Econ Piling Pte Ltd v NCC International AB
[2008] SGHC 26

Case Number : OS 694/2006

Decision Date : 25 February 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Tan Hsuan Boon (Wee Swee Teow & Co) for the plaintiff; Balachandran s/o Ponnampalam (Robert Wang & Woo LLC) for the defendant

Parties : Econ Piling Pte Ltd — NCC International AB

Partnership

Contract

25 February 2008

Chan Seng Onn J:

Introduction

1 The plaintiff, Econ Piling Pte. Ltd. ("Econ"), (formerly known as Econ Corporation Limited) is a company incorporated in Singapore. The defendant, NCC International Aktiebolag ("NCC"), is a company incorporated in Solna, Sweden. Both companies are in the business of construction.

2 The main issue in dispute before me is whether Econ and NCC ("the parties") entered into a partnership, and if so, then whether they subsequently agreed to dissolve the partnership. NCC contends that there is no partnership and there is no agreement to dissolve the partnership. Econ asserts to the contrary that the partnership exists and the partners have reached an agreement to dissolve the partnership.

The legal principles involved

3 Before going into the facts, it will be useful to state the relevant legal principles to be applied to determine the issues in dispute.

Existence of partnership to be inferred from all the circumstances of the case

4 The Court of Appeal in *Chua Ka Seng v Boonchai Sompolpong* [1993] 1 SLR 482 held that whether a partnership existed is to be determined by taking all the circumstances together, not attaching undue weight to any one of them, but drawing an inference from the whole. In *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association & Anor* [2000] 4 SLR 137, the Court of Appeal accepted that all the surrounding circumstances should be taken into account in the determination of the existence of a partnership. One of the factors which the Court of Appeal considered relevant (at [34]) was "[t]he label used by the parties, particularly in the legal documents." Other relevant factors include the parties' conduct and, in particular, the way in which they have dealt with each other and with third parties, and whether those dealings with third parties are conducted with the knowledge or authority of the other alleged partners: see para 7-23 of *Lindley & Banks on Partnership* (Sweet & Maxwell, 18th Ed, 2002) ("*Lindley & Banks*"). While all these factors

are relevant, they are by no means conclusive in determining the issue which is one of mixed fact and law.

5 Hence, the true nature of the business relationship has to be objectively inferred from all the relevant facts and surrounding circumstances, including the manner in which the parties in that business relationship have conducted their business affairs with each other and with third parties.

Objective test to ascertain whether agreement is reached

6 The central issue in the case of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 ("*Tribune Investment*") was whether or not the parties had entered into a valid contract of sale and purchase. The parties did not sign any formal written agreement. The Court of Appeal held at [39] and [40] that:

> The existence of any contract must thus be culled from the written correspondence and contemporaneous conduct of the parties at the material time…..Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring consensus ad idem is objective. Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other.

7 In *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 ("*Projection v The Tai Ping*"), the central issue before the Court of Appeal was whether the parties, who were involved in continuing negotiations over a period of time, had reached a compromise agreement. The Court of Appeal held (at [15]) that "[i]t is settled law that in determining whether the parties have reached agreement, the court applies the objective test." The Court of Appeal agreed (at [16]) with the following observations expressed by Lord Denning MR:

> …I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards. (in *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5 at p 10)
>
> The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them." (in *Butler Machine Tool Co v Ex-Cell-O Corporation (England)* [1979] 1 All ER 965 at p 968.)

8 In a similar vein, VK Rajah JC stated in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258 ("*Midlink Development*") at [48] that:

> Acceptance in a contractual setting must be ascertained objectively. Acceptance can be signified orally, in writing or by conduct. When there is a history of negotiations and discussions,

the court will look at the whole continuum of facts in concluding whether a contract exists.

9 The legal principles are reasonably clear and neither counsel has taken any issue with them. Where they differ is in the conclusions to be drawn from the application of those principles to the facts. I will now set out the background and the relevant facts chronologically as far as possible. It is also more convenient for me to analyse the facts and state my findings along the way, rather than leave that to the end after all the facts have been presented.

Formation of joint venture

10 Econ and NCC entered into a joint venture agreement dated 13 May 2002 ("the JVA") to jointly tender, and if successful, to participate in a joint venture to construct and complete the civil works for Contract No. 822 of the Land Transport Authority ("LTA"). This LTA contract ("the Contract") is for the construction and completion of the MRT stations at MacPherson and Upper Paya Lebar, and the tunnels at this section of the Circle Line.

11 Clause 5.1 of the JVA states that the participating interest of NCC and Econ shall be 45% and 55% respectively. Under the JVA, there is to be a management board, comprising 4 members (with each party appointing 2 members), to exercise overall control and administration of the joint venture. "Joint Venture" is defined in the agreement to mean the association of the parties entering into the JVA. Clause 25.1 makes clear that the JVA does not constitute a partnership or other form of company between the parties under any applicable law. Notwithstanding the fact that the tender will provide for the joint and several liability of the parties to LTA for the performance of the Contract, clause 25.1 provides that as between themselves, each party shall at all times be acting as an independent business entity in the ordinary course of business.

12 However, it is important to note that clause 25.1 does not preclude the parties to the joint venture from *subsequently agreeing* to operate as a partnership. Hence, I do not think that NCC can rely on this clause to argue that no partnership could ever come into existence between the parties. As I will explain later, I am of the view that the parties entered into a partnership *after* they secured the Contract.

Award of the Contract

13 LTA awarded the Contract to the joint venture on 1 August 2002 for a contract sum of $338,601,511.06 on the basis that "*the partners of the joint venture shall be jointly and severally liable to the Authority for the punctual, true and faithful performance and observance of the Contract.*"

Registration of the partnership as "ECON-NCC J.V."

14 Two weeks after the award, NCC and Econ registered a partnership called "ECON-NCC J.V." with the then Registry of Companies and Businesses ("ROC"), whose functions have been taken over by the Accounting and Corporate Regulatory Authority of Singapore ("ACRA"), to undertake "Mixed Construction Activities and Infrastructure Engineering Services". No 10B Circuit Link Singapore 378962 is the registered place of business of the partnership. The registration number given for the partnership is 52975539D. NCC and Econ are the registered owners. The registered commencement date of the partnership is 13 August 2002 and the registration date is 14 August 2002.

15 Mr Per Nielsen ("Nielsen"), a director of NCC, had signed an application form to register the business with the ROC under the Business Registration Act (Cap 32, 2001 Rev Ed) declaring on behalf

of NCC that the statements made in the application form were true and correct. I note at this juncture that there is no affidavit from Nielsen to state that he did not know what he was signing or that he did not understand that he was in fact applying for the partnership to be registered on behalf of NCC. Instead, the financial controller of ECON-NCC J.V. and NCC, Mr Christer Andersson ("Andersson"), filed an affidavit on 19 November 2007 on behalf of NCC to assert (at paragraph 26) that Mr Per Rosengren ("Rosengren"), the only key senior staff in Singapore at the material time in 2002, did not seem to have been informed of the significance of the registration and it appears that he did not appreciate the nature of the registration. Hence, when ECON-NCC J.V. was registered, NCC was not aware of the effect of such registration and NCC thought that such registration was a procedural requirement for the parties to do business in Singapore. However, Rosengren, who has since left NCC, did not file any affidavit to support these assertions of Andersson that concern him. Not only did I give little or no weight to Andersson's rather low opinion of Rosengren's competence in this matter, I also noted that it was not Rosengren but Nielsen who signed the application form to register the partnership. Andersson has not, on behalf of NCC, made any assertion that Nielsen, as a director of NCC, also did not know what he was signing when he (Nielsen) made the application to ROC together with Mr Geoffrey Yeoh Seng Huat ("Geoffrey Yeoh"), a director of Econ, to register the partnership, "ECON-NCC J.V.", with ROC. Even if such an assertion were made, I would find it hard to believe that Nielsen, a director of NCC, did not know or failed to fully appreciate the legal significance of making an application to ROC to register the partnership.

