovery of the Outstanding THG Shares are valid, binding and are to be honoured by TYC's banks (a list of which was appended), notwithstanding that the cheques are not accompanied by a supporting payment voucher signed by JC.

52 Two further substantive prayers were added to OS 895 by way of orders made in Summons 6201 of 2013 on 7 January 2014. They were:

(a) that JC specifically perform her contractual obligations under the DOS, the SSD and the TYC Deed, in that she:

(i) sign all necessary payment vouchers and/or cheques for expenses in relation to the Nassim Road Expenses;

(ii) sign all necessary payment vouchers and/or cheques such that TYC can procure the

complete redemption, return and/or recovery of the Outstanding THG Shares;

(iii) sign all necessary payment vouchers and/or cheques such that TYC can make payment of the KPMG Fees, the Express Co Fees, and the TSMP Fees to the relevant parties; and

(iv) sign all necessary payment vouchers and/or cheques such that TYC can make payment of all expenses owing to TYC's long-term recurring creditors (a list of which was appended); and

(b) that JC specifically perform her contractual obligations under the DOS, the SSD and the TYC Deed within seven days of a court order to that effect or within seven days of the presentation of the relevant payment voucher and/or cheque, failing which TYC's cheques signed by HT for the relevant payments shall be valid, binding and are to be honoured by TYC's banks, notwithstanding that the cheques are not accompanied by a supporting payment voucher signed by JC.

53 Although not expressly stated, the two new prayers added to OS 895, in so far as they also covered payments by TYC for the TSMP Fees and the Outstanding THG Shares, were clearly alternative prayers to the first two declarations originally sought in OS 895 (see [51(a)] and [51(b)] above). This is because specific performance would only be necessary if I dismissed TYC's request that HT could unilaterally sign cheques to effect such payments.

The hearings

54 There were three rounds of oral arguments before me. The Plaintiffs were represented by Mr Thio Shen-Yi, SC ("Mr Thio"). HT was represented by Mr Chelva Rajah, SC. Mr Eugene Thuraisingam ("Mr Thuraisingam") represented JC.

55 The first round of oral arguments took place on 24 Feb 2014. I made two observations at this first hearing. First, I thought that it was rather clear, even on the basis of the affidavit evidence adduced thus far, that JC was in breach of her obligation to redeem the Outstanding THG Shares. Secondly, I pointed out to Mr Thio that the affidavit evidence does not actually disclose that JC was not prepared to *allow TYC to exercise the self-help remedy, and to itself redeem* the Outstanding THG Shares (as opposed to JC refusing to redeem these shares herself). I therefore adjourned this hearing to give the Plaintiffs time to adduce evidence that JC was obstructing TYC from exercising its self-help remedy.

56 At this first hearing, I also ordered that there be cross-examination of HT and JC on the issue of the KPMG Fees and the Nassim Road Expenses at the next hearing because these items were the subject of factual disputes raised in the affidavit evidence.

57 There was an important clarification in the first hearing that I ought to mention. I queried Mr Thio on his role in relation to the 2nd, 3rd and 4th Plaintiffs respectively in the proceedings given that he was, on his own case, formally appointed to represent TYC only. Mr Thio clarified that as a result of events subsequent to the filing of OS 895, the 2nd, 3rd and 4th Plaintiffs no longer had any interest in the proceedings. I understood that to mean that there were no payment issues for which an order against JC was required by the 2nd, 3rd or 4th Plaintiffs.

58 The net effect of Mr Thio's clarification was that the prayers sought in OS 895 now had to be narrowed down even further. References to the Plaintiffs (see for example, [51(a)] above) would now

be read as referring only to TYC. Indeed, for all intents and purposes, and notwithstanding six parties are formally named on the record, the proceedings were really just between TYC and HT on the one side, and JC on the other.

59 The second hearing took place on 27 March 2014. At this hearing, Mr Thio informed me that JC had indicated that she would comply with her obligation to procure full redemption of the Outstanding THG Shares by 15 April 2014, failing which TYC could itself redeem the Outstanding THG Shares. However, Mr Thio sought an order from the court that JC procure OCBC to disclose the exact amount needed to redeem the Outstanding THG Shares before 15 April 2014 – this order would enable TYC to effect redemption should JC fail to do so by that date.

60 As agreed between Mr Thio and Mr Thuraisingam, I granted the following by way of a consent order ("Consent Order No 1"):

(a) JC shall procure OCBC to inform TYC on or before 10 April 2014 the costs and expenses necessary for TYC to procure the complete redemption, return and/or recovery of the Outstanding THG Shares; and

(b) in the event that JC fails to procure redemption of the Outstanding THG Shares by 15 April 2014, she shall specifically perform her contractual obligations under the DOS, the SSD and the TYC Deed by signing all necessary payment vouchers and/or cheques such that TYC can procure the complete redemption, return and/or recovery of the Outstanding THG Shares.

61 The hearing was then adjourned until after 15 April 2014. I would note here that the most significant claim (in monetary terms) was disposed of with Consent Order No 1.

62 The third hearing took place on 21 April 2014. The main purpose of this hearing was to take oral evidence in relation to the Nassim Road Expenses and the KPMG Fees. However, before the cross-examination began, Mr Thio informed me that all the parties had come to an agreement in relation to the Nassim Road Expenses. JC would sign the relevant cheques or payment vouchers to enable TYC to reimburse HT. A draft consent order to that effect was then presented to be recorded as an Order of Court ("Consent Order No 2"). I approved Consent Order No 2 in terms.

63 Therefore, at the cross-examination, the only outstanding issues that had yet to be resolved at that point were:

(a) the validity of the resolutions passed at the EGM authorising HT to appoint TSMP as TYC's solicitors;

(b) flowing from that, which party was liable to pay the TSMP Fees and the Express Co Fees; and

(c) payment of the KPMG Fees.

64 At the end of this third hearing, I asked counsel for all parties to provide further submissions on the above issues.

My decision

The validity of the resolutions passed at the EGM

The EGM's power to appoint solicitors to commence legal action

65 The case before me was argued on the footing that the validity of TSMP's appointment, and therefore, TYC's liability to pay the TSMP Fees, would depend on whether the EGM had the power to authorise HT to appoint solicitors to commence the present proceedings.

66 It would seem intuitively logical, and practically sensible, that shareholders with majority control over a company should be able to authorise the commencement of legal proceedings against an errant director, if the board of directors of that company cannot act by virtue of that director having the ability to veto any board resolution authorising such proceedings. However, as will become evident, the simplicity of this proposition is more apparent than real.

67 A convenient starting point is the rule in *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss v Harbottle*"). The rule states that the proper plaintiff in a suit for the enforcement of a corporate right is the company itself. Therefore, minority shareholders are generally not entitled to sue to enforce a company's rights. This aspect of the rule in *Foss v Harbottle* is clear.

68 The more contentious question relates to which organ of the company (that is, the board of directors or the members in general meeting), constitutes the "company" for the purpose of commencing litigation in the company's name.

69 Interestingly, *Foss v Harbottle* suggests that the power to commence litigation lies with the members in general meeting where the action is brought against errant directors to enforce duties owed to the company. The court there noted (at 493):

> On the first point it is only necessary to refer to the clauses of the Act to shew that, whilst ***the supreme governing body*** , the ***proprietors at a special general meeting*** assembled, retain the power of exercising the functions conferred upon them by the Act of Incorporation, ***it cannot be competent to individual corporators to sue*** in the manner proposed by the Plaintiffs on the present record. [emphasis added in bold italics]

70 However, *Foss v Harbottle* was decided at a time where a company was regarded as an association of its shareholders. In other words, the shareholders in general meeting were equated with the company. Directors, on the other hand, were regarded as agents of the members in general meeting and therefore, subject to shareholders' control: see Pearlie Koh, *Company Law* (LexisNexis, 2nd Ed, 2009) ("*Company Law*") at p 71; and R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, 15th Ed, 2013) ("*Ford*") at p 232–233.

71 This paradigm was substantially altered by the seminal decision of the House of Lords in *Saloman v A Saloman & Co Ltd* [1897] AC 22 ("*Saloman*") which recognised that a company was a separate legal entity from its members, and subsequently by *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* [1906] 2 Ch 34 ("*Cunninghame*"). *Cunninghame* rejected the notion that directors were agents of the members in general meeting. Instead, the House of Lords held that directors owed their duties to the company as a separate entity (see *Company Law* at pp 71–2; and *Ford* at pp 233–234).

72 Importantly, for present purposes, *Cunninghame* established that the division of powers between the directors and shareholders in any case would depend on the construction of a company's constitution, which has the effect of a contract between the members and the company, and the members among themselves.

73 In Singapore, the division of powers between directors and shareholders is also statutorily

enshrined in s 157A of the Companies Act which provides:

> **Powers of directors**
>
> **157A.**—(1) *The business of a company* ***shall*** *be managed by or under the direction of the directors*.
>
> (2) The directors may exercise all the powers of a company except any power that this Act or the memorandum and articles of the company require the company to exercise in general meeting.
>
> [emphasis added in italics and bold italics]

74 Companies which adopt the Table A articles of association ("Table A Articles") contained in the Fourth Schedule to the Companies Act will have Art 73, which is identical to s 157A(1) and (2). Article 73 was incorporated as part of TYC's Articles.

