Foo Jong Peng and others *v* Phua Kiah Mai and another [2012] SGCA 55

Case Number	: Civil Appeal No 4 of 2012
Decision Date	: 08 October 2012
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; V K Rajah JA; Woo Bih Li J
Counsel Name(s)	: S Magintharan, B Uthayacharan and James Liew (Essex LLC) for the appellants; Hee Theng Fong and Leong Kai Yuan (RHTLaw Taylor Wessing LLP) for the respondents.
Parties	: Foo Jong Peng and others — Phua Kiah Mai and another

Civil Procedure – Appeals

Contract – Implied Terms

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 14.]

8 October 2012

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

1 This was an appeal against a decision of the High Court judge ("the Judge") in *Phua Kiah Mai and another v Foo Jong Peng and others* [2012] SGHC 14 ("the Judgment") granting declarations, *inter alia*, that the Management Committee ("Management Committee") of the Singapore Hainan Hwee Kuan ("the Association") did not have the power to remove office bearers from their positions on the Executive Committee ("Executive Committee"). We dismissed the appeal and now set out the detailed grounds of our decision.

Background Facts

Parties to the dispute

2 All the parties to this appeal are members of the Management Committee of the Association. The Association was registered with the Registry of Societies on 18 December 1890. For purposes of clarity, the parties will be addressed by name and the positions held by the parties will be described as they were prior to the disputed Management Committee meeting held on 20 October 2011 (hereafter referred to as "the 20 October 2011 Meeting").

3 The First Respondent, Phua Kiah Mai, is the President of the Association and the Second Respondent, Hun Chin Guan, is the Honorary Secretary General.

4 The First Appellant, Foo Jong Peng, was President for two consecutive terms from January 2006 to January 2010 and is presently the First Vice President. The Second Appellant, Lee Teck Hai, is the Head of the Public Relations Division and had proposed the motions for the removal of Phua Kiah Mai and Foo Jong Peng from their positions. The Third Appellant, Han Tan Juan, is Head of the Cultural & Education Division and had proposed the motion for the removal of Hun Chin Guan from his position. The Fourth Appellant, Foo Shick Thai, and Fifth Appellant, Pang Fui Nam, were elected as

the new President and Honorary Secretary General respectively after resolutions to remove Phua Kiah Mai and Hun Chin Guan were passed at the 20 October 2011 Meeting.

Management structure of the Association

5 Under Rule 8 of the Rules of the Singapore Hainan Hwee Kuan ("the Rules"), Management Committee members will be elected by a vote of the general body of members at the Annual General Meeting ("AGM"). Rule 7 provides that the elected Management Committee members shall hold office for a term of two years. The Management Committee administers the affairs of the Association, and has the duties and powers to implement resolutions passed by the General Meeting, formulate the overall policy for the Association and control the budget and finances.

6 The elected Management Committee members then elect from amongst themselves the office bearers ("office bearers") of the Association – the President, three Vice-Presidents and the heads and deputy heads of ten committees each dealing with a specific aspect of the Association's affairs – under Rule 9. The functions and duties of each office bearer are defined in the Rules. Pursuant to Rule 13, all the elected office bearers will then collectively form a smaller Executive Committee. Pursuant to Rule 16, the Executive Committee has the powers to, *inter alia*, implement resolutions passed by the Management Committee and to oversee the general administration of the Association.

Background to the dispute

7 The parties were all voted in as members of the Management Committee by the general body of members at the AGM held in January 2010. The parties – save for Hun Chin Guan, who was only elected after the previous Honorary Secretary General resigned in May 2011 – were then elected to their respective positions by the members of the Management Committee.

8 The Kheng Chiu Tin Hou Kong and Burial Ground ("Tin Hou Kong") is a company incorporated in Singapore and limited by guarantee. It effectively operates as the financial arm of the Association and provides the funds needed to support the Association's activities. Foo Jong Peng is the Chairman of Tin Hou Kong's board of directors and Phua Kiah Mai is the Vice-Chairman. All the parties to this appeal except Hun Chin Guan also sit on the board.