16 Andersson further alleged in his affidavit that NCC was "entering into a contract for the first time in Singapore", thereby suggesting that NCC was ignorant of the laws in Singapore. However, I noted that NCC had previously entered into a joint venture with Woh Hup (Pte) Ltd and Shanghai Tunnel Engineering Co Ltd, to carry out another portion of the construction work on the MRT Circle Line under LTA Contract 825. This joint venture was registered on 31 August 2001 as a partnership, "WH-STEC-NCC JV", with Woh Hup (Pte) Ltd and Shanghai Tunnel Engineering Co Ltd as the other two partners. The registration of WH-STEC-NCC JV took place almost one year *prior to* the registration of ECON-NCC JV as a partnership. Rosengren was also NCC's representative in the WH-STEC-NCC JV partnership. As such, it is not likely for Rosengren to be unfamiliar with the registration of a joint venture as a partnership in Singapore.

17 I accept the unrebutted affidavit evidence of Mr Joseph Sin Kam Choi ("Joseph Sin"), the managing director of Econ, filed on 17 December 2007 at paragraph 28, that after the Contract was secured from LTA, he personally communicated to Rosengren the need to register a partnership to carry out the works for the following reasons:

(a) We needed one ACRA entity to register with the Inland Revenue Authority of Singapore ("IRAS") for Goods and Services Tax ("GST"); and

(b) Since NCC was a foreign entity, LTA would have to withhold a percentage of payment (according to the prevailing tax rate, which I understood was about 15% at that time) to NCC as withholding tax whenever payments were due, if LTA made payment to NCC and Econ separately. To avoid such withholding tax, the Econ-NCC J.V. had to be registered in the Singapore jurisdiction, and we agreed to register it as a partnership.

18 Joseph Sin averred that Rosengren naturally agreed as the second of the reasons was in fact for NCC's benefit.

19 In the circumstances, I am inclined to believe that NCC understood the legal implications of registering ECON-NCC J.V. as a partnership with ROC.

Agreement to reduce Econ's interest to 0.1% due to its financial difficulties

20 Due to the financial difficulties faced by Econ, the parties entered into an agreement dated 22 May 2003 ("the Variation Agreement") wherein Econ transferred 54.9% of its interest to NCC, leaving Econ with a reduced interest of 0.1% only. Pursuant to the Variation Agreement, Econ was removed as the "lead company".

21 NCC is entitled to appoint the chairman of the management board with a casting vote. Decisions are carried if approved by parties with an aggregate interest of more than 50%. Effectively, NCC has full control of the ECON-NCC J.V.

Pressure from LTA for NCC to take over the Contract

22 On 11 December 2003, Mr Rajan Krishnan, the LTA engineer wrote to inform NCC that "*In the event that your joint venture partner ceases business the Authority would continue with the Contract with NCC on the same terms and conditions of the Contract*."

23 The concern of LTA was palpable. Matters escalated upwards within LTA. On 12 January 2004, Mr Chua Chong Kheng, LTA's Director, Contracts and Process, wrote to remind Rosengren, the Project Director, as follows:

> As you are well aware, a provisional liquidator was appointed over Econ Corporation Limited ("Econ") on 26 November 2003. Further, we understand that the High Court has appointed an interim judicial manager over Econ on 6 January 2004.
>
> Under clause 67.1.2 of the Conditions of Contract, in the event a joint venture partner appoints a provisional liquidator or is placed under judicial management, the Authority is entitled to treat the employment of the Contractor as being determined or continue with the Contract with NCC International AB on the same terms and Conditions of the Contract.
>
> In the premises, we wish to put on record the Authority expressly reserves its rights under the Contract.

24 The pressure piled up when LTA wrote again to ECON-NCC J.V. on 31 January 2004 to enquire from Rosengren the status and the way forward with the interim judicial manager.

25 According to NCC, LTA was taking up the issue of the novation of the Contract with NCC. Clearly, LTA wanted to hold NCC responsible for the whole Contract and hence, the novation was required. LTA forwarded to NCC their usual form of novation, which was eventually accepted with some modifications by NCC and Econ. Andersson admitted that NCC had no choice but to enter into the Deed of Novation as a result of Econ's insolvency. I do not believe that NCC has any other option given the right available to LTA to compel NCC to take over the whole Contract, if necessary. Once the main contract with LTA is novated, there is also not much leeway remaining, but for NCC to arrange for the sub-contracts to be novated subsequently from Econ to them.

26 The Deed of Novation of the Contract was finally executed on 25 July 2005 after much delay. The signatories are LTA, NCC and Econ.

Events leading to the draft Deed of Dissolution of the Partnership ("draft Deed of Dissolution")

27 In the meantime, Econ was placed under interim judicial management by the court on 6

January 2004. By a letter dated 6 February 2004, the interim judicial manager for Econ, M/s Ferrier Hodgson ("FH"), informed NCC's previous solicitors, M/s Goodwins Law Corporation ("Goodwins"), that Econ would no longer participate in the joint venture and would be willing to novate its share to NCC.

28 On 17 February 2004, Goodwins replied that:

> The proper course would be for the **partnership** to be dissolved and the contracts, liabilities and assets to be transferred to our clients.
>
> Accordingly, we forward to you a **draft agreement for the dissolution** of the **partnership** for your consideration and comments. Please let us have your comments by February 20, 2004.
>
> We are awaiting from LTA the draft novation agreement in respect of the Main Contract (C822).
>
> We are presently drafting the novation agreements for the sub-contracts which the **partnership** had entered into with sub-contractors. The draft will be sent to you tomorrow. (emphasis added)

29 In my view, this reply from Goodwins is a contemporaneous document clearly showing that NCC itself recognised and expressly represented, presumably under advice from its solicitors at that time, that the parties were in a partnership, and that NCC was proposing that the partnership be dissolved. By all accounts, it is an admission by NCC against its own interest with regards to the issue in dispute before me. I also note that this letter from Goodwins had been copied to the "clients", and I presume that NCC would have a copy of it. If indeed what Andersson is suggesting in his affidavit is that Goodwins made a mistake of its own accord to rely on what is in the ROC search, then I would have expected NCC to alert Goodwins of its mistake upon receipt of a copy of the letter from Goodwins. None of that apparently happened as no correction was ever made by Goodwins to rectify the mistake (e.g. by clarifying that the business relationship between NCC and Econ is not a partnership but is in reality a joint venture.)

30 I do not believe that Goodwins made any mistake in the letter, describing NCC-ECON J.V. as a partnership, and in stating that it was the partnership (and not the joint venture) that had entered into sub-contracts with sub-contractors and it was the partnership that would have to be dissolved. What is also surprising is that if NCC regards the registration to be a mistake, why is NCC perpetuating that mistake by unilaterally renewing the registration of the partnership with ACRA now that NCC controls the partnership? After Econ relinquished the role of "lead company" to NCC, NCC took steps to renew the registration of the partnership in 2005, 2006 and 2007. This occurred even after Econ's solicitors sent a letter to ACRA dated 11 July 2006 (and copied to NCC's solicitors), stating that the partnership was dissolved, and hence the partnership should not be renewed. It appears to me that NCC wants to continue to represent to the world at large that ECON-NCC J.V. is still doing business as a partnership.

