Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd [2006] SGCA 44

Case Number : CA 29/2006

Decision Date : 21 December 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Chan Kia Pheng and Koh Kang Ming Shaun (KhattarWong) for the appellant; Ling Daw Hoang Philip (Wong Tan & Molly Lim LLC) for the respondent

Parties : Golden Harvest Films Distribution (Pte) Ltd — Golden Village Multiplex Pte Ltd

Companies – Directors – Meetings – Board of directors of joint venture vehicle comprising two groups of three directors each – Each group nominated by different party to joint venture – One group of directors walking out of meeting – One of remaining three directors at meeting appointing himself as chairman – Remaining three directors passing resolution – Whether appointment of chairman irregular – Whether meeting not invalidated by irregular appointment of chairman – Section 392(2) Companies Act (Cap 50, 1994 Rev Ed)

Companies – Memorandum and articles of association – Company's articles of association silent on procedure by which to appoint chairman of board meeting – Whether clause in shareholders' agreement implemented in practice but not incorporated in company's articles of association may be used to supplement such articles of association

21 December 2006

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The present appeal turned on rather unusual facts and raised important issues centring around the conduct of meetings of the company (here, the meeting of the board of directors) in general and the appropriate legal norms that ought to be observed in the conduct of such meetings in particular.

2 We dismissed the appeal, and now give the detailed grounds for our decision.

3 The unusual fact situation in the present proceedings occurred in the context of a joint venture ("the JV") between parties which belonged to conglomerates that were located in Hong Kong and Australia, respectively. These will be set out in more detail in the next part of this judgment. By way of a quick preliminary sketch, however, this joint venture was to be effected through the respondent company. To this end, the two conglomerates to the JV each nominated three directors to the board of directors of the respondent ("the Board"), with a total of six nominated directors. If there was a deadlock in relation to any decision by the Board, the chairman would, under the articles of the respondent, have the casting vote.

4 In a nutshell, the present proceedings arose in the following way. A warrant to act was given by the respondent's managing director to a firm of lawyers, authorising it (the law firm) to act on its behalf *in a claim against the appellant* (who is the first defendant and *part of the aforementioned Hong Kong* conglomerate, there also being a claim against the listed holding company of the appellant as the second defendant). The respondent required a resolution of its board of directors to ratify this warrant to act. Not surprisingly, the directors nominated to the Board by the party to the JV belonging to *the Hong Kong* conglomerate *objected* to a director nominated by the party to the JV

belonging to the *Australian* conglomerate being appointed as chairman of the meeting of the Board held to ratify the warrant to act referred to above ("the Board meeting") (such an appointment would, in the event of a deadlock in voting, have probably resulted in the resolution being passed). These directors (nominated by the party to the JV belonging to the *Hong Kong* conglomerate) ultimately walked out of the Board meeting. It was also not surprising when the remaining three directors (nominated by the party to the JV belonging to the *Australian* conglomerate) continued with the Board meeting and passed the resolution.

5 There was in fact no legal impediment to the continuation of the meeting despite the walk-out by the three directors nominated by the party to the JV belonging to the *Hong Kong* conglomerate, as even chairmen are not competent to terminate validly constituted board meetings prematurely. In fact, the learned trial judge ("the Judge") had cited the English decisions of *National Dwellings Society v Sykes* [1894] 3 Ch 159 and *Catesby v Burnett* [1916] 2 Ch 325 to support this proposition (see *Golden Village Multiplex Pte Ltd v Golden Harvest Films Distribution (Pte) Ltd* [2006] 3 SLR 599 ("GD") at [51]–[54]). Therefore, the immediate issue that arose on this appeal was whether the directors nominated to the Board by the party to the JV belonging to the Hong Kong conglomerate had *valid legal reasons* for walking out of the Board meeting. This, in turn, raised two more specific issues for our decision:

(a) Whether the appointment of the chairman was irregular; and

(b) Whether, if (a) above was answered in the affirmative, the Board meeting had nevertheless not been invalidated by the procedural irregularity as, pursuant to s 392(2) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"), such an irregularity had neither caused nor might have caused "substantial injustice that cannot be remedied by any order of the Court".