75 In this regard, s 157A is best understood in the light of its legislative history. Prior to its enactment in 2003, there was no statutory statement as to the distribution of powers between the board of directors and the general meeting. Rather, this was determined solely by a company's constitution.

76 For companies that had adopted the Table A Articles under the Fourth Schedule to the *old* Companies Act (Cap 50, 1967 Rev Ed), the Art 73 then in force ("the old Art 73") provided as follows:

> *The business of the company shall be managed by the directors* who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these Regulations, required to be exercised by the company in general meeting, ***subject, nevertheless*** *, to any of these Regulations, to the provisions of the Act*, ***and to such regulations, being not inconsistent with the aforesaid Regulations or provisions, as may be prescribed by the company in general meeting*** ; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made. [emphasis added in italics and bold italics]

It should be noted that the old Art 73 is in *pari materia* with reg 55 of Table A under the Companies Act 1862 (UK).

77 The cases have not spoken in a single voice as to the meaning of the limiting words in the old Art 73 (which are in bold italics in the extract above).

78 There are basically two lines of authority.

79 The first states that the old Art 73 vests management powers exclusively in the board of directors and the members in general meeting cannot override board decisions or direct the board to act in a certain way: see *Cunninghame*; *Quin & Axtens Ltd v Salmon* [1909] AC 442; *John Shaw & Sons (Salford) Ltd v Peter Shaw and John Shaw* [1935] 2 KB 112 ("*John Shaw*"); and *Breckland Group Holdings v London and Suffolk Properties Ltd* [1989] BCLC 100.

80 Under the first line of authority, the shareholders' control over the exercise of management powers by the directors is limited to two options: amending the articles, or removing the board and

electing a new one in its place. The shareholders cannot usurp the powers which are vested in the directors by the company's articles: *John Shaw* at 134.

81 The second line of authority states that the members in general meeting can control the board of directors by passing an ordinary resolution, provided the resolution is not inconsistent with the Companies Act or the articles of the company: see for example *Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd* [1909] 1 Ch 267; and *Credit Development Pte Ltd v IMO Pte Ltd* [1993] 1 SLR(R) 68 ("*Credit Development*").

82 In *Credit Development*, the issue was whether the shareholders had the power to pass resolutions to appoint accountants and solicitors to investigate the affairs of the company (in this case, the company's articles contained a provision that was identical to the old Art 73). Lim Tiong Qwee JC held that this was a matter of interpreting the company's articles. On this basis he found that the shareholders did have such a power. He observed (at [22]):

> When such resolutions are passed, what the company in general meeting is saying to the directors is "Appoint accountants and solicitors for these specific purposes. ***Subject to that*** *you manage the company's business and exercise all the company's powers*".[emphasis added in italics and bold italics]

83 In December 1999, the Company Legislation and Regulatory Framework Committee ("the CLRFC"), chaired by Dr Phillip Pillai, was appointed and tasked with undertaking a comprehensive review of the company law and regulatory framework in Singapore. The CLRFC's findings and recommendations were published in the *Report of the Company Legislation and Regulatory Framework Committee (October 2002)* ("*the CLRFC Report*").

84 The CLRFC recommended that the Companies Act then in force be amended to include a statutory restatement of the division of powers between the directors and the general meeting along the lines of s 198A of the Australian Corporations Act 2001 (No 50 of 2001) (Aust) ("the Australian Corporations Act"). The CLRFC's recommendation was as follows (see the *CLRFC Report* at para 4.7):

> 4.7.1 *We recommend the adoption of the statutory restatement of the distribution of powers between directors and general meeting in the following model used in s. 198A of the Australian Corporations Act 2001: "(1) The business of a company is to be managed by or under the direction of the directors. (2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting."* ***This will override article 73 of Table A, Fourth Schedule, CA which provides that management powers are also subject to "such regulations, being not inconsistent with the aforesaid Regulations or provisions, as may be prescribed by the company in general meeting."***
>
> 4.7.2 In the Singapore decision of *Credit Development v IMO* [1993] 2 SLR 370, on a construction of article 73 of Table A, Fourth Schedule, CA, it was held that an ordinary resolution of shareholders in a general meeting may exercise some of the powers given to the directors. The holding in Credit Development takes a different approach from UK and Australian cases (now clearly backed by the slightly different articles they have and also provisions like s. 198A, Australian Corporations Act 2001) which give management more autonomy. While the decision in *Credit Development* is useful in those exceptional cases where the majority shareholder does not control the board, it may not be necessary with the re-statement of directors' duties that has been recommended, and in particular, the re-emphasis on the duty of directors to exercise their powers for proper purposes.

[emphasis added in italics and bold italics]

85 Section 157A was introduced by way of the Companies (Amendment) Act (Act 8 of 2003) because of the CLRFC's recommendation. In my view, this provision, as well as Art 73 (where adopted), settles the position that where powers of management are vested in the board of directors, then *ordinarily*, the board alone can exercise those powers. The shareholders cannot control the board in the exercise of these powers by passing a resolution.

86 There is a further (open) question as to whether it was also Parliament's intention that *only* the board of directors should ever make management decisions: see *Company Law* at p 74. To put this differently, should an express term in a company's articles conferring management powers upon the shareholders be deemed invalid as a matter of law? Or does s 157A establish a default rule which may be varied by the company's articles?

87 Although this issue did not arise in the present case and parties did not make submissions on it, I would parenthetically observe that the latter interpretation is preferable because:

(a) as a matter of practicality and commercial reality, corporate structures are so varied that it would be impossible to prescribe a set form of corporate governance. For example, there may be good commercial justifications for certain management powers to be reserved to the members in the case of a closely held joint venture company;

(b) under s 157A(2), the directors may exercise all the powers of the company, apart from what the Companies Act or the company's constitution reserves for the general meeting;

(c) section 198A of the Australian Corporations Act, upon which s 157A is based, is modelled as a "replaceable rule" and therefore can be overridden by express provision in a company's constitution;

(d) the fact that the language of s 157A is replicated in Art 73 of the Table A Articles suggests that a company may choose to depart from the statutorily prescribed division of powers in its constitution;

(e) there is nothing in the relevant secondary material which suggests that Parliament had intended s 157A to have the effect of invalidating any attempt to depart from the division of powers under s 157A;

(f) conversely, it would appear that s 157A was intended to prevent shareholders from interfering with the exercise of management powers where these are vested in the board of directors by the constitution; and

(g) the leading textbook on company law in Singapore supports the view that s 157A establishes a default rule which may be varied by the company's articles: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon*") at p 150.

88 It is therefore my view that the division of powers between the board of directors and the shareholders is a *matter of contract* under current Singapore law, subject to any provision in the Companies Act.

89 The constitution of the company is therefore paramount, and it is not possible to generalise in

any given case. If, however, s 157A and Art 73 of the Table A Articles apply, as they did in the present case, then the compact between the shareholders and the directors is that while the former own the company, the latter manage it.

90 The reason for this compact may be somewhat obvious – directors are fiduciaries of the company whereas shareholders are not. Directors are therefore required, always, to act in the best interests of the company. Shareholders are not fiduciaries of the company – shareholders are entitled to vote in their own personal interests on any shareholders' resolution. This is so even if their personal interests conflict with the company's best interests.

91 Mr Thio was therefore correct in conceding that ordinarily, the board of TYC alone may exercise powers of management because TYC's constitution vested such powers in the board. Mr Thio submitted, however, that TYC's board was deadlocked in relation to the numerous issues raised at the EGM. In that case, he said that there was an exception to the general rule that shareholders could not exercise management powers. He argued that a general meeting had "reserve powers" of management, which, in this case, included the power to appoint solicitors to commence OS 895.

92 Mr Thuraisingam accepted that the TYC board was deadlocked in relation to the issues raised at the EGM. He also accepted that the shareholders did have some form of reserve powers if TYC's board was unable or unwilling to act. He argued, however, that this was limited to appointing new directors and that reserve powers did not give the shareholders powers of management. According to Mr Thuraisingam, this meant that the EGM did not have the power to appoint solicitors to commence OS 895.

93 Both parties cited several authorities where the courts had considered both the existence and scope of the general meeting's reserve powers. I will now consider the most relevant of these authorities, starting with three English cases.

94 In *Barron v Potter* [1914] Ch 895 ("*Barron*"), the company's constitution gave the directors the power to appoint additional directors. There were only two directors. One of the directors refused to attend meetings and the business of the company came to a standstill. An extraordinary general meeting of the company was convened and resolutions passed to remove the recalcitrant director and to appoint new directors.

95 The issue then was whether the appointment of the new directors was valid. In holding that it was, Warrington J stated (at 903):

> *If directors having certain powers are unable or unwilling to exercise them – are in fact a non-existent body for the purpose* – there must be some power in the company to do itself that which under other circumstances be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment. [emphasis added]

96 In *Foster v Foster* [1916] 1 Ch 532 ("*Foster*"), the articles gave the directors the power to appoint one of their own as managing director. In circumstances where the directors were unable to appoint a managing director because of internal friction, the court held that the general meeting had the power to do so.