9 Sometime in March 2011, a dispute arose between Foo Jong Peng and Phua Kiah Mai over the management of the financial affairs of Tin Hou Kong. During a meeting of the Tin Hou Kong board of directors on 26 July 2011, Foo Jong Peng expressed the view that he was no longer able to work with Phua Kiah Mai and proposed to table a motion to remove Phua Kiah Mai as Vice-Chairman. The other directors objected to this motion as proper notice had not been given. At a subsequent meeting of the Management Committee of the Association held on the same day, Foo Jong Peng again attempted to table a motion to remove Phua Kiah Mai as President of the Association. Phua Kiah Mai – who was chairing the meeting – rejected the motion as it was not in accordance with the agenda. Foo Jong Peng proposed that a special Management Committee meeting be called to remove Phua Kiah Mai as President of the Association and Hun Chin Guan then requested Foo Jong Peng to provide a reason for removal and to send in an official proposal to table the motion.

10 On 3 August 2011, Foo Jong Peng wrote to Hun Chin Guan in the latter's capacity as the Honorary Secretary General, calling for a special meeting of the Management Committee on 16 August 2011 with the proposed agenda of "re-organising" the Management Committee. [note: 1] The letter was signed by 26 members of the Management Committee. An intervening Management Committee meeting was held on 5 August 2011, but the meeting was inquorate.

11 Phua Kiah Mai then sought the advice of his solicitors M/s RHTLaw Taylor Wessing LLP ("RHTLaw"). RHTLaw replied to Foo Jong Peng, stating that the Honorary Secretary General was not in a position to convene a special Management Committee meeting for the sole purpose of removing the President as the Management Committee had no power to remove an office bearer under the Rules. Foo Jong Peng nonetheless proceeded to convene a meeting of the Management Committee on 16 August 2011, purportedly upon the request of 25 other Management Committee members. Phua Kiah Mai and Hun Chin Guan did not attend the meeting, and no resolutions were passed in their absence.

12 On 12 September 2011, Lee Teck Hai wrote to Hun Chin Guan, proposing a motion to remove Phua Kiah Mai as the President of the Management Committee and to elect a new President, to be voted upon at the next Management Committee meeting. [note: 2] Lee Teck Hai sent a second letter on 15 September 2011 to table a further motion to remove Foo Jong Peng as the First Vice President of the Association and for the election of a new First Vice President. [note: 3] Hun Chin Guan replied on 19 September 2011, reiterating the alleged legal position that the Management Committee had no power to remove the President and First Vice President in the absence of express provisions in the Rules and that any resolution passed to this effect would be *ultra vires* and void; it would thus be meaningless for the two proposed motions to be placed on the agenda. [note: 4]

13 Following an adjournment of a Management Committee meeting on 28 September 2011 due to a lack of quorum, Lee Teck Hai sent a letter on 7 October 2011 advising Hun Chin Guan that a meeting of the Management Committee should be convened on an urgent basis for the purpose of adopting and approving the accounts for the Financial Year 2010, and that the continued failure to do so would put the Management Committee in breach of the Association's Rules and statutory requirements. [note: 5] This was followed by a letter from Tan Han Juan to Hun Chin Guan on 10 October 2011, proposing a third motion to remove Hun Chin Guan as the Honorary Secretary General and for an election to fill the vacancy. [note: 6]

14 Hun Chin Guan did not respond to Lee Teck Hai or Tan Han Juan. Lee Teck Hai then requested Foo Jong Peng to convene a Management Committee meeting. On 12 October 2011, Foo Jong Peng issued a notice – in his capacity as First Vice President – convening the 20 October 2011 Meeting. The notice stated that the meeting had been convened upon the request of over half of the Management Committee members, and the listed agenda included the approval of the Association's accounts for the Financial Year 2010 and the motions to remove Phua Kiah Mai, Foo Jong Peng and Hun Chin Guan from their respective positions. [note: 7] Notice of the meeting was duly served on all members of the Management Committee.