Draft Deed of Dissolution sent to Econ by NCC

31 In this same letter to Econ dated the 17 February 2004, Goodwins enclosed a draft Deed of Dissolution, which bears the following distinctive title at the top of the first page:

> Subject to Contract Until Execution of Deed by both Parties
>
> DEED FOR DISSOLUTION OF PARTNERSHIP

32 The draft Deed of Dissolution prepared by Goodwins defines the partnership to be the "ECON-NCC J.V. registered with the Registrar of Companies and Businesses". It refers to Econ and NCC as "Partners." The JVA dated 13 May 2002 and the Variation Agreement dated 22 May 2003 between Econ and NCC are defined to be the "Partnership Agreements". In the recital, it is stated, *inter alia*, that:

> The **Partners formed the Partnership** for the purpose only of carry out and completing the LTA Main Contract pursuant to the terms of the Partnership Agreements.
>
> ….
>
> The **Partners** have agreed to dissolve the **Partnership** as from the Cessation Date on the terms and in the manner set out herein. (emphasis added)

33 The contents of the draft Deed of Dissolution (drafted by NCC's own solicitors) demonstrate unequivocally that NCC clearly regarded itself as a partner together with Econ in the partnership called ECON-NCC J.V. for the purpose of carrying out and completing the Contract. Otherwise, it makes no sense for NCC's solicitors to draft the Deed of Dissolution in that fashion.

Existence of partnership and conduct of the parties

34 From the totality of the evidence, I find that NCC and Econ have entered into a partnership to carry out the Contract.

35 The submission by counsel for NCC that a partnership did not exist between Econ and NCC is contrary to the following conduct of the parties over the past few years:

(a) Registration of the entity ECON-NCC J.V. with ROC as a partnership on 14 August 2002. Despite Econ's objections, NCC has itself repeatedly renewed the registration of ECON-NCC J.V. as a partnership;

(b) Registration of the partnership ECON-NCC J.V. as a GST registered business with the Inland Revenue Authority of Singapore on 24 August 2002;

(c) Opened and operated bank accounts in the name of ECON-NCC J.V. with signatories from both Econ and NCC, for instance the Svenska Handelsbanken AB, Singapore Branch, account no. 40XXXXXXXX and account no. 40XXXXXXXX to manage the funds and profits of the partnership;

(d) Obtaining permits and licences from the relevant authorities in respect of the Contract in the name of ECON-NCC J.V.;

(e) Making commitments to regulatory authorities like Singapore Power, State Land Authority with regard to the works under the Contract in the name of ECON-NCC J.V.;

(f) Awarding sub-contracts in the name of and on the letter head of ECON-NCC J.V. and dealing with the sub-contractors on that basis. The letters of award to numerous sub-contractors bear the Econ and NCC logos, and also the registered name and registration number of the partnership, "ECON-NCC J.V. (Registration No. 52975539D)". The letters of award define the "Main Contractor" as "ECON-NCC J.V." The "Main Contract" is defined as "Contract C822 of the Circle Line between the Authority and ECON-NCC J.V." Mr Chua Thing Chong ("Chua") (or

alternatively Mr Sik Kay Lee) from Econ and Rosengren from NCC signed the letters of award "*for & On Behalf of ECON-NCC J.V. Pte Ltd*". Chua and Rosengren did not sign them on behalf of Econ and NCC respectively as separate corporate entities. The mere fact that there are two signatories to all the letters of award for the sub-contracts, one representing Econ and the other representing NCC signing for and on behalf of the partnership, does not indicate in anyway that it is therefore no longer a partnership but is a joint venture. The fact that a single partner signing a document may bind the partnership does not mean that the letters of award from the partnership cannot be legally signed by two partners.

(g) In the earlier affidavits filed by Andersson in these proceedings, he was of the view that the sub-contracts were entered into by ECON-NCC J.V., as opposed to the individual corporate entities. For example, at paragraph 7 of his affidavit filed on 29 May 2006, he stated that "*the JV let sub-contracts over a period of time for various parts of the works….. These sub-contracts were entered into by the JV.*"

(h) In NCC's letter to the provisional liquidator of Econ dated 13 December 2003 signed by Rosengren, NCC clearly acknowledged the existence of a partnership which NCC wanted to dissolve with immediate effect as follows:

> Please find attached a letter dated 11 December 2003 from the Land Transport Authority, confirming that NCC is to take over and perform the contract, under the same terms and conditions, in place of the Econ-NCC J.V.
>
> Consequently, the basis and substratum of **partnership** is gone. As we have to perform the contract and not suffer losses, for which Econ will also be liable, we would like to **dissolve the partnership with immediate effect**. We can then make the appropriate arrangements including funding, and carry out the project.
>
> **Attached is the Notice of Dissolution of the partnership** which we request that you sign and return to us urgently.
>
> The date of Dissolution will be the date of the Notice. (emphasis added)

(i) NCC presumably instructed Goodwins to prepare the draft Deed of Dissolution. After the terms of the Deed were agreed between the parties, NCC asked Econ to sign it in March 2004. NCC evidently has been acknowledging all along that a partnership exists between them, and that Econ is entitled to cease its participation in the partnership.

36 There is, in my view, overwhelming evidence that Econ and NCC have conducted themselves as partners and acted on the basis that a partnership existed between them. Although there is no written partnership agreement, they are nevertheless clear on how the partnership assets, liabilities and profits are to be shared in the partnership because they had signed a JVA prior to entering into a partnership for the purpose of undertaking the Contract, which sets out how the assets, liabilities and profits are to be shared.

37 From the various letters of award dated between18 Nov 2002 and 20 Jun 2003, the parties have been consistently and continuously representing to all third parties and to the world at large that they are a partnership, operating under the registered name of ECON-NCC J.V. The parties have conducted their business activities throughout with third parties on the basis that they are a partnership. Sub-contractors including interested parties such as banks and insurers dealing with them, upon verification with ACRA, will also find that Econ and NCC are the owners of the partnership

registered as "ECON-NCC J.V." with the registration number 52975539D. It is also telling from the admission by Andersson at paragraph 37 of his affidavit, that "*(NCC) and (Econ) had to enter into contracts with third parties on the basis that both were jointly liable to the third party*" because "*this approach was dictated by necessity*", which I presume to be business necessity.

38 What NCC is essentially saying is that whenever NCC and Econ conduct their business affairs with third parties, they are a partnership and will be liable to third parties as partners of the registered partnership called ECON-NCC J.V. But as between themselves, they are not a partnership. I find this difficult to accept. In my judgment, they are partners with Econ having a 55% share and NCC having a 45% share in the partnership, and later, with Econ's share in the partnership reduced to 0.1% as a result of the Variation Agreement.

39 Having registered ECON-NCC J.V. with ROC as a partnership, the burden falls on NCC to prove that ECON-NCC J.V. is not a partnership but a joint venture. This NCC failed to do. In fact, the evidence appears strongly tilted towards the business arrangement being a partnership, with their respective interests, rights and duties in the partnership structured along the earlier JVA and later, amended by the Variation Agreement, in so far as these agreements are not inconsistent with the incidents of a partnership. It is also worth noting that in the draft Deed of Dissolution, Goodwins has itself defined both the JVA and the Variation Agreement as the "Partnership Agreements", although counsel for NCC now calls this a mischaracterisation. Against the clear words in the title "Deed for Dissolution of Partnership" and the contents, counsel for NCC wants the court to construe it as a "Deed for Dissolution of a Joint Venture", which I am unable to.

Negotiations subsequent to the draft Deed of Dissolution

40 On 5 March 2004, Goodwins forwarded to FH a draft balance sheet for the ECON-NCC J.V. as at 31 December 2003 as well as a draft Deed of Novation received from LTA which provided that NCC would perform the Contract as if only NCC has been named as the contractor and LTA would release and discharge Econ from further performance of the Contract and accept the liability of NCC to perform the Contract as if only NCC had been named as the contractor in the Contract.

