Sembcorp Marine Ltd *v* PPL Holdings Pte Ltd and another
[2012] SGHC 118

Case Number : Suit No 351 of 2010/H

Decision Date : 30 May 2012

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Davinder Singh S.C., Eugene Quah Siew Ping, Bernette Colleen Meyer and Isaac Lum Wei Yuen (Drew & Napier LLC) for the plaintiff and for the first defendant in counterclaim; Kenneth Tan S.C. (instructed), N. Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the defendants and for the plaintiffs in counterclaim; Alvin Yeo S.C., Monica Chong and Koh Swee Yen (WongPartnership LLP) for the second defendant in counterclaim.

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

Contract

30 May 2012

Tay Yong Kwang J :

1 This case concerns the aftermath of a joint venture deal that turned sour. The plaintiff, Sembcorp Marine Ltd ("Sembcorp"), and the first defendant, PPL Holdings Pte Ltd ("PPL Holdings") entered into a joint venture arrangement in 2001 in order to capture a segment of the offshore oil rig construction market. The joint venture company was the second defendant in the counterclaim, PPL Shipyard Pte Ltd ("PPL Shipyard"), with Sembcorp and PPL Holdings each holding 50% of the shares in PPLS. In brief, Sembcorp contended that PPL Holdings had acted in such a way as to drop out of the joint venture arrangement, leaving a Chinese company, Yangzijiang Shipbuilding (Holdings) Limited ("Yangzijiang"), in its place. This would be a highly undesirable situation for Sembcorp, because Yangzijiang is a Chinese rig building company which wishes to enter the Singapore market and which Sembcorp alleged to be its competitor. Sembcorp's case was that PPL Holdings' actions left Sembcorp in the unenviable position of being a partner in a joint venture with a competitor.

2 The issues that arise in this case pertain mainly to the question of whether certain terms can be implied into the agreements between the parties and also other questions of contractual interpretation. The reliefs claimed by Sembcorp include an order that PPLH transfer to Sembcorp the shares in PPLS that PPLH had agreed to transfer to Yangzijiang and declarations to the effect that the joint venture agreement between the parties has been terminated. In the counterclaim, PPLH claimed, *inter alia*, declaratory relief that certain resolutions passed by directors nominated by Sembcorp to the PPLS board of directors be invalidated.

The background

The parties

3 Quite apart from the named parties to this action, there were also a number of companies and natural persons who played pivotal roles in this case. The parties and their relationships listed here are set out as around 2001 before the joint venture arrangement was entered into between the

parties and before the ownership structure of some of the companies changed significantly.

4 Sembcorp Marine was a publicly listed company incorporated in Singapore and in the business of constructing oil rigs and ships. It was a company linked to the Government of Singapore. Sembcorp Marine was represented in many of its negotiations in relation to the joint venture by its then President, Mr Tan Kwi Kin ("TKK").

5 PPL Holdings was a private company incorporated in Singapore. Before the joint venture arrangement was entered into between the parties in 2001, PPL Holdings held 97% of the issued share capital of PPL Shipyard. The remaining 3% share capital was held by E-Interface Holdings Limited ("E-Interface"), the second defendant. E-Interface was a private company incorporated under the laws of the British Virgin Islands and was a wholly-owned subsidiary of PPL Holdings. In other words, prior to the joint venture arrangement, PPL Holdings held 100% of PPL Shipyard's shareholding; 97% directly and 3% indirectly through E-Interface. There were only two directors of PPL Holdings, one Dr. Benety Chang ("Chang") and one Mr. Anthony Aurol ("Aurol"). As will be seen, Chang and Aurol were the key figures in the events that were to follow. PPL Holdings and E-Interface will be referred to jointly as "the defendants".

6 PPL Shipyard was in the business of design and construction of offshore drilling rigs. It was a private company incorporated in Singapore and its day to day operations were managed by Chang, who was the Executive Deputy Chairman, and by Aurol, the Executive Director.

7 On the same side of the fence as PPL Holdings and PPL Shipyard were two other companies, Baker Technology Limited ("Baker") and Saberon Investments Pte Ltd ("Saberon"). Baker was a public company listed on the Stock Exchange of Singapore. It owned the entire issued share capital of PPL Holdings. Chang was the Chief Executive Officer of Baker and Aurol was the Chief Operating Officer. Chang and Aurol also served as two of the six directors of Baker. The defendants' position is that although Chang and Aurol were the only directors of PPL Holdings (the first defendant), the exercise of their powers was with reference to the directors of the board of directors of Baker.

8 Saberon held approximately 67% of the issued and paid up share capital of Baker. Chang held 67% of the shares in Saberon and his wife, Doris Heng, held another 15%. Aurol held 15% of the shares in Saberon. The remaining 3% of Saberon was held by Tan Yang Guan.

The events surrounding the joint venture agreement

9 On 9 April 2001, the joint venture agreement ("the JVA") was signed between Sembcorp and PPL Holdings. At least part of the motivation for the joint venture was the opportunity to launch a strong joint vehicle to bid for a project put out for tender by Santa Fe International Corporation to build two semi-submersible drilling rigs. Neither party to the JVA was believed to have been able to successfully bid for this project on its own. The parties to the JVA were at the outset a very complementary match for one another, although in this litigation the parties dispute the extent to which this was so. Sembcorp's case is that PPL Holdings was experienced in constructing drilling rigs but did not have sufficient financial and other resources to successfully bid for the semi-submersible project. Sembcorp on the other hand was able to procure finance and provide corporate guarantees for the joint venture and also had ample shipyard space [note: 1]. PPL Holdings' case was similar, save that it preferred to state that PPL Holdings entered into the joint venture for Sembcorp's yard space and not its financial resources. Despite this, PPL Holdings acknowledged that Sembcorp was a desirable business associate because it was financially strong and was a government linked company [note: 2]. Sembcorp claimed that the whole chronology of events was relevant to the question of the backdrop of facts for the implication of certain terms into the JVA and the parties took care to state

their positions carefully.

10 Chang, on behalf of PPL Holdings, initially offered in a memorandum of 27 February of 2001 to TKK that the joint venture be between the publicly listed Baker and Sembcorp [note: 3], with PPL Shipyard as the joint venture vehicle. Chang recognised that Sembcorp's concerns with this proposal were that Baker as a listed company might be restricted in its flexibility to make decisions and that the shareholders of Baker would be able to dispose of their shareholding easily in the market. To allay Sembcorp's concerns, Chang was willing to subject his entire shareholding of about 83% in Baker to a moratorium on disposal and commit himself to a management contract with the joint venture company. TKK, on behalf of Sembcorp, rejected this proposal and preferred that the joint venture be between Sembcorp and the private company PPL Holdings, with PPL Shipyard as the joint venture vehicle. Chang subsequently agreed to this.

11 On 29 March 2001, Sembcorp and PPL Holdings entered into a Sale and Purchase Agreement ("S&P") by which PPL Holdings agreed to sell, and Sembcorp agreed to buy, 10,000 shares representing 50% of the issued share capital of PPL Shipyard [note: 4]. The price of the shares was about $16 million, which was calculated with reference to PPL Shipyard's Net Asset Value at that time. Pursuant to cl 4(H) of the S&P, Sembcorp and PPL Holdings were obliged to enter into a joint venture agreement which had as its main objective the expansion of the business of PPL Shipyard.

12 The JVA was entered into between Sembcorp and PPL Holdings on 9 April 2001. Several clauses of the JVA were highly relevant to the proceedings at hand and they are set out in full below. A significant part of Sembcorp's case hinged on its argument that the JVA was premised on the ongoing participation of Sembcorp and PPL Holdings as equal business partners holding equal shares in PPL Shipyard. In this regard, cls 4 and 5 of the JVA were particularly relevant. Sembcorp also alleged that PPL Holdings had breached cl 13, which was entitled "Confidentiality", and cl 24, which was entitled "Good Faith". Additionally, cl 11 was relevant as it set out Sembcorp's right of pre-emption over PPL Holdings' shares in PPL Shipyard.

> 1. **INTERPRETATION**
>
> ...
>
> "Party" or "Parties" shall mean all or any of the parties named in this Agreement, as the case may be, their respective successors-in-title and transferees who acquire the shares in accordance with this Agreement;
>
> ...
>
> 3. **THE PARTIES' OBJECTIVES**
>
> The Parties acknowledge that they have entered into this Agreement with the aim to continue and expand [PPL Shipyard]'s Business through the marketing contacts and assistance, support in terms of facilities and other resources, and financial backing that the Parties can provide.
>
> 4. **SHARE CAPITAL**
>
> ...
>
> 4.2 Unless otherwise agreed to in writing between the Parties hereto, the share capital of the Company shall be held in the following proportions:

Name of Party	Percentage of shareholding
SembCorp	50 per cent
PPLH	50 per cent

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

5. **BOARD OF DIRECTORS**

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

SembCorp	3 Directors
PPLH	3 Directors

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

...

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

6. **SHAREHOLDERS' MEETING**

6.1 ...The quorum necessary for meetings of Shareholders of the Company shall be the two Shareholders. Each Shareholder shall only appoint one representative who shall have only one vote. The Chairman of the meeting will be a nominee of Sembcorp. The Chairman will not have a casting vote.

...

7. **SHAREHOLDERS' APPROVAL**

Notwithstanding anything contained in the Articles of Association or herein to the contrary, each of the following matters in respect of the affairs of the Company shall require the unanimous approval of the Shareholders:

...

8. **OPERATIONAL SUPPORT**

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

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

...

9. **OPERATION OF BANK ACCOUNTS**

...All cheques drawn by the Company and each subsidiary of the Company in excess of Singapore Dollars Two Hundred and Fifty Thousand (S$250,000.00) shall be signed by one person nominated by Sembcorp and one person nominated by PPLH. The cheques shall be signed by two Directors, one each from Sembcorp and PPLH if the amount drawn is in excess of Singapore Dollars One Million (S$1,000,000.00)

...

11. **TRANSFER OF SHARES**

11.1 None of the Parties shall except with the prior written consent of the other Party create or permit to subsist any mortgage, pledge, lien or charge over, or grant any option or other rights or dispose of any interest in all or any of the shares held by it (otherwise than by a transfer of the said shares in accordance with the provisions of this Agreement or the Company's Articles of Association).

11.2 Any Party which intends to transfer all or part of its shares ("Offeror") in the Company should first serve a notice to the other Party offering to sell such shares to the other Party ("Offeree") whereupon the provisions of this Clause 11 shall apply.

...

11.7 The restrictions on transfer of shares contained in this Clause 11 do not apply in the case of a transfer of the whole and not part of the shares owned by any Party to its wholly owned subsidiary, its holding company or wholly owned subsidiaries of the holding company PROVIDED ALWAYS that in the event such transferee ceases to be a wholly owned subsidiary, holding company or wholly owned subsidiaries of the holding company of the transferring Party, such transferee shall transfer all its shares back to the transferring Party. The transferring Party shall procure that the transferee accepts and is bound by the terms of this Agreement and until the transferee is so bound the sale shall not be effective.

...

11.10 Upon the completion of the sale of the shares in accordance with the terms of this Clause 11, and unless otherwise agreed to by the Parties, the Directors nominated by the Party which has sold its shares shall immediately resign from the Board. If only a portion of the shares held by

a Party are sold by a Party pursuant to this clause 11, the Parties shall agree on the Directors, if any, nominated by that Party which has sold a part of its shares, who shall continue to remain on the Board of the Company and the terms of such tenure as Director on the Board of the Company.

13. **CONFIDENTIALITY**

13.1 All communications between the Parties and the Company and all information and other material supplied to or received by any of them from the others which is either marked "confidential" or is by its nature intended to be exclusively for the knowledge of the recipient alone and any information concerning the business or trading transactions or the financial arrangements of the Parties or the Company or of any person with whom any of them is in a confidential relationship of the recipient shall be kept confidential by the recipient (except for such relevant information as may be required by the parent company of a Party for purposes of consolidation of the accounts and to satisfy various group policies and procedures) unless or until the recipient can reasonably demonstrate that it is or part of it is, in the public domain, whereupon, to the extent that it is public, or in the event that the recipient is requested or required by a judicial, administrative or governmental body to disclose any such confidential information, or where such confidential information is already known to the recipient... then this obligation shall cease.

...

21. **ASSIGNMENT**

21.1 The Parties hereto shall not transfer or assign all or any of their rights or obligations hereunder to any third party unless otherwise mutually agreed to in writing by parties hereto.

21.2 This clause shall not apply in the case where the rights of obligations hereunder are transferred or assigned to a wholly owned subsidiary, the holding company or the wholly owned subsidiary of the holding company of a Party.

24. **GOOD FAITH**

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

...

26. **AMENDMENTS**

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

...

34. **ENTIRE AGREEMENT**

34.1 This Agreement constitutes the entire agreement between the Parties hereto with respect to the matters dealt with herein and supersedes any previous agreement between the Parties hereto in relation to such matters.

...

13 Pursuant to cl 31.2 of the JVA, PPL Shipyard's Articles of Association were amended on 26 September 2001 to incorporate the terms of the JVA. The amended articles will be referred to as the "Consequential Articles". Soon after the S&P and the JVA were entered into, PPL Shipyard was awarded the contract from Santa Fe International Corporation for the project to build two semi-submersible drilling rigs.

The change in the proportions of ownership of PPL Shipyard

14 Almost two years after these events occurred, a change in the proportions of ownership of PPL Shipyard took place with the signing of a Supplemental Agreement ("the SA") on 5 July 2003. This change is important because part of Sembcorp's case argues for the implication of the term that certain provisions in the JVA premised on an equal shareholding in PPL Shipyard held by the parties to the JVA ceased to apply when this change occurred. The defendants dispute this and maintain that despite the change in ownership, those provisions remained. Therefore, Sembcorp and the defendants put forward two different versions of the events leading up to the SA; Sembcorp's version supports its position that Chang behaved in such a way as to force Sembcorp to enter the SA while the defendants' version denies this.

15 Sembcorp stated that Chang approached TKK in late 2002 with the proposal that Sembcorp purchase PPL Holdings' entire interest in PPL Shipyard, which was 50% of PPL Shipyard's issued share capital. This would give Sembcorp a 100% shareholding in PPL Shipyard. TKK offered a counter-proposal for a two-tiered staggered purchase of the PPL Shipyard shares, first 20% and then 30%, with the total consideration being $17 million. Chang agreed to this in principle. On 25 June 2003, Chang met TKK and told him that Keppel Offshore & Marine Ltd ("Keppel") had approached Chang with an offer to purchase PPL Holdings' entire shareholding in PPL Shipyard for $21 million. Chang gave TKK 48 hours to respond to this.

16 On 30 June 2003, Chang met TKK at the Starhub canteen at Cuppage Centre. At this meeting, TKK revised Sembcorp's offer for the PPL Shipyard shares upwards to $21 million with the following terms. Sembcorp would purchase 35% of PPL Shipyard's share capital immediately and oblige Chang and Mr TK Ong to remain with the management of PPL Shipyard for another three years, after which Sembcorp would purchase the remaining 15% of PPL Shipyard's share capital on the basis of a call option [note: 5]. At Chang's request, TKK agreed that Sembcorp would pay Chang interest at the prevailing bank rates on the remaining 15% of PPL Shipyard's share capital and would grant Chang a right to 15% of the undeclared profits of PPL Shipyard.

17 In contrast, the defendants' denied that TKK offered Chang a two-tiered staggered purchase of PPL Holdings' shareholding in PPL Shipyard and claimed that there was only an in-principle agreement between Chang and TKK for the sale of 20% of PPL Shipyard's share capital as held by PPL Holdings, without mention of an agreed price. The defendants say that Chang met TKK on 20 June 2003 at TKK's request. TKK informed Chang that Keppel had offered to buy both Sembcorp's and PPL Holdings' interests in PPL Shipyard and that Chang should ignore Keppel's offer. The next day, Chang received a letter containing an offer from Keppel to buy the defendants' interest in PPL Shipyard for $21 million. Chang informed TKK about this, to which TKK responded by saying that Sembcorp wanted to continue the business of PPL Shipyard and proposed that Sembcorp proceed with the purchase of 20% of PPL Shipyard's share capital from PPL Holdings.