15 On 17 October 2011, RHTLaw wrote to Foo Jong Peng, stating that the notice to convene the meeting was improper. The proposed meeting was nevertheless held on 20 October 2011 and was attended by a sufficient quorum of 27 Management Committee members. Phua Kiah Mai and Hun Chin Guan were both absent from the meeting. The members approved the Association's accounts for the Financial Year 2010 and resolutions were passed removing Phua Kiah Mai and Hun Chin Guan from their positions. The motion to remove Foo Jong Peng as First Vice President was defeated, and Foo Shick Thai and Pang Fui Nam were elected as the new President and Honorary Secretary General, respectively, following a vote by the members present at the meeting.

16 Phua Kiah Mai and Hun Chin Guan then filed Originating Summons No 975 of 2011 ("the Originating Summons") in the High Court.

Decision below

Decision below

17 The Respondents' prayers in the Originating Summons were as follows:

> 1. A declaration that [Foo Jong Peng] had no power to convene the Singapore Hainan Hwee Kuan Management Committee meeting held on 20 October 2011;
>
> 2. A declaration that the Singapore Hainan Hwee Kuan Management Committee meeting held on 20 October 2011 is invalid;
>
> 3. A declaration that the Singapore Hainan Hwee Kuan Management Committee has no power to remove their President, First Vice President and Honorary Secretary General and elect a new President, First Vice President and Honorary Secretary General;
>
> 4. A declaration that [Lee Teck Hai's] proposal to table the motions for the removal of [Phua Kiah Mai] as President and [Foo Jong Peng] as First Vice President of the Singapore Hainan Hwee Kuan, as well as the election of a new President and First Vice President by the Management Committee of the Singapore Hainan Hwee Kuan, was wrongful and *ultra vires*;
>
> 5. A declaration that [Han Tan Juan's] proposal to table the motions for the removal of [Hun Chin Guan] as Honorary Secretary General of the Singapore Hainan Hwee Kuan and the election of a new Honorary Secretary General was wrongful and *ultra vires*;
>
> 6. A declaration that the resolutions passed by the Management Committee of the Singapore Hainan Hwee Kuan on 20 October 2011 to remove [Phua Kiah Mai] as President of the Singapore Hainan Hwee Kuan and to elect [Foo Shick Thai] as President of the Singapore Hainan Hwee Kuan are invalid and thus null and void;
>
> 7. An injunction to restrain [Foo Shick Thai] from acting as President of the Singapore Hainan Hwee Kuan;
>
> 8. A declaration that the resolutions passed by the Management Committee of the Singapore Hainan Hwee Kuan on 20 October 2011 to remove [Hun Chin Guan] as Honorary Secretary General of the Singapore Hainan Hwee Kuan and to elect [Pang Fui Nam] as Honorary Secretary General of the Singapore Hainan Hwee Kuan are invalid and thus null and void;
>
> 9. An injunction to restrain [Pang Fui Nam] from acting as Honorary Secretary General of the Singapore Hainan Hwee Kuan.
>
> ...

18 The Judge held that the Rules did not expressly provide for the removal of a member of the Executive Committee, *ie*, an office bearer, and declined to imply a term permitting the Management Committee to remove members of the committee (it was ambiguous which committee the Judge was referring to) apart from general expulsion from the Association for misconduct (see [5] of the Judgment).

19 As the Management Committee members were appointed for a fixed two-year term, the Judge considered that a more reasonable interpretation of the Rules was that the members of the Association did not intend to have the membership of the committee rotated before the term had expired (*ibid*). The smooth functioning of the Association might otherwise be impeded by "constant election battles" (*ibid*). If the Rules provided for the members to hold office for two years, they were

entitled to do so and the court would not imply a term for their removal (*ibid*). In the absence of an express provision in the Rules, the Management Committee could not remove Management Committee members before the expiry of their terms (*ibid* at [6]).