97 In *Alexander Ward & Co v Samyang Co* [1975] 1 WLR 673 *("Alexander Ward*"), two members of the company instituted proceedings on the company's behalf. At the time the proceedings were commenced, the company had no directors. The company later went into liquidation and the liquidator

ratified the proceedings. Before the House of Lords, it was argued that the liquidator could not ratify the proceedings because there was no competent principal at the time the proceedings were commenced. The House of Lords rejected this argument. Lord Hailsham stated (at 678–679):

> [A]t the relevant time the company was fully competent either to lay arrestments or to raise proceedings in the Scottish courts. *The company could have done so either by appointing directors, or, as I think,by authorising proceedings in general meeting, which in the absence of an effective board, has a residual authority to use the company's power*. [emphasis added]

98 More recently, the New South Wales Court of Appeal in *Massey & Anor v Wales & Ors* [2003] NSWCA 212 ("*Massey*") considered the question of shareholder reserve powers. *Massey* concerned a company which had two directors. One director, Yaqob Rajwan, wanted to appoint Baruch Rajwan to the board of the company but a quorum for a board meeting could not be reached as the board was deadlocked. Yaqob Rajwan nonetheless held a board meeting in the absence of the other director and Baruch Rajwan was appointed as a director. This appointment was invalid. The Rajwans then gave instructions to solicitors to commence legal proceedings on the company's behalf. Thereafter, a shareholders resolution was passed to ratify the appointment of the solicitors. The issue before the court therefore was whether the shareholders had the power to do so.

99 Hogdson JA (with whom Meagher and Beazley JJA agreed) held that on the facts of the case, the general meeting did not have the power to ratify the appointment of solicitors. His reasons were as follows:

> (a) If the articles provide that the business of the company is to be managed by the directors, there is generally no power in the general meeting to control or direct the directors in the exercise of these powers: *Massey* at [45].
>
> (b) This is because of the contract between the members as contained in the constitution of the company. Under this contract, the management of the company should be by persons who each should have a fiduciary duty to act in the interest of the company as a whole: *Massey* at [46].
>
> (c) The general position is subject to the qualification that where the board is unwilling or unable to act, the general meeting has some kind of reserve power. The source of this reserve power is a matter of implication on the basis of business efficacy or necessity: *Massey* at [47].
>
> (d) Where, as in the present case, the articles contained an express power for the general meeting to appoint new directors or to remove directors and replace them with other directors, it would be unreasonable to regard a deadlock in the board as giving shareholders general powers of management: *Massey* at [47].
>
> (e) The earlier cases, including *Barron* and *Foster*, did not support a wide doctrine of reserve powers: *Massey* at [50]–[71].
>
> (f) Insofar as *Alexander Ward* stood for the contrary proposition, it should not be followed: *Massey* at [59].

100 I pause here to note that the juridical basis of the general meeting's reserve powers is not clear.

101 In *Walter Woon*, the position is stated broadly, and as follows (at para 5.13):

If there is no competent board or where the board cannot act (e.g. where there is a deadlock in the board), the power of management reverts to the members.

Walter Woon cites *Barron* as authority for this proposition. Lord Hailsham's *dicta* in *Alexander Ward* (see [97] above) also supports this broad proposition.

102 The obvious difficulty with a wide doctrine of reserve powers is that it is not readily reconcilable with the division of powers between the directors and shareholders under s 157A of the Companies Act (and Art 73 of the Table A Articles): see *Company Law* at p 76; Paul Davies and Sarah Worthington, *Gower & Davies Principles of Modern Company Law* (Sweet & Maxwell,9th Ed, 2012) ("*Gower & Davies*") at p 391.

103 In fact, one prominent academic has gone as far as to suggest that reserve powers can *never* exist under the modern view of the division of powers between directors and shareholders: see Ross Grantham, "The reserve powers of company shareholders" (2004) 63(1) CLJ 36 at p 37. Professor Grantham suggests that the existence of reserve powers rests on the (outdated) notion that directors are agents of the shareholders in general meeting.

104 Another view is that reserve powers are a matter of implication under a company's constitution on the basis of necessity or business efficacy: see for example *Ford's Principles of Corporations Law* vol 1 (Butterworths, Loose-Leaf Service, 1995) at para 7.130.6. As noted earlier, *Massey* accepted this as the basis for the qualification to the general rule that powers of management reside in the board alone. In my view, this analysis is persuasive.

105 As a matter of principle, the predicate of the compact between the shareholders and the company under s 157A of the Companies Act (and Art 73 of the Table A Articles) is the subsistence of a board of directors that is both competent and willing to manage the affairs of the company. If this predicate is absent or otherwise incapable of fulfilling its purpose, it does not make sense that the company should be powerless to act simply because of the general rule that powers of management are ordinarily exercisable by the directors alone.

106 Further, the rationale for implying reserve powers is most evident from the viewpoint of policy. Professor Grantham himself concedes that if legal proceedings are contemplated against a director who is able to prevent the company from suing, it would be undesirable on the ground of accountability if the shareholders were powerless to act. However, Professor Grantham's objection to shareholder reserve powers is that they cannot be explained in a principled way. Based on what I have said at [104] and [105] above, I would respectfully disagree.

107 Yet, it must be emphasised that insofar as shareholder reserve powers are a matter of implication, their scope is narrow and the express terms of the contract between the shareholders and directors should be respected as far as possible. In this regard, I agree with Hodgson JA's view in *Massey* that there is no wide doctrine of reserve powers. A wide doctrine of reserve powers can only rest on the proposition that the board is generally subject to the control and direction of the shareholders. As I have already noted, this would be untenable in view of s 157A (and Art 73 of the Table A Articles).

108 In my judgment, the cases on reserve powers can be distilled into the following set of principles:

(a) Reserve powers do not devolve to the shareholders unless the board is unable or unwilling to act.

(i) In relation to unwillingness, the fact that shareholders disagree with a *bona fide* board decision will not in itself be sufficient.

(ii) However, if the directors who are preventing the company from suing are the wrongdoers themselves, this requirement is more often than not satisfied.

(b) If the deadlock in management may be broken in some other way under the company's constitution (as was the case in *Massey*), then the court should refuse to recognise that shareholders have reserve powers of management.

(i) The reason for this proposition is that reserve powers are implied under a company's constitution on the basis of necessity. The corollary to this proposition is that mere convenience will not justify the exercise of management powers by shareholders.

(ii) In this regard, I note that in *Massey*, the deadlock in management could have, as a matter of contract, been broken by appointing additional directors.

(c) The scope of the reserve powers which the shareholders may exercise would depend on the facts of each case.

(i) The cases have not established any general proposition governing the issue of scope. In my view, it is clear that reserve powers may not be exercised to contravene an express term in a company's articles.

(ii) A convenient test, in my view, can be stated as what is reasonably necessary in the circumstances of the case. The reference to necessity recognises that reserve powers arise because of a deadlock in management and hence their scope should ordinarily go no further than what is necessary to break that deadlock. It reinforces the point that reserve powers are narrow in scope.

(iii) The reference to reasonableness, on the other hand, recognises the practical difficulties and uncertainties which shareholders face in the purported exercise of reserve powers. Necessity must therefore be judged with a degree of latitude.

(d) Keeping in mind that it is all a matter of contract, the resolution in general meeting to commence proceedings must be passed in accordance with the requisite majority as prescribed by the company's constitution. Absent any super majority requirement contained in the company's constitution, the power to commence proceedings may be authorised by an ordinary resolution.

109 I will now apply these principles to the case before me.

110 In relation to the first issue of whether TYC's board was unable or unwilling to act, it is not disputed by the parties that TYC's board was deadlocked in relation to the matters raised at the EGM.

111 The source of the deadlock was twofold. First, the Payment Clause required both HT and JC to approve payments by TYC (see [25] above) and JC had refused to approve payment of many expenses (at the commencement of OS 895, these expenses were not limited to the KPMG Expenses and the Nassim Road Expenses (see [27] and [51] above), including the amounts required to redeem the Outstanding THG Shares. Second, HT and JT were the only two directors of TYC, and both had to agree when making management (and payment) decisions.

112 In relation to the second issue of whether the deadlock in management could be broken in some other way under TYC's Articles, there were arguments before me as to whether TYC's Articles even allowed for additional directors to be appointed. In my view, however, these arguments had no bearing for two reasons.

113 The first relates to a point alluded to earlier, that is, the source of the deadlock in the present case was the Payment Clause, which required both HT and JC to approve payments by TYC. The appointment of additional directors would not have broken the deadlock in this respect.

114 The second relates to the fact that the parties did not dispute that Art 8 of TYC's Articles (see [13] above) meant that any additional directors appointed would have been bound by HT's or JC's discretion in respect of the management of TYC. This included the commencement of OS 895.

115 I was therefore satisfied that TYC did not have a contractual remedy under the TYC Articles to break the deadlock in relation to the matters raised at the EGM.

116 In relation to the third issue of scope, Mr Thuraisingam submitted that the reserve powers of the EGM were limited to appointing new directors. He submitted that the doctrine of reserve powers did not permit shareholders to exercise management powers, including the power to appoint solicitors to commence proceedings. Mr Thuraisingam cited *Massey* as authority for this proposition.