18 On 30 June 2003, Chang met TKK at the Starhub canteen at Cuppage Centre at which Chang

proposed that Sembcorp should match Keppel's offer, and purchase PPL Holdings' 50% shareholding in PPL Shipyard for $21 million. On 5 July 2003, the men met at TKK's office and agreed that Sembcorp would purchase 35% of PPL Shipyard's share capital from PPL Holdings, that Chang and Aurol would remain with the management of PPL Shipyard for three years and that PPL Holdings would have a put option in respect of the remaining 15% PPL Shipyard shareholding exercisable after three years and that the PPL Shipyard staff would receive share options from Sembcorp. TKK agreed to pay Chang interest on the remaining 15% of PPL Shipyard and agreed to grant Chang a right to 15% of the profits of PPL Shipyard.

19 There are two main points of difference between the parties' accounts. The first relates to the manner in which Chang and TKK were apprised of the Keppel offer; Sembcorp said that Chang forced its hand with the Keppel offer and the defendants said that TKK was the one who told Chang about the Keppel offer. The second relates to the nature of the option in respect of the 15% PPL Shipyard shareholding; Sembcorp said it should be entitled to a call option but the defendants said they should be entitled to a put option.

20 In any event, the SA, as it was signed on 5 July 2003, was in the form of a letter addressed to TKK from Chang and it provided as follows:

> Dear KK,
>
> RE: **SALE OF OUR 35% INTEREST IN PPL SHIPYARD PTE LTD**
>
> ...
>
> Further to our meeting today, this serves to confirm our agreement that you will purchase Seven Million (7,000,000m)(sic) shares representing 35% of the issued and share capital of PPL Shipyard Pte Limited for Singapore Dollars Fourteen Million and Seven Hundred Thousand Only ($14.7m).
>
> The terms of the sale and purchase shall be as follows:
>
> 1. Completion shall take place on 9 July 2003 at Jurong Shipyard Pte Ltd when the following will take place:
>
> (a) SembCorp will deliver a cheque in favour of PPL Holdings Pte Ltd in the amount of $14.7m; and
>
> (b) PPL Holdings well(sic) deliver to SembCorp the duly executed transfers of 7,000,000 shares together with the relevant share certificates and such documents as may be required...
>
> 2. The remaining Three Million (3,000,000) shares owned by us shall be purchased by SembCorp immediately upon receipt of written notice from us of our intention to sell our remaining shares so long as the notice is given on or after 36 months from the date hereof. The completion i.e payment for and delivery of the shares, shall take place not later than seven(7) days from the date of the notice and the consideration for the shares will be an amount computed in the following manner:
>
> The % of shares owned by us on the date of notice **MULTIPLIED BY** $42,000,000 which will give the base price ("Base Price") **PLUS** interest at the rate of the base lending rate posted by DBS Bank, Singapore on the Base Price and accruing from the date hereof until the date of payment

PLUS undeclared profits of PPL Shipyard Pte Ltd from the date hereof on the remaining shares owned by us at the time of notice.

Insofar as calculating the interest of the remaining shares is concerned, interest shall be computed at the end of every twelve months from the date hereof and the amount for each year shall be accumulated and determined at time of completion of the sale. In addition, in the event that the shares are not sold at the end of forty-eight months from the date hereof, the amount computed as interest for the forty eight months shall be added to the Base Price and interest shall cease to be payable thereafter.

3. SembCorp shall offer stock options to the PPL employees on terms t(sic) be discussed.

4. The agreement shall be supplemental to the [Joint Venture Agreement] dated 9 April 2001.

Yours faithfully

PPL Holdings Pte Ltd

It is clear that the SA was for the sale and purchase of 35% of PPL Shipyard's share capital. Clause 2 of the SA gave a put option to PPL Holdings and cl 4 of the same made it clear that the SA was supplemental to the earlier JVA.

21 Sembcorp's position was that this letter was merely meant to reflect the main heads of agreement relating to its purchase of additional shares in PPL Shipyard and that TKK and Chang both understood that subsequent to the SA, Sembcorp and PPL Holdings would enter into a formal sale and purchase agreement, amend the JVA and change the composition of the PPL Shipyard board to reflect Sembcorp's rights as a majority shareholder.

22 The defendants disputed this. They denied the contention that what was agreed was no more than the main heads of argument and that TKK and Chang understood that further formalities were necessary. According to the defendants, the entire agreement clause contained in Clause 34.1 of the JVA applied to the SA and operated to exclude any alleged agreement that fell outside these documents [note: 6].

23 Completion of the sale and purchase of the PPL Shipyard shares took place on 9 July 2003 as stipulated in the SA. However, no formal agreement in furtherance of the SA was ever entered into between the parties and PPL Shipyard's Articles of Association were not formally amended to take into account these changes. Sembcorp contended that it was implied in the SA that once this change in ownership of PPLS occurred, certain provisions of the JVA and PPL Shipyard's Articles that were premised upon the existence of equal shareholding *ipso facto* ceased to apply. Sembcorp cited two changes in PPL Shipyard which it claimed showed that PPL Holdings acted in a manner consistent with Sembcorp's alleged 85% majority control of PPL Shipyard.

24 The first was that PPL Shipyard was treated as a subsidiary of Sembcorp, which implemented certain policies in order to bring PPL Shipyard's operations in line with those of Sembcorp's larger group of companies. These policies included those relating to human resource, publicity and finance [note: 7]. PPL Holdings admitted that most of these policies were indeed implemented but stated that this was done in accordance with the terms of the JVA and the Consequential Articles, and with the consent of the directors nominated by PPL Holdings to the PPL Shipyard board [note: 8].

25 The second was that there was also a change in the composition of the PPL Shipyard board.

Prior to the change in proportions of ownership, Sembcorp and PPL Holdings each nominated three directors to the board of PPL Shipyard board. After the change, Sembcorp nominated an additional three directors to the board, which left it with six nominated directors as compared to PPL Holdings' three. PPL Holdings did not dispute this change but contended that the directors it had nominated only agreed to this change in the belief that the allocation of votes would remain as that stated in Clause 5.3 of the JVA, namely three votes each for both sets of directors nominated by Sembcorp and PPL Holdings, regardless of the number of directors on each side.

Sembcorp's claims

26 The catalyst for the dispute in this case arrived on 17 April 2010 when Baker made a public announcement that on 16 April 2010, it had received a binding letter of offer from Yangzijiang to purchase all the issued and paid up share capital in PPL Holdings, which was a wholly owned subsidiary of Baker. PPL Holdings' assets at the time comprised some cash and more importantly, from Sembcorp's point of view at least, 15% of the issued and paid up share capital of PPL Shipyard. Solicitors for Sembcorp, Drew & Napier LLC ("Drew and Napier") sent a letter dated 22 April 2010 to Baker seeking confirmation that Baker would not accept the Yangzijiang offer. Baker replied through its solicitors Straits Law Practice LLC ("Straits Law") by a letter dated 23 April 2010 ("the Straits Law letter"), stating that it had already accepted the offer.

27 On 15 May 2010, Sembcorp filed this writ and Statement of Claim, alleging in main part that PPL Holdings had breached two express and two implied terms contained in the JVA and the SA. On 26 July 2011, Sembcorp applied to amend the Statement of Claim for the third time to include a third implied term. Sembcorp alleged that PPL Holdings breached the following two express terms (the terms are excerpted at [12] above). First, cl 13 of the JVA entitled "Confidentiality" was breached in that Aurol had wrongfully disclosed PPL Shipyard's accounts to Yangzijiang and Baker in order that Yangzijiang could calculate the price for the offer with reference to PPL Shipyard's net book value for the 2009 financial year. Second, cl 24 of the JVA entitled "Good Faith" was also breached in that PPL Holdings failed to exercise any reasonable efforts to uphold the "spirit" of the JVA and ensure that the offer from Yangzijiang was rejected by Baker.

28 Sembcorp also alleged that there was a breach by the defendants of the following terms which were implied in the JVA and SA (which will be referred to respectively as the First, Second, and Third Implied terms):

(a) that such of their provisions as were premised upon the existence of the equal shareholding of Sembcorp and the 1st Defendant in PPL Shipyard would cease to apply and subsist upon either party acquiring a majority of the issued and paid up share capital in PPL Shipyard and the JVA would terminate and the Consequential Articles would cease to subsist or apply upon one party ceasing to hold any beneficial interest in PPL Shipyard;

(b) that neither party will, without offering its shares to the other, act in any manner which would cause the other to end up being a "partner" in PPL Shipyard with a party owned or controlled by someone other than the principals of the parties to the JVA; and

(c) that each party will ensure that its wholly owned subsidiary, its holding company or the wholly owned subsidiaries of its holding company (as defined in the Companies Act (Cap. 50)) would not do anything which would undermine the benefits conferred on the parties by Clause 11.7 of the JVA.

29 Based on these alleged breaches, Sembcorp claimed the following reliefs which are briefly

stated here. First, a declaration that when the change in the proportions of ownership of PPL Shipyard occurred, the provisions of the JVA and the Consequential Articles that were premised upon the existence of equal shareholding ceased to apply. Second, an order that the defendants transfer their 15% shareholding of PPL Shipyard to Sembcorp against payment of the sum of $59,433.522 or, alternatively, an order that the defendants offer their 15% shareholding to Sembcorp pursuant to the put option contained in cl 2 of the SA. Third, a declaration that Sembcorp became the owner of 100% of PPL Shipyard and that the JVA was terminated.

30 The defendants filed a counterclaim and claimed in the main several declaratory and injunctive reliefs pertaining to resolutions passed by the board of PPL Shipyard, in particular, certain resolutions relating to the requested vacation of office of some members of the board nominated by PPL Holdings. These claims will be dealt with after the plaintiff's claims have been considered.

The issues

31 Sembcorp's allegations all related to its concern that it was placed in a position of being a partner in a joint venture with its competitor, Yangzijiang. If the Yangzijiang offer to Baker were consummated, then although formally PPL Holdings still remained Sembcorp's partner in the JVA, in reality PPL Holdings would be a wholly owned subsidiary of Yangzijiang and would have to dance to its tune. The reliefs Sembcorp claimed all appear to be premised on the need to avoid this arrangement and put an end to such an unwanted union. Therefore, Sembcorp prayed that the provisions in the JVA relating to equal control and management be disapplied such that Yangzijiang would not be able to influence its management of PPL Shipyard and, further or alternatively, that the JVA be terminated such that it would not need to deal with Yangzijiang in PPL Shipyard at all.

32 The first issue is whether the defendants have to offer their 15% shareholding of PPL Shipyard to Sembcorp. This would depend on whether the Second Implied Term could be implied into the JVA and the SA, whether it was breached by the defendants and whether Sembcorp should be entitled to specific performance of the same; alternatively whether the put option contained in cl 2 of the SA was triggered as Sembcorp contended. If this issue is answered in favour of Sembcorp, then it would follow that Sembcorp should be entitled to a declaration that it is the owner of 100% of PPL Shipyard. The second issue is whether the provisions in the JVA and the Consequential Articles that were premised on equal shareholding ceased to apply when there was a change in the proportions of ownership of PPL Shipyard. The answer to this would depend on whether the First Implied Term could be implied into the JVA and the SA and whether the defendants breached this term. The third issue is whether Sembcorp should be entitled to terminate the JVA on the basis of a breach by the defendants of cl 13 or cl 24 of the JVA or of the Third Implied Term.

The first issue: Whether the defendants have to offer their 15% shareholding of PPL Shipyard to Sembcorp

33 The first stage of the inquiry examines whether the Second Implied Term was implied into the JVA and the SA, whether there was breach of this term and what the relief for this breach should be. The second stage of the inquiry examines whether the put option in Clause 2 of the SA was triggered by the Straits Law letter of 23 April 2010 informing Sembcorp that Baker had already accepted the Yangzijiang offer, such that Sembcorp had the right to purchase the remaining 15% shareholding of PPL Shipyard from PPL Holdings.

The Second Implied Term

34 The Second Implied Term reads:

(b) that neither party will, without offering its shares to the other, act in any manner which would cause the other to end up being a "partner" in PPL Shipyard with a party owned or controlled by someone other than the principals of the parties to the Joint Venture Agreement;

The law on implied terms

35 The law on implied was disputed by the parties. Since three terms have been put forward for implication, it would be useful to discuss the principles which are to apply to each. This case is concerned with terms implied in fact, that is, terms which are implied into particular contracts in particular cases, and therefore does not create any precedent for different cases in the future. This is to be distinguished from terms implied in law, which are of no concern to the present case. Such terms if implied in law, will be implied into all contracts of a similar type in the future (see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [41] and [42]).

36 The exercise of implying terms into contracts is essentially one of inserting terms into a contract that did not exist at the time the contract was made. Frequently, the need for this arises where the contract is silent as to what should happen in the event of a particular contingency; which contingency eventuates and the parties are caught in a bind because the contract does not stipulate what should happen next. Lacking such direction, the obvious answer is simply that nothing should happen and the loss should lie where it falls. In that sense, the contract is capable of functioning but it may not "work" to give effect to the business purpose of the contract as the parties had intended. This of course would be an unsatisfactory answer to the party who has to shoulder the loss, who would argue for the implication of a term to redistribute the same. Overshadowing this exercise are the principles of sanctity and freedom of contract. The danger of implying terms too freely is that the court would be *ex post facto* rewriting the contract which the parties had written for themselves and allowing a party to weasel out of a bargain (however badly drafted) which it had struck.

37 The long-standing tests for the implication of terms are known as the "officious bystander" and the "business efficacy" tests (henceforth referred to collectively as the "two traditional tests"). Both emanated from decisions of the English Court of Appeal and both are part of Singapore law (see for example *Forefront* at [29]–[32], *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [36] and *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Chua Choon Cheng*") at [63]). The officious bystander test was stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 ("*Shirlaw*") (affirmed, [1940] AC 701) at 227:

> ...that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh of course!'"

The business efficacy test was stated by Bowen LJ (as he then was) in *The Moorcock* (1889) 14 PD 64 at 68:

> ... an implied warranty... is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men...

In Singapore, the two traditional tests are complementary and their relationship, as stated in *Forefront* at [36] and approved in *Chua Choon Cheng* at [63], is that the officious bystander test is the practical mode by which the business efficacy test is implemented.

38 Notwithstanding the vintage of these tests, Sembcorp argued that another approach to the implication of terms in fact should be adopted. This was stated by Lord Hoffmann in the Privy Council decision of *Attorney General of Belize and others v Belize Telecom & another* [2009] 1 WLR 1988 ("*Belize*") at [21] as follows:

> ...in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

39 This test put forward by Lord Hoffmann will be referred to as the "*Belize* test" or the "*Belize* statement" (to account for the view that it does not strictly constitute a separate test). From Sembcorp's point of view, the difference that the *Belize* test would make to its case is evident from its submissions, in that the *Belize* test would oblige the court to consider principles of contractual interpretation, including principles of admitting extrinsic evidence for this interpretation, in the process of implying terms into the agreements between the parties. Sembcorp's submissions on the facts were premised on the notion that more of the "relevant background" would be under consideration if the *Belize* test was adopted. The precise points of difference between the *Belize* test and the two traditional tests will be considered in greater detail below (see [49], [56] and [60] below). The difference that the introduction of the *Belize* test would make to Sembcorp's case remains to be seen.

40 Sembcorp's arguments for the adoption of the *Belize* test were rather bare and relied on a decision of this court in *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen* [2011] SGHC 201 ("*Kim Eng*"), which Sembcorp claimed was an instance where *Belize* was applied in Singapore law. In *Kim Eng*, the plaintiff stockbroking firm sought, *inter alia*, to imply a term, that the defendant dealer was to indemnify the plaintiff for losses arising out of share trades executed by the defendant, into the defendant's terms of employment. The precise *dicta* relied on were at [66] and [67]:

> 66 The plaintiff submitted that in any case, the indemnity obligation constituted an implied term of the employment based on the facts here, especially by reason of the standard requirement, practice and custom that was in place since 2002 or so. It submitted, on the authority of [*Belize*], that the only question to ask is what the instrument, read as a whole against the relevant background, would reasonably be understood to mean...
>
> 67 On this issue, I agreed with the plaintiff. The evidence showed that the requirement of an indemnity was applied to everyone in the plaintiff performing the same tasks as the defendant. Such a practice was obviously known to the defendant and complied with by her when she provided the security, when she accepted the terms of the 2003 letter and when she signed the internal memorandum in September 2008...