20 No order of court was extracted prior to the filing of this appeal and it was not apparent from the Judgment whether the Judge had granted all nine prayers.

The issues on appeal

21 The Appellants appealed against the entirety of the Judgment, raising two main issues:

(a) whether there was an implied term in the Rules giving the Management Committee the power to remove an office bearer in the Executive Committee; and

(b) whether the 20 October 2011 Meeting was properly convened.

The first issue was the key point of contention between the parties. However, before turning to analyse the two main issues, we will first address a preliminary issue that was raised.

Our decision

Preliminary issue: whether live issue to be decided

22 On the day of the oral hearing, a preliminary point was raised that we should decline to hear this appeal on the merits as there was no longer a live issue to be decided. The Respondents relied on this court's decision in *Attorney-General v Joo Yee Construction Pte Ltd (in liquidation)* [1992] 2 SLR(R) 165 ("*Joo Yee*") for the proposition that the Court of Appeal should exercise its inherent jurisdiction to decline to decide an issue which the Appellants retain no interest in, even if the decision would set a useful precedent for future cases. Counsel for the Respondents informed us that a new Management Committee had been elected at the AGM held on 20 May 2012 and that new office bearers had also been elected by the Management Committee; accordingly, even if the Appellants were to succeed in the present appeal, it would not affect their interests as the Respondents' terms of office had lapsed.

23 We did not agree with the Respondents that the instant appeal was one where there was no live issue to be decided and considered that the principles laid down in *Joo Yee* were not directly applicable to the facts of this case. *Joo Yee* involved very unusual factual circumstances where the appellant, the Attorney-General (representing the Ministry of Health ("MOH")), had taken a neutral position before the High Court, *viz*, it did not object to any of the legal positions contended for as long as a direction of court was made. The respondent company, Joo Yee Construction Pte Ltd ("Joo Yee Construction"), had entered into a construction contract with the MOH with provisions governing the employment of nominated subcontractors and when direct payments could be made to these subcontractors. When Joo Yee Construction subsequently went into liquidation, a question arose as to whether direct payments made by the MOH to four nominated subcontractors would contravene the combined operation of ss 280(1) and 327(2) of the Companies Act (Cap 50, 1988 Ed). The High Court ruled that the payments were in contravention of the Companies Act and were accordingly void as against Joo Yee Construction's liquidators. The Attorney-General then appealed; the four nominated subcontractors either did not appeal or withdrew their appeals. Notably, as parties had agreed amongst themselves on costs, costs were not in issue (see *Joo Yee* at [6]). This court followed the principles in the House of Lords decisions of *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 ("*Sun Life Assurance*") and *Ainsbury v Millington* [1987] 1 WLR 379 ("*Ainsbury*") and

held as follows at [10]:

> ... In so far as the Ministry of Health was concerned, its interest in this issue ceased to exist once the court had ruled on the issue *and* the four nominated subcontractors had accepted the court's ruling by withdrawing or not proceeding with their appeals. ***The Ministry of Health could not thereafter be prejudiced or be exposed to the risk of litigation at either the instance of the respondents or the four nominated subcontractors if it acted in accordance with the ruling of the court .*** Accordingly in our view there was no live issue in this appeal. [emphasis in original; emphasis added in bold italics]

24 We now turn to briefly consider the decisions in *Sun Life Assurance* and *Ainsbury*. In *Sun Life Assurance*, the English Court of Appeal affirmed an order of the court below granting rectification of an endowment policy of life assurance and the consequent payment of additional sums due to the assured as a result of the rectification. Leave to appeal to the House of Lords was granted on the following specific terms:

> On the [Appellants'] undertaking to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by this order...