6 Counsel for the appellant, Mr Chan Kia Peng, rightly conceded that if issue (a) above was answered in the negative, the appeal would fail. He argued, however, that issue (a) should be answered in the affirmative and that the irregularity concerned (in this appeal, the irregular appointment of the chairman during the Board meeting referred to above) could not be "cured" via s 392(2) of the Act. Not surprisingly, counsel for the respondent, Mr Philip Ling, argued to the contrary.

7 So much by way of a brief – and broad – overview of the issues involved in the present appeal. We turn now to set out the factual background leading to the present appeal in more detail.

The joint venture and its parties

8 The respondent was incorporated as the vehicle to carry out the objectives of the JV between the Golden Harvest conglomerate in Hong Kong and the Village Roadshow conglomerate in Australia (the Hong Kong and Australian conglomerates referred to above) to acquire, hold, construct, develop, lease, operate, dispose of and exploit cinema complexes in Singapore. The appellant is part of the Golden Harvest conglomerate.

9 The JV was governed by the terms of a shareholders' agreement ("Shareholders' Agreement") entered into by the following parties:

(a) Village Cinemas Australia Pty Ltd ("Village");

(b) Golden Screen Limited ("Golden Harvest");

(c) Dartina Development Limited ("the Company"); and

(d) Golden Village Multiplex Pte Ltd (the respondent).

10 Village and Golden Harvest own 50% of the Company's shares each, and the Company owns all the shares of the respondent.

11 As already mentioned above, the Shareholders' Agreement gave Village and Golden Harvest the right to nominate three directors each for appointment to the Board. Therefore, of the six directors who sit on the Board, Graham William Burke, Peter Edwin Foo and Kirk Senior are Village nominees, while Raymond Chow, Phoon Chiong Kit ("PCK") and Roberta Chin Chow are Golden Harvest nominees. All three Golden Harvest-nominated directors are also directors of the appellant. The Shareholders' Agreement also gave Village a right to appoint the chairman of the respondent. However, the Shareholders' Agreement was never incorporated into the articles of association of the respondent. The relevant provisions are reproduced at [33] below.

The main proceedings

12 The respondent commenced Suit No 413 of 2005 ("the main action") against the appellant and the second defendant (also from the Golden Harvest group of companies), and Suit No 557 of 2005 ("Suit 557/2005") against PCK, one of the three Golden Harvest-nominated directors of the respondent.

The main action

13 The main action arose out of an agreement for lease dated 23 December 2002 ("Agreement for Lease") executed with IMAX Corporation ("IMAX") for the lease of the IMAX system. The appellant was one of the original lessors in the Agreement for Lease. Subsequently, the original lessors assigned all of their rights, duties and obligations under the Agreement for Lease to the respondent and, by an agreement in writing dated 11 February 2004 ("Transfer Agreement"), it was agreed, *inter alia*, that on the terms and in the circumstances set out in the Transfer Agreement, upon the happening of a specified event, the appellant shall accept a transfer of the respondent's rights and obligations under the Agreement for Lease and pay the respondent a transfer sum ("Transfer Sum"), and the second defendant shall accept a transfer of obligations as guarantor.

14 The respondent's case was that the specified event had taken place and it had accordingly issued the Notice of Transfer ("Transfer Notice") to the appellant on 23 November 2004 for, *inter alia*, the appellant to take over the respondent's rights and obligations under the Agreement for Lease and to pay to the respondent the Transfer Sum. The appellant and second defendant disagreed with the position taken by the respondent and refused to comply with the Transfer Notice.

15 Prior to the issuance of the Transfer Notice, the performance of the IMAX Theatre had been discussed at length at meetings of the Board on 6 October 2003 and 31 March 2004. Both those meetings were attended by PCK. It was ultimately decided by the Board during the meeting on 31 March 2004 that the respondent would cease operation of the IMAX Theatre with effect from 1 January 2005 and, in exercise of its rights under the Transfer Agreement, transfer its rights and obligations under the Agreement for Lease to the appellant. Pursuant to such decision of the Board, the Transfer Notice was issued by the respondent to the appellant.