41 From the excerpt above, it is clear that *Kim Eng* did not constitute an application of *Belize* in Singapore law. *Belize* was merely cited in the plaintiff's submissions in that case and no comment was made on the authority, with the court choosing to agree with the plaintiff on the facts. The decision in *Kim Eng* did not engage in a discussion of the *Belize* test and ask what would be the relevant background and what the instrument would reasonably be understood to mean. Instead, it determined the issue based on the subjective knowledge and actions of the defendant there at various points in time, as would be appropriate in reliance on the traditional tests. The question of whether *Belize* should be a part of Singapore law therefore remains an open one.

42 The defendants submitted that *Belize* should not be applied in the instant case and put forward two arguments. First, that normatively, implication of terms and interpretation of contracts should remain two separate doctrines and *Belize* subsumed implication into interpretation, thus liberalising the process of implication beyond acceptable limits (the defendants cited Paul Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140 ("*Davies' article*") and Elizabeth Macdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'? (2009) 26 JCL 97) ("*Macdonald's article*"). Second, the Singapore Court of Appeal in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM*") at [98] disapproved of the *Belize* test because it did not provide normative guidance to the process of implication and would result in much practical uncertainty. It should be noted that *MFM* was a case about the remoteness of contractual damages and the discussion on implied terms, though highly instructive, would be, strictly speaking, *obiter*.

43 Before determining the applicability of the *Belize* test to the present dispute, it should be determined what the *Belize* test actually is and how it differs from the two traditional tests. The facts of *Belize* are not of real interest and can be stated shortly. In *Belize*, what was at issue were the articles of association of Belize Telecommunications Ltd, which was founded as part of the process of the privatisation of telecommunication services in Belize. The articles provided for the nomination of certain directors by the holder of a special share, if that holder also held a certain percentage of a class of ordinary shares. Subsequently, the special shareholder's shareholding of the ordinary shares dropped below the requisite percentage and the question was what should happen to the directors it had previously nominated since the articles were silent on this. The defendants claimed that the director would be irremovable and the claimants claimed that it should be implied into the articles that a director appointed by virtue of a specified shareholding should be removed if there was no longer such a shareholding. Lord Hoffmann delivering the advice of the Privy Council agreed with the claimants. *Belize* concerned articles of association but the principles it cited and propounded were expressly with reference to contracts as well.

44 After stating the test in *Belize*, Lord Hoffmann went on to say (also at [21]) that the officious bystander and business efficacy tests were really reformulations of the *Belize* test as stated above:

> ...this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

45 The learned judge then went on to quote Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 226, 282-283 on the conditions that must be satisfied for the implication of a term in a contract (at [26] and [27] of *Belize*):

> "(I) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it "goes without saying"[;] (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."
>
> 27 The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so.

46 The *dicta* quoted above would suggest that the *Belize* test is really the same two traditional tests combined into a minimalist package. There has been some disagreement over this and commentaries have stated that the *Belize* tests is in fact a new approach to the implication of terms that stretches the doctrine into the territory of the interpretation of contracts in a manner that is unacceptable. The learned author of *Davies' article* states (at 140) that the *Belize* test "appeared to subsume implication of contract terms within a broad , liberal doctrine of interpretation"; and (at 143) that it suggests "that reasonableness is crucial when deciding whether to imply a term." According to the author, this should not be welcomed because interpretation and implication are two conceptually separate doctrines and should remain that way. Interpretation considers what the actual instrument means but implication involves *adding* to the actual instrument. Implication is a far more intrusive and powerful doctrine and should be circumscribed narrowly. Furthermore, under the *Belize* approach, the "subjective intentions of a party are now irrelevant, and [the] only matter of importance is what the reasonable observer would understand the contract to mean" (at 144). The learned author also indicated that the threshold for the implication of terms may be lowered and that "Lord Hoffmann's approach in *Belize* affords the court greater room to alter the bargain made.... it may be difficult to control the scope given to the term "reasonableness" and its objective nature" (at 145). In other words, the learned author's main fears are that in the process of implication, the parties' subjective intentions would have to yield to the objective meaning of the contract and that *Belize* would lower the threshold for the implication of terms.

47 The learned author of *Macdonald's article* has as her main concern that the process of implication should be based on the intention of the parties. The role of the two traditional tests "has been to limit the implication of terms in fact to try to ensure that the courts do not go beyond the parties' intentions and 'improve' their bargain" and the tests limit the implication to the "least disputable area of the intention of the parties" (at 98). The *Belize* test, in her view, while reflecting the search for the intention of the parties, did not also have any limiting effect on that search.

48 It is clear that in *Belize*, Lord Hoffmann was explicitly positioning the process of implication very closely to that of interpretation. At [17], his Lordship stated:

> **17** The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instruments are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> **18** In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. *But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.* [emphasis added]

49 This does not appear to be an overhaul of the process of implication of terms. The process of implication is closer to the process of interpretation than might have been explicitly stated before *Belize*, in that both exercises aim to give effect to the meaning of the contract, objectively assessed. Starting from first principles, it would be uncontroversial to state that the contracting parties make the bargain for themselves and the principle of freedom of contract mandates that the court should not rewrite the instrument which the parties have produced. This is subject to at least one exception,

that is, the court's ability to imply terms into the contract to deal with contingencies for which the contract does not provide.

50 As mentioned above, at [36] and at [17] of *Belize*, if the contract is silent as to a particular contingency which eventuates, then the most literal interpretation of the contract is that the loss should lie where it falls. This however, cannot be the outcome if it would contradict the common intention of the parties as expressed in the words of the contract. It would be an absurdity for the loss to lie where it falls if such a situation clearly would not be coherent with the common intention of the parties. If terms cannot be implied where they would contradict the express terms of the contract, then terms should not be implied where they would contradict the overall scheme of the arrangement which the parties have made for themselves or the business purpose of the contract. Similarly, the loss should not lie where it falls if this would contradict either the express terms of the contract of the overall scheme of the same. As was stated by Bowen LJ in *The Moorcock* at 68:

> The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side;...the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.

51 When implying terms into a contract, the court must necessarily interpret the contract to ascertain the parties' presumed common intention before the court can determine what term to imply (if at all) to give effect to such intention. Lord Hoffmann's statement that the implication of a term is not an addition to the instrument must be understood in that sense. Of course, formally, implication involves adding a term to the instrument where none existed but in substance, the implication of terms should not add to or vary the meaning of the contract. The implied term should simply give effect to what the contract must mean. The court should not re-allocate the risk of the silent contract except to the extent to which the parties would have done so themselves. In order to figure out what the parties would have done, it is necessary to ascertain their presumed common intention by interpreting the contract and that common intention is given effect to in the event of a contingency by implying the relevant term. All Lord Hoffmann was saying was that the term to be implied should accord with a reasonable interpretation of the contract.

52 Indeed, the Singapore Court of Appeal in *Ng Giap Hon* at [74] approved of Lord Wright's dicta in *Luxor (Eastbourne), Limited v Cooper* [1941] AC 108 at 137–138:

> *This [*viz, *the implication of terms into contracts] does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication [of the term in question] must arise inevitably to give effect to the intention of the parties.* [emphasis added by the Court of Appeal in *Ng Giap Hon*]

53 The process of implication has always been an objective exercise. The parties' presumed common intention is ascertained objectively and this must be so in order to avoid interminable argument over what the parties' subjective intentions *really* were at the time of contracting (see *Belize* at [25]; *Chitty on Contracts Volume I General Principles* 30th ed (H.G. Beale QC gen ed) (Thomson Reuters, 2008) ("*Chitty*") at para 13-004; *The Moorcock* at 68 excerpted at [49] above; and *Forefront* at [41] (the determination of the "*presumed* common intention" of the particular contracting parties must invariably adopt an objective approach)). Furthermore, the inquiry into the parties' subjective intentions is really more a matter for the doctrine of rectification, in which it is alleged that the parties at the time of contracting had made a mistake and their subjective intention

is sought in order that this can be rectified (see Sir Kim Lewison, *The Interpretation of Contracts*, 5th Ed, Sweet & Maxwell 2011 ("*Lewison*") at 6.01, p 272). The parties' subjective knowledge is only relevant insofar as that provides the *relevant background* against which the contract should be interpreted and the term should be implied (see *The Moorcock* at 68–69). If the term implied would require the parties to have knowledge which they did not actually have at the time of contracting, then such implication would be impossible.

54 What then, of the arguments that implication and interpretation should be kept separate? The defendants pointed to Sir Bingham M.R.'s (as his Lordship then was) caution in the English Court of Appeal decision *Philips Electronique Grand Publique SA v British Sky Broadcasting* [1995] EMLR 472 at 481:

> The court's usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power.

55 Implication and interpretation are indeed separate doctrines. Implication sits precariously on the boundary between the parties making their own contract and the courts making their contract for them. This potential intrusion into the freedom of contract must be narrowly circumscribed in order that the court only implies those terms which would give effect to the parties' presumed common intention.

56 While separate, the doctrines are related and the relationship between the two is very succinctly stated in *Belize*: the process of implication must accord with the process of interpretation. It should also be recognised that the interpretation of the contract is often a preliminary step to the implication of a term. This must be so because if the parties' intention could not be ascertained, it would be impossible to give effect to the unknown. The discerning of intention is conducted via the process of interpretation. The author of *Davies' article* thinks it a mistake to say that interpretation and implication are points on a continuous spectrum (at 144). A wanton exercise of the power to interpret a contract will inevitably reach the point where the interpreter reads too much into the contract, almost as if he were reading in terms that were not there. Notwithstanding the creative extremes possible, the legal doctrines of implication and interpretation remain separate and distinct. Interpretation, if done correctly within the confines of its principles, will not tip over into implication and implication is circumscribed by such high and tight boundaries that a term would not be easily implied at all.

57 In *Belize*, Lord Hoffmann explicitly preserved the high threshold for the implication of terms into a contract, stating (at [16]):

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable.

At [19], his Lordship approved of Lord Pearson's dicta in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609:

> "...An unexpressed term can be implied if and only if the court finds that the parties must have

> intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

At [22], his Lordship acknowledged that the business efficacy test was a reformulation of the *Belize* test, which reformulation embodied the requirement of necessity:

> ...conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

58 The discussion above should provide sufficient response to the criticism referred to at [46]–[47] above. The subjective intention of the parties is relevant only insofar as it can be objectively ascertained but this was the longstanding approach in any case. The threshold for the implication of terms would not be lowered by *Belize* and would definitely not be lowered to the threshold of "reasonableness": Lord Hoffmann took pains to point this out twice at [19] and [22]. The threshold remains that of necessity, subject to the qualification that this necessarily implied term must *also* accord with a reasonable interpretation of the contract (see also [23] of *Belize*).

59 How should one approach the criticism in *MFM* that the *Belize* approach provides little normative guidance? Granted, the *Belize* test is bare and simple and following the words of the test alone does not provide that much direction. However, Lord Hoffmann did not purport to supersede or render obsolete the traditional tests for the implication of terms and in fact referred to them as reformulations of the *Belize* test which "a court may find helpful in providing an answer" (at [21]). Therefore, the guidance and direction of the two traditional tests remain very much available.

60 If the above is true, then it may be asked, what purpose does the *Belize* test serve? If it purports to state nothing new, then why bother with it at all? The value of the *Belize* test lies in its clear elucidation of the relationship between interpretation and implication, which relationship may have been a necessary incident of all prior implications of terms in fact but which did not find expression until *Belize*. The *Belize* statement is not so much a stand-alone test as it is a final hurdle. If a term is thought fit for implication on the satisfaction of either of the traditional tests, *Belize* demands that the term implied must be checked for consonance with a reasonable interpretation of the contract. In *Belize*, it was stated that the officious bystander and business efficacy tests were not to be treated as different or additional tests from the *Belize* statement (at [21]). Notwithstanding that, it is clear that *Belize* has made explicit a process which must have been impliedly carried out in all previous instances where terms were implied in fact. The approach to be adopted in this case will therefore proceed on similar lines.

61 Before returning to the facts of this case, the question of what should constitute the "relevant background" must be answered. In *Belize* at [16], Lord Hoffmann stated this as:

> ...to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 ["*Investors*"].

This relevant background was stated with reference to his Lordship's own words in *Investors* on the interpretation of express terms of a contract.

62 In Singapore, the interpretation of express terms adopts the *Investors* approach and goes one step further. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [132] it was held that extrinsic evidence of, *inter alia*, pre-contractual negotiations and the subsequent conduct of the parties was admissible as long as it was relevant, reasonably available to the parties and related to a clear context. This is in clear contrast to the English position which prohibits the admission of such extrinsic evidence.

63 In *Zurich*, it was also pointed out that if the court was satisfied that the parties intended to embody their entire agreement in a written contract, no such extrinsic evidence would be admissible to contradict, vary, add to, or subtract from its terms. However, at the same time, entire agreement clauses would not necessarily preclude the implication of terms.

64 There is a clear difference between the philosophies of *Zurich* and *Investors* and if the *Belize* statement was founded on the philosophy of *Investors*, would it mean that the *Belize* statement should be confined to the principles of *Investors*? The difference between *Zurich* and *Investors* relates to ascertaining the express meaning of the contract, with which the implied term must accord. The difference does not itself impact on the doctrine of implication. Evidence of pre-contractual negotiations, even if this skates a little close to the thin ice of rectification, is admissible as is evidence of the subsequent conduct of the parties, although some view inconsistent subsequent conduct of the parties as a plain and simple breach. *Zurich* and *Belize* would therefore be compatible. As always, the focus of the court is on the *particular* factual matrix before it (see generally, *Forefront*).

Whether the Second Implied Term should be implied into the JVA

65 The structure of the inquiry is as follows. The court has to ascertain whether the particular factual matrix of the case (see *Ng Giap Hon* at [89]) gives rise to circumstances that would make it necessary to imply the Second Implied Term into the JVA and the SA, with reference to the business efficacy, officious bystander, and *Belize* requirements. Satisfaction of either the business efficacy or officious bystander tests would suffice for the implication of the term and the *Belize* statement requires that the term implied be checked for consonance with a reasonable interpretation of the JVA and the SA.

66 The precise factual matrix surrounding the claimed implication of the Second Implied Term revolved around two issues put forward by Sembcorp. First, that the identity of the parties was important to the parties to the JVA. Second, that co-operation, trust and confidence between the parties to the joint venture was critical to the joint venture.

67 The identity of the parties was critical because the joint venture was premised on both Sembcorp and PPL Holdings contributing their particular respective resources in order to achieve the objectives of the joint venture, which were primarily to expand the business of PPL Shipyard [note: 9]. Sembcorp pointed to cl 4(H) of the S&P which stated that the parties would combine the existing resources of PPL Holdings with those of Sembcorp and cl 3 of the JVA which stated that the parties would contribute marketing contacts, facilities, financial backing and other resources. Clause 8.1 of the JVA purportedly required the parties to provide reasonable support to PPL Shipyard with the consent of the other party and cl 8.2 stated that the parties would provide PPL Shipyard with reasonable goods, services and equipment.

68 Sembcorp argued that its expected contribution to the joint venture was essentially to provide financial facilities, corporate guarantees and yard space. On the other hand, PPL Holdings' expected contribution to the joint venture was the expertise and experience of Chang, TK Ong, and Aurol. It

cited the fact that TKK had rejected Baker as a counterpart to the joint venture for the precise reason that it would have been too easy for Chang to sell his shares in a public company and exit the joint venture. Furthermore, it relied on the many instances in cross-examination in which it alleged that Chang had admitted he was aware of Sembcorp's concern that he was to remain in control of PPL Holdings. According to Sembcorp, Chang was aware of this to the extent that he offered a moratorium on his shares in Baker if Sembcorp would accept Baker as a counterparty in the JVA. Chang did not offer a moratorium on his PPL Holdings shares because he understood that he was to remain in control of PPL Holdings.