Viscount Simon LC, delivering the judgment for the House of Lords, declined to hear the appeal and set out the relevant principles, as follows (at 113–114):

> ... *The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly in the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it.* … [t]he objection here is that, if the appeal fails, the respondent gains nothing at all from his success.
>
> … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.
>
> [emphasis added]

The House of Lords followed *Sun Life Assurance* in *Ainsbury*. An appeal was filed against the refusal to grant an injunction ordering the respondent to vacate a council house. By the time the appeal was before the House of Lords, the local authority had terminated the tenancy of the council house, and both the appellant and respondent were no longer in possession. Both parties were legally aided throughout the proceedings with nil contributions. The House of Lords held that "neither party can have any interest at all in the outcome of the appeal" and dismissed the appeal. Lord Bridge made the following important observation (at 381C-D):

> ... *Again litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.* Realistically counsel did not suggest that the possibility in this case of either party being ordered to pay the costs of the other, which in practice is so remote as to be negligible, could be regarded as affording a sufficient lis inter partes to keep the appeal alive. [emphasis added]

25 The common thread running through all three cases considered above was this: costs were not in issue because the parties to the appeal had reached some form of agreement on costs. It was an

integral part of the reasoning in all three cases that any ruling made on the dispute would have no effect on the parties' rights and obligations not only because the subject matter of the appeal was moot or would have no direct legal consequences for the parties if resolved either way, *but also* because *none of the parties had a monetary interest in the outcome* as all questions of costs had been disposed with. The present case was thus distinguishable from the cases considered above. While it was true that the election of new office bearers of the Executive Committee meant that the Respondents' previous terms of office had lapsed and the issue of whether the Respondents still legally held their offices despite the purported removal was therefore rendered moot, the parties to this appeal were, quite unfortunately, unable to come to an agreement on costs. If the Appellants were successful, the Respondents would have been liable for costs here and below, and the positions of the parties may therefore have been affected. We agreed with Lord Bridge's observations cited above at [24] (see *Ainsbury* at 381C-D) and considered that the potential costs ramifications in the present appeal meant that the Appellants retained a real interest in the outcome of this dispute before us; see also Lord Hoffmann's judgment in the House of Lords decision of *R (Bushell and others) v Newcastle upon Tyne Licensing Justices and another* [2006] 1 WLR 496 at [5]–[6] (*cf* Lord Brown at [23] expressing some doubt on whether costs alone could provide a sufficient *lis* for an appeal, although this observation was made in the context of the special character of the House of Lords as a second-tier appeal court and the requirement of leave to appeal).

26 We thus rejected the Respondents' preliminary objection and proceeded to hear the substantive merits of the appeal.

The implied power of the Management Committee to remove an office bearer

Law relating to terms implied "in fact"

27 The law relating to implied terms in fact was, until fairly recently, thought to be well-established, albeit not entirely certain in its precise ambit of application. A summary of the two traditional tests, *viz*, the "business efficacy" test and the "officious bystander" test, is found in the Singapore High Court's decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 ("*Forefront*") (at [29]–[31]) (subsequently approved by this court in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*") at [36]):

> 29 It has always been acknowledged that particular terms might be implied into particular contracts. However, in order not to undermine the concept of freedom of contract itself, terms would be implied only rarely – in exceptional cases where, as one famous case put it, it was *necessary* to give "*business efficacy*" to the contract (see *per* Bowen LJ (as [he] then was) in the English Court of Appeal decision [of] *The Moorcock* (1889) 14 PD 64). In the words of Bowen LJ himself (at 68):
>
> > Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have

> been intended at all events by both parties who are [businessmen]; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

30 Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ's judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR's judgment will reveal that the learned Master of the Rolls did not *explicitly* adopt the "business efficacy" test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [*The Moorcock*] at 71).