41 M/s Wong Partnership ("Wong"), the former solicitors for Econ, replied on 10 March 2004 that Econ was agreeable to the proposed draft novation agreement. The following day, Wong wrote to Goodwins proposing the following minor amendment to clause 4.1.2 of the draft Deed of Dissolution:

> Econ shall from the Cessation Date be released and discharged from all liabilities, claims, demands and obligations arising out of or in relation to the Partnership save as expressly provided in this Agreement.

42 Goodwins thereafter replied directly to FH, attaching a signed letter dated 19 March 2004 which they were going to issue to Wong but did not, as Wong was no longer acting for the interim judicial manager. The letter to FH reads as follows:-

> As discussed, I forward to you the letter which I was going to issue to WongPartnership today and the attachments, please sign the partnership dissolution agreement and return them to us for signature. If you were to call me, I will send someone to your office to collect them. LTA's Deed of Novation will be sent to you as soon as I receive the signature set from LTA.

43 In the attached letter addressed to Wong, Goodwins agreed with the minor amendment proposed by Wong and in turn proposed other minor amendments including correcting an error in clause 2.3 by substituting the reference to the "Joint Venture Agreement" with the "Partnership

Agreements". Goodwins attached a clean copy of the Deed of Dissolution amended accordingly and stated that:-

> We trust your clients have no objections to the amendments. Please have your clients execute and return the agreement in duplicate for our clients' signature. We would like to collect it on March 22, 2004. If this is not possible, please call the writer.

44 It is also significant to note that through this attached letter, Goodwins informed the interim judicial manager of Econ that:

> We have also changed the definition of "Cessation Date" for dissolution to be on the same date as the agreement.
>
> We will date the agreement the day our clients sign the agreement. This will be the **same day** we collect the signed agreement from you or **the next day**. (emphasis added)

45 Essentially, NCC has been representing to Econ that NCC will, upon receipt of the signed Deed of Dissolution, promptly either on the *same day* or *the next day* execute the same and return it to Econ. Hence, I find that it is reasonable for the parties, in particular Econ, to assume that the negotiations are carried out on that basis.

46 On 24 March 2004, Goodwins followed up with another letter to FH attaching LTA's Deed of Novation (which was earlier approved by Wong on behalf of Econ) for the signature of the interim judicial manager.

47 M/s Wee Swee Teow & Co ("Wee"), the present solicitors acting for Econ, pointed out to Goodwins some technical discrepancies and suggested further minor amendments in two faxes both dated 26 March 2004. On 29 March 2004, Goodwins replied as follows:-

> Thank you for your telefax of March 26, 2004. The following documents are attached for your clients' signature:
>
> 1. LTA's Deed of Novation (in triplicate)
>
> 2. Deed of Dissolution of Partnership
>
> We would like to collect it at 4.00 p.m. today.

Terms in the Deed of Dissolution finally settled by 29 March 2004

48 I examined the "Deed for Dissolution of Partnership" attached to Goodwins' letter dated 29 March 2004, and noted that all the further minor amendments suggested by Wee had been incorporated by Goodwins, thereby indicating NCC's acceptance of the proposed amendments without any further modifications. Further, and importantly, NCC's own solicitors removed the phrase "Subject to Contract Until Execution of Deed by both Parties", which I could only reasonably interpret to mean that the terms of the Deed of Dissolution were finalised and agreed by that time.

49 From the exchange of letters above, not only have the parties conducted themselves on the basis that they were in a partnership, they have also by now come to an agreement to dissolve that partnership on the terms set out in the fresh sets of the Deed of Dissolution attached to Goodwins' letter dated 29 March 2004, addressed and sent by hand to the solicitors of Econ.

50 In my judgment, the parties had on 29 March 2004 finalised and agreed on the terms for both the Deed of Dissolution of Partnership and the Deed of Novation, which NCC asked Econ to execute.

Deeds not executed due to an outstanding dispute

51 The deeds however could not be executed because the parties had not resolved an outstanding dispute relating to Econ's claims in respect of employees' salaries and foreign workers' levies.

52 As evidenced by Goodwins' letter dated 28 April 2004 addressed to FH, the parties finally agreed that the sum of $83,521.17 would be paid to Econ in full and final settlement of any claims whatsoever which Econ may have against ECON-NCC J.V. Goodwins further informed that NCC would issue a cheque to Econ for the said sum in exchange for the Deed of Dissolution of Partnership and the Deed of Novation duly signed on behalf of Econ.

53 On 3 August 2004, Wee wrote to the present solicitors acting for NCC, namely M/s Robert W H Wang & Woo ("Wang") enquiring when NCC would be proceeding with the completion of the Deeds and payment of the agreed sums in respect of outstanding invoices due to Econ. Wang replied querying whether the Deed of Novation could be challenged by any creditor as an undue preference notwithstanding that NCC would be assuming all liabilities, and whether Econ would be applying to the creditors of Econ or the court to approve the novation.

54 Wee responded that Econ would not be obtaining the approval of either the court or the creditors. Wee pressed for payment of the agreed sums in respect of the outstanding invoices due to Econ. From the correspondence, it would appear that Wee had taken the legal position that the judicial manager of Econ is empowered under the Companies Act to "sell or otherwise dispose of the property of the company by public auction or private contract", and as such, there is no additional obligation on the part of the judicial manager to obtain the approval of either the court or the creditors.

55 Wang replied on 2 September 2004 alleging for the first time (after months of negotiations to settle the outstanding claims since January 2004 culminating in the agreement in late April 2004 for NCC to pay Econ $83,521.17 in full and final settlement of any claims whatsoever which Econ may have against the ECON-NCC J.V.) that NCC now had a claim of $19,383.98 against Econ. Wang in this letter confirmed that "*(NCC) agreed to pay the sum of $83,521.17 concession in return for your clients signing the Deed of Novation and the Agreement for Dissolution of the Partnership*." Wang explained that NCC's request for the agreements to be sanctioned by the court or the creditors was to provide certainty in the light of the petition filed by the judicial manager to wind up Econ.

56 On 30 September 2004, Wang wrote to Wee, this time disputing that a sum of $83,521.17 was owed to Econ and stated that in fact, Econ owed NCC a sum of $19,383.98. Wang maintained that whilst NCC was prepared to waive some of its claims and pay Econ $83,521.17 by way of a concession as stated in its letter of 2 September 2004, NCC had recently discovered that Econ did not pay $82,359.34 to NCC being Econ's share of the advance payment bond fee and the tender documents fee. After taking this into account, Wang said that NCC would pay the difference of $1,161.83.

57 On 5 November 2004, the winding up petition was withdrawn after the court sanctioned a scheme of arrangement approved by the creditors of Econ on 30 September 2004. Wee therefore responded on 8 November 2004 that NCC should no longer have any reservations in relation to the execution of the Deeds. Wee demanded payment of the agreed sum of $83,521.17 and reiterated

that:

> …there was an agreement between our respective clients, as set out in a letter from your clients' former solicitors, M/s Goodwins Law Corporation, dated 28 April 2004. According to the agreement, the execution of the Deeds is in exchange for your clients' payment of the sum of $83,521.17 to our client ("the agreed sum"), in full and final settlement of all claims between our respective clients.
>
> Our client has always been prepared to execute the Deeds. In the premises, our client denies that any sums are owed to your clients or NCC International AB. Consequently, any attempt by your clients to off-set any sums whatsoever against the agreed sum will be firmly resisted.