69 Co-operation, trust and confidence between the parties to the joint venture was critical, according to Sembcorp, because it was inherent in the nature of the rig building industry that extensive investments of time and money were required for each rig project and because the joint venture was entered into in order to build a good track record for PPL Shipyard to attract more business. Each party had the ability to veto proposed actions of PPL Shipyard, given the equal shareholding, Sembcorp also pointed to the deadlock clause in cl 12 of the JVA which showed that the parties were obliged to co-operate and cl 11.2 – 11.6 of the JVA which, it alleged, were clauses on the parties' rights of pre-emption to the effect that a party who wanted to sell its shares in PPL Shipyard first had to offer those shares to the other party. That envisioned that the parties were to have some control over their counterparty to the joint venture. Lastly, Sembcorp relied on the good faith clause in cl. 24 of the JVA and the "spirit" and "interest" of the joint venture [note: 10].

70 In response to this [note: 11], the defendants contended that the JVA was a carefully crafted agreement, the negotiations for which benefited from the input of the parties' legal counsel. Therefore, there should be a presumption against the implication of terms. Furthermore, cl 11 of the JVA expressly dealt with the subject of restrictions of share dealings and expressly limited its own ambit to dealings in the shares of PPL Shipyard itself without extending to the shares of shareholders of PPL Shipyard. No term should be implied where this would contradict any express term. The simple reason why Chang had not offered a moratorium of his PPL Holdings shares was because he was not asked to provide one, even though he was aware that Sembcorp wanted Chang to be committed to the project.

71 The defendants maintained that the Second Implied Term was in itself vague. It should be obvious both that a term should be implied and the contents of the term to be implied. The Second Implied Term failed on both counts. The definition of "controlled" and when such control would change was nebulous. If Chang and Aurol, as the purported principals of PPL Holdings at the time the JVA was signed, were so important to the joint venture, then there should have been every reason for them to sign the JVA in their personal capacities. It was also not obvious that the issue of a change of control of one of the parties to the JVA should be addressed by allowing the other party the chance to purchase that party's shares, given that there were other possible ways to do this and it was not obvious which way the parties would have chosen. The Second Implied Term did not provide guidance as to the price of the share offer or any mechanism by which the price could be fixed and was therefore too vague as to be legally enforceable. Finally, the Second Implied Term was not limited as to time, which, in the defendants' view, unrealistically and unreasonably expected Chang and Aurol to commit to the joint venture for an indefinite amount of time.

72 The contrast between the parties' submissions is clear. On the one hand, Sembcorp presses the more abstract, purposive elements of the joint venture and the alleged shared understandings of the parties surrounding the signing of the JVA. On the other hand, the defendants did not mount an outright denial of these abstract elements but chose to focus the mechanics of the JVA and the Second Implied Term. In the final analysis, even if both parties' versions of the facts are themselves

accurate, the question really is which set of arguments is more relevant to the implication of the Second Implied Term. Here we are concerned with implying that particular term into the particular document of the JVA. The JVA itself, and the reasonable meaning it conveys, would be of paramount importance. Sembcorp contends that the purposive elements of the parties' relationship are also obvious from the terms of the JVA and to this I now turn. The point of view to be adopted in this exercise is that of a reasonable observer who is reading the JVA. As mentioned above, we are searching for the presumed common intention of the parties, objectively ascertained, not the parties' subjective intentions since that would amount to rectification of the contract which is not the case argued before me. When considering all the evidence relied upon, it must always be borne in mind that the thrust of the Second Implied Term was really to pre-empt a situation where the principals of either party to the JVA were to lose control of that party. What Sembcorp would have to show therefore, is that the JVA conveyed the reasonable meaning that the principals of both the parties were to remain in control of those parties and that there was a gap in the JVA because it did not provide for the situation where one such principal lost control. The Second Implied Term suggests that Sembcorp was concerned to vet the party it would go into partnership with.

73 In the first place, cl 4(H) of the S&P which Sembcorp relied on is unlikely to be relevant because the S&P is a document which is external to the JVA and neither party argued for its incorporation. Moving on to consider cls 3, 8.1 and 8.2 of the JVA (see [12] above), it is clear that these clauses oblige the *parties* to the JVA to bear these objectives in mind and provide the operational support. As defined in cl 1.1 of the JVA, "Party" or "Parties" refers to any of the parties named in the JVA and their respective successors-in-title. The only parties named in the JVA are Sembcorp and PPL Holdings, without mention of the principals or personalities behind these parties. How then, would these clauses convey the reasonable meaning that the principals behind the parties were to retain control of each party? Clauses 3, 8.1 and 8.2 may force the principals behind the parties to bear the onus of ensuring that the parties comply with the obligations in those clauses but they say nothing about the identity of the principals themselves or the amount of control they were to exert over the parties. In any event, the JVA itself seems to contemplate that the identities of the parties to the JVA could change, since "parties" included the successors-in-title thereof. Further, cl 11 provided a mechanism by which the parties could dispose of their shares in PPL Shipyard.

74 What about the expected contributions of the parties at the time the JVA was signed? Sembcorp argued that PPL Holdings was expected to contribute Chang and Aurol's expertise and experience to the joint venture. The inference is that there should be some sort of understanding that Chang and Aurol were expected to remain and contribute these. Chang also knew that TKK was concerned about Chang easily exiting the joint venture and he (Chang) even offered a moratorium of his Baker shares. Therefore, Sembcorp suggested, Chang should have understood that he was to remain in control of PPL Holdings. Two points can be made here. The first is that Chang's alleged awareness of all these notions really is ambivalent. Even if Chang was aware of these, was there a sufficient nexus of thought between him and Sembcorp or TKK for this to constitute a common intention of the parties? It is equally plausible for Chang to believe that since Sembcorp was aware of all these concerns and yet did not take any steps to assuage them, Sembcorp did not see them as sufficiently weighty concerns for inclusion in the terms of the JVA. There were no express clauses in the JVA requiring Chang or Aurol to remain for any specified period of time or to subject their shares to a moratorium. There were no conditions on the disposal of their shares. There was also no allegation that Chang was aware that Sembcorp was labouring under any sort of mistake as to the understanding between the parties and that he sought to take advantage of this.

75 The second point to be made is that these expectations run counter to cl 11.7 of the JVA. Clause 11 provides a mechanism for the disposal of shares by the parties. If a transfer of all or part of a disposing party's shares was proposed to be made to a third party, cl 11.2 requires the disposing

party to first offer the shares to the other party. However, cl 11.7 states that this restriction did not apply if either party wanted to divest all of its shares to a related company. Such divestment could be done without the need for such an offer and without conditions attached. This suggests that if PPL Holdings were to divest all of its shares in PPL Shipyard to a related company, it could do so without having to first offer its shares to Sembcorp. This related company may not necessarily be controlled by the same principals which controlled PPL Holdings, namely Chang and Aurol. How then could it be said that the parties to the JVA had signed it on the premise that Chang and Aurol would remain in control of PPL Holdings? Hypothetically, Sembcorp could argue that the entire group related to PPL Holdings was ultimately controlled by Chang and Aurol, since they together held a significant proportion of the shares in Saberon, which could be taken as the overall parent company of the group. Although this was the state of affairs at the time the JVA was signed, there was no warranty that it would be preserved for the duration of the joint venture and neither were there any provisions in the JVA to ensure that it would remain unchanged.

76 Sembcorp also relied on the proposition that co-operation, trust and confidence between the parties to the joint venture was critical to its success. That may be true, but this would be so no matter who the principals of the parties were and the clauses relied on, cls 11.2–11.6, 12 and 24, did not provide that the principals of the parties would not be able to divest their control of the parties. Nothing much changes even if Sembcorp was able to show that at the time the JVA was signed, the parties and their respective principals were particularly able to co-operate with each other. That would be good for the joint venture but there was nothing to suggest that this situation must be preserved for the future. Parties to a joint venture would have entered into it because they thought they would be able to co-operate with each other for the foreseeable future but it would be difficult to infer from this premise that the parties' principals should remain in control in order for that to happen.

77 This would also contradict the put option contained in cl 2 of the SA. If Sembcorp could conceive of ending the joint venture by buying over all of PPL Shipyard's shares, then it seemed that Sembcorp would have been happy for PPL Shipyard to function without Chang and Aurol. It was not clear whether Sembcorp was really anxious for Chang and Aurol to stay or more anxious to preclude the entry of a competitor. It was more likely that the latter was true.

78 Moving on to the defendants' submissions, I saw merit in their contention that the court should be slow to imply terms into the rather detailed JVA which comprised thirty-five clauses and governed many aspects of the relationship between the parties. As for the contention that the Second Implied Term would contradict cl 11, which expressly dealt with the subject of share transfers, I was a little less impressed. Clause 11 addressed the situation where shares of PPL Shipyard were proposed for disposal, not the shares of the parties themselves which is a wholly different consideration. If the shares of PPL Shipyard were disposed of, the parties to the joint venture would change. It is different to contemplate the situation where the principals of the parties would change as a result of the disposal of the parties' own shares. It is not accurate to say that the issue of share transfers in general was addressed by cl 11. The nature and consequences of the different types of share transfers still differed. In the light of the conclusions reached below, it is not necessary to consider the defendants' submissions on the contents of the Second Implied Term.

79 Looking through the haze of facts and clauses, the final picture that emerges to the reasonable observer is that the JVA and the circumstances surrounding it pointed to the importance of the particular parties to the joint venture remaining parties. However, it was not obvious how important the principals of those parties were. There was a gap in the JVA in that it did not provide for the situation where one of the principals of the parties lost control of that party but it would not occur to the reasonable observer that the parties would have necessarily have intended this to trigger a

responsive event. Sembcorp allegedly held the belief that Chang and Aurol were important players in PPL Holdings and that their presence was important but the Second Implied Term does not quite sing the same tune. Rather, the Second Implied Term suggests that Sembcorp wanted to vet the proposed new principals of PPL Holdings and to decide if it wished to continue the joint venture under those circumstances. If Sembcorp really wanted Chang and Aurol to stay, the Second Implied Term would have taken the form of a prohibition on the disposal of their shares or an undertaking by the two men to remain in the joint venture. Instead, the said Term indicates that if Sembcorp was not fond of the proposed changed principal, then it would buy up all the offered PPL Shipyard shares and effectively terminate the joint venture. Sembcorp would then have to fulfil all the outstanding rig building contracts on its own without the expertise and experience of Chang and Aurol. This ran contrary to its rhetoric on PPL Holdings' expected contributions to the joint venture and the co-operation and trust between the parties.

80 Given the black holes in the factual matrix that Sembcorp put forth and therefore the lack of a compelling case on the facts for the implication of the Second Implied Term, it is clear what the conclusion on this matter ought to be. There was little impetus to proceed to the stage of applying the tests for implication but they will be considered nevertheless. Should the officious bystander have posed the Second Implied Term to the parties at the time the JVA was entered into, it was not obvious that the parties would have retorted in the necessary "testy" manner. It did not go without saying that they envisioned the change in control of the principals of the parties to be an issue which needed resolution or that the resolution was to be effected by a share offer. Further, it was not necessary for business efficacy that the Second Implied Term be read into the joint venture. Even if the principals of the contracting parties were to change, PPL Shipyard could still work effectively towards its desired purpose of expanding its business and it would still benefit from the financial resources and yard space of Sembcorp coupled with the intellectual property of PPL Holdings. Necessity must be assessed from the point of view of both parties. It is uncertain that PPL Holdings would have thought it necessary that the principals of Sembcorp would remain. Notwithstanding that PPL Holdings had considered Sembcorp an attractive counterparty because it was a government-linked company, that situation did not remain static and it did not mean that Sembcorp would be considered an unattractive counterparty just because it ceased to be linked to the government.

Whether the Second Implied Term should be implied into the SA

81 The SA was a shorter but no less detailed document which was incorporated into the JVA by virtue of cl. 4 of the SA. The SA effected the sale of 35% of the shares in PPL Shipyard by PPL Holdings to Sembcorp and provided a put option for the sale of the remaining 15% of the PPL Shipyard shares. Sembcorp's case was that the Second Implied Term should be implied into the SA for two reasons [note: 12].

82 First, that the parties in the course of the negotiations leading to the SA were aware that it was important that Chang and the management team remain with PPL Holdings even after the sale of 35% of the PPL Shipyard shares. Sembcorp relied on evidence from Chang's cross-examination to show that he was aware that Sembcorp was concerned to retain Chang after the sale of the shares. There was also an email from Chang [note: 13] containing his earlier proposal that Sembcorp purchase PPL Holdings' entire shareholding in PPL Shipyard, which email contained certain proposals to satisfy Sembcorp's concern that Chang retain an interest in the joint venture after the sale of the shares. This included the proposals that Chang would use part of the sale proceeds to purchase Sembcorp shares in the open market and that he would offer a profit guarantee.

83 Second, that PPL Holdings was aware that Sembcorp's intention in entering into the SA was to prevent the situation where Sembcorp was to be a partner in the joint venture with a competitor. The

SA for the sale of the shares was entered into by Sembcorp at that price allegedly to stave off an offer for the shares by Keppel, also a competitor of Sembcorp (see above at [14] to [16]). Therefore it must have been clear that at least part of the purpose of the SA was to avoid the situation where Sembcorp would have to be a joint venture with a perceived competitor.

84 I was not convinced that it was necessary to imply the Second Implied Term into the SA. Even if Chang knew that Sembcorp was concerned to see that he retain an interest in PPL Shipyard, this was no basis for saying that Chang and PPL Holdings similarly intended the same. TKK had made it clear to Chang that he wanted Chang to remain. Unfortunately, there was little provision for this in the SA. The only clause to that effect is the put option in cl 2, which could be read as obliging PPL Holdings to retain its 15% shareholding of PPL Shipyard for at least 36 months. An alternative interpretation of the ambiguous words of cl 2 would be that PPL Holdings could sell its shares to a third party at any time but Sembcorp would only be obliged to purchase those shares if PPL Holdings gave them written notice of the same, 36 months after the date of the SA. Sembcorp's case is that both parties were well aware of Sembcorp's concerns. Yet, if such concerns were already addressed by way of cl 2 only, however weak a protection it might offer to Sembcorp, the obvious inference to be drawn is that both parties had intended to assuage Sembcorp's concerns in such a manner. Why should the court see any reason to imply anything stronger? On Chang's part, even if he knew that Sembcorp was so concerned, all that he saw before him was that Sembcorp agreed to a weak mode of protection by including a put option instead of the stronger shield of a call option (which was mentioned but not agreed to).

85 I was also not convinced by Sembcorp's allegation that the SA was entered into to stave off competition from Keppel. The facts supporting these allegations were hotly contested and even if Sembcorp's account could be accepted at face value, the conclusion drawn in the preceding paragraph still stands. If Sembcorp was so concerned to avoid partnership with a competitor, why did it not protect itself in a better way?

86 Finally, the terms of the SA do not give reason to imply the Second Implied Term. The strongest argument for implication would probably be based on cl 2 of the SA, a put option which states that Sembcorp shall purchase PPL Holdings' remaining 15% shareholding of PPL Shipyard as long as notice is given of PPL Holdings' intention to sell those shares at least 36 months from the date of the SA. However, the shares referred to are clearly the shares in PPL Shipyard held by PPL Holdings. It might even be said that since the term only provided for that situation, a reasonable inference that is to be drawn from reading the contract is that the parties only thought it important to protect the disposal of PPL Shipyard shares and not the disposal of shares of the parties to the joint venture.