16 At a subsequent meeting of the Board held on 15 February 2005 which was also attended by PCK, various steps, *inter alia*, to be taken by the respondent were minuted pursuant to the issuance

of the Transfer Notice, including informing IMAX of the respondent's decision; re-charging to the appellant costs such as the annual maintenance fee and minimum rent payable to IMAX under the Agreement for Lease; and billing the appellant the Transfer Sum. The minutes of this board meeting showed that PCK gave instructions to proceed with the above steps.

17 Notwithstanding the fact that PCK as a director of the respondent had knowledge of the operations of the IMAX Theatre and, being privy to internal communications between the staff of the respondent, had even put forward his own ideas and feedback as to how certain issues were to be addressed, and despite the fact that he had previously agreed to the transfer along with the other directors of the respondent, PCK subsequently wrote two letters on behalf of the appellant alleging that the respondent was in breach of its obligations under the Transfer Agreement in failing to properly promote and market the IMAX Theatre in Singapore and that the Transfer Notice had not been validly given.

18 By reason of the appellant's and second defendant's failure to take and accept the transfer of rights and obligations under the Agreement for Lease, and in particular, the appellant's failure to pay the respondent the Transfer Sum, the respondent commenced the main action against the appellant and the second defendant to enforce its rights under the Transfer Agreement.

Warrant to act

19 M/s KhattarWong ("KW"), the solicitors acting for the appellant, wrote to Wong Tan & Molly Lim LLC ("WTML"), the solicitors for the respondent, requesting production of a warrant to act from the respondent. WTML obtained a warrant to act from the respondent executed by its managing director, Kenneth Tan ("Tan"), on 27 June 2005. A copy of the same was forwarded to KW by WTML's fax dated 27 June 2005.

20 The appellant took the position that the warrant to act was invalid as Tan had not been authorised to sign the same on behalf of the respondent. The appellant then took out an application in Summons in Chambers No 3346 of 2005 ("SIC 3346/2005") in the main action to strike out the action, which is the subject of this appeal.

Suit No 557 of 2005

21 By reason of PCK's alleged inconsistent conduct in, on the one hand, giving instructions as a director of the respondent for the respondent to exercise its rights under the Transfer Agreement to transfer its rights and obligations under the Agreement for Lease to the appellant and demanding payment of the Transfer Sum by the appellant, and subsequently, on the other hand, opposing such transfer and objecting to such payment in his capacity as a director of the appellant, the respondent commenced an action against PCK for a declaration that PCK was in breach of his fiduciary duties as director of the respondent and an injunction to restrain PCK from acting in further breach.

22 Suit 557/2005 is still pending, and awaits the outcome of a meeting of the Board to be convened within 30 days after the decision in the present appeal, for the purpose of passing a resolution to ratify the warrant to act. This was necessitated by a similar application filed by PCK for the action to be struck out on the ground that the warrant to act authorising the action was invalid.

Summons in Chambers No 3346 of 2005 and the present appeal

23 Summons in chambers No 3346 of 2005 was an application filed by the appellant on 5 July 2005 for, *inter alia*, a declaration that the warrant to act signed by Tan purportedly for and on behalf

of the respondent to authorise WTML to act for the respondent in the main action is invalid as Tan was not authorised to sign the said warrant to act, and that consequently, WTML had not been validly and/or properly authorised to represent the respondent in the main action and the appellant prayed for the main action to be struck out.

24 The application came up for hearing before the assistant registrar ("AR"), who agreed that Tan was not authorised to sign the warrant to act. She allowed the respondent an opportunity to obtain a board resolution to ratify the warrant to act for the main action by 27 December 2005, failing which, the appellant could apply before her for a final order that the main action be struck out.

25 The parties then attended before the AR again on 5 January 2006. At the hearing, the respondent took the position that there was a valid board resolution on 20 December 2005 to ratify the warrant to act signed by Tan for the commencement of the main action, whereas the appellant's position was that there was no valid board resolution. The AR agreed with the appellant and made the declaration sought for by the appellant and ordered the main action to be struck out. The respondent subsequently appealed against the AR's orders and the Judge allowed the respondent's appeal and set aside the orders made by the AR in SIC 3346/2005.