Deed of Dissolution to be dated "23 March 2005" after settlement of sums disputed

58 I accept the affidavit evidence of Mr Timothy James Reid ("Timothy Reid"), the Scheme Manager of Econ, filed on 31 March 2006 at paragraph 20, that the above issues on the outstanding claims between Econ and NCC were finally resolved in March 2005 with NCC agreeing to pay the sum of $19,529.80 to Econ, in exchange for Econ's agreement to proceed with the novation of the Contract and the dissolution of the partnership forthwith. This is plainly evidenced by the exchange of letters between the solicitors on 23 March 2005, whereby:

(a) Wee enclosed the following documents duly executed by Timothy Reid on behalf of Econ:-

(i) Deed of Novation between LTA, Econ and NCC (3 copies)

(ii) Deed of Dissolution of Partnership between NCC and Econ (2 copies)

(iii) Power of Attorney from Econ and NCC (ECON-NCC J.V.) appointing Mr Sven Ulf Forsberg to act for and behalf of Econ and NCC (ECON-NCC J.V.). This Power of Attorney was required by LTA.

(b) Wee asked for "a cheque for $19,529.80 being full and final settlement of this matter."

(c) Wang sent a cheque from NCC made payable to Econ for $19,529.80 "*in full and final settlement of all claims by Econ Corporation Ltd for goods and services provided by them to Econ-NCC J.V.*" in exchange for the Deed of Novation, the Deed of Dissolution and the Power of Attorney, duly executed by Econ.

59 From an objective assessment of the entire negotiations, the conduct of the parties, and all the relevant correspondence between the parties, in particular those on 23 March 2005, I am driven inexorably to the conclusion that the parties had on 23 March 2005 mutually expressed their intentions and reached an agreement to dissolve the partnership on the "Cessation Date" and on the terms as stated in the Deed of Dissolution. The "Cessation Date" is defined to mean the date of the Deed of Dissolution or such other date as may be mutually agreed in writing by both parties. In fact, both parties had acted on this concluded agreement by their exchange of letters on 23 March 2005, by Econ's execution of the Deed of Dissolution, Deed of Novation and a Power of Attorney and delivery of these executed documents to NCC in exchange for the sum of $19,529.80 in full and final settlement of all claims. Hence, NCC's argument that there was no concluded agreement has no merits whatsoever. As was held by VK Rajah JC in *Midlink Development* ([8] *supra*) at [49] and [55]:

> A contract may be concluded on the terms of even a draft agreement, if the parties are perceived by their conduct to have acted on it. ….. the sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings. Incompleteness in form is not tantamount to legal inefficacy. Subject to any specific statutory requirements, the law almost invariably allows substance to take precedence over inadequacies in form.

60 Based on the earlier representations in the letter dated 19 March 2004 from NCC (see [45] above) that they would sign the Deed of Dissolution the day (or at the latest the day after) they receive the executed Deed of Dissolution from Econ, it is only fair and just that NCC be made to honour that expectation created by NCC's representations, and for me therefore to hold that the Deed of Dissolution should have been signed by NCC on 23 March 2005 (if there was no breach by NCC) because the negotiations were to all intents and purposes conducted on that basis by both parties. It would be reasonable for Econ to expect NCC to act promptly by signing and returning a copy of the Deed of Dissolution either on 23 March 2005, or at the latest the following day.

61 I will give effect to that reasonable expectation of Econ. As was stated by the Court of Appeal in *Tribune Investment* ([6] *supra*), the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed.

62 At no time before the parties acted on their agreement by their exchange of letters above did NCC inform or even suggest to Econ, that they would only sign the Deed of Dissolution after all the sub-contracts were novated, or that the novation of the sub-contracts might not even materialise due to the change in the cost of building materials and steel. I therefore find that Econ could never have agreed to such an arrangement. Further, Econ's acceptance of the cheque payment on 23 March 2005 is also significant in that it meant that Econ had already accepted that it was not entitled to any further share in the profits of the partnership, which led next to the novation of the Contract to NCC on 25 July 2005. It is illogical for Econ to have agreed to stop claiming a share in the profits of the partnership and yet willingly remain liable under the sub-contracts until such time that NCC is able to novate all the sub-contracts before it (NCC) executes the Deed of Dissolution.

63 I also note that NCC has itself acted upon the Deed of Dissolution and treated it as binding even though NCC has not signed it. For instance, since 23 March 2005, NCC has:

(i) proceeded to arrange for LTA to execute the Deed of Novation. (Note: Clause 3.6 of the Deed of Dissolution states that all contracts between the partnership and the third parties including the LTA Main Contract shall be novated or otherwise transferred to NCC or its nominees.);

(ii) not shared any profits of the partnership with Econ. (Note: Clause 2.3 of the Deed of Dissolution states that NCC is entitled to exclude Econ from the profits of the partnership pursuant to the Partnership Agreement.); and

(iii) also borne all responsibility for the conduct of all legal proceedings against the partnership without Econ suffering losses or liabilities arising therefrom. (Note: Clause 4.3 of the Deed of Dissolution states that NCC shall keep Econ fully indemnified in respect of any liability which may be incurred from the Cessation Date until the contractual commitments of the Partnership are novated or transferred, in respect of anything done by NCC.)

64 For the reasons stated above, I accordingly ordered the Deed of Dissolution to be dated 23 March 2005.

Applicability of sections 26 and 32 of the Partnership Act for dissolution of the partnership

65 At this juncture, I shall digress to deal with a submission made by counsel for Econ in relation to the provisions for dissolution under the Partnership Act (Cap 391, 1994 Rev Ed) ("the Act"). Counsel for Econ submitted that the Deed of Dissolution duly executed by Timothy Reid on behalf of Econ on 23 March 2005 constitutes a sufficient notice to NCC of Econ's intention to determine the partnership. He referred me to section 26 of the Act which provides that where no fixed term has been agreed upon for the duration of the partnership (which counsel submits is the case here as there is no partnership agreement and no fixed term agreed upon by the parties for the duration of the partnership), any partner may therefore determine the partnership at any time on giving notice of his intention to do so to all the other partners. Counsel also referred me to *Low Pui Heng v Tham Kok Cheong & Ors* [1965] 1 MLJ 212 to support his argument that it is immaterial whether NCC agreed to the dissolution of the partnership. In that case, a partnership was converted into a limited company. When informed of this, the plaintiff applied to court claiming a declaration that the partnership was still subsisting, although a notice of dissolution of the partnership was communicated to the plaintiff. The Court held:

> This being a partnership at will, the plaintiff had no choice but to accept the decision of her partners. I am therefore unable to declare the partnership to be still subsisting as claimed.

66 If counsel is correct that the present case is a partnership at will, then obviously the effective date for dissolution of the partnership should also be 23 March 2005 because the Deed of Dissolution provides, *inter alia*, that the partnership shall be dissolved on the Cessation Date. It may well be possible to construe Econ's forwarding of the signed Deed of Dissolution to NCC to be an effective notice of dissolution to NCC.

67 However, on the facts of this case, I do not think that it is a partnership at will. It is clear to me that the parties have entered into the partnership for the sole purpose of carrying out and completing the Contract which has a specified completion date. Hence, the parties must have envisaged and agreed that the duration of the partnership shall not extend beyond the date of completion of the Contract. In essence, this is not a partnership with no fixed term or with an undefined duration. Further, this Contract is a huge undertaking of some $338 million to construct two MRT stations with tunnels included. LTA has clearly specified in the Contract that the date for completion of the whole of the works is 30 August 2006 and that liquidated damages for delay in completion are fixed at $66,000 per calendar day subject to a limit of $50 million. I cannot imagine that the partners would have agreed to such partnership terms that any one partner can unilaterally decide to walk out of the huge undertaking on a mere service to the other partner of a notice of dissolution of the partnership, without the agreement of the other partner. Such an action will not only risk costly delays but also put at risk the whole undertaking. Implying the existence of such a partnership term is not commercially sensible and is wholly unrealistic, considering the huge size, cost and complexity of this undertaking.