87 The officious bystander suggesting the Second Implied Term to the parties at the time the SA was signed would be likely to receive a mixed response. Sembcorp might very well have answered "Oh of course!" but Chang and PPL Holdings would be far more likely to say "But of course not. Sembcorp may have been concerned to avoid the sale of PPL Shipyard to a competitor but this was all it agreed to in the SA. What is more, Sembcorp's concerns seem to revolve around the sale of PPL Shipyard, not the sale of PPL Holdings." The Second Implied Term would also not be necessary for business efficacy. The business purpose of the SA was to effect the sale of PPL Holdings' shares in PPL Shipyard in a staggered manner. The SA would achieve its purpose even without the Second Implied Term. Lastly, the Second Implied Term did not accord with a reasonable interpretation of the SA.

88 Following from the findings that the Second Implied Term should not be implied into the JVA or the SA, it is unnecessary to consider the issue of whether the defendants had breached this term or whether Sembcorp should be entitled to specific performance of the same. All that remains to be said is that the defendants would not be obliged to offer their 15% shareholding of PPL Shipyard to

Sembcorp on the basis of the Second Implied Term.

Whether the put option contained in clause 2 of the SA was triggered

89 Sembcorp's case was that the letter sent on 23 April 2010 by Straits Law LLC [note: 14] (solicitors for the defendants) stating that Baker had accepted the Yangzijiang offer constituted written notice under cl 2 of the SA which triggered the put option contained in the same clause. The letter stated:

> **OFFER BY YANGZIJIANG SHIPBUILDING (HOLDINGS) LTD TO PURCHASE THE ENTIRE ISSUED AND PAID-UP SHARE CAPITAL OF PPL HOLDINGS PTE LTD**
>
> ...
>
> 4. (a) Baker Tech has accepted the Yangzijiang Shipbuilding (Holdings) Ltd's ("**Yangzijiang**") offer.
>
> ...

90 Sembcorp supported its case with the following evidence. First, a meeting took place on 18 April 2010 between the representatives of Sembcorp and PPL Holdings [note: 15] in the wake of the Yangzijiang offer. During this meeting, Chang allegedly said that if Sembcorp "were to give a similar offer, they would consider selling to [Sembcorp] instead". Sembcorp seized on this to claim that since Sembcorp was a majority shareholder of PPL Shipyard and PPL Holdings was not, that Chang must have been referring to the sale of the PPL Shipyard shares. Second, the terms of the Yangzijiang offer were telling. Yangzijiang required Baker to give proof of PPL Holdings' and E-Interface's shareholdings in PPL Shipyard and one of the conditions of the Yangzijiang offer was that Chang and Aurol would not voluntarily leave their positions as executive directors of PPL Shipyard for two years from 1 January 2011. Third, Yangzijiang on 1 September 2010initiated another agreement between *inter alia* Yangzijiang and Baker which conditioned the sale of the PPL Holdings shares on the outcome in this action. The agreement stated that if a final judgment in this suit determined that Sembcorp was entitled to the 15% shareholding in PPL Shipyard, Baker would have to refund the consideration of US$116,250,000 to Yangzijiang. Fourth, that Chang under cross-examination purportedly conceded that the Yangzijiang offer was *effectively* (my emphasis) for the purchase of the PPL Shipyard shares. Fifth, that Chang and Aurol allegedly behaved in a surreptitious manner with regard to the Yangzijiang offer in that they did not inform Sembcorp of the offer and were evasive about the extent of the negotiations between themselves and Yangzijiang that preceded the making of the offer.

91 Naturally, the defendants disagreed. Their main contention was simple, namely that the Straits Law letter was written notice of *Baker* selling its shares in *PPL Holdings*, not notice of *PPL Holdings* selling its shares in *PPL Shipyard*.

92 This issue ultimately rests on the interpretation of cl 2 of the SA. The main sentence in cl 2 which is worth focusing attention on reads:

> The remaining Three Million (3,000,000) shares owned by *us* shall be purchased by Sembcorp immediately upon receipt of written notice from *us* of our intention to sell our remaining shares... [emphasis added]

It is also very important to note that the SA was in the form of a letter addressed to Sembcorp and TKK and was signed off with "Yours faithfully – **PPL Holdings Pte Ltd**". It was undisputed that the SA

was an agreement entered into by both parties to the JVA and those parties alone.

93 The clause on its face is abundantly clear. In order for this clause to be triggered such that Sembcorp would purchase the remaining shares, there has to be written notice of an intention to sell the remaining Three Million shares. This intention was to be that of the writer of the letter, PPL Holdings.

94 On this point, Sembcorp's reliance on Chang's statements at the meeting of 18 April 2010 and his apparent concession under cross-examination does not assist its case. Chang's intentions and knowledge cannot be attributed to PPL Holdings. PPL Holdings was not run as a one man show whose corporate veil could be pierced to reveal Chang. It had a full complement of directors on its board. Any intentions of PPL Holdings would have been likely to come in the form of resolutions from the board or official releases, not oral statements from one of its directors.

95 Sembcorp relied on a decision of the English Court of Chancery, *Re Sedgefield Steeplechase Co (1927) Ltd, Scotto v Petch and others* ("*Re Sedgefield*") [2001] BCC 889 as authority for the law on what would constitute an "intention" to sell shares in the context of pre-emption rights. *Re Sedgefield* was a case which examined how the pre-emption rights in the articles of association of a company which owned a racecourse in England could be triggered. These pre-emption rights operated in such a way that if any shareholder intended to transfer his shares, he would have to first give written notice to the board which may then offer the shares to the other shareholders of the company. The main question in that case was what sort of intention was required to trigger the giving of this written transfer notice. Lord Hoffmann held that a shareholder who intended to transfer his shares but did not intend to contravene the pre-emption provisions would not be obliged by the pre-emption rights in the articles to serve the transfer notice (at 220–221). Lord Hoffmann commented on what it means to "intend" to transfer shares; his Lordship cited a decision of Fox J in *Owens v GRA Property Trust Ltd* (10 July 1078, unreported) as authority for the proposition that "a shareholder may intend to transfer his shares within the meaning of the pre-emption article although his ability to do so depends on contingencies outside his control" (at 219). The proposition is not strictly on point in relation to the facts of this case since it states that a shareholder may intend to transfer his shares for the purposes of the pre-emption provision even if events conspire to make this impossible. Nevertheless, the principles stated by Fox J and approved by Lord Hoffmann on the nature of "intention" are of some interest (at 218):

(i) The word [intends] relates exclusively to a state of mind.

(ii) *It relates to the state of mind of the transferor only*.

(iii) The intention must be made manifest in some way and must be unequivocal.

...

(v) The intention must be a present intention

96 On the strength of the authority which Sembcorp put forward, its reliance on the terms of Yangzijiang's offer and the condition imposed by Yangzijiang based on the outcome in this litigation was shaken. The *transferor's* intention is relevant, not the *transferee's*. The transferor in the context of the Yangzijiang offer is Baker and its intention, from the Straits Law letter anyway, is to dispose of its shares in PPL Holdings. Whatever benefits Yangzijiang wished to obtain out of the transaction cannot necessarily be attributed to Baker's intention to confer those benefits.

97 We are thus left with Sembcorp's allegations of Chang's and Aurol's surreptitious behaviour. This contention is, at best, equivocal and, at worst, a personal attack. If Baker was selling its shares in PPL Holdings, it would have been courteous of Chang and Aurol to inform Sembcorp of this development but there was no obligation on them to do so. They were therefore entitled to be reticent about the arrangement.

98 Given that the put option in cl 2 was not triggered, Sembcorp was not entitled to the 15% shareholding in PPL Shipyard on that basis and the cheque of S$59,433,522 that it tendered as consideration is of no consequence. Under these circumstances, there is no need for me to go on to consider the allegations made by the defendants that Sembcorp had not calculated the price for the consideration correctly.

The second issue: Whether the provisions in the JVA and the PPL Shipyard Articles that were premised on equal shareholding ceased to apply when there was a change in the proportions of ownership of PPL Shipyard

Whether the First Implied Term should be implied into the JVA

99 The gist of the First Implied Term was twofold. First, that once the 50-50 shareholding in PPL Shipyard was upset, the provisions in the JVA that were premised on equal shareholding would cease to apply. Second, that the JVA and the Consequential Articles would cease to apply once either party to the JVA no longer held any shares in PPL Shipyard.

100 Sembcorp argued for the implication of this term into the JVA on the basis that the circumstances leading up to the signing of the JVA and the terms of the JVA supported such an implication. Further, such implication would avoid an absurd result. Oddly enough, the two parts of the First Implied Term are not obviously two halves of a whole and they stem from different premises. The first part is premised on the notion that certain provisions in the JVA were premised on equal shareholding ("the equality provisions") and the second is premised on the notion that the JVA would only subsist for so long as both parties to the JVA remained identical without succession. Of course, this is not fatal to the implication of the First Implied Term which would in any event be severable. It remains to be seen whether the same set of evidence can justify the implication of the two parts. They will be referred to respectively as "part one" and "part two".

101 According to Sembcorp, in relation to part one of the First Implied Term, these were the equality provisions in the JVA which would cease to apply upon the cessation of equal shareholding, as set out at para 15 of its Statement of Claim (Amendment No. 3). The first set of such provisions was contained in cl 5 and related to the involvement of both parties in the operation of PPL Shipyard's board of directors. In brief, cl 5 and its sub-clauses entitled the parties to nominate three directors each, obliged the directors nominated by them to co-operate in the nominating and removal of directors, required that at least one director nominated by each party be present to constitute the quorum at any meeting and entitled the parties to nominate persons to different roles on the board. The second set of provisions related to the need for the participation of both parties for the operation of PPL Shipyard. Clause 6.1 required that both parties be present for the purpose of quorum at shareholders' meetings. Clause 7 required that both parties consent before PPL Shipyard could carry out certain actions and cl 9 required both parties to be signatories to PPL Shipyard's bank accounts. These provisions will be examined in greater detail later.

102 The hurdles that Sembcorp would need to cross for the implication of the First Implied Term are several. In relation to part one of the First Implied Term, it would not suffice to simply show that the provisions above were premised on equal shareholding. That is merely a bland description without

more. The provisions may have been included on the basis of equal shareholding but Sembcorp would need to go one step further and show that the provisions would only be *workable* insofar as there is equal shareholding or that the provisions or the entire JVA would be absurd otherwise. It would also suffice for Sembcorp to show that an objective assessment of the parties' intentions would show that they had *intended* that such provisions would cease to apply. Sembcorp would also have to follow through with the rest of its argument and show that, as a natural corollary, if such provisions ceased to apply, there should be something that would be able to supplant them. In relation to part two, in similar fashion, Sembcorp would have to show that the JVA and Articles were *unworkable* without either party's participation in the JVA or that the parties *intended*, objectively assessed, that the JVA and Articles would terminate.

103 Sembcorp claimed that the circumstances preceding the signing of the JVA demonstrated that the equality provisions were premised on the equality of shareholding between the parties. The parties had entered into the entire JVA on the premise of equal shareholding and on the strength of this premise, the JVA expressly provided for the parties to have equal management rights and required the parties to make equal contributions to PPL Shipyard. Sembcorp pointed to negotiations that took place in early 2001, during which Sembcorp's proposal to acquire more than 50% of PPL Shipyard's shares was turned down by Chang, who also insisted that the directors nominated by the parties to the PPL Holdings board should carry an equal number of votes in order to reflect the equal shareholding and that Sembcorp should not have a casting vote to break any deadlock.

104 Sembcorp also pointed to the express terms of the JVA which it claimed were based on an equal shareholding, namely recital (C) and cls 4.2– 4.3 describing the parties' equal shareholding; cls 5.3 and 5.1 which described the parties' equal participation in the affairs of the PPL Shipyard board; cl 11 which stated that if either party's shareholding dropped below 50%, the parties would have to agree on the number of directors that the selling party could nominate to the board; and cls 8.4 and 8.6 which required the parties to provide financing to PPL Shipyard in proportions which corresponded to their proportions of shareholding in PPL Shipyard and that the parties would have to bear the losses incurred by PPL Shipyard in the same proportions.

105 Clause 5.1 in particular was interesting because it provided that "Unless otherwise agreed", the parties may appoint three directors each to the PPL Shipyard board, "so long as they shall hold such number of shares...", which read together with cl 4.2, indicated that this number of shares referred to the equal shareholding. In other words, this suggested that the parties' right to nominate three directors to the board rode on the fact of equal shareholding. This provision will be analysed in greater detail below, especially in regard to the parties' subsequent conduct in relation to this provision.

106 The absurd result that Sembcorp claimed would occur if the First Implied Term was not implied was derived in the hypothetical situation where a majority shareholder were to acquire 19,999,999 shares, or a 99.9999% shareholding of PPL Shipyard. According to Sembcorp, if the First Implied Term were not implied, the minority shareholder in that case would be able to block action by the board simply be refusing to show up at board or shareholder meetings because of the quorum requirement. The directors it appointed would be able to block board resolutions by simply voting against them. This would offend commercial sense, especially in the light of cls 8.4 and 8.6 which premised the provision of finance and the shouldering of loss on the percentage of shareholding. It could not be that a minority shareholder who contributed very little money and shouldered very little risk would be able to derail the proposed activities of PPL Shipyard.

107 The defendants' response to these contentions was that any changes to the JVA had to be negotiated and recorded during the negotiations for future changes to the proportions of

shareholding. This was supported by the wording of cls 4.2 and 4.3 of the JVA. Clause 4.2 stated that "unless otherwise agreed in writing", the parties were to hold the shares of PPL Shipyard in equal proportions while cl. 4.3 stated that these proportions were to be maintained for the duration of the JVA, "unless otherwise agreed to in writing." Clause 26.1 of the JVA also provided that any amendments to the JVA would have to be agreed to in writing by both parties. The defendants also deprecated Sembcorp's suggestion that the equality provisions should cease to apply the moment the proportions of equal shareholding changed as itself not according with commercial sense. The defendants also produced evidence of the minutes of a meeting that took place on 29 September 2008, five years after the conclusion of the JVA, during which Sembcorp's Executive Committee noted that:

> ..the [JVA] between [Sembcorp] and [PPL Holdings] still provided for voting rights of the parties to be equal although [Sembcorp's] share was now 85%. It was necessary to re-negotiate the Agreement as it was unfair that [Sembcorp] did not have a majority voting right. [A Sembcorp director] explained that the [JVA] could not be negotiated at the time [Sembcorp] acquired the additional 35% share as [PPL Holdings] was about to sell their 50% stake to Keppel, and their 35% share had to be purchased on an urgent basis.

108 I will turn to consider Sembcorp's contentions first. One thing that stood out was that Sembcorp's arguments took on an "all or nothing" flavour. As long as there was no equal shareholding, the equality provisions would necessarily cease to apply. This lack of nuance and texture hampered their submissions. The process of the implication of terms is necessarily based on the particular factual matrix before the court, in particular, the events which gave rise to the alleged necessity for the implication of the terms. What Sembcorp was essentially doing in this case was to run a very abstract argument based on events that had happened in the distant past, without showing why the fact of PPL Holdings' present 15% shareholding in PPL Shipyard necessitated the implication of the terms. What Sembcorp was inviting this court to do was to examine the logic of the terms of the JVA against the background leading up to the JVA and comment on the apparent inherent fallacy. However, the court cannot improve the parties' agreement retrospectively just because it appears flawed on hindsight. Sembcorp had to show why the facts as they stood made implication a necessity.

109 Sembcorp's reliance on the pre-contractual negotiations of the JVA does indeed indicate that the parties had entered into the JVA on the premise that each was to have an equal shareholding in PPL Shipyard. I can accept that the parties provided for each other to have equal management rights and required each other to make equal contributions to PPL Shipyard because those were the proportions of shareholding at the time the JVA was entered into. That does not carry its case any further as it is merely descriptive. There is nothing prescriptive to persuade me that because the parties had premised the JVA on equal shareholding, the equality provisions would necessarily cease to apply when the proportions were upset, no matter how slight the upset might be. Sembcorp could not show me how the equality provisions were so inextricably linked to the initial premise of equal shareholding that they became *unworkable* or necessarily went against the grain of the entire argument read in context.

110 Although, in general, consideration of hypothetical situations in the deliberation process for the implication of terms should be frowned upon, Sembcorp's zero sum game arguments meant that the term it sought to imply had to be capable of working in all situations where the proportions of shareholding shifted away from equal proportions, even if this shift was of a very small percentage.