117 I was unable to agree with Mr Thuraisingam's submission. For a start, it conflates the second and third issues identified at [108(b)] and [108(c)] above. In *Massey*, Hodgson JA found that *no* reserve powers devolved to the shareholders because the deadlock in management could be broken by appointing additional directors. Hodgson JA therefore did not go on to consider the issue of scope as it was moot. Hence, *Massey* does not stand for the proposition that shareholders' reserve powers are limited to appointing additional directors.

118 Keeping with the discussion at [108(c)] above, I was of the view that the scope of shareholder reserve powers are fact-sensitive issues. In this regard, I agreed with Mr Thio's submission that *Massey* could be distinguished because the appointment of additional directors would not have broken the deadlock in the present case (see [112]–[115] above).

119 Mr Thuraisingam further submitted that it would be contrary to Art 76 of TYC's Articles for the EGM to exercise the power to appoint solicitors to commence proceedings. The exact wording of Art 76 is as follows:

> The directors may from time to time by power of attorney appoint any corporation, firm, limited liability partnership or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities, and discretion (not exceeding those vested in or exercisable by the directors under these Regulations) and for such period and subject to such conditions as they may think fit, and any such powers of attorney may contain such provisions for the protection and convenience of persons dealing with any such attorney as the directors may think fit and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him.

120 With respect, I disagreed with Mr Thuraisingam's argument. "Attorneys" may mean lawyers under American usage but that was not its meaning under Art 76. In my view, Art 76 relates to the appointment of delegates under a power of attorney and not to the appointment of solicitors to commence proceedings.

121 Finally, and in relation to the requirement in [108(d)] above, I noted that TYC's Articles do not prescribe any super majority requirement for a general meeting to authorise legal proceedings. I was therefore satisfied that the ordinary resolution passed at the EGM constituted valid approval for the commencement of OS 895 against JC.

122 On the facts of this case, I was satisfied that it was reasonably necessary for the EGM to have the limited power to appoint solicitors to commence proceedings to determine the rights and obligations of the relevant parties under the Divorce Settlement Agreements, so as to break the deadlock in management.

123 In coming to this conclusion, I was mindful of the nature of the litigation decision in the present case; the proceedings were commenced against a director who herself could prevent the company from suing. In circumstances where the board itself was incapable of making a disinterested decision, I was fortified in my view that it was reasonable for the EGM to exercise the power to do so.

Section 216A of the Companies Act

124 I will now consider whether (and if so how) s 216A of the Companies Act affects the issue of whether the EGM had the power to appoint solicitors to commence OS 895 and therefore, my decision that the EGM did have such power. Section 216A permits a "complainant" to commence action in the name of a company, subject to satisfying certain requirements. Section 216A(1) defines a "complainant" and for present purposes, it suffices to say that the definition includes a shareholder of a company.

125 The parties did not address the s 216A issue squarely in submissions. Mr Thuraisingam submitted that if JC had breached her fiduciary duties, HT ought to have commenced a derivative action against her for damages under s 216A. However, Mr Thuraisingam's argument seemed to be directed at whether the prayers for specific performance as a remedy should be granted and not the EGM's power to commence proceedings against JC.

126 Mr Thio, on the other hand, merely argued that HT did not need to commence a derivative action under s 216A because he had the support of the majority at the EGM.

127 In *Massey*, Hodgson JA appeared to suggest that the general meeting lacked the power to commence legal proceedings because individual shareholders could commence derivative proceedings in the company's name in some cases. Hodgson JA stated (at [70]):

> … I would have thought that the inability of a general meeting to authorise the commencement of proceedings is a reason why, in some circumstances, an individual shareholder should be permitted to do so.

128 It is not clear precisely what Hodgson JA meant. If he was suggesting that a general meeting does not have *wide* powers to commence proceedings in the company's name when powers of management are vested in the board, this view would be uncontroversial. If, however, Hodgson JA was stating a broader proposition that the general meeting could never possess reserve powers to commence legal proceedings, then I must respectfully disagree.

129 I do not doubt that it would be more conducive to certainty in cases such as the present if a derivative action is commenced. It may also be argued that if the general meeting is permitted to exercise reserve powers (in appropriate cases) to commence legal proceedings in the company's name, then the requirements (and safeguards) prescribed by s 216A would be circumvented. There

are three requirements. The complainant must:

(a) give 14 days' notice to the board of his intention to apply for leave to commence a derivative action;

(b) be acting in good faith; and

(c) show that it is *prima facie* in the interest of the company that the action be brought.

130 In my judgment, such an argument, although attractive at first blush, was untenable on the facts of the present case for the following reasons.

131 To begin with, s 216A is a facilitative provision and it clearly does not mandate that a derivative action is commenced in every case where proceedings are authorised by shareholders as opposed to the board. A clear example in which a derivative action need not be commenced is where the power to commence litigation is expressly conferred on the general meeting by the company's articles.

132 It should be noted that there are important conceptual differences between a derivative action and an action brought by the general meeting in the exercise of its reserve powers.

133 At common law, a derivative action is one where a member sues in his own name, on behalf of all the other members, to enforce the company's rights. In this sense, he "derives" his right to sue from the company: *Walter Woon* at para 9.30. The position under s 216A is somewhat different. Strictly speaking, an action brought under that section is a corporate (as opposed to a personal) action brought in the company's name: *Walter Woon* at para 9.69. In substance however, the action is controlled by the individual complainant and not the board of directors. To this extent, a derivative action is a "true" exception to the proper plaintiff rule in *Foss v Harbottle*.

134 In contrast, reserve powers are a matter of implication under a company's constitution and they relate to the internal division of power between the two organs of the company. If it is shown that the general meeting did have reserve powers to commence proceedings, then the proper plaintiff would be before the court and it would be moot to consider whether an exception to the rule in the sense of a derivative action should apply.

135 In this regard, the following observations in *Company Law* (at pp 142–143) are instructive:

> The rule in *Foss v Harbottle* is of course not so much concerned about the question of how corporate powers are divided between the organs of the company, but is concerned with the question whether individual shareholders may commence suit [sic] on behalf of the company.

136 I agree. It would be putting the cart before the horse to regard the ability to bring a derivative action as foreclosing the possibility of the general meeting exercising reserve powers to commence legal proceedings in the company's name.

137 I also noted that the requirements under s 216A are generally directed at proceedings commenced by minority shareholders and not by the majority in general meeting. At the second reading of the Companies (Amendment) Bill 1993, it was stated by the then Minister of Finance, Dr Richard Hu Tsu Tau that:

> As Members would recall, the proposed new sections 216A and 216B provide for statutory

derivative actions by minority shareholders on behalf of their companies. Only one representor has questioned the need for such a provision. The representor was concerned that the new statutory right might be open to abuse by minority shareholders.

138 Section 216B of the Companies Act is also relevant. Section 216B permits the court to consider the fact that a breach of duty has been approved by the members of the company when granting leave under s 216A (even though such approval is not conclusive of whether leave should be granted).

139 The above observations are in turn consonant with the principle of "majority rule" enunciated in *Foss v Harbottle*. This principle states that if the alleged wrong is capable of being ratified by a majority of shareholders in general meeting, then no individual shareholder should be permitted to maintain an action in respect of the matter: see *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066.

140 It may therefore be said that the policy of the law has been to treat proceedings authorised by the majority of shareholders in general meeting differently from those commenced by minority shareholders. To this end, majority rule makes contractual sense in most (but clearly not all) cases because minority shareholders typically freely chose to become members of a company. I note also that majority rule is the norm under the Companies Act in the exercise of certain corporate powers. To mention just two examples, an ordinary resolution in general meeting suffices to authorise the issue of shares by a company, or for a company to dispose of all, or substantially all, of its assets.

141 Majority rule also makes economic sense because the majority has the greater incentive to maximise corporate value. In the context of corporate litigation, it prevents unnecessary, multiplicitous or vexatious actions being commenced in the company name by placing the litigation decision with the majority. This, however, is subject to the caveat that in most cases, the majority's control over litigation is indirect and exercised by removing a board which refuses to act.

142 Further, if a minority shareholder feels that proceedings commenced by the majority (whether through the board or in exercise of reserve powers) is not in the company's best interest, that minority shareholder may apply for leave to discontinue the proceedings under s 216A(2) of the Companies Act. From the viewpoint of policy, this would serve as a check against the majority's power to commence proceedings in the company's name.

143 Finally, it bears reiteration that the doctrine of reserve powers does not give a general meeting *carte blanche* powers to commence litigation in the company's name. Rather, as will be obvious from the discussion above (see [93] to [123]), reserve powers only arise in exceptional cases and they are narrow in scope.

144 For the reasons stated above, I was satisfied that s 216A of the Companies Act does not affect my decision that the EGM had the power to appoint solicitors to commence OS 895. It followed that TSMP's appointment was valid.

145 My decision (at [144] above) made it unnecessary to consider Mr Thio's other submissions regarding the EGM's power to appoint solicitors to commence legal proceedings. However, I will do so for completeness.

146 Mr Thio submitted that leaving aside the issue of reserve powers, the EGM nevertheless had the power to appoint solicitors to commence OS 895. He provided two reasons for this. First, he said that the decision to commence legal proceedings was not a management decision if it concerned the breach of fiduciary duties by existing directors. Secondly, he said that the general meeting had the

power to commence legal proceedings where the directors had refused to do so for improper motives.