31 There was another test, which soon became equally famous. It was [stated] by MacKinnon LJ in another English Court of Appeal decision. This was the famous "*officious bystander*" test which was propounded in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227 ("*Shirlaw*") (affirmed, [1940] AC 701), as follows:

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie 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!'"
>
> At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Interestingly, the essay referred to above was in fact a public lecture delivered at the London School of Economics in the University of London: see Sir Frank MacKinnon, *Some Aspects of Commercial Law – A Lecture Delivered at the London School of Economics on 3 March 1926* (Oxford University Press, 1926) (and see, especially, p 13). ...

[emphasis in original]

28 The relationship between the two tests is complementary, rather than alternative or cumulative: the officious bystander test is the *practical mode* by which the business efficacy test is implemented (see *Forefront* at [36], cited with approval by this court *in Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 at [63]).

The Belize test

29 The conceptual basis of the implication of terms was reconsidered in the Privy Council decision (on appeal from the Court of Appeal of Belize) of *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 1 WLR 1988 ("*Belize*"). Lord Hoffmann, delivering the advice of the Board, stated that "[t]he proposition that the implication of a term is an *exercise in the construction of the instrument as a whole* is... a matter of logic" [emphasis added] (at [19]) and reformulated the test for implied terms (hereafter referred to as "the *Belize* test") in the following terms (at [21]):

> It follows that 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.* It will be noticed from Lord Pearson's speech [in *Trollope & Colls Ltd v North*

> *West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609] that 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?* [emphasis added]

The two traditional tests, in the learned law lord's view, merely represented different ways in which the courts have expressed this key question, and Lord Hoffmann warned of the "dangers in treating these alternative formulations of the question as if they had a life of their own" (at [22]).

The Belize test considered

30 There has, in fact, been a dearth of local authority considering the *Belize* test. Whilst the recent Singapore High Court decision of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another* [2012] 3 SLR 801 referred to the *Belize* test, we refrain from commenting on it as we understand that appeals are pending before this court. There was also an observation, by way of *obiter dicta*, by this court in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM*"), where it was stated as follows (at [98]; see also at [100], where there is a further reference in the context of terms "implied in law"):

> It is interesting to note, at this juncture, that the broad underlying thread of *interpretation* which Lord Hoffmann utilises in advocating his approach centring on assumption of responsibility by the defendant (a point perceptively made by *Wee* [Paul C K Wee, "Contractual interpretation and remoteness" [2010] LMCLQ 150] ... has *also* been utilised by the learned law lord in the area of implied terms as well (in particular, to terms implied *in fact*) – hence, the analogy drawn by Lord Hoffmann between both these aforementioned areas. However, and with the greatest of respect, the uncertainty generated in the latter area would, in our view, apply equally to the former area. In the recent Privy Council decision (on appeal from the Court of Appeal of Belize) of *Attorney General of Belize v Belize Telecom Limited* [2009] 1 WLR 1988, for example, Lord Hoffmann, delivering the judgment of the Board, adopted an extremely broad approach towards the implication of terms in fact, effectively *effacing* the distinction between the time-honoured "business efficacy" and "officious bystander" tests (for a general account of these two tests (as well as their possible relationship), see the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [29]–[40]). This results, however, in a lack of concrete rules (and consequent normative guidance) as well as uncertainty in the practical sphere (a point which is also emphasised by *Wee* at 162–166; reference may also be made to Elizabeth Macdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97). One should not, in fact, be surprised at such a result as the lack of guidance as well as uncertainty is likely to be the result when the *umbrella* concept of *interpretation*, which is pitched at a *necessarily high level of abstraction*, is utilised (in substance, if not form) as the legal basis for *different and disparate areas of law* (*cf* also the collected essays in Brian Coote, *Contract as Assumption - Essays on a Theme* (Hart Publishing, 2010) (Rick Bigwood ed); in so far as *The Achilleas* itself is concerned, see the very recent comment by Brian Coote, "Contract as Assumption and Remoteness of Damage" (2010) 26 JCL 211 ("*Coote*")). The lack of guidance stems from the absence of a sufficiently specific set of *concrete* rules and principles whilst the resultant uncertainty is the natural consequence when legal rules and principles lacking specific and concrete guidance are sought to be applied to the various sets of facts (which are themselves necessarily myriad in nature) (in this regard, see also generally this court's observations in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 ("*Mühlbauer*") (at [40]–[43]) about the danger of over-generalisation and over-