111 Perhaps Sembcorp's argument was a little different, in that since the parties included the equality provisions on the basis of equal shareholding, they had thereby intended for the provisions to

cease to apply otherwise. But this does not necessarily follow and in any event this argument was not made out on the facts put before me by Sembcorp.

112 Sembcorp then turned to an absurd hypothetical situation in order to justify its claim. The problem with this is that the implication of terms is very much premised on the particular factual matrix placed before the court and the reasons why this matrix has shown that there is a gap in the parties' agreement, which gap there is impetus to fill by the implication of a necessary term. If it were the case that Sembcorp held a 99.9999% shareholding in PPL Shipyard and PPL Holdings still insisted on the application of the equality provisions, I might be inclined to say that the equality provisions would not make much sense under such circumstances. This was not the case here. Every set of facts taken to its extreme will appear absurd and sound ridiculously in need of a remedy. However, I would be implying a term based on that extreme hypothetical set of facts, not the particular facts which are before me. In any event, as Chang pointed out, it was rather inconceivable that Sembcorp would have agreed to purchase all but one of the shares in PPL Shipyard.

113 Moving on to the defendants' contentions, there is merit in their argument that the changes to the JVA were to be negotiated at the point at which the shareholding of PPL Shipyard was to change. Importantly, the words of the JVA indicated the parties' presumed common intention that the proportions of shareholding in PPL Shipyard could change and this was reflected in cls 4.2 and 4.3, cl 11 in general which provided a mechanism for the transfer of shares in PPL Shipyard and cl 11.10 in particular which provided that the PPL Shipyard board would decide which directors were to remain on the board in the event that one party did sell part of its shares pursuant to cl 11.

114 It seemed rather incongruous for the JVA to have contemplated the situation where the parties' shareholding in PPL Shipyard changed but not provide as to how its terms would apply or cease to apply in such event. Even if the parties had truly not applied their minds to this possibility, it would be unreasonable to imply a term that all the equality provisions would cease to apply in such event. What then would fill the void? How would the quorum for shareholder meetings be constituted and how many directors should each party be allowed to nominate to the board? Resolution of these and the many other questions is not so simple or obvious an issue as can be effected by an implication of terms. The reason is because the precise change in the proportions of shareholding is unpredictable. The consequential amendments to the quorum and the number of directors to be appointed entailed considerations of proportion and are difficult to predict. For example, if there was equal shareholding, it might make sense for each party to nominate three directors each. If the proportions of shareholding shifted to 75% and 25%, how many directors should the minority shareholder be entitled to nominate? "One" or "two" would be equally plausible answers. It would be impossible to discern what the parties had intended in the event the proportions of shareholding were to change. It is impossible to devise a "one size fits all" solution. Furthermore, the contents of the provisions may not change in an automatic fashion, such that the number of directors that one party could nominate would automatically track the proportions of its shareholding. The parties might individually evaluate the provisions and modes of control and could be willing to trade off certain terms to obtain their desired results. The best that can really be said is that the parties would have to renegotiate the terms of their agreement. The JVA is very much capable of amendment, as cl 26.1 indicated, and as the parties by the SA had done.

115 Given the discussion above, there is no need to even resort to the two traditional tests for implication. Suffice to say that the first part of the First Implied Term was not necessary for business efficacy and the parties would have replied to the officious bystander with a "We are not agreed on what would happen should the equal proportions of shareholding be upset."

116 The discussion above related to only the first part of the First Implied Term, on which

Sembcorp focussed the bulk of its submissions. This is not to neglect the second part of the First Implied Term, which can be dealt with very shortly. The definition of "party" contained in cl 1.1 of the JVA is "all or any of the parties named in this Agreement... their respective successors-in-title and transferees who acquire the shares in accordance with this Agreement". This must mean that any person who acquires shares in PPL Shipyard in accordance with the JVA is a party. The second part of the First Implied Term states that if any one party were to lose its beneficial interest in PPL Shipyard, the JVA would terminate and the Consequential Articles would not apply. This should be obvious. If one of the two parties loses its beneficial interest, there is no longer any joint venture and there would be no need for the JVA to govern the relationship between the parties. If the Consequential Articles ceased to apply, this would have to mean that PPL Shipyard's original set of Articles of Association would have to return to fill the void. Given that the Consequential Articles were amended for compliance with the JVA, it would make sense that there would be no need for the Consequential Articles to govern PPL Shipyard if there were no JVA subsisting.

117 Perhaps the outcome that Sembcorp was trying to achieve by seeking to imply the second part of the First Implied Term was to disapply the JVA and the Consequential Articles the moment PPL Holdings lost its beneficial interest in PPL Shipyard. However, the use of the word "party" in the second part of the First Implied Term read with the definition of the same in cl 1.1 of the JVA made this an impossible quest. I saw no necessity to imply the second part of the First Implied Term either, given that the facts did not throw up a situation where there would be only one party holding 100% of the shares in PPL Shipyard thus resulting in a collapse of the joint venture.

Whether the First Implied Term should be implied into the Supplemental Agreement

118 Sembcorp claimed that the First Implied Term should also be read into the SA. As the SA was incorporated into the JVA by virtue of cl 4 of the SA, this would be tantamount to claiming that the First Implied Term should be implied into the JVA. It seems that Sembcorp's real point was that the circumstances surrounding the SA were persuasive as to this implication.

119 Sembcorp rested its claim on two points. The first was that the parties allegedly had not regarded the SA as a final agreement and contemplated that a more formal agreement would be entered into subsequent to the completion of the sale and purchase, which formal agreement would include several amendments to the terms of the JVA. This, according to Sembcorp, was evidence that the parties clearly understood that the provisions in the JVA on equal rights of management and control had ceased to subsist. Sembcorp claimed that the SA was a sparse document which merely reflected the heads of agreement between the parties and was signed with great haste in order to stave off Keppel's offer and Chang and Aurol had allegedly acted in such a way as to pressurize TKK into signing the SA urgently. There were also certain alleged inconsistencies and inadequacies in the terms of the SA which indicated that further negotiations were required. There was also evidence of negotiations between the parties conducted after the conclusion of the SA on the specific terms that should be included in the new agreement. However, these negotiations came to nothing. From the date the SA was signed in 5 July 2003, the parties were allegedly in negotiations all the way till late 2004. At this point, the parties allegedly reached an *impasse* in the negotiations, in particular with regard to the amendment of the terms in the JVA to reflect Sembcorp's purported rights as a majority shareholder of PPL Shipyard. Sembcorp's own case is that it let the matter rest, in order not to antagonise PPL Holdings and upset relations between the parties. This matter rested all the way until 16 April 2010 when the Yangzijiang offer surfaced.

120 The second point that Sembcorp relied on was that subsequent to the signing of the SA, the parties allegedly conducted themselves on the basis that the equality provisions no longer applied. First, Sembcorp nominated three more directors to the PPL Shipyard board, bringing their total to six

nominated directors as compared to PPL Holdings' three. According to Sembcorp, Chang had apparently conceded that Sembcorp had a "majority" on the PPL Shipyard board, although under cross-examination he stated that despite the increased number of Sembcorp nominated directors, the voting rights of the parties remained equal. Second, a representative of Sembcorp, Mr Ong Poh Kwee, who was one of the newly appointed directors, was appointed Deputy Managing Director. Third, after the SA, Sembcorp allegedly began to treat PPL Shipyard as a subsidiary within its group of companies and implemented various policies within it including those relating to financial policy, publicity, human resource and risk management. Lastly, after the SA, PPL Holdings itself started to classify PPL Shipyard as an "associate company", rather than a "subsidiary" as it had before. This apparently showed that PPL Holdings was aware of its decreased shareholding and the accompanying reduction in the rights of management and control in PPL Shipyard.

121 In response, the defendants argued that the SA was silent on the necessity for further negotiations in order to amend the JVA and that the indications for further negotiations referred to other things like employee stock options. The defendants further denied that a further formal agreement was required and disputed Sembcorp's evidence on this point. The defendants claimed that the subsequent conduct of the parties could not vary the JVA, since by cl 26.1 of the JVA, it could only be varied by a written agreement of the parties. Further, if, as Sembcorp claimed, the First Implied Term introduced certain amendments to the SA, then why would there be a need for the parties to negotiate on future amendments? The defendants also adduced their own evidence to the effect that the parties had conducted themselves after the signing of the SA in accordance with the alleged subsistence of the equality provisions.

122 Sembcorp's first point falls easily on the fact that the negotiations halted in 2004 and never resumed. Six years passed before Sembcorp realised that it needed to further the discussions to amend the JVA when the Yangzijiang offer came along. Even if Sembcorp was right that the parties at the time of signing the SA contemplated that a new more formal agreement was required, this does not necessarily indicate that the equality provisions were to be disapplied. If no new agreement was produced from the preliminary negotiations and proposals of terms, how is the court to determine the intentions of the parties? Both parties proposed and counter-proposed different terms and no consensus was apparent. In any event, the lapse of six years indicated Sembcorp's acquiescence to the status quo. The excuse that Sembcorp did not wish to antagonise PPL Holdings was not convincing and there is nothing for the court to infer from its allegedly non-confrontational behaviour. Simply put, Sembcorp did not protect its position in the way it ought to have. It was also not disputed that the SA was discussed in the morning but signed only in the afternoon after TKK and Chang had returned from lunch. It was therefore not signed in a great hurry as a temporary measure.

123 Sembcorp's second point falls with similar ease. I am with the defendants in that the subsequent behaviour of the parties could not modify the JVA. In fact, it might be more accurate to say that the parties were actually acting in breach of the provisions of the JVA. In any event, subsequent behaviour of the parties, being extrinsic evidence, is not admissible to vary the contents of the agreement (see *Zurich* at [132]). Sembcorp may argue that the subsequent behaviour of the parties should be an aid to construing the JVA in such a way that it would be reasonable to imply the First Implied Term. Closer consideration of this behaviour does not convince me that it would be reasonable, let alone necessary, to imply the same. The shareholding of the parties had changed after the SA such that Sembcorp owned 85% of PPL Shipyard. However, Sembcorp proceeded to nominate 3 more directors to the board, bringing its representation on the board to a 66% majority (6 against PPL Holdings' 3). How would it be possible to infer from this that the parties were acting in accordance with a 85% majority? I was not persuaded by the appointment of Mr Ong Poh Kwee, since that did not necessarily create an inference that the equality provisions should be disapplied. Further, the fact that Sembcorp implemented its own policies within PPL Shipyard is not indicative of anything

beyond the fact that PPL Holdings must have consented to that. These policies do not strike at the heart of the equality provisions, which relate to, in the main, shareholder quorum, and board representation in PPL Shipyard. Lastly, PPL Holdings' treatment of PPL Shipyard as an "associate company" rather than a "subsidiary" is an entirely accurate description of the fact of its reduced shareholding but does not indicate that PPL Holdings conceded anything with respect to the equality provisions.

124 In the circumstances, I saw no reason to imply the First Implied Term in the SA. It was not necessary for business efficacy and, if the officious bystander had raised the matter, even if Sembcorp would enthusiastically agree that it was obvious, PPL Holdings would almost certainly have said something quite the contrary.

The third issue: Whether Sembcorp should be entitled to terminate the JVA on the basis of the various breaches alleged to have been committed by the defendants

125 Sembcorp alleged in the alternative that the defendants had breached three important terms amounting to conditions in the JVA and, on this basis, Sembcorp should be allowed to terminate the same. The first term was the confidentiality obligation contained in cl 13, the second was the good faith provision in cl 24 and the third was what is known as the Third Implied Term, the thrust of which was that neither party would do anything to the other which would undermine the benefits conferred on the parties by cl 11.7 of the JVA. These terms will be addressed in turn.

The confidentiality obligation in clause 13

126 Sembcorp claimed that this was a condition of the JVA and that it was breached because Aurol had wrongfully disclosed PPL Shipyard's accounts, which were purportedly confidential information, to Yangzijiang and to Baker. With this information in hand, in particular, the net book value of PPL Shipyard for the financial year 2009, Yangzijiang was able to calculate the price that it should offer for the shares in PPL Shipyard. Sembcorp took pains to show that these accounts were confidential information as they fell within the definition of the same in cl 3.1 of the JVA. I accept that the accounts were confidential although the defendants argued otherwise on the basis of the nature of the information and the words of cl 3.1.

127 What is more important is whether the accounts lost their confidential nature as a result of subsequent events. According to Sembcorp, this is the chronology leading up to the disclosure of the accounts. Sometime in March 2010, Ms Aw Seok Chin ("Aw"), the company secretary of PPL Shipyard, received a draft of the accounts dated 22 February 2010. On 31 March 2010, she circulated to PPL Shipyard's board, a directors' resolution to pass, *inter alia*, resolutions relating to the approval of the accounts for submission at PPL Shipyard's forthcoming Annual General Meeting ("AGM") and to convene this meeting on 16 April 2010. Subsequently, on 12 April 2010, the directors of PPL Shipyard approved the resolution and pre-signed the attendance sheet and minutes of the AGM which was to be held on 16 April 2010. One day later, on 13 April 2010, Aurol forwarded copies of the accounts to Baker and Yangzijiang. The AGM was subsequently held on 16 April 2010 and the accounts were filed with the Accounting and Corporate Regulatory Authority on 19 April 2010.

128 The defendants' chronology of events was similar, save that they alleged that the accounts had lost their confidential nature by 13 April 2010. They say that Aurol had collected the accounts on that date and made copies of them. He asked Aw to file a copy with ACRA and then forwarded the information by email to Baker and to the broker who acted for Yangzijiang. Interestingly, Aw was copied in that same email because she was also the company secretary of Baker.

129 The defendants' case was that Aurol acted in several different capacities on the same day. In handing the accounts to Baker, he was acting in his capacity as a director of PPL Holdings. As a shareholder of PPL Shipyard, PPL Holdings was entitled to receive a copy of the PPL Shipyard accounts. In handing the accounts to Yangzijiang, Aurol was acting in his capacity as a director of Baker.

130 In the final analysis, the question really is whether the accounts had lost their confidential nature by virtue of the approval of the resolutions that took place on 12 April 2010. Sembcorp's case was that the minutes remained confidential because the terms of the resolutions stated that the approval for the accounts had only been given in relation to the submission of the accounts at the AGM on 16 April. Notwithstanding that no physical AGM took place on 16 April 2010, Sembcorp maintained that the accounts were only approved on that date.

131 This contention was questionable. The relevant resolution stated:

PPL SHIPYARD PTE LTD

Unique Entity Number 199708012N

(Incorporated in the Republic of Singapore)

WE, THE UNDERSIGNED, BEING ALL THE DIRECTORS OF THE COMPANY, AGREE AND CONSENT TO PASS THE FOLLOWING RESOLUTIONS ON THIS DATE, AS DIRECTORS' RESOLUTIONS IN WRITING PURSUANT TO ARTICLE 101(a) OF THE ARTICLES OF ASSOCIATION OF THE COMPANY

1. STATUTORY FINANCIAL STATEMENTS

RESOLVED THAT the accompanying Statutory Financial Statements for the financial year ended 31 December 2009 together with the Report of the Directors and Statement by Directors be and are hereby approved for submission at the forthcoming Annual General Meeting of the Company.

...

Sgd. Tang Kin Fei, Tan Kwi Kin, Dr Benety Chang, Wong Weng Sun

PPL SHIPYARD PTE LTD

DIRECTORS' RESOLUTION IN WRITING

DIRECTORS' REPORT AND AUDITED FINANCIAL STATEMENTS page 2

Sgd. Anthony Sabastian Aurol (Alternate—Tan Yang Guan), Lee Fook Kang, Tan Ah Hwa, Tan Cheng Tat [Not signed, Ong Poh Kwee]

Dated: 22 February 2010

132 A reading of the document reveals that it contemplated that the resolutions therein were passed on the date of the document. The directors "AGREE AND CONSENT TO PASS THE FOLLOWING RESOLUTIONS ON *THIS DATE*", and resolved that the accounts "*be and are hereby* approved for

submission". It seemed clear enough that the accounts were approved and the only relation to the AGM was that the accounts were also approved for *submission* at the AGM. For all intents and purposes and on a plain reading of the document, the resolutions were passed on the date of the document, which was 22 February 2010. None of the directors who signed appended the date of their signature, although the parties did not seem to dispute that all directors had signed by 12 April 2010 at the latest. There was no indication that the directors had intended for the resolutions to be approved at any date later than the date of the document.