68 On the contrary, the parties have formed and entered the partnership on the basis that the business relationship between themselves as partners is to be governed by the JVA (and later amended by the Variation Agreement) in so far as it is not inconsistent with the incidents of a partnership. Clause 20.1 (b) of the JVA, read together with clause 25.3 and interpreted in the light of the partnership, essentially provides that subject to any further agreement, the relationship between the partners shall come to an end only when all the following conditions occur:

(i) all obligations provided for in the Contract are entirely executed by the partners; and

(ii) all accounts between the Employer and the partners are finally settled and all bonds and guarantees are returned; and

(iii) all amounts due to the partners under the Contract shall have been paid to them and all liabilities have been discharged.

69 From the above, it seems to me that the applicable section is not section 26 but section 32 of the Act, which provides that:

Dissolution by expiration or notice

32.-(1) **Subject to any agreement** between the partners, a partnership is dissolved –

(a) if entered into for a **fixed term**, by the **expiration of that term**;

(b) if entered into for a **single adventure or undertaking**, by the **termination of that adventure or undertaking**;

(c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

(2) In the case mentioned in subsection (1)(c), the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice. (emphasis added)

70 In my view, sections 32(1)(c) and 32(2) are clearly inapplicable. The only relevant ones to be considered are either section 32(1)(a) or section 32(1)(b). Consequently, unless there has been some other agreement reached by the partners, the partnership between them is dissolved by the termination or completion of the Contract with LTA, or at the end of such extended time for completion allowed by LTA.

71 As the application of section 32 is expressly made subject to any other agreement between the partners in the Act, I take the view that the parties have excluded the operation of sections 32(1)(a) and (b) because, as stated earlier, they have in fact a separate agreement on when the partnership is to end, which is only upon the fulfilment of the 3 conditions stated in [68] *supra*.

72 But the financial problems of Econ intervened, followed by judicial management of Econ, which precipitated certain courses of action by LTA and the parties. This eventually led to a further agreement to dissolve the partnership earlier than what the parties originally planned for. See [59] *supra*.

Conduct of the parties after 23 March 2005

73 I return now to the events that happened after 23 March 2005**.** In breach of the agreement on 23 March 2005 to dissolve the partnership, NCC did not execute the Deed of Dissolution or the Deed of Novation. NCC also took no steps to wind up the affairs of the partnership including the novation of all sub-contracts and the de-registration of the partnership with ACRA.

74 Instead, Wang wrote to Wee on 13 April 2005 raising new issues: (a) the two queries from LTA and (b) the need for Timothy Reid to re-execute the Power of Attorney because of certain amendments required by LTA. Wee responded to the LTA queries by confirming that Econ Corporation

is no longer a part of the Econ Group and by enclosing the Order of Court approving the Scheme of Arrangement with Timothy Reid as the Scheme Administrator, as well as a copy of the Scheme of Arrangement dated 15 September 2004. After discussion with Wang in relation to issue (b), Wee agreed to arrange for a director of Econ to sign a revised Deed of Novation due to LTA's reservations whether Timothy Reid was the appropriate person to sign it.

75 On 19 April 2005, Wang wrote to request that Econ pass a board resolution to approve the Deed of Novation and to authorize its directors to affix their common seal, as Wang believed that LTA would, no doubt, require an extract of the board resolution and a certified true copy of a letter from the Scheme Administrator to the directors giving his consent to the novation. Wang also informed that LTA had requested for an extract of the board resolution authorizing Econ to grant the power of attorney to Mr Ulf of NCC.

76 On 22 April 2005, Wang sent 3 copies of the Deed of Novation to Wee for Econ's execution and requested for the return by 25 April 2005. On 5 May 2005, Wang wrote to Wee again, this time requesting Econ to re-endorse the power of attorney, saying that the original power of attorney furnished by Econ was lost in transit between NCC's office in Sweden and the ECON-NCC J.V.'s office in Singapore.

77 Due to NCC's delay in executing the Deed of Dissolution and the Deed of Novation, Wee emailed Wang on 4 May 2005, requesting for a Deed of Indemnity to be executed by NCC and furnished to Econ, in terms that:

> 1. NCC shall pay and discharge all debts and liabilities of the Partnership to third parties incurred in the normal course of business of the Partnership (except any tax liabilities of Econ) as envisaged in the Joint Venture Agreement dated 13 May 2002 and 22 May 2003, and shall keep Econ indemnified from and against any such debts and liabilities;
>
> 2. NCC shall have no further claims against Econ relating to the Partnership.

78 Wang responded on 10 May 2005 taking the position that:

> The proposed Deed of Indemnity is unnecessary as the Deed of Dissolution of Partnership contains terms (see clause 4) releasing Econ Corporation from liability on contracts entered into by Econ-NCC J.V. Therefore, to move the matter forward Econ Corporation should sign LTA's Deed of Novation so that the Deed of Dissolution of Partnership can be given effect by the novation of all sub-contracts. These novations will discharge Econ Corporation.

79 Wee then wrote back on 20 May 2005 explaining that the Deed of Indemnity attached to its email to Wang merely served to make the common intention explicit in that NCC would, pursuant to the Deed of Dissolution of Partnership and the Deed of Novation, pay and discharge all debts and liabilities of the partnership to third parties incurred in the normal course of the business of the partnership, and indemnify Econ from and against any such debts and liabilities. Wee added that Econ required NCC to provide this Deed of Indemnity in favour of Econ, before Econ would execute and return the Deed of Novation (in triplicate).

80 Wang disagreed. As NCC's reply on 25 May 2005 gives a good flavour of what was NCC's thinking at this time, I have set it out in full:-

> …….The Deed of Novation is to transfer Econ's rights and obligations pertaining to LTA's Contract C822 to NCC. The Deed of Dissolution of Partnership is **to dissolve the partnership,**

transfer the partnership's assets to NCC and to discharge and release Econ from debts and liabilities of the partnership. *Our clients will have implemented both documents but for LTA's request that Econ re-execute the Deed of Novation.* If Econ were to sign and return the Deed of Novation there will be no need for an indemnity.

Your clients were paid $19,529.80 in exchange for, inter alia, the Deed of Dissolution and the Power of Attorney. The Deed of Novation was signed by Mr Tim Reid and given to us in exchange for our clients' cheque. Currently, we have a Deed of Novation which is binding on Econ. The only reason we requested Mr Reid to sign an amended Deed of Novation (the amendments being minor and having no material effect) was because the LTA proposed these changes. Subsequently, Mr Reid preferred that Econ sign the Deed of Novation instead of him. In the circumstances, the signing of the amended Deed of Novation should be done as a matter of course. If Econ is not prepared to sign the Amended Deed of Novation then we will request LTA to dispense with the amendments they have proposed.

If LTA should insist on the changes and either Mr Reid or Econ do not sign the Deed of Novation then our clients will want the Scheme Administrator to return the sum of $19,529.80.

The whole process of releasing Econ from liability arising from LTA Contract C822 and the partnership is at a standstill because of their failure to sign and return the Deed of Novation. Unless Econ signs and returns the document, our clients will not and cannot take steps to ensure that Econ is not joined in any future or current legal proceedings. We make clear that the consequences following therefrom and the costs Econ will suffer will have to be borne entirely by them. Econ-NCC J.V. will not bear such costs.

We trust that Econ will see sense and sign the Deed of Novation.

[emphasis added]

81 It appears that NCC would have signed the Deed of Dissolution but for LTA's request that Econ re-executes the Deed of Novation. At this juncture, NCC appeared very keen to execute the Deed of Dissolution of the partnership and was even prepared to request that LTA dispense with the proposed amendments.