26 This is an appeal by the appellant against the decision of the Judge. The main issue in this appeal is whether the board resolution to ratify the warrant to act signed by Tan for the commencement of the main action was validly passed at the Board meeting of 20 December 2005.

The Board meeting and resolution passed on 20 December 2005

27 The Board meeting was convened by conference telephone and was attended by Raymond Chow, Roberta Chin Chow and PCK as the Golden Harvest-nominated directors of the respondent, and by Simon Phillipson ("Phillipson") (alternate to Graham William Burke), Peter Edwin Foo and Kirk Senior as the Village-nominated directors.

28 Phillipson wanted to chair the Board meeting in accordance with what he claimed was past practice and as provided for under the Shareholders' Agreement, but PCK countered that they had "recently discovered" that the relevant provision in the Shareholders' Agreement giving Village the right to appoint the chairman had not been incorporated into the articles of association and that until then it could not be given effect to.

29 The Village-nominated directors then proposed Phillipson for the chair while the Golden Harvest nominees voted against him and proposed Raymond Chow instead. This latter proposal was, likewise, opposed by the Village-nominated directors.

30 Despite the parties not being able to agree on the appointment of a chairman, Phillipson sought to proceed with the Board meeting on the basis that he was in the chair and PCK threatened to call off the Board meeting and gave notice that he was going to hang up the phone. Phillipson's response was that PCK was not in a position so to do and that the Board meeting could continue even if PCK chose to hang up the phone.

31 Eventually, the three Golden Harvest-nominated directors hung up the phone and left the Board meeting. In their absence, the three remaining directors of the respondent continued with the Board meeting and all voted in favour of and duly passed the resolution to ratify the warrant to act signed by Tan to commence the main action ("the Board resolution").

32 Upon the conclusion of the Board meeting, the minutes of the Board meeting were signed by

Phillipson as the chairman of the Board meeting and entered in the minute book of the respondent.

Shareholders' Agreement and articles of association

33 Clause 5.1 of the Shareholders' Agreement starts by stating that "[t]he Shareholders *shall cause* the Articles of the Company and GVM *to be amended* so as to result in the Articles providing, amongst other things, the following" [emphasis added] matters, in so far as they are relevant to the issues in this appeal:

(a) 5.1(i) on "Chairman": "*The Chairman of the Company and GVM* and the Board of the Company and GVM *shall be appointed by Village*. The first Chairman shall be Graham Burke." [emphasis added]

(b) 5.1(j) on "Casting Vote": "The Chairman shall have a second or casting vote over all Management Issues, but shall not have a casting vote over matters which are Unanimous Issues or are not Management Issues."

34 The relevant articles in the context of the present appeal are as follows:

116. … Unless otherwise determined two shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the Chairman shall have a second or casting vote.

…

118. The Directors … may from time to time elect a Chairman who shall preside at their meetings, but if no such Chairman be elected or if any meeting the Chairman be not present within five minutes after the time appointed for holding the same a substitute for that meeting shall be appointed by such meeting from among the Directors present.

…

122. The Directors shall cause proper minutes to be made in books to be provided for the purpose of … all meetings of the Company and all business transacted, resolutions passed and orders made at such meetings and any such minute of any meeting, if purporting to be signed by the Chairman of such meeting … shall be sufficient evidence without any further proof of the facts therein stated.

Was there an irregularity?

35 The appellant's argument in this appeal was premised on the assumption that Phillipson's appointment of himself as chairman of the Board meeting was irregular.

36 The respondent argued, of course, to the contrary. Mr Ling argued, in particular, that the *past practice* in such meetings justified such an appointment. Such an argument is especially pertinent in the light of the fact that the relevant article (Art 118, reproduced above at [34]) was in fact *silent* on the procedure by which a chairman would be appointed.

37 We must point out at the outset that the Judge ought to have considered the appellant's argument to the effect that Phillipson's appointment of himself as chairman of the Board meeting was irregular. By holding that this issue was not material in the light of the fact that the Board meeting was (and remained) quorate pursuant to Art 116 (reproduced above at [34]) did not, with respect,

address the appellant's argument to the effect that the irregularity lay in Phillipson's appointment of himself as chairman. If, in fact, that appointment was irregular, there would be possible legal consequences *vis-à-vis* the Board meeting itself. Hence, this threshold issue ought to have been addressed directly by the Judge.