133 Sembcorp alternatively contended that even if a document had been approved for public release, the information remained confidential prior to its publication. To support this contention, it relied on a quotation from *Confidentiality* (London Sweet & Maxwell, 2006) at p88 to the effect that the details of a patent told to a person in confidence would retain the quality of confidentiality until publication. The same reasoning was applied to the government budget and a company's financial results.

134 Sembcorp next relied on the cases of *Shelly Films Ltd v Rex Features* [1994] EMLR 134 which concerned disclosure of a film costume prior to the film's release and *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 which concerned the premature publication of photographs for a music album sleeve. In both these cases, it was said that the information was confidential until its release into the public domain. These case concerned common law obligations imposed to retain confidentiality. In these cases, the information released was time sensitive, in such a manner as to adversely affect commercial interests which were backed by substantial investments. Had the details of the film costume and music album sleeve been prematurely released, the elements of anticipation and surprise that would have otherwise accompanied them would be severely compromised. In the present case, the directors had expressly approved the accounts for filing with ACRA, where they would enter the public domain, before Aurol's actions. Even if the accounts were released by him a little later on 16 April 2010, there was no evidence that Yangzijiang would have considered them to be any less valuable. There was also no evidence that Yangzijiang would not have made its offer if the accounts were disclosed on or after 16 April 2010. Obviously, just because the accounts were not time sensitive does not mean that they were not confidential.

135 The test for confidentiality is found in the case of *Douglas v Hello! Ltd (No 3)* [2006] QB 125 at 151 where the English Court of Appeal stated that:

> ...information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others.

The information contained in the accounts was available to the directors of PPL Shipyard and they intended that the accounts be approved, formally on 22 February 2010 or, at the latest, when they appended their signatures to the resolutions on 12 April 2010. Their approval signified that the accounts would be submitted to ACRA for entry into the public domain and would thus become available to others. The accounts therefore lost their confidentiality by 12 April 2010 at the latest and it could not be said that Aurol's conveyance of the same to Baker and Yangzijiang breached cl 13 of the JVA. Even if the accounts were still confidential on 12 April 2010, they were meant to become public information by 16 April 2010. In any case, any such breach in these circumstances would be a very minor technical one of a few days and certainly would not justify the extreme remedy of termination of the JVA. This was not a case of disclosure of information which was never meant for the public eye and which brought detriment to the owner of the information.

The good faith obligation in Clause 24

136 Sembcorp alleged that the disposal of Baker's entire interest in PPL Holdings to Yangzijiang breached the obligation of good faith owed by PPL Holdings to Sembcorp pursuant to cl 24 of the JVA. This clause obliged the parties to the joint venture to do all things reasonably within their power to give effect to the spirit and interest of the joint venture. Sembcorp's case was that the spirit of the joint venture was that each of the parties would participate in the expansion of PPL Shipyard's business and that the identity of the parties to the joint venture was to remain the same on a long term basis.

137 I see no merit in this contention. As discussed previously, such obligations incumbent on the parties to the joint venture would bear on PPL Holdings which remained very much a part of the joint venture (albeit now in the ownership of Yangzijiang) and would continue to contribute to the expansion of PPL Shipyard. If Sembcorp was contending that Baker should not have sold its shares to Yangzijiang, those arguments have been canvassed and dealt with in the context of the Second Implied Term.

Whether the Third Implied Term should be implied into the JVA

138 Sembcorp claimed that the Third Implied Term should be implied into the JVA. The gist of this term was that the parties and their related companies would not do anything to deprive the other of the benefits of cl 11.7 of the JVA. The term "related company" will be used here to refer to a wholly owned subsidiary, holding company, or wholly owned subsidiaries of the holding company, as per the definition in cl 11.7. This clause was placed in the general share transfer provisions of cl 11 and essentially provided that if either of the parties wanted to transfer all of its shares in PPL Shipyard to a related company, there was no need to first offer those shares to the other party in the joint venture, in contrast to the situation where one party wanted to transfer shares to a third party. Sembcorp claimed that there were two benefits to cl 11.7. First, it conferred on the parties the right to decide whether they wanted to be in a joint venture with any potential buyer. Second, if the transferee ceased to be a related company, the JVA required that the shares in PPL Shipyard were to revert to the transferor.

139 It was not entirely clear what Sembcorp was asking for in this particular claim. How would this differ from saying that the other party should not breach cl 11.7? If they were the same, then it is obvious that parties should not breach the contracts they had entered into and there was no need to imply a further term to this effect. Whatever particular and unique "benefits" Sembcorp saw in cl 11.7 are irrelevant. If a party breached cl 11.7, it would not have performed its obligations under cl 11.7 and Sembcorp would therefore not have the benefit of this performance. The Third Implied Term was quite unnecessary for business efficacy. It would be superfluous to imply this term into the JVA.

Conclusion on the plaintiff's claim

140 For the reasons above, I dismiss Sembcorp's claim on all counts.

Counterclaim

141 In counterclaim, the defendants sought many forms of declaratory reliefs and several forms of injunctions or orders for specific performance. Seven of those reliefs related to declarations premised on a successful outcome for the defendants on the plaintiff's case, such as a declaration that the JVA has not been terminated and continues to have full force. In the light of my decision above, no more need be said about these. The remaining reliefs related to several board resolutions passed by the PPL Shipyard board after the Yangzijiang offer arrived, which the defendants sought to declare invalid, the purported removal of Chang and Aurol from the PPL Shipyard board and the purported

removal of the managing director and company secretary from PPL Shipyard, which the defendants sought to prevent by injunction. The defendants organised their counterclaim into four separate issues. The first relates to whether the Sembcorp-nominated directors on the PPL Shipyard board were entitled to request any of the PPL Holdings-nominated directors to vacate their directorships and thus, whether Aurol was validly removed as a director. The second relates to whether certain resolutions passed at a board meeting of 28 April 2010 were valid. The third relates to whether certain resolutions passed at board meetings in May and June 2010 were valid. In respect of the first, second and third issues, the defendants also claimed relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The fourth issue concerns the question of the alleged conflicts between the JVA and the Consequential Articles and whether they should be rectified.

The first issue in counterclaim: Whether Sembcorp-nominated directors on the PPL Shipyard board could request PPL Holdings-nominated directors to vacate their directorships

142 On 8 June 2010, a letter addressed to Aurol was sent by the six directors that Sembcorp had nominated to the PPL Shipyard board ("the six Sembcorp directors"). This letter was also copied to Chang and the other director that PPL Holdings had nominated to the PPL Shipyard board, Mr Douglas Tan. The letter stated [note: 16] :

> 2. We note that you have admitted disclosing [PPL Shipyard's] financial statements for the year 2009 ("**Financial Statements**") to [Yangzijiang]. At the time of the disclosure, the Financial Statements were confidential information belonging to [PPL Shipyard] as they had not been filed with [ACRA]. We are of the view that this constitutes a breach of your fiduciary duties to [PPL Shipyard].
>
> 3. As stated in our letter to you dated 6 May 2010, we consider this breach to constitute serious misconduct. This is particularly so in light of the fact that Yangzijiang is a potential competitor of [PPL Shipyard]. We do not agree with your position that the breach is merely "technical".
>
> 4. It is also significant that the disclosure of the Financial Statements occurred at a time when [Baker] was negotiating the purported sale of its indirect shareholding in [PPL Shipyard] to Yangzijiang. Given this, it is clear that you are conflicted in your dual role as a director of both [PPL Shipyard] and [Baker].
>
> 5. This conflict appears to have impacted your role as a director of [PPL Shipyard] in other ways also. For instance, you, together with the other [PPL Holdings] nominated directors, have refused and/or neglected to attend directors meeting (sic) after 28 April 2010. This is despite 2 directors meetings having been called. This orchestrated attempt by you and the other PPL Holdings nominated directors to stifle the operation of the Board of [PPL Shipyard] is clearly not in the best interests of [PPL Shipyard].
>
> 6. In light of the above and after consideration of how to appropriately discharge our fiduciary duties, we have concluded that on balance and to be prudent, notwithstanding the appointment of Wong Partnership, it is in the best interests of [PPL Shipyard] to require you to vacate your office as a director. We are of the view that your position has become untenable by virtue of your admitted conduct and the present conflict. Accordingly, we, as a majority of the directors of [PPL Shipyard], hereby request that you vacate your office as a director of [PPL Shipyard]. This request is made pursuant to Article 90(g) of the Memorandum and Articles of Association of [PPL Shipyard] and has the effect of vacating your office as a director of [PPL Shipyard] as at the date of this letter.

143 This letter from the six Sembcorp directors purported to remove Aurol from his position as director of PPL Shipyard on the basis of Article 90(g) of the Consequential Articles. This Article provides:

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

144 The defendants submitted that the Sembcorp directors' reliance on Art. 90(g) was misconceived because it ran contrary to the overall scheme of the Articles on two counts. First, a director could only be appointed or removed with the consent of the shareholder who had nominated him (and there were only two shareholders, Sembcorp and PPL Holdings). The defendants cited Articles 76A, 85 and 86(2) in support of this. Article 86(1) is included for the fuller picture:

> 76 A. Subject to the Act and unless otherwise agreed by the members, the Board shall comprise six Directors of whom three Directors shall be appointed by Sembcorp (the "Sembcorp Directors") and three Directors shall be appointed by PPLH (the "PPLH Directors") so long as they shall each hold fifty per cent (50%) of the shares for the time being in the capital of the Company.
>
> ...
>
> 85. The company may by ordinary resolution remove any Director notwithstanding anything in these Articles or in any agreement between him and the Company (but without prejudice to any right to damages for termination of such agreement not in accordance with the terms thereof), and may, if thought fit, by ordinary resolution, appoint another person in his stead.
>
> 86(1). Subject to Article 86(2), the Company may, without prejudice to the powers of the Directors under Article 87, from time to time, by ordinary resolution appoint new Directors either to fill a casual vacancy or as an addition to the existing Directors, and change any minimum or maximum number of Directors specified in Article 76, or prescribe such minimum or maximum if there be none so specified.
>
> 86(2). Notwithstanding Article 86(1), any vacancy on the Board will be filled by a Director nominated by the member that nominated the Director who is retiring or ceasing for whatever reason to be a Director. Each of the members agree that they shall cause their nominee members of the Board and their representatives at a general meeting to support and vote for the other member's nomination or removal upon receipt of advice in writing to such effect from the member nominating or removing such Director.

145 Second, that the PPL Shipyard board would not have the requisite quorum to act without the participation of at least one director from PPL Holdings. The defendants cited Articles 98 and 101(a) in support of this:

> 98. The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction

of business. Until otherwise determined by the Board, two Directors shall constitute a quorum provided that at any such meeting at least one PPLH Director and one Sembcorp Director shall be present otherwise there shall be no quorum. At any meeting of the Board, provided a quorum is present, every Director shall be entitled to one vote save that (a) if less than three PPLH Directors are present, all the PPLH Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of PPLH Directors present, and (b) if less than three Sembcorp Directors are present, the Sembcorp Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of Sembcorp Directors present. If within half an hour of the time appointed for the holding of a Board meeting the quorum specified above is not present, the meeting shall stand adjourned to the seventh working day thereafter at the same time and place. At such adjourned meeting, the required quorum shall be as stated above. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman of the meeting shall not have a second or casting vote...

101(a) A resolution in writing signed by all of the Directors for the time being shall be as effective for all purposes as a resolution of the Directors passed at a meeting duly convened, held and constituted. A written notification of confirmation of such resolution in writing sent by a Director shall be deemed to be his signature to such resolution in writing for the purposes of this Article. Such resolution in writing may consist of several documents, each signed by one or more Directors.

146 According to the defendants, in the light of the above Articles, and as a matter of purposive interpretation, the operation of Article 90(g) should be impliedly subject to two qualifications, *viz*, that a director can only be removed with the consent of the shareholder who nominated him and the phrase "majority of the other directors" must include at least one director nominated by PPL Holdings and by Sembcorp. The exercise which the defendants invited this court to undertake is similar to that which Lord Hoffmann in *Belize* undertook. His Lordship in *Belize* had to consider whether a certain term should be implied into a company's articles of association, not a contract, and the eventual implication of the term was grounded on the basis of the overall scheme of the articles, not of close consideration of the particular factual matrix before the Privy Council. The implication of terms into articles of association as compared to contracts is not necessarily a different exercise and especially not in this case. Here, the Consequential Articles were modified to take into account the provisions of the JVA and the Consequential Articles were essentially the product of an agreement between Sembcorp and PPL Holdings as to how the relationship between themselves in the joint venture company, PPL Shipyard, was to be governed.

147 The first point to note is that the scheme of the Articles is such that the directors of the PPL Shipyard board can only exercise their powers as directors at a meeting with the requisite quorum. Article 102 states:

102. A meeting of the Directors at which a quorum is present shall be competent to exercise all the powers, authorities and discretions for the time being vested in or exercisable by the Directors generally.

A meeting of directors at which a quorum is present shall be competent to exercise directorial powers. It follows that a meeting of directors without quorum shall not be competent to exercise directorial powers. It cannot be that the Consequential Articles took the trouble to specify the requirements for quorum if no quorum was required anyway for the directors to exercise their powers. If it were otherwise, Art 102 would be rendered meaningless.

148 The second point to note is that the individuals who constitute the board of PPL Shipyard only have power in relation to PPL Shipyard insofar as they act in their capacity as directors. If they are also shareholders, they can also act in their capacity as shareholders but that is not relevant to this issue. The only power they can exercise is directorial power. They have no other inherent or intrinsic power and their power flows from the holding of their office. Therefore, the only actions they can take in relation to PPL Shipyard must be a result of the exercise of that directorial power. There is no other nexus between their actions and PPL Shipyard.

149 Logically, therefore, the individuals on the PPL Shipyard board can only act in relation to PPL Shipyard in their capacity as directors. Their actions as such directors can only be effected at a meeting with the requisite quorum.

150 How does this relate to Art 90 (g) which states that a director can be removed if he is requested to do so in writing by a majority of the other directors? The removal of a fellow director unquestionably falls within the ambit of an exercise of directorial powers in relation to PPL Shipyard. Such removal is a question of the management of the PPL Shipyard board and thus of the management of PPL Shipyard itself. If the other directors can only exercise their directorial powers at a meeting with the requisite quorum, then such a meeting must be constituted in order to remove a fellow director.

151 The requirement of writing should not be allowed to distract and should not be thought of as a requirement that would legitimise any purported action by the directors regardless of whether the requirement of quorum was complied with. The requirement of writing here does not appear to take on the significance that it would, for example, in relation to contracts for the sale of land.

152 Put simply, a director of PPL Shipyard could only be removed by his fellow directors if they took such action pursuant to a meeting at which there was the requisite quorum. Both cl 5.3 of the JVA and Art 98 of the Consequential Articles are clear that quorum is constituted by the presence of at least one PPL Holdings-nominated director and one Sembcorp-nominated director.

153 On that note, although the overall outcome of this reasoning may be favourable to the defendants, I am not inclined to granting them the specific reliefs that they asked for. I do not think it necessary to imply that the phrase "the majority of the other directors" must include at least one PPL Holdings-nominated director because it is possible that there could be a meeting at which the requisite quorum was constituted and a majority of directors took the action to remove a director but such majority did not include at least one PPL Holdings-nominated director. Neither could I imply that a director could only be removed by the shareholder that had nominated him as the overall scheme of the Articles did not appear to point in that direction.