147 I do not accept Mr Thio's submission that the decision to commence proceedings against a recalcitrant director is not a management decision. I do not see how the defendant's identity alters the nature of the decision to be taken. In my view, the real issue in such cases is that the directors are unable or unwilling to make the relevant litigation decision as fiduciaries: see *Walter Woon* at para 9.12.

148 Mr Thio was unable to cite any authority in support of this proposition, apart from a footnote in *Halsbury's Laws of Singapore* vol 6 (Butterworths Asia, 2006 Issue) at para 70.272, which in turn referred to the English Court of Appeal decision in *Bamford v Bamford* [1969] 2 WLR 1107 ("*Bamford*").

149 While *Bamford* does suggest (at 1115) that the decision to commence legal proceedings against errant directors could be made by the shareholders passing an ordinary resolution, this proposition is stated too broadly and it is inconsistent with the division of powers under s 157A (and Art 73 of TYC's Articles). I note that *Bamford* referred to *Foss v Harbottle* in coming to this conclusion. As mentioned at [70]–[73] above, that case was decided on a basis that does not hold currency today.

150 It is also clear that Mr Thio's submissions on this point were premised on shareholders having wide powers of management if the board was unable or unwilling to act. In my view, this submission was framed too broadly. Any question concerning the general meeting's power to commence proceedings against a recalcitrant director should be approached in accordance with the principles set out at [108] above.

The EGM's power to authorise HT to unilaterally sign cheques

151 This leaves me to address Mr Thio's further submission that the EGM's reserve powers include the power to authorise HT to unilaterally sign cheques on TYC's behalf.

152 I disagreed with Mr Thio's submission for two reasons. First, such a power would have been inconsistent with the Payment Clause which requires both JC and HT to approve payments by TYC. TYC's shareholders had unanimously agreed to the Payment Clause, TYC is bound by it, and the Payment Clause cannot be varied unless all TYC shareholders agree (see [23]-[25] above).

153 Second, TYC's main complaint in these proceedings was that JC had breached either her fiduciary duties as a director of TYC, or an implied term of the SSD, by refusing to sign cheques or payment vouchers on TYC's behalf. In my judgment, it may be reasonable to imply a reserve power which allowed the EGM to commence OS 895 - OS 895 would enable the court to determine the parties' rights and obligations under the Divorce Settlement Agreements or at general law.

154 However, the same could not be said about a reserve power which would, in effect, allow the EGM to determine payment matters for itself, or worse, to re-write the rights and obligations of the parties under the SSD.

155 It follows that the EGM could not authorise HT to unilaterally sign cheques and make payments on TYC's behalf.

Specific Performance

156 I turn, then, to Mr Thio's alternative submission that the court should specifically order JC to sign cheques or payment vouchers for TYC to make payment of the KPMG Fees, the TSMP Fees and the Express Co Fees. He based this submission on two grounds:

(a) First, there is an implied term in the TYC Deed that HT and JC's power to approve any payment by TYC under the Payment Clause cannot be exercised dishonestly, for an improper purpose, capriciously or arbitrarily ("the Implied Term"). By refusing to approve payment of these fees, JC had breached the Implied Term.

(a) I shall refer to this as the "Implied Term Argument".

(b) Second, by refusing to approve payment of these fees, JC has breached her fiduciary duties as a director of TYC. The court is therefore able to remedy such breach by way of an order for specific performance pursuant to s 409A of the Companies Act.

(b) I shall refer to this as the "Fiduciary Duty Argument".

Implied Term Argument

157 Mr Thio submitted that the Implied Term formed part of the SSD (and by extension, the TYC Deed) because the Implied Term satisfied the three-step framework described by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*").

158 Under this three-step framework, a term would be implied *in fact* in an agreement if:

(a) there is a gap in the contract which was not contemplated by the parties;

(b) it is necessary to imply in a term, typically in the business or commercial sense, to give the contract efficacy; and

(c) the specific term to be implied must be one which the parties, having regard to the need for (typically) business efficacy, would have responded "Oh, of course!" had they been asked at the time of the contract whether the term should form part of the contract.

(1) Application of the *Sembcorp Marine* framework

(A) The first step

159 The first step begins with the question of whether there was a gap in the SSD.

160 To me, this was straightforward: the party coming to court merely has to tell the court what it perceives the gap to be, and why the gap is a "true" gap, that is, the parties did not at all contemplate the issue which is now sought to be addressed by way of an implied term (see *Sembcorp Marine* at [94]–[96]). Vinodh Coomaraswamy J's approach in *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 at [51] demonstrates correctly how the first step ought to be applied.

161 Mr Thio argued that the gap in the SSD is that neither the Payment Clause nor any other term in the SSD provides what should happen if either HT or JC paralysed TYC by withholding approval to the making of payments by TYC. To fully appreciate this argument, it is necessary to explain the

background leading up to agreement on the Payment Clause.

162 After the divorce but prior to the implementation of the payment system under the Payment Clause, HT alleged that JC had unilaterally made unauthorised payments out of TYC's bank accounts. HT then commenced court proceedings in 2011 to obtain an injunction to restrain JC from making unilateral payment decisions ("OS 1080"). However, OS 1080 was discontinued in June 2012 without HT obtaining the reliefs that he had sought.

163 Mr Thio submitted that the discontinuation of OS 1080 and the Payment Clause were connected – the Payment Clause was inserted in the SSD to ensure that future payments made by TYC would not be improper, capricious or arbitrary.

164 I accepted that there was such a connection between OS 1080 and the Payment Clause. Clause 18 of the SSD expressly provided that the parties agreed to discontinue OS 1080 despite HT not receiving any of the reliefs that he had sought. Given that HT and JC remained the only two directors of TYC even after their divorce, it must have occurred to them – or in any event it was reasonable to infer – that their status post-divorce may cause problems in their joint-management of TYC (especially in relation to the control of TYC's purse strings).

165 To that end, the Payment Clause was an understandable check and balance to the problem of unilateral payment decisions by either HT and JC.

166 The parties probably did not foresee that the Payment Clause could give rise to a different problem. To some extent it was ironic, but not totally unexpected. When the Payment Clause was conceived, HT and JC were trying to solve a very narrow issue, that is, how to prevent either of them from unilaterally causing TYC to *make* payments without the consent of the other.

167 HT and JC had not addressed their minds to the converse potentiality, that is, whether there was a need by either party to prevent the other from unilaterally causing TYC to *withhold* payments despite the other having given approval. In other words, they had not contemplated that the very power that they had given to themselves to prevent improper, capricious and arbitrary payments by the other might be turned on its head to cause, in Mr Thio's words, improper, capricious or arbitrary withholding of payment of legitimate expenses incurred by TYC.

168 Therefore, I agreed with Mr Thio that there was a gap in the SSD and by extension, the TYD Deed (because TYC's rights and obligations flow from the TYC Deed, not the SSD).

169 The first of the *Sembcorp Marine* framework was therefore satisfied. I turn then to the second step.

(B) The second step

170 The purpose of the second step is again quite straightforward, that is, to determine whether the transaction is efficacious despite the gap.

171 If the transaction is efficacious despite the gap, it would not be necessary to imply in any term, and the argument for the implication of a term comes to an end. The second step, understood in this sense, is not applied to determine whether a gap exists. It is not the same as the business efficacy test understood in the normal sense when applied as a self-standing test (see [90] to [98] of *Sembcorp Marine*).

172 English law appears to have adopted a more relaxed standard. In *Marks and Spencer PLC v BNP Paribas Securities Services Trust Company (Jersey) Limited & Air* [2014] EWCA Civ 603 at [28], the English Court of Appeal held that "a party does not show that a term is unnecessary simply by showing that the parties' agreement could work without the implied term." On the face of this proposition, it would appear that a term is less likely to be implied under Singapore law as compared to English law. The difference, in my view, is perhaps more apparent than substantive.

173 One way to justify this "conservatism" under Singapore law (*Sembcorp Marine* at [88]) is to think of the court's role as being limited to giving the "minimum of efficacy" to the contract (*The Moorcock* (1889) 4 PD 64 at 69). The court's role is not to ameliorate the parties' bargain. As Lord Pearson said in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609, the court will not *improve* a contract which the parties have made, however desirable the improvement may be (see *Sembcorp Marine* at [88]). There is also no rule of contract law (either generally or specifically) in relation to implied terms that if a term can be implied to prevent loss to one party, that term is necessary for the efficacy of the transaction and ought to be implied.

174 The power to imply terms into a contract should not be considered as routine. It is so intrusive that Sir Thomas Bingham MR called it an "extraordinary power" in *Philips Electronique Grand Public SA and Another v British Sky Broadcasting Limited* [1995] EMLR 472 at 481. This is why the threshold for implied terms in fact is consistently expressed as being high (see *Sembcorp Marine* at [100]; see also Lord Grabiner, "The Iterative Process of Contractual Interpretation (2012) 128 LQR 41 at p 59).

175 Leaving aside specific policy considerations that vary from case to case, a principal reason for the restrained approach of the law towards the implication of terms into a contract is that every term implied is ultimately an exercise in guesswork by the court.