38 We turn now to consider the respondent's argument to the effect that where (as here) the articles are silent, it might be possible to invoke *past practice* to "fill in the gaps", so to speak.

39 In the English decision of *In re Imperial Mercantile Credit Association (Marino's Case)* (1867) LR 2 Ch App 596, for example, although the relevant articles of association did not prescribe any particular form for the transfer of shares, the court held that the uniform practice of the company was to require that the shares concerned be transferred by deed executed by both the transferor as well as the transferee. On the facts of this particular case, the transfer deed had been executed only by the transferor. Hence, the directors of the company were held to be justified in not registering the transfer and that, consequently, the attempt by the transferor to remove his name from the register failed. However, in order for past practice to apply, there must be concrete *evidence* adduced. In this particular case, for instance, Sir G J Turner LJ observed (at 598) that there had been "*evidence* before us that it was the *unvarying course* of this company not to act upon the transfer of shares when brought in for registration, unless they had been executed by the transferees" [emphasis added]. Again, Lord Cairns LJ observed (at 600) that "the practice of the company with regard to its transfers is in evidence before us". Unfortunately, in the present proceedings, this particular argument does not appear to have been dealt with by the Judge. In fairness to him, however, it appears that the argument was not emphasised by counsel for the respondent. It was canvassed before this court but there were insufficient facts before us. Indeed, this particular argument ought to have been canvassed, if at all, in more detail in the court below.

40 Before we leave the general case law with regard to past practice, we ought to note another couple of decisions. The first is the House of Lords decision of *Cruikshank v Sutherland* (1923) 92 LJ (Ch) 136. This case concerned the articles of partnership, which were silent as to the principle to be adopted in preparing the full and general account of the property. However, in this instance, the House held that there was no evidence to support an alleged past practice – thus emphasising, once again, the need to adduce sufficient *evidence* before the court if such an argument is to succeed.

41 And, in the English Court of Appeal decision of *In re White (Dennis), decd* [2001] Ch 393, it was held that where the articles concerned are *clear* (as opposed to being silent), evidence of past practice is unhelpful, save where it furnishes a context in which to construe the contract in question (see at 410). This must, *ex hypothesi*, be correct for there is, in such a situation, *no* need to "fill in the gaps" as such.

42 Returning to the facts of the present proceedings, it is our view that the respondent did not even need to rely upon the argument of past practice in the first instance although, as noted in the preceding paragraphs, that argument was available to it as well. This is because the respondent had an *even stronger* argument upon which it could succeed and which justified Phillipson's appointment as chairman of the Board meeting. Simply put, it is clear that, as amongst the parties to the JV, cl 5.1 of the Shareholders' Agreement is in fact contractually binding. If so, we need not even rely on the argument from past practice. Indeed, Phillipson's appointment as chairman of the Board meeting would be justified under cl 5.1(i) itself as a matter of contractual agreement. It is true that cl 5.1 had not yet been incorporated into the articles of association. However, it is clear, as we have just noted, that the clause itself was contractually binding amongst the parties in any event. Shareholder agreements are clearly binding as amongst the parties themselves, and there is nothing in this particular agreement to suggest that it ought not to be enforced, at least in so far as cl 5.1 is

concerned (and see generally the illuminating essay by Prof L S Sealy, "The Enforcement of Partnership Agreements, Articles of Association and Shareholder Agreements" in *Equity and Commercial Relationships* (P D Finn ed) (Law Book Company, 1987) ch 4 especially at pp 107–113, where possible difficulties which are not applicable in the context of the present proceedings are also discussed). We also note the House of Lords decision of *Russell v Northern Bank Development Corporation Ltd* [1992] 1 WLR 588 ("*Russell*"). Although certain aspects of the actual decision in *Russell* have been the subject of some controversy, including what the case actually decided (see, for example, Giora Shapira, "Voting Agreements and Corporate Statutory Powers" (1993) 109 LQR 210; B J Davenport, "What Did *Russell* v. *Northern Bank Development Corporation Ltd.* Decide?" (1993) 109 LQR 553; C A Riley, "Vetoes and Voting Agreements: Some Problems of Consent and Knowledge" (1993) 44 NILQ 34; as well as Eilis Ferran, "The Decision of the House of Lords in *Russell* v. *Northern Bank Development Corporation Limited*" [1994] CLJ 343; and *cf* L S Sealy, "Shareholders' Agreements – An Endorsement and A Warning from the House of Lords" [1992] CLJ 437), the *general principle* contained therein to the effect that shareholder agreements are generally binding amongst the parties appears to be clear. In any event, the factual matrix in the present proceedings does not involve any attempted fetter on the respondent's right to exercise its statutory powers, and is hence quite different from that to be found in *Russell* itself. In the circumstances, therefore, we find that Phillipson's appointment of himself as chairman of the Board meeting was *regular*. In the circumstances, this settles the appeal in favour of the respondent (see also [6] above).