154 In the result, the letter from the six Sembcorp directors, written without a directors' meeting with the requisite quorum, did not constitute a valid request for Aurol to vacate his office as director of PPL Shipyard. PPL Shipyard should not be allowed to treat him as having vacated his office. I do not think it necessary to grant the injunctive reliefs asked for by the defendants in respect of Chang and/or Douglas Tan, that this court should prevent by injunction PPL Shipyard from requesting Chang and/or Douglas Tan to vacate their directorships and/or treating Chang and Douglas Tan as having so done except with the defendants' consent. It should suffice to hold that any removal of any director has to be done at a board meeting with the requisite quorum.

155 One final point that was raised by the defendants in relation to this issue was whether Aurol's service agreement as Executive Director of PPL Shipyard had been validly terminated. This termination was purportedly effected by a letter from Mr Tang Kin Fei (a Sembcorp-nominated director) on

11 June 2010, on the basis that Aurol's appointment as an executive of PPL Shipyard was dependent on his remaining as a director. In the light of my findings above, Aurol's executive appointment was not validly terminated because he was not validly removed as a director of PPL Shipyard.

The second issue in counterclaim: Whether the resolutions passed at the PPL Shipyard board meeting of 28 April 2010 were valid

156 The defendants claimed that certain resolutions passed at a meeting of the PPL Shipyard board on 28 April 2010 were invalid. These resolutions purported to [note: 17] :

(a) resolve that the [PPL Shipyard board] would appoint a new designated Manager(sic) Director to phase in and succeed Mr Douglas Tan;

(b) appoint Mr Lee [Fook Kang] as Chief Financial Officer of PPL Shipyard;

(c) appoint Ms Tan Yah Sze and Ms Kwong Sook May as Joint Company Secretaries to replace Ms Jeanni Aw as Company Secretary...

157 The defendants submitted that these were invalid for three reasons. First, they were purportedly passed on the basis that the Sembcorp-nominated directors had six votes and the PPL Holdings-nominated directors had three votes. This, according to the defendants, was erroneous. Second, the resolutions were not passed *bona fide* in the interests of PPL Shipyard. Third, and in the case of resolution (c) only, the Consequential Articles did not give the PPL Shipyard board any power to appoint joint company secretaries.

Whether the resolutions are invalid on the grounds that sembcorp improperly asserted its six director votes to PPL Holdings' three

158 In relation to their first reason, the defendants relied on cl 5.3 of the JVA, the relevant portion of which provides:

> At any meeting of the [PPL Shipyard board], provided a quorum is present, each party will have three (3) votes irrespective of the number of directors present.

In response, Sembcorp referred to Art 98 of the Consequential Articles, the relevant part of which states:

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

Sembcorp's point was that Art 98 restricted the provision for three votes each to Sembcorp-nominated directors and PPL Holdings-nominated directors to the situation where there were less than three directors from each side present. If one side had more than three directors present, those directors would be entitled to one vote each.

159 The defendants then pointed to cl 31.2 of the JVA, which provides:

> In the event of any conflict between the terms of [the JVA] and the Memorandum and Articles of Association, the terms of the [JVA] shall, as between the parties hereto, prevail...

On the basis of this provision, the defendants submitted that any provision in the JVA would prevail at all times over any contradictory provision in the Memorandum and Articles.

160 The keyword here is "conflict". If and only if the terms of the JVA conflict with the words of the Consequential Articles, the terms of the JVA would prevail. The question here then is whether cl 5.3 and Art 98 conflict with each other. Sembcorp's contention would mean that on a plain reading of Art 98, it is only if there are less than three directors present from each party, that each party will be entitled to three votes. If more than three directors are present, then each director will be entitled to one vote each. According to the defendants, however, on a plain reading of cl 5.3, *irrespective of* the number of directors present, each party will be entitled to three votes. This means that the number of directors present does not matter because the entitlement of each party would be three votes in any event. On the interpretation that the defendants advanced, even if the number of directors exceeded three, each party would still be entitled to three votes. On the defendant's case, therefore, the apparent difference between the two provisions relates to what should happen in the event that more than three directors from a party are present at the meeting.

161 The objective of cl 5.3 of the JVA is to preserve adequate representation for both parties on the PPL Shipyard board. Clause 5.3 itself states the requirement for quorum of a board meeting, that there must be two directors present, with at least one director from each party. The concern here appears to be that each party should have someone to represent its interests and ensure that board resolutions are not passed in its absence. In order for such concerns to be protected, each party is given three votes. Bearing in mind that at the time the JVA was signed in 2001, each party could only nominate three directors to the board, it is clear that each party was afforded the maximum amount of representation it was entitled to and that one party could not act unilaterally if the other party objected. This would be so even if the first party had all three of its directors present and the other party had only one in attendance.

162 It could not be that if there are more than three directors present from one party, something not contemplated anyway when the JVA was signed, that that party would by sheer number of voters be able to override the other party's three votes. It is the number of votes given to each party that matters, not the number of voters present. Read in their proper context, I see no conflict at all between cl 5.3 and Art 98. Both are directed at the same outcome – three votes on each side irrespective of the number of voters present from any side. The only difference was in the expressions used, with the essence of the agreement having been captured by cl 5.3 in a more succinct way than in Art 98. The resolutions of 28 April 2010, insofar as they purported to be passed by six votes against three, would therefore be invalid.

Whether the resolutions were passed *bona fide* in the interests of PPL Shipyard

163 In respect of its second reason, the defendants submitted that the relevant question to be asked is whether the Sembcorp directors were acting in what they honestly believed to be the best interests of PPL Shipyard, or whether, as the defendants contended, they were acting in order to scuttle the deal between Baker and Yangzijiang.

164 At this point, Sembcorp contended that the defendants were essentially alleging that the Sembcorp-nominated directors, in not acting *bona fide* in the interests of PPL Shipyard, had breached their fiduciary duties towards the company. Sembcorp claimed that the defendants lacked standing to seek relief in respect of the alleged breach of fiduciary duties and only the company would be the

proper plaintiff to such an action. This principle was enshrined in *Foss v Harbottle* (1843) 2 Hare 461: 67 ER 189 and applied in Singapore in *Ng Heng Liat and ors. v Kiyue Co Ltd and anor* [2003] 4 SLR(R) 218. The defendants in this suit were mere shareholders of the company and were not bringing a derivative action on behalf of PPL Shipyard under s 216A of the Companies Act.

165 I agree with Sembcorp that the duty in issue is owed by the directors to the company on whose board they sit. Fiduciary duties are owed to both the company and to their fellow directors. In this suit however, PPL Holdings and E-Interface were neither and thus lacked the requisite standing to enforce this duty. On this basis, the defendants' claim for relief on this point fails.

Whether resolution (c) is invalid on the ground that the Consequential Articles did not give the PPL Shipyard board any power to appoint joint company secretaries

166 The defendants claimed that under the Consequential Articles, the Sembcorp directors, or the board of PPL Shipyard in general, had no power, to appoint two joint secretaries for PPL Shipyard. Rather, the board was constrained to appointing one secretary. According to the defendants, this was because Arts 109 and 110 provide:

> 109. The Company shall have a Secretary. The Secretary and any joint secretaries or deputy or assistant secretary or secretaries may be appointed by the Directors for such term... A Director may be the Secretary
>
> 110. A provision of the Act or these regulations requiring or authorising a thing to be done by or to a Director and the Secretary shall not be satisfied by its being done by or to the same person acting both as Director and as, or in place of, Secretary.

From the language of the Articles, the defendants claimed, it was obvious that a clear distinction was drawn between "Secretary" and "joint secretaries" and that it should not be possible for the directors to appoint two persons as joint secretaries.

167 With respect, it is difficult to see the logic behind the defendants' contention here. As Sembcorp rightly pointed out, Art 109 itself contemplated the appointment of joint secretaries by the directors. The board could appoint one or more and designate them in the way it deems appropriate. The defendants' challenge on this point similarly fails.

168 The resolutions of 28 April 2010, insofar as they purported to be passed by six votes against three, are invalid. The defendants' challenge to these resolutions fails on the other two grounds raised above.

The third issue in counterclaim: Whether certain resolutions passed at board meetings in May and June 2010 were valid

169 The defendants sought a declaration that the resolutions passed at certain board meetings of PPL Shipyard be declared invalid. These meetings took place on 11 May, 3 June, 14 June and 21 June 2010 ("the impugned board meetings"). According to the defendants, the quorum required by Art 98 was not obtained because none of the PPL Holdings-nominated directors attended those meetings, contrary to the requirement that at least one director from each party be present. This prayer for relief was related to the decisions of Woo Bih Li J in *Tang Kin Fei v Chang Benety* [2011] 1 SLR 568 and of the Court of Appeal in *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274 which overturned Woo J's decision in part.

170 In the above cases, these prayers for relief were before the court [note: 18] :

1. A declaration that the resolution at the board meeting held on 11 May 2010 appointing Wong Partnership to advise and act for [PPLS] is valid.

2. Further or in the alternative, a declaration that the resolution at the board meeting held on 3 June 2010 confirming the appointment of Wong Partnership to advise and act for [PPLS] is valid.

3. A declaration that the resolutions at the board meeting held on 3 June 2010 that [PPLS] instruct Wong Partnership to:

(a) investigate the allegations made by [SCM] in a letter dated 10 May 2010 and addressed to the board of directors of [PPLS] ('Allegations');

(b) advise [PPLS] how it should respond to the Allegations;

(c) provide general advice on any issue relating to the dispute between its shareholders; and

(d) provide general advice on any issue relating to the continued operations of [PPLS] -

are valid.

4. A declaration that the resolution at the board meeting held on 14 June 2010 appointing Wong Partnership to enter an appearance on behalf of [PPLS] and accept service on behalf of [PPLS] of any documents served in the action in Suit No 351 of 2010/H ('the Suit') in the High Court of the Republic of Singapore is valid.

5. A declaration that the resolutions at the board meeting held on 21 June 2010 are valid, namely:

(a) That Wong Partnership's appointment be expanded such that they may:

i. do all such things arising from or related to the Suit to protect the interests of [PPLS]; and

ii. provide advice to [PPLS] on how it should respond to the allegations made against it in the Suit.

(b) That, as an interim measure and pending contrary suggestions from Wong Partnership, the Chairman of [PPLS] or any other person nominated by the Chairman of [PPLS] is hereby authorised by [PPLS] to provide instructions to and receive advice from Wong Partnership on the Suit. Douglas Tan may comment on or add to the instructions provided to Wong Partnership. However, where the instructions of Douglas Tan conflict with those of the Chairman of [PPLS] or the Chairman of [PPLS'] nominee, the instructions of the Chairman of [PPLS] or the Chairman of [PPLS'] nominee will prevail.

171 Woo J granted an order in terms in respect of certain prayers (with no order on prayer 1 on the basis that its substance was covered by the resolution in prayer 2, at [41]), thus holding that those resolutions should be declared valid. Chang appealed and the Court of Appeal agreed with him, to the effect that those resolutions which Woo J declared valid should not have been, thus refusing to validate those resolutions. The eventual outcome was that Mr Tang Kin Fei was not entitled to any of

the reliefs he sought and none of those resolutions was declared valid.

172 On that basis, the defendants sought before me declarations that the resolutions referred to above were invalid. They argued that the earlier decisions were made on the basis that Art 98 was subsisting and operative and I decide that Art 98 was indeed so, such relief should be granted. Sembcorp's reply to this was that the JVA and Art 98 were no longer valid and did not subsist. It contended that the parties and the issues in both sets of proceedings were different and that therefore no question of issue estoppel arose.

173 While acknowledging that the parties to the proceedings were different, in that the directors Chang and Mr Tang Kin Fei were before the courts in the previous set of proceedings but the shareholders of PPL Shipyard are before this court, I was of the opinion that the issues decided by Woo J and the Court of Appeal were materially the same as the issues before me. I may not be bound by those decisions in the estoppel sense but I saw no reason why they should not apply since substantially the same facts and issues were canvassed in the previous proceedings and the present one. This is especially so in the light of my decision above (see [99] to [124]) that the First Implied Term could not be read into either the JVA or the SA and that the equality provisions, including Art 98, subsisted.

174 However, the point of concern was whether the defendants, as mere shareholders of PPL Shipyard, have sufficient standing to seek such declaratory relief. Notwithstanding that the earlier set of proceedings had already decided the merits of this issue, the question here was whether the defendants here were in a position to apply for orders consequential upon and further to that decision. On the same basis as my decision above on the second issue (see [163] to [165]), I would decline the relief claimed by the defendants. If I am wrong on the question of whether the defendants have sufficient standing here, I would grant the declaration sought as the impugned board meetings were clearly conducted without the requisite quorum.

The fourth issue in counterclaim: Whether the conflicts between the JVA and the Consequential Articles should be corrected

175 The defendants included in their Defence and Counterclaim (Amendment No. 3) a document known as Schedule 2, which set out the various provisions in the JVA and the Consequential Articles which were allegedly in conflict with each other. On the basis of cl 31.2 of the JVA (see [159] above), the defendants contended that the provisions of the Articles should be corrected to bring them in line with the JVA.

176 However, a detailed examination of the alleged conflicts between the words of the provisions is not a matter that should involve the court. It would suffice to say that cl 31.2 is a clause that subsists and that it still governs the relationship between the parties. The parties should therefore correct any conflict between the provisions by themselves as it is really a contractual matter between them.

177 It should also be noted that in Schedule 2, the first set of provisions which the defendants requested this court to bring in line with each other is cl 5.3 of the JVA and Art 98. For the reasons stated above (see [158] to [162]), these provisions are not in conflict with each other.

The defendants' claims under s 216 of the Companies Act

178 In respect of the first, second and third issues in the counterclaim, *viz*, the board resolutions of 28 April 2010 and the impugned board meetings, the defendants also prayed for relief under s 216 of

the Companies Act which is a provision for relief for minority shareholders on the ground of oppression.

179 There is no reason to grant any further relief here. The prayer for relief under s 216 of the Companies Act could not be a device to circumvent the defendants' lack of standing for the second and third issues. In respect of the second issue, the defendants have not shown how the resolutions were unfair or oppressive. In respect of the third issue, the substantive issues have already been decided by Woo J and the Court of Appeal.

Conclusion

180 For the reasons set out above, I dismiss Sembcorp's claims entirely and allow the defendants' counterclaim in part. Sembcorp is to pay the defendants costs of this action and of the counterclaim, with appropriate deductions to be made for the issues which the defendants have failed in.

181 I make no order as to costs in respect of PPL Shipyard in the counterclaim as its participation in the proceedings was essentially confined to that of holding a watching brief on the developments. It did not call any evidence and did not cross-examine any witness during the trial. Its closing submissions have not changed or added to the issues in contention between Sembcorp and the defendants. The costs of Wong Partnership for acting for PPL Shipyard will have to be resolved between the law firm and Sembcorp or the Sembcorp-nominated directors on the board of PPL Shipyard.

[note: 1] Statement of Claim (Amendment No. 3) ("SOC No. 3") at paras 10 - 12

[note: 2] Defence and Counterclaim (Amendment No. 3) ("Defence No. 3) paras 16 - 17

[note: 3] Memorandum from Chang to TKK dated 27 February 2001, 1 Agreed Bundle ("AB") p198

[note: 4] Sale and Purchase Agreement, 1 AB pp 233-259

[note: 5] SOC No.3 paras 25-30

[note: 6] Defence (No. 3) para 48

[note: 7] SOC (No. 3) pp 24-25

[note: 8] Defence (No. 3) paras 55-56

[note: 9] See in general, paras 533 to 587 Plaintiff's Closing Submissions ("PCS")

[note: 10] See generally, paras 588 to 621 PCS

[note: 11] See generally Defendants' Closing Submissions ("DCS") paras 264-302

[note: 12] See generally PCS paras 622 to 660

[note: 13] 2AB pp 561-562

[note: 14] 11 AB pp 3311–3312

[note: 15] 11 AB pp 3272–3273

[note: 16] AB 13 pp 3693 - 3695

[note: 17] Defence and Counterclaim (Amendment No. 3) head of claim (8) at p 97

[note: 18] *Tang Kin Fei v Chang Benety* [2011] 1 SLR 568 at [2]

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