176 The danger with the introduction of guesswork – albeit informed and principled – into a contract after the bargain has been concluded between the parties was aptly summarised by Sundaresh Menon CJ (extra-judicially) in "The Somewhat Uncommon Law of Commerce" (2014) 26 SAcLJ 23 at [18]:

> ***The obvious danger*** *with implication, being by its nature an exercise in filling in what parties had not addressed their minds to*, ***is that the court might too easily rewrite the contract to its own preference*** *.* Lawyers are not generally noted for an awareness of their own limitations; and there is therefore an ***inevitable temptation*** *to try to supplement or improve the contract, or to recast it in accordance with the court's sense of the justice of the case, and in the process*, ***lose sight of the actual bargain*** *that was struck between the parties. This is* ***especially dangerous*** *because that bargain would have been struck at a time when the parties would have been looking ahead and pricing the inherent uncertainties that this must entail*. ***It is impossible for a court to factor this in meaningfully at the time it comes to examine the issue with the clarity of perfect hindsight.*** The uncertainty and unpredictability generated by this mismatch is wont to constitute a grave disservice to people of commerce if judges fail to keep such realities firmly in mind. [original emphasis omitted; emphasis added in italics and bold italics]

177 People looking on from the outside without being involved in the process of negotiation and bargaining which led to final agreement are seldom in a position to predict with any degree of accuracy what the parties were truly thinking had a particular issue been put squarely to them. It is one thing to say that objectively, this is what the parties must have intended or assumed; it is another thing altogether to say that the objective perspective reflected, in *truth*, the parties' positions at that time. It is therefore important that the courts adopt a conservative approach in the

implication of terms into a contract.

178 Against this canvass of conservatism, Mr Thio had to satisfy the court that the gap caused by the Payment Clause was one which needed to be plugged in order for the SSD to be efficacious. The question was whether "for the sake of efficacy of [the SSD] something more needs to be added to [the SSD]" (see *Sembcorp Marine* at [91]).

179 For the reasons that follow, I was not persuaded that the gap caused by the Payment Clause was one which needed to be plugged in order for the SSD to be efficacious.

180 At the outset, I accepted that the management of TYC was an integral aspect of the SSD. Although the Divorce Settlement Agreements were a private matter between HT and JC, the bulk of their combined and individual wealth was represented by their respective founder shares in TYC and the consequent control and voting rights conferred on these founder shares (see [14] above). It was therefore inevitable that TYC had to be part of, and party to, the Divorce Settlement Agreements.

181 With the introduction of TYC (with its significant stake in THG, a listed entity), the implementation of the Divorce Settlement Agreements was never going to be simple or straightforward. Contractual rights were conferred, and obligations imposed, on TYC. The settlement also reflected the parties' agreement on how TYC should be managed. A wide spectrum of management issues were covered, including a TYC dividend policy, TYC's responsibility to pay a host of expenses – medical fees and insurance for the family, as well as the costs, taxes and outgoings of various properties. TYC's liability for the expenses of 40C Nassim Road was just one example.

182 In addition, these new rights and obligations placed TYC in an unenviable position because there was the theoretical possibility that TYC may have to enforce those rights against either HT or JC; or conversely, TYC may be sued by HT or JC if TYC defaulted on its obligations to either. Perhaps this would not be an issue if TYC had directors on its board other than HT and JC, but that was not the case. It was also not the case that HT and JC were mere strangers who happened to be the only two directors of TYC.

183 Given the extensive role that TYC was made to play in the divorce settlement, the issue of how TYC would be managed post-divorce would undoubtedly affect the efficacy of the execution and implementation of the Divorce Settlement Agreements. Thus, whether and when TYC would meet its payment obligations was undoubtedly an issue which went towards the efficacy of the SSD.

184 That, however, was not conclusive because even if the SSD had a gap that undermined the workability of the SSD, it did not follow as a matter of course that it was necessary, for the minimum of business efficacy, that a term needs to be implied into the SSD. If there were other means by which this gap could be ameliorated, the consequences of the gap on the efficacy of the SSD would be similarly limited.

185 On this critical issue, it was my view that the gap caused by the Payment Clause was adequately ameliorated by the existing duties imposed as a matter of law on HT and JC, namely, the duties imposed on directors pursuant to s 157(1) of the Companies Act and at general law.

186 Section 157(1) states that "[a] director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office." This is a broad and wide-ranging duty which encompasses the following obligations:

(a) A director shall "act *bona fide* to promote or advance the interests of the company": *Ho*

Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) [2014] 3 SLR 329 ("*Scintronix*") at [35]. A corollary of this obligation is that the director must be "genuinely acting to promote the company's interest"; whether or not this is objectively the case is a matter within the court's purview (*Scintronix* at [38]).

(b) A director shall not be *dishonest*, even if he subjectively thought that being dishonest – by bribing to win business contracts, to take the most extreme example – was in the interest of the company. The Court of Appeal in *Scintronix* flatly rejected (at [40]) the suggestion that a director who created a sham contract and made unauthorised and irregular payments out of the company's funds for the purpose of securing business for the company can be said to be acting genuinely in the interests of the company. The rationale, the court explained, was that profit maximisation "by any means" can never be in the interests of the company.

(c) A director shall not exercise his office and the powers that the office confers for an *improper purpose*. Again, this rule applies even if the director had considered himself as genuinely acting in the interests of the company: *Walter Woon* at paras 8.76 to 8.82.

(d) A director shall not make a decision *capriciously* and *arbitrarily* as such manner of decision-making can never be, by definition, one that was genuinely taken in the interests of the company. At best, a decision made capriciously or arbitrarily is one which pays no regard to the company's interest; at worst, it fully contradicts the duty of directors to exercise reasonable diligence, which has been read into the scope of s 157(1) of the Companies Act: *Walter Woon* at para 8.118.

187 To recapitulate, the Implied Term imposes a fetter on the power HT and JC each enjoyed under the Payment Clause. Neither can exercise such power dishonestly, for an improper purpose, capriciously or arbitrarily. Given the broad obligations that come within the ambit of s 157(1) of the Companies Act, including those fleshed out at [186] above, I would think that if either HT or JC had exercised the power to withhold approval of payments in a manner that was dishonest, capricious, arbitrary or for an improper purpose, such exercise of power would likely constitute a breach of director's duties. The scope of the Implied Term was, in my view, a subset of the existing obligations that HT and JC *already owe to TYC* in their capacity as directors of TYC.

188 In these circumstances, and bearing in mind the conservatism that overhangs the entire process of implication of terms, I could not see how it was necessary, for the efficacy of the SSD, that the Implied Term was required. Any withholding of approval of payment by JC for clearly legitimate TYC expenses was and can be controlled by her duties owed to TYC as a director.

189 I was assisted in my conclusion at [188] above by the arguments that were made on the Nassim Road Expenses (although that claim has since been settled (see [62] above)). Under cl 5(a) of Appendix B of the DOS, TYC is liable to pay all "costs, taxes and outgoings" in connection with 40C Nassim Road. The arguments between the parties concerned the ambit of these words. Mr Thuraisingam argued that "renovation" expenses were not covered by these words; Mr Thio argued that no words of limitation should apply to cl 5(a), and all expenditure on 40C Nassim Road is included.

190 In response to Mr Thio's argument, I had asked Mr Thio whether TYC would be liable to pay if HT were to spend $10 million on extravagant renovations – say, gold-plating the swimming pool. Mr Thio submitted this would not happen as expenditure on the Nassim Road bungalows would be controlled by HT's fiduciary duties. The underlying principle in Mr Thio's answer accorded with my view, which is that the check against any abuse is the fact that HT is a director of TYC. Just as a term need not be implied in cl 5(a), I did not think that the Implied Term needed to be implied in the

Payment Clause.

191 It could have been argued – though it was not – that the Implied Term governed HT and JC's contractual duty to each other (and TYC) in their personal capacities, and that this was a duty that was wholly different from a director's duty which is owed to the company (and not to other shareholders or directors). The difficulty, perhaps, was that TYC was the party seeking to enforce the obligation under the Implied Term, not HT.

192 Be that as it may, even if this submission had been made, it would not have made a difference to my analysis – in my view, the Payment Clause was a contractual promise by HT and JC to each other (and subsequently, TYC) in their capacities as directors of TYC. Although the SSD was entered into between HT and JC as a private settlement pursuant to a divorce, this did not alter their status as directors which, to me, is the only capacity that they could have contemplated was their bargain in relation to the Payment Clause. And this is because the Payment Clause deals solely with expenses of TYC.

193 The scope of the Implied Term was perhaps fashioned by reference to *Paragon Finance plc v Nash and another* [2002] 1 WLR 685 ("*Paragon Finance*") which Mr Thio cited. In that case, two mortgages over residential property contained a provision which permitted the lender discretion to vary the interest rate. The borrowers submitted that the lender's discretion to set rates ought to be fettered by an implied term that the rates would not be set "dishonestly, for an improper purpose, capriciously or arbitrarily". This found currency with the English Court of Appeal.

194 Dyson LJ (as he then was) explained that the court accepted the implied term because the court found the situation without the implied term to be unpalatable. He noted (at [30]–[31]) that without the implied term, the lender would be completely free, in theory at least, to specify an interest rate at the most exorbitant level; raise the interest rate because it found the borrower to be a nuisance (an improper purpose); or raise the interest rate because its manager did not like the colour of the borrower's hair (a capricious reason). Notwithstanding, the court concluded (at [47]) that there was no breach of the implied term on the facts as the lender's raising of the interest rate was a commercial judgment and not for dishonest or capricious purposes or otherwise arbitrary.