43 We accept that the agreed changes to the articles of association were not implemented. However, it is not disputed by the appellant that cl 5.1 of the Shareholders' Agreement has not been abandoned by the parties and that it therefore remains in force as among the shareholders. It bears emphasising that the shareholders agreed to the changes in order to give efficacy to the management of the JV since Village and Golden Harvest are each represented by three directors on the Board. Accordingly, without a mechanism to appoint the chairman of any directors' meeting, no such meeting could be held; hence, cl 5.1(i) was agreed upon in order to ensure that there would be no deadlock. Its importance, in the circumstances, cannot be over-emphasised. There is evidence before us that Golden Harvest had agreed to this clause because it was prepared to allow Village to have the casting vote in the event of any deadlock at directors' meetings.

44 Evidence has also been adduced that at previous meetings of the Board, the Golden Harvest-nominated directors had let Phillipson chair the meetings without fail. We refer, in particular, to the minutes of a previous meeting of the Board held on 27 April 2005 at which Phillipson was appointed chairman for the meeting, which meeting dealt with an equally contentious matter. Whilst this might have supported the respondent's argument based on past practice, it is reasonable for this court to infer from the conduct of the Golden Harvest-nominated directors at such meetings that they recognised and gave effect to Golden Harvest's obligation to allow a Village-nominated director to chair all directors' meetings as agreed under cl 5.1(i) even though that particular clause had not been formally incorporated into the articles of association yet. In our view, the Golden Harvest-nominated directors had, by such conduct, recognised and given effect to their own obligations as if cl 5.1(i) had already been incorporated into the articles of association. We see no reason why, in principle, we should or could not give effect to this arrangement consistently with the terms of Art 118, which provides that the directors shall elect a chairman from time to time. Indeed, cl 5.1(i) was intended by the shareholders, as we have already noted above, to *supplement Art 118 by providing a mechanism to avoid any potential deadlock.* As we have stated earlier, cl 5.1 of the Shareholders' Agreement remains valid and enforceable as among the parties thereto. Accordingly, we find it surprising that for the purposes of this Board meeting, the Golden Harvest-nominated directors should have taken the unjustifiable stand that cl 5.1(i) no longer applied to this particular directors' meeting and that Art 118 of the articles of association should apply strictly to determine the rights of the shareholders as

represented by their appointed directors. The conduct of the Golden Harvest-nominated directors in resiling from the contractual obligations of the shareholders they represent in the respondent raises serious issues of not only of the standard of corporate governance in a joint venture company, but also of a possible breach of directors' duties *vis-à-vis* the respondent. In so far as the former is concerned, this court should not countenance such a serious breach of corporate governance. In so far as the latter is concerned, we refrain from making a considered judgment as the respondent has commenced separate proceedings against PCK for breach of directors' duties arising from what transpired at the Board meeting (as to which see above at [21]–[22]).