82 After more exchanges of letters and phone calls between the solicitors, Wang finally wrote on 17 June 2005 that:

In order to take the matter forward, we have instructions to confirm that NCC International AB will release and discharge Econ Corporation Limited, now known as Econ Piling Pte Ltd ("Econ") from all liabilities, claims, demands and obligation arising out of or in relation to the **partnership** of Econ-NCC J.V. from the date **Econ ceases to be a partner.**

Please have your clients sign and return to us the Deed of Novation urgently. [emphasis added]

83 It is pertinent to observe that as late as 17 June 2005, Wang continued to conduct matters on behalf of NCC on the basis that NCC and Econ were partners. Thus far, NCC had not raised any issue in all the correspondence that there was no partnership in existence. As before, Wang's letter above was copied to NCC. Neither is there any allegation stemming from Andersson in his affidavits filed in these proceedings that their present solicitors Wang also made a mistake in describing Econ as a "partner" and ECON-NCC J.V. as a "partnership" in this letter of 17 June 2005, in reliance on some ROC search and without checking with their clients, NCC. It is highly improbable that if there were

indeed such a mistake, that the mistake is still undiscovered after such a long passage of time.

84 On 21 June 2005, Wee forwarded the amended Deed of Novation (in triplicate) duly signed by two directors of Econ for the attention of Wang. After much delay on 18 October 2005, Wang forwarded the original of the Deed of Novation dated 25 July 2005 signed by all three parties (LTA, NCC and Econ) for Econ's retention.

85 To all intents and purposes, the parties had by 25 July 2005 finally agreed to terminate the very purpose for which the ECON-NCC J.V. had been created – to be jointly and severally responsible for the execution of the Contract. Under the Deed of Novation, NCC undertakes to perform the Contract in all respects as if only NCC has been named as the Contractor in the Contract and LTA agrees to accept NCC's undertaking and to release Econ from further performance and from all claims and liabilities in respect of the Contract. NCC has by this time ceased to share any profits of the partnership with Econ for the Contract after the execution of the Deed of Novation by all three parties.

86 Section 1(1) of the Act states that "*Partnership is the relation which subsists between persons carrying on a business in common with a view of profit*." It is clear that it is a fundamental condition of the statutory definition of a partnership that the business is carried on by two or more persons in common. Thus it has been stated in *Lindley & Banks* ([4]) *supra* at para 2-06 that:

> [T]his necessarily means that there must be a single business… this also presupposes that the parties are carrying on that business for their common benefit and that they have, as regards the business, expressly or impliedly accepted *some* level of mutual rights and obligations as between themselves. [emphasis in original]

87 Hence, flowing from Econ's novation of the Contract to NCC, there is no further reason for the partnership to remain in existence, since it is no longer possible for Econ and NCC to jointly carry out the works, and there is no longer any business in common for them. It follows then that the fundamental condition for their existence as a partnership is no longer present.

88 Accordingly, the ongoing relationship of the partners in the partnership has ceased to exist by 25 July 2005, even if it were true that 23 March 2005 is not the correct date on which the dissolution of the partnership is to take effect pursuant to the agreement of the parties.

NCC refused to provide an executed copy of the Deed of Dissolution

89 Subsequent to the novation of the Contract, Econ was probably expecting NCC to provide the executed Deed of Dissolution in due course since everything had been settled.

90 Consequently, by way of letters dated 1 December 2005, 13 February and 20 February 2006, Wee requested for and subsequently demanded a copy of the Deed of Dissolution and also reminded NCC to de-register the partnership forthwith.

91 The only response was a short reply from Wang dated 6 March 2006 stating that "*we are taking our clients' instructions and will get back to you this week.*" No explanation was given as to why NCC refused to execute the Deed of Dissolution.

92 In breach of the agreement to dissolve the partnership, and despite repeated requests, NCC failed to provide Econ with a duly executed copy of the Deed of Dissolution. Econ gave NCC notice by way of a letter dated 23 March 2006 that legal proceedings would be commenced. When Econ did not

receive any further reply from NCC, Econ commenced these proceedings on 31 March 2006.

Commercial reasons behind NCC's refusal to execute the Deed of Dissolution

93 It is not surprising that there are commercial reasons behind NCC's refusal to sign the Deed of Dissolution. Counsel for NCC informed me during the hearing that the crux of the matter is that the sub-contractors want a price increase and NCC is thus not able to novate the sub-contracts. If the sub-contractors agree to the novations with no change in the terms of the sub-contracts, in particular the prices, NCC would sign the Deed of Dissolution.

94 Hence the real reason behind NCC's refusal to sign the Deed of Dissolution is NCC's fears that with the cost of construction materials having risen since the award of the sub-contracts, any attempt to novate the sub-contracts will result in the sub-contractors taking the opportunity to renegotiate their unit rates and increase the sub-contract prices. Apparently, the cost of building materials has escalated upwards and steel prices have gone up by about 200% since the tender for the Contract. Disputes have arisen with sub-contractors and suppliers. As NCC does not want to pay the increased rates to the sub-contractors, NCC seeks to drag out these proceedings through a series of applications and appeals in the hope that this matter is resolved only after the Contract is completed, thus avoiding the need for NCC to renegotiate and novate the sub-contracts. However, Econ never agreed to have the dissolution and the novations delayed until after the completion of the Contract, which NCC is now undertaking alone.

Other defences raised by NCC

Deed of Dissolution should not pre-date the Novation

95 Counsel for NCC contends that the Deed of Dissolution cannot pre-date the Deed of Novation of the Contract, which was signed by Econ and returned by Wee to Wang on 21 June 2005. I disagree. It should be noted that clause 9.2 of the Deed of Dissolution states that "*The LTA Main Contract* ***shall*** *be novated to NCC on such terms as required by LTA*." Novation of the Contract is not a condition precedent to the execution of the Deed of Dissolution.

96 Unlike the winding up of a company which marks the moment of extinction of the company, the dissolution of a partnership does not mean that the partnership is immediately extinct on the date of dissolution: para 24-01 of *Lindley & Banks* ([4] *supra*). Dissolution of a partnership simply means that the ongoing nature of the partnership terminates but the partners may still continue with the partnership in order to wind up the affairs of the partnership. Therefore, after the partners have agreed to dissolve the partnership, they can take steps thereafter, for instance, to settle their accounts, to novate any contracts as are necessary for the winding up of the partnership and finally to de-register partnership. In other words, the dissolution of a partnership represents the commencement of the winding up of the business, as opposed to the conclusion of the winding up in the case of the dissolution of a company.

Pre-conditions to the Deed of Dissolution not fulfilled

97 NCC now alleges that there are pre-conditions to its execution of the Deed of Dissolution. Andersson averred in his affidavit that after the appointment of the judicial manager, Mr James Evans ("Evans") of NCC had discussed the pre-conditions with Econ's directors, Geoffrey Yeoh and Joseph Sin, who were therefore aware that NCC's agreement to take over the Contract was subject to the following conditions:

(a) all third party contracts entered into by NCC and Econ could be novated to NCC without any change in the terms.

(b) all guarantees and performance bonds could be replaced without any additional cost to NCC.

(c) No claims would be made by LTA or any sub-contractors or suppliers against NCC and Econ.

(d) LTA agreed to the novation.

98 At paragraph 44 of his affidavit, Joseph Sin denied knowledge of these pre-conditions. Evans never affirmed any affidavit concerning his alleged discussions with Econ's directors. If Andersson's allegations were based not on some personal knowledge but on what he was told subsequently by Evans, then it is inadmissible hearsay.