195 *Paragon Finance* is materially different from the present case in a number of aspects, first of which is the parties' relationship. Unlike the borrowers in *Paragon Finance*, who had little bargaining leverage against the lender, neither HT nor JC here entered into the SSD on an unequal footing. Dyson LJ's tone illuminates the main concern that the court had, namely, the inequality of the parties' relative positions should there be no implied fetter on the lender's discretion. This was sufficient for the court to infer that at the time the borrowers and lender entered into the mortgage, the expectation was that the lender's right to vary its interest rate was necessarily fettered to the extent that it could not raise the interest rate dishonestly, for an improper purpose, capriciously or arbitrarily.

196 The second and more important difference is that there was no other control against the lender, unlike the existence of overarching director's duties imposed at law in the present case.

197 Mr Thio also referred me to *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 ("*Equitable Life*"). The main issue in that case before the House of Lords was whether the discretion conferred on directors by the articles of association of a mutual life assurance society was restricted by an implied term that the directors could not adopt a course of action that had the effect of overriding or undermining the guaranteed annuity rate (which was a critical feature of the policy). Article 65 of the society's articles of association conferred on the directors absolute discretion in

declaring the amount of bonus to be paid out to policyholders. The directors of the society had adopted a policy of declaring a lower final bonus to policyholders of a certain category. The society sought a declaration from the court that it was entitled to adopt such a course.

198 Lord Steyn, delivering the leading judgment of the court, held (at 459) that the discretion conferred by Art 65 was restricted by an implied term under which the directors were precluded from depriving the guaranteed bonus to the policyholders. He explained that the provision for guaranteed annuity rates was a selling point in the marketing by the society of its policies, and was obviously a significant attraction for purchasers of those policies. Thus, "the supposition of the parties must be presumed to have been that the directors would not exercise their discretion in conflict with the parties' contractual rights."

199 Plainly, the facts and holding in *Equitable Life* are very different from the present case. Factually, the term sought to be implied in *Equitable Life* was nothing like that in the present case. The implied term there restricted the director's power under the articles of association to undermine the fundamental purpose of the contract entered into between the policyholders and the society. There was no such concern in the present case.

200 Legally, the decision in *Equitable Life* has no bearing on the present case because all that was established in that case was that the discretion of the directors of a society to affect a policy, which discretion was conferred contractually by the articles of association (and not a statutory or fiduciary duty imposed by law), was subject to an implied term that the discretion is not exercised in a manner that conflicts with the rights of the policyholders. Existing director's duties would have been insufficient because the directors could be genuinely acting in the interests of the society in exercising the power in the articles of association in a way that defeats the purpose that the policyholders had in mind when they contracted with the society.

201 To his credit, Mr Thio did not overstate *Equitable Life*. His strongest point in relation to that case was a reference to Lord Cooke's judgment that no legal discretion, however widely worded, could be exercised for purposes contrary to those of the instrument by which it is conferred. Again, that is simply another way of saying that the scope of the discretion under the articles of association must be read in the light of the purpose of the contract between the society and policyholders. I found nothing wrong with that statement of principle but I did not see how it was materially relevant to the principal submission that the Implied Term ought to be recognised as forming part of the SSD.

202 I shall address a couple of other authorities that I found apposite. The first is *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm) ("*Investec*"). In that case, the plaintiffs were former employees of the defendant bank. They were seeking damages from the defendant for breach of contract in failing to pay them bonuses which they claimed were a matter of right and not discretionary. The defendant's main argument was that the plaintiffs were simply not entitled to any bonus under the contractual formula for calculating bonus entitlement. The plaintiffs contended that the defendant bank had acted in bad faith or irrationally in manipulating or adjusting the inputs into the formula that resulted in the conclusion that no bonus was payable. This was a breach of the defendant's implied duty to exercise its discretion in good faith, and not in an arbitrary, capricious or irrational manner.

203 Leggatt J, after surveying the authorities dealing with clauses granting discretion to one of the contracting parties to the contract, agreed that there was such a general implied duty in principle (at [100]):

> Both on the authorities and as a matter of principle, it seems to me that where a contract gives

> responsibility to one party for making an assessment or exercising a judgement on a matter which materially affects the other party's interests and about which there is ample scope for reasonable differences of view, *the decision is properly regarded as a discretion which is subject to the implied constraints that it must be taken in good faith, for proper purposes and not in an arbitrary, capricious or irrational manner*. … The concern, as Rix LJ observed in *Socimer* at para 66, is that the decision-maker's power should not be abused. The implication is justified as a matter of construction to give effect to the presumed intention of the parties. … [emphasis added]

204 The decision of Rix LJ referred to by Leggatt J is *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558 ("*Socimer*"). That case concerned the right of the defendant under a contract to either liquidate or retain a portfolio of assets belonging to the plaintiff upon a defaulting event. The value of the assets to be liquidated or retained was to be determined by the defendant at the date of termination of the contract. However, the defendant did not carry out any valuation of the assets (which the defendant sold in dribs and drabs). The plaintiff, through its liquidator, then brought proceedings claiming that it was entitled to a larger sum than had been credited by the defendant.

205 The issue in *Socimer* (that was relevant to the present case) was whether the defendant was under an implied obligation to take reasonable care to ascertain the true market value of the plaintiff's assets, notwithstanding that the valuation clause provided the defendant with the discretion to determine the value of those assets. The court disagreed (at [116]) with the plaintiff's submission that the implied term was necessary to prevent abuse caused by the defendant's self-interest.

206 In the court's view, there were other general implied controls guarding against such abuse. Rix LJ, who delivered the leading judgment of the English Court of Appeal, explained that clauses giving one party a power to make decisions under the contract which may have an effect on both parties are (at [66]):

> … limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. …

207 This general limitation was considered by the court to be less extensive than the implied term sought by the plaintiff (see [67] of *Socimer*) because whilst the implied duty to take reasonable care to ascertain the true market value effectively imposes on the defendant what the court considers to be a reasonable market value, the general implied limitation does not take away from the defendant its discretion to decide what, in its subjective view, amounted to a reasonable valuation. The general implied limitation (see the excerpt reproduced at [206] above) only required the defendant to exercise its subjective judgment rationally and in good faith (see [112] of *Socimer*).

208 These authorities seemed to suggest that a party which is given an exclusive right under a contract to make a decision that may adversely affect another party to the contract is under an obligation to exercise that discretion, at minimum, in a manner that is not arbitrary, capricious, perverse or irrational. In my judgment, I did not think that this proposition was a principle that applies in all circumstances and in relation to all contracts where such clauses are concerned. I say this for a number of reasons.

209 First, these are situations concerning implication of terms in fact, not law. Given that whether a term is implied in fact depends on the circumstances of each case, there cannot be a general principle that applies to all contracts conferring such discretions. To put it another way, if a party has

freely agreed to give another party an unfettered discretion to make decisions that may adversely affect both parties to the contract, the two parties ought to be permitted to contract as such. I know of no general principle or policy that restricts the parties' freedom to enter into such agreements. In ascertaining the parties' presumed intentions, the court is precisely trying to determine whether the parties could have agreed on such a course of plan. This is why presumed intention has to be assessed on a case-by-case basis and cannot be subject to an overarching general proposition.

210 Second, in all of the authorities that I have been referred to or otherwise came across, the relationship between the contracting parties were different from that between HT, JC and TYC. The cases which have recognised an implied term similar to the Implied Term concerned a society and policyholders (*Equitable Life*), an ordinary retail borrower and a commercial lender (*Paragon Finance*), employees and an employer bank (*Investec*), and a commercial borrower and a commercial lender (*Socimer*). None of these were remotely close to the situation of a contract entered into between owners of a company who were also its only directors and in the midst of divorce proceedings.

211 Third, given HT and JC's position as entrenched directors of TYC (see [13] above), the need for a general limitation, as was necessary in *Socimer* and *Investec*, for example, was at least questionable if not entirely obviated by the directors' duties imposed on HT and JC by s 157(1) of the Companies Act and more broadly at general law. Just as the court in *Socimer* held that the duty to take reasonable care in obtaining a valuation was unnecessary because any abuse of self-interest was taken care of by the generally implied limitation inherent in clauses conferring discretion (see [207] above), it would also be unnecessary to recognise the Implied Term in the SSD. The duties imposed on HT and JC, as directors, have the same content and prophylactic effect as the Implied Term.

212 Given that there was a pre-existing set of obligations owed by HT and JC to TYC that served the same purpose as the Implied Term, I concluded that the SSD was not inefficacious despite the gap caused by the Payment Clause. Consequently, it was not necessary for something additional to be implied to the SSD.

213 TYC's case for the implication of terms therefore ended here.

(C) The third step

214 For completeness, and on the assumption that I was wrong on the second step, I shall give my views on the third step.

215 The application of the third step of the framework posits the hypothetical question: what would the parties' response be if an officious bystander had suggested that a *specific* term should form part of the parties' agreement? The court will only imply the term suggested by the officious bystander if the court is persuaded that the parties' response to the officious bystander would be "Oh, of course!".