45 There is also authority which suggests that, where the articles are silent, the court is able to locate (or, more accurately, imply) a procedure that would help accord efficacy to the entire situation by way of *an implied term*: see the English Court of Appeal decision of *Tett v Phoenix Property and Investment Co Ltd* [1986] BCLC 149 ("*Tett*"). This particular case states clearly that such a term would be one that is "implied in fact", rather than one that is "implied in law" (reference may also be made to the English High Court decision of *Re Benfield Greig Group plc* [2000] 2 BCLC 488 at 509–512). This must surely be correct as such situations are fact-dependent and should not (as is the case for "terms implied in law") set a precedent for similar cases in the future for all contracts of that particular type. The distinction between these two categories of implied terms was in fact set out in this court's recent judgment in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571 ("*Panwah Steel*"), as follows (at [9]–[10]):

> 9 There are at least two broad categories of implied terms – "terms implied in fact" and "terms implied in law", respectively. The latter is of relatively recent vintage and is based, in the final analysis, on considerations of public policy (see generally *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] SGCA 20 at [90]). Terms under this particular category are of a broader cast:
>
> > In other words, the decision of the court concerned to imply a contract "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. [emphasis in original]
>
> (See *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("*Forefront Medical Technology*") at [44].)
>
> 10 The former category (relating to "terms implied in fact") is the traditional category. It is narrower in nature. Unlike "terms implied in law", the implication of a term does not create a precedent for future cases. As was stated in *Forefront Medical Technology* (at [41]):
>
> > In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case – *and that case alone*. The court is only concerned about the presumed intention of the particular contracting parties – *and those particular parties alone*. [emphasis in original]

46 It should be noted that the court in *Tett* referred to both the traditional tests utilised with respect to "terms implied in fact", *viz*, the "business efficacy" and "officious bystander" tests, respectively (see generally *Tett* at 159–160 and 164). And as this court stated in *Panwah Steel* ([45] *supra* at [11]), these tests "are complementary in nature". Terms will not, of course, be implied lightly, but an argument centring on an implied term was nevertheless a viable argument to be made in the circumstances. It might even, on occasion, overlap with the earlier argument considered, centring on past practice. For example, where the articles are clear there would be neither room to

imply a term nor justification to utilise past practice in order to "fill in the gaps" (as to which see *In re White (Dennis), decd* ([41] *supra*)). Indeed, it might be argued that, where the articles are silent and there is in fact adequate evidence of past practice, there is a "term implied in *law*" to the effect that past practice can be utilised to "fill in the gaps" (for an elaboration of "terms implied in law", see *Panwah Steel* at [9], which is reproduced at [45] above).

47 However, this particular argument (centring on an implied term) does not arise on the facts of the present case as the legal position is governed by an *express* term, albeit of the Shareholders' Agreement. Indeed, where an express term of the contract governs the legal relationship between the parties, there is no scope for the implication of a term. Further, this particular argument was not, in any event, canvassed before the Judge; indeed, it was not canvassed before this court either. We therefore do not comment further on this particular legal principle in the context of the present proceedings, although it might be relevant in other fact situations.

48 What *is* clear, however, is that at the time the three Golden Harvest-nominated directors hung up the phone and effectively left (or, more appropriately, walked out on) the Board meeting, Phillipson's appointment as chairman of the Board meeting was clearly regular, based on a past practice which gave effect to the terms of the Shareholders' Agreement. In the circumstances, these directors were wrong in walking out of the Board meeting before it could begin to conduct its business. It may well be that they had been advised that it was proper for them not to participate in the meeting if Phillipson were to take the chair, but clearly they had anticipated that he or a Village director would take the chair. If they had been so advised, the advice was wrong in the circumstances of this case. It might, in our view, even be argued that by walking out on the Board meeting, the directors concerned (as well as the appellant) would be *estopped* from claiming that the appointment of Phillipson as chairman was irregular and, *a fortiori*, that the subsequent proceedings were improper. Furthermore, perhaps an argument from *waiver* might have been invoked by the respondent as well. However, it is not necessary to consider either of these arguments in this case. We would however observe that should similar conduct arise in the future in board meetings of a company, arguments arising from estoppel or waiver might find fruitful ground.

49 Although it is, strictly speaking, unnecessary to do so in the light of our findings above, we nevertheless turn, next, to consider whether (assuming that there had been an irregularity, which we reiterate we have *not* found) the Board meeting itself was valid as, pursuant to s 392(2) of the Act, such (an assumed) irregularity had neither caused nor might have caused "substantial injustice that cannot be remedied by any order of the Court".