99 This issue of dissolution arose only after Econ was placed under interim judicial management by the court on 6 January 2004. Once the interim judicial manager has been appointed to take over, the directors are no longer legally in charge or in control. For critical matters such as the dissolution of the partnership, it would have been for the interim judicial manager (and later the judicial manager) to decide, and not the directors. NCC should have known that Econ's directors did not have any authority to make decisions for Econ whilst there was an interim or a judicial manager in place. NCC appears to have recognised this all along by negotiating directly with the interim judicial manager concerning the terms for the Deed of Dissolution. Yet Evans does not appear to have ever discussed these important pre-conditions for the same Deed of Dissolution with the interim judicial manager, Timothy Reid, who was handling these negotiations from the very beginning. I find this rather unusual, and hence, difficult to believe. In any event, Timothy Reid averred in his affidavit filed on 17 December 2007 that NCC never informed him of those alleged pre-conditions. I accept his averment on this.

100 Andersson further asserts that notwithstanding the novation of the Contract, ECON-NCC J.V. is to continue until novation of all relevant sub-contracts is confirmed.

101 I very much doubt the existence of these pre-conditions. Prior to the commencement of these proceedings, NCC never at any time mentioned these important pre-conditions in any of their correspondence (whether between themselves or their respective solicitors). It is highly improbable that such important pre-conditions, if they do in fact exist, would not have emerged in the numerous correspondence in the course of their dealings and negotiations which stretched over a period of more than two years from 17 February 2004 when the dissolution of the partnership was first mooted by NCC's solicitors to the date of commencement of this action on 31 March 2006 by Econ. It is not as if the solicitors have not been in active communication with each other during this period. In fact, there were prolonged and extensive negotiations before the final agreement was reached for each of the various matters. Despite the plentiful opportunities, NCC never availed of them to mention these pre-conditions even once.

102 Instead, the correspondence emphasised the urgency of executing the Deed of Dissolution. Nothing was mentioned that novation documents for the sub-contracts have to be executed first, or that NCC would only execute and date the Deed of Dissolution after all the sub-contracts have been novated. In fact, NCC's allegations of the existence of the pre-conditions are plainly contradicted by what is stated below in NCC's solicitors' letter dated 25 May 2005:

Our clients will have implemented both [the Deed of Novation and the Deed of Dissolution of the Partnership] but for LTA's request that Econ re-execute the Deed of Novation.

103 Further, if these pre-conditions were so "fundamental to any dissolution" as alleged by NCC, then it is most surprising that NCC again never alluded to them when Econ made repeated demands for NCC to execute the Deed of Dissolution. If they were so critical then why were they also not expressly included in the Deed of Dissolution drafted by NCC itself. Indeed, if the novations of the contracts with LTA and the sub-contractors were a pre-condition to the execution of the Deed of Dissolution of Partnership, then the numerous clauses in the Deed dealing with novation would have been totally unnecessary and superfluous.

104 On the contrary, the following clauses in the Deed of Dissolution plainly show that the agreement between the parties is for the Deed to be executed forthwith upon receipt by NCC, and thereafter the Deed is to govern the necessary steps to be taken for the dissolution process to give effect to their agreement. The obligations of the parties to procure the novations are clearly envisaged to be performed ***subsequent*** to the signing of the Deed. It will be stretching much too far to construe the clauses below in the Deed as conditions precedent to the agreement to dissolve:

3. Dissolution

3.6 All contracts between the Partnership and the third parties including the LTA Main Contract **shall be novated or otherwise transferred** to NCC or its nominees.

3.9 The provisions of clauses 3.2, 3.3, 3.4, 3.5, **3.6**, 3.7 and 3.8 **shall be carried** into effect by the Partners acting jointly.

4. Release and Discharge

4.2 NCC **shall procure the novation** to itself or secure the release and discharge of all contracts binding on the Partnership without Econ suffering any financial liability thereunder.

4.3 NCC **shall** keep Econ fully indemnified in respect of any liability which may be **incurred from** the Cessation Date **until the contractual commitments** of the Partnership **are novated or transferred**, in respect of anything done by NCC.

6. Completion

6.1 The **transfer** of all assets and liabilities to NCC **consequent upon** this Agreement **shall be completed as soon as practicable** and the Partners **shall respectively execute** and provide all such deeds and documents and do all things as may be necessary effectively to **novate or transfer all contracts**, vest the assets and to transfer the liabilities of the Partnership **to NCC**.

7. Outstanding Obligations

7.2 Each of the Partners **shall** do all such acts and things and execute such deeds and documents as may be necessary fully and effectively to give effect to this Agreement.

9. Novation

9.1 All contracts between the Partnership and Suppliers, sub-contractors and other

service provides **shall be transferred as soon as practicable** to NCC either;

9.1.1 by Econ being released and discharged from performance thereunder; or

9.1.2 the contracts being novated or assigned to NCC.

9.2 The LTA Main Contract **shall be novated** to NCC on such terms as required by LTA. (emphasis mine)

105 As can be seen from the clauses above, there is nothing stated in the Deed that the novations of the sub-contracts are to be without any change in price or are to be exactly on the same terms, failing which there is to be no dissolution of the partnership. Nor is anything stated that the third party contracts are to be novated **before** the Deed of Dissolution is to be executed.

106 The Court of Appeal in *Projection v The Tai Ping* ([7] *supra*) was faced with the question whether parties who had carried lengthy negotiations, had reached an agreement. The following passage from *Chitty on Contracts* Vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 2-026 in relation to "continuing negotiations" was cited with approval by the Court of Appeal:-

> The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties, or one of them, had **reservations not expressed** in the correspondence. (emphasis added)

107 In *Aircharter World v Kontena Nasional* [1999] 3 SLR 1 at [30], Karthigesu JA delivering the judgment of the Court of Appeal, said:

> In deciding whether the parties have reached agreement, the courts normally apply the objective test. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally**, rely on some unexpressed qualification or reservation** to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party, therefore, do not prevent the formation of a contract. [emphasis added]

108 Based on an objective assessment of the correspondence between the parties and the surrounding factual circumstances in this case, Econ and NCC have, in my judgment, agreed on all the terms in the Deed of Dissolution without any reservations or qualifications to the terms therein regarding the dissolution of the partnership. As such, NCC cannot now attempt to rely on some unexpressed qualification or reservation to show that it has not in fact agreed to dissolve the partnership without the alleged pre-conditions.

109 In conclusion, I find that these alleged pre-conditions are non-existent. There was simply no agreement whereby Econ would sign and return the Deed of Dissolution to NCC, only for NCC to hold onto it and wait for all the sub-contracts to be novated before NCC would execute it, whilst Econ would have long ceased to share in the profits of the partnership with NCC.

Orders made

110 Having regard to all the circumstances of this case, damages are obviously not an adequate remedy. Accordingly, I granted Econ their alternative prayer and ordered NCC specifically to perform the agreement to dissolve the partnership by executing the Deed of Dissolution of the Partnership and

to date the same on 23 March 2005. I made a further order that NCC is to de-register the partnership with ACRA.

111 Under clause 4.4 of the Deed of Dissolution , the partnership shall be deregistered from the records of ROC (now ACRA) as soon as practicable after the "Cessation Date". The solicitors for NCC are authorised to lodge the notice of termination of the partnership with ACRA as soon as practicable under clause 6.3 of the Deed of Dissolution.

112 I also awarded costs fixed at $17,000 inclusive of disbursements to be paid by NCC to Econ.

113 Finally, I would like to acknowledge the assistance of counsel in providing me with detailed written submissions and the relevant authorities in support of the legal positions they have advanced. It has made my task in deciding this matter, with its fairly complex set of facts, much easier.