216 There are two ways I could be wrong with respect to the second step. Consequently, there would be two different outcomes depending on how I was wrong.

217 First, I could be wrong in that the existing directors' duties did not mirror, or at least capture the scope of, the Implied Term, such that a director's exercise of a power dishonestly, for an improper purpose, capriciously or arbitrarily is of a different nature from, and not subsumed by, the duties imposed by s 157(1) of the Companies Act or at general law.

218 If I were wrong on this point, I would agree with Mr Thio that the Implied Term ought to be implied as it would have passed muster under the third step of the *Sembcorp Marine* framework. HT and JC would have approved the Implied Term to supplement the insufficiency left notwithstanding their existing directors' duties.

219 Second, I could be wrong on a separate point in that although the director duties mirrored, or at least captured the scope of the Implied Term, the SSD was nonetheless inefficacious notwithstanding such existing directors' duties. Here, I did not think that the third step would have been satisfied.

220 If the existing directors' duties mirrored or captured the scope of the Implied Term, but for some reason the Payment Clause was still insufficient for the efficacy of the SSD, HT and JC would, I think, have questioned the relevance of the Implied Term. They would not have responded with "Oh, of course!" when asked if the Implied Term formed part of the SSD. To put it another way, if the Implied Term is in any event a subset of the directors' duties incumbent on HT and JC, and the existence of those same directors' duties is considered inadequate in remedying the gap, HT and JC would not have seen any additional benefit that the Implied Term would provide.

(2) Whether JC breached the Implied Term by refusing to pay the KPMG Fees

221 For completeness, I shall explain why I did not think that JC had breached the Implied Term in respect of her refusal to approve payment of KPMG Fees. Here, I proceed on the basis that I was wrong, and that the Implied Term should be implied in the Payment Clause.

222 No submission was pressed on JC's refusal to approve payment of the TSMP Fees and the Express Co Fees, and rightly so, because it was manifestly clear that her refusal to approve the two payments stemmed from her honest belief that the EGM had not been validly convened and consequently, TSMP was not properly appointed (see [50] above).

223 The courts have been slow in interfering with commercial decisions of directors which have been made honestly even if they turn out, on hindsight, to be financially detrimental (*Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 at [30]). Part of the reason for this wide margin of deference is that "it is theoretically possible for a board of directors to make a decision which is commercially ludicrous and yet act perfectly honestly" (see *Walter Woon* at para 8.36).

224 As Lord Greene MR said in *In re Smith and Fawcett Ltd* [1942] Ch 304 at 306 (which was cited with approval by the Court of Appeal in *Scintronix* at [37]), directors "must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company". What matters, therefore, is the directors' intention, not the consequences of the directors' decision, however detrimental. The consequences may, however, sometimes be a useful indicator of intention.

225 JC's main complaint against KPMG was that they never contacted her in the course of carrying out their work, even though the scope of their work involved evaluating, followed by advising, HT and JC on their respective individual income tax position. There were other aspects relating to TYC's corporate tax but that was not disputed by JC. Mr Thio rejected this argument, submitting that JC's refusal to authorise payment of the KPMG Fees had no basis because she had not even read the report or sought advice on whether the report was accurate. He also referred to a term of the engagement which provided that the KPMG Fees are not contingent "upon the results of [their] engagement".

226 In my view, the fact that there is such a term was, at best, neutral. Otherwise, a director would be compelled to authorise payment under contracts which contains such a term even if the director were genuinely of the view that the counterparty had breached the contract in a way which made it commercially sensible, from a business perspective, to withhold payment or to secure a reduction in the amount payable. Or to set-off any counterclaim for breach. It may also be commercially sensible for a company seeking to cure a breach to withhold payment so that the cure would be more forthcoming. Whether the contractual obligation to pay was absolute under the law is irrelevant.

227 JC admitted in cross-examination that she had not read the report by KPMG. Mr Thio submitted that JC could not have adopted an honest view that KPMG had not discharged its obligations fully or properly because she had not read the report. I disagreed.

228 JC knew – and it was not disputed by HT or Mr Thio – that KPMG did not consult her. It was also undisputed that KPMG's role included an assessment of the parties' individual income tax position. In fact, as Mr Thuraisingam submitted, HT conceded during cross-examination that it was not unreasonable for JC to take issue with the report by KPMG because it affected her personal income tax.

229 In fact, when JC initially refused to approve payment, a meeting was scheduled with KPMG on 5 April 2013. It was at this meeting that JC tore up the KMPG report, a fact that Mr Thio stressed during cross-examination and in his submissions to highlight JC's attitude towards the matter. Leaving that aside, what JC had said in that meeting was helpful to understanding the crux of her issue with KPMG. This was what she said during her cross-examination:

> I said [to the KPMG team leader]: "Mun Chuan, you can't be doing my income tax." I then qualified with him: "How could you have done it?" He says: "I was given the DOS and all those report." I said: "Surely, you then should have asked me am I staying in 15 Nassim Road because you are indicating just because it's in DOS that I'm staying there. … I'm staying in Reflection [the name of a condominium] and everywhere else has got nothing to do with the DOS. I was physically not staying there. I have got to be honest and truthful and therefore I cannot accept it without you coming to discuss with me and I have been trying to [tell] Grace Wong telling her at all times I want to see the KPMG people. …

230 Her point was simple, and in my view, fair. KPMG had premised its assessment of JC's income tax on the assumption, having regard to the DOS, that JC was staying in a condominium unit at 15 Nassim Road. JC felt that KPMG should not have made that assumption without clarifying with her because she was not staying at 15 Nassim Road, but somewhere else (or so she claimed). JC's point was that if KPMG had consulted her and sought the necessary information, they would have discovered the discrepancy, and their assessment would have been different.

231 I note, at this juncture, that this issue of the impact of the Divorce Settlement Agreements on JC's income tax was not entirely trivial. On this part of KPMG's assessment, JC's occupation of the condominium unit at 15 Nassim Road was likely to be treated as a taxable employment benefit. Both sides appeared to have accepted that the value of this taxable employment benefit is in the region of $200,000.

232 It must be remembered that KPMG were contracted to perform services which were in their nature qualitative. It was not as if KPMG were only engaged to undertake a simple mathematical exercise which involved inputs that were free of any judgment or analytical assessment. KPMG had to make judgment calls which may vary depending on the parameters that they used. JC's point was

that KPMG ought to have checked with her on the accuracy of the parameters before they rendered their opinion on the effect of the Divorce Settlement Agreements on her personal income tax. The force of her contention, framed this way, was difficult to ignore.

233 I would make a final observation. The dispute over payment here did not relate to a supply of basic consumables, but to the provision of professional services. A dispute over the quality of professional services rendered generally involves a greater measure of subjective judgment; and the client receiving such services should be given some latitude if it genuinely believes that there was a deficiency in the quality of services for which payment should be withheld.

234 In these circumstances, I did not think that JC's stance was one which "no director could honestly believe to be taken in the interests of the company" (see *Cheam Tat Pang and another v Public Prosecutor* [1996] 1 SLR(R) 161 at [80]). I considered this margin of deference that should be afforded to directors. I also considered the fact that she had reached out to KPMG to lodge her dissatisfaction (see [229] above). While I thought that JC was perhaps not the easiest of clients (*qua* director of TYC) to deal with, I found that she did approach the issue of payment of the KPMG Fees with an honest, *bona fide* belief that KPMG ought not to be paid (then or perhaps at all) because it had not discharged fully or properly its obligations under the terms of the engagement.

Fiduciary Duty Argument

235 The Fiduciary Duty Argument was based on JC's refusal to authorise payment of the KPMG Fees. This is said to be concurrently a breach of JC's fiduciary duties which she owed as a director of TYC.

236 For the same reasons that I gave at [223] to [234], I did not accept that JC had breached her fiduciary duties.

Conclusion

237 Although I held that TSMP was validly appointed by the resolutions passed at the EGM, and that TYC is therefore liable to pay TSMP and Express Co for the services respectively rendered, I was not in a position to make a determination on whether the TSMP Fees and the Express Co Fees, in terms of quantum, were reasonable and ought to be paid by TYC. These were matters for TYC and its directors to decide, and not the court, at least not in these present proceedings.

238 In sum, save for Consent Order No 1 and Consent Order No 2 which remained valid and binding on the parties, and prayers relating to costs and liberty to apply, I dismissed OS 895 in its entirety.

Costs

239 Mr Thuraisingam submitted that JC was prepared to pay costs of $20,000 in relation to the two Consent Orders that were made only after proceedings had commenced. He however sought costs of $50,000 for the dismissal of OS 895. Mr Thio sought costs of approximately $112,000 (factoring in reasonable disbursements) on a global basis.

240 Although I dismissed most of the prayers sought by TYC, I recognised that the majority of the claims by TYC had been settled by way of the two Consent Orders that were entered into only after proceedings had commenced, and only after quite a few hearings. Therefore, it seemed fair that TYC should get some of its costs from JC. For that reason, on a global basis and after factoring in the costs that Mr Thuraisingam claimed should be awarded to JC for the dismissal of OS 895, I awarded

TYC $20,000 in costs payable by JC. I ordered HT to bear his own costs.