Section 392(2) of the Companies Act

50 Before proceeding to consider the application of s 392(2) of the Act in the context of the facts of the present proceedings, it would be appropriate to set out both this subsection as well as sub-s (1), as follows:

> **Irregularities**
>
> **392.** —(1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to —
>
> (*a*) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and

(*b*) a defect, irregularity or deficiency of notice or time.

(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

51 The appellant claimed that it had suffered substantial injustice as a result of the irregular self-appointment of Phillipson as chairman in contravention of the articles of association of the company. This irregularity enabled the Village directors to "bulldoze" their way towards passing a resolution which the Board was entitled to deliberate and vote upon in accordance with such articles of association. But for the irregularity, the Golden Harvest-nominated directors could and would have participated in the meeting and effectively opposed and defeated the resolution.

52 It has been well-established that there must be a nexus between the irregularity and the injustice that has accrued. The requirement of a nexus is clear from the wording of s 392(2) of the Act, which states that "[a] proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has *caused or may cause* substantial injustice …" [emphasis added]. This requirement of a nexus was emphasised by the Supreme Court of Queensland in *Re Pembury Pty Ltd* (1991) 9 ACLC 937 at 940. Further, Anderson J, in the Supreme Court of Western Australia decision of *Poliwka v Heven Holdings Pty Ltd* (1992) 7 ASCR 85, endorsed *Re Pembury Pty Ltd* and elaborated on the nexus principle (at 98) by observing that "it is the procedural irregularity that must have caused the injustice, not the resolutions themselves".

53 In the present proceedings, the appellant relied heavily upon the Supreme Court of New South Wales decision of *Mamouney v Soliman* (1992) 10 ACLC 1,674. In this case, the plaintiff challenged the validity of the resolutions in a meeting, claiming that the notice requirements had not been complied with. The defendants had sought to rely on the Australian equivalent of s 392(2) of the Act, and claimed that the lack of notice did not invalidate the resolutions. The court found in favour of the plaintiff, and held, *inter alia*, that if proper notice had been given, *a different result would probably have followed* at the meeting so that the irregularities had caused, or might cause, substantial injustice. This was the holding relied upon by the appellant in the present case. In the present case, would a different result have probably followed if the appointment of the chairman had been regular?

54 The Judge has found that there was no nexus between the appointment of Phillipson and the passing of the resolution on the ground that after the Golden Harvest directors walked out of the meeting, the chairman did not have to use his casting vote to vote in favour of the resolution. However, in our view, this approach, with respect, merely sidesteps the substantive issue that but for the self-appointment of Phillipson, the Golden Harvest directors would not have left the meeting and the nexus would have been established. We do not think we can realistically state that if the directors had stayed, the chairman would not have used his casting vote. Accordingly, we are prepared to accept that there was a nexus between the appointment of Phillipson and the passing of the resolution. However, even then, we are of the view that the appellant would still fail in its argument under s 392(2) of the Act simply because if there had been substantial injustice caused, it had in fact been perpetrated in the *opposite* direction. The intention of the Golden Harvest directors in walking out of the Board meeting and of the appellant in bringing the present proceedings was *to deprive the respondent of its opportunity to have its case heard under the main action*. It was, in short, an attempt to stifle the respondent's cause of action at its root. This, they were not entitled to do for two different and separate reasons: first, on the part of the appellant, it had agreed to allow the Village director to chair all directors' meetings, and second, on the part of the Golden

Harvest directors, their primary duty as directors was to protect the interest of the respondent and not that of the appellant This is aptly reflected the following observations of the Judge (see GD at [58]):

> I would go further than that. Even assuming for the sake of argument that there was a nexus, it would be a greater injustice to invalidate the directors' resolution and thereby prevent the plaintiff from pursuing its action against the defendants. It was clear beyond doubt to me that the striking-out application taken out by the first defendant was with the sole objective of preventing the plaintiffs' claim from being heard on its merits by the court. It was incumbent upon me to deny the defendants that outcome.

That the *respondent's perspective* is *also* relevant is inherent in the entire process of a holistic weighing and balancing of the various interests of all the relevant parties: see, for example, the observations of Bowen CJ in Eq in the New South Wales decision of *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477 at 493.

Conclusion

55 For the reasons stated above, we dismissed the appeal with costs.

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