abstraction in making legal arguments). Put simply, whilst it is desirable from a conceptual perspective to have umbrella doctrines that make for *theoretical* "neatness", there is a limit to which one can have "one-size-fits-all" *doctrines* that will not ultimately become legal procrustean beds (see also *Wee* at 166 and 175–176). Indeed, the necessity for *specific* rules and principles has always been the hallmark of the development of the common law. Such specificity has, in fact, been (perhaps paradoxically) one of the key strengths of the common law itself, which is why Prof S F C Milsom perceptively observed that the common law system developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such (see generally S F C Milsom, "Reason in the Development of the Common Law" (1965) 81 LQR 496; see also *Mühlbauer* (at [42]) where it is observed that there is an *interactive* process between the *universal* and the *particular* or the *general* and the *specific* in law and decision-making). [emphasis in original]

31 As we shall see, the observations in *MFM*, although rendered by way of *obiter dicta*, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the *Belize* test. And it is that whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of "interpretation". In particular, the process of implication is *separate and distinct from* the more general process relating to the interpretation of documents. Indeed, the process of implication of terms proceeds, *ex hypothesi*, on the *absence* of an *express* term of the contract. Hence, the implication of a term, whether in fact or in law (for the distinction between these two categories of implied terms, see generally *Forefront* (at [41]–[44]); reference may also be made to the decision of this court in *Jet Holding Ltd v Cooper (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90]–[91]), involves tests as well as techniques that are not only specific but also different from those which operate in relation to the interpretation of documents in general and the (*express*) terms contained therein in particular (see also the observation of Lord Steyn in the House of Lords decision of *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 458 as well as the perceptive observations by Prof Gerard McMeel in *The Construction of Contracts – Interpretation, Implication, and Rectification* (2nd ed, Oxford University Press, 2011) at para 10.04). The (general) *concept* of "*interpretation*" has much in common with the *implication* of terms *inasmuch as both entail an objective approach*. *However*, it is, in our view, incorrect to *conflate* the tests as well as techniques which accompany both the aforementioned processes. Before proceeding to elaborate further, it would be appropriate at this juncture – consistently with the views just expressed – to note the very pertinent observations by a learned author, as follows (see Paul S Davies, "Recent developments in the law of implied terms" [2010] LMCLQ 140 ("*Davies*") at p 144):

> Lord Hoffmann's speech in *Belize* may be seen to assimilate further implication within interpretation. Indeed, this was Lord Hoffmann's stated aim, since "the implication of the term is not an addition to the instrument. It only spells out what the instrument means". Yet this is questionable as a matter of logic: if the contract is silent on a point, by implying a term the court is supplementing, or replacing, this silence. It is submitted that it is stretching the boundaries of interpretation too far to suggest that implication is not an addition to the instrument, or that it simply gives effect to what the instrument means. An implied term may give effect to what the instrument should, ideally, have expressly provided for, but not what the instrument means in the form in which it was agreed by the parties.
>
> There is no utility in artificially forcing the doctrine of implication within the confines of interpretation. Indeed, it may actually be dangerous. This is exemplified by the fact that it no longer matters if the parties would not have responded to the officious bystander with a cursory, "Oh, of course!" Why should a term be imposed upon a party if it would not have instantly agreed

> to such a term upon being asked by a bystander? ... *Belize* suggests that the subjective intentions of the parties are now irrelevant, and that the only matter of importance is what the reasonable observer would understand the contract to mean.

32 Returning to *Belize*, as is evident from Lord Hoffmann's approach in that case (quoted above at [29]), the central focus or test is premised on – to use more general terminology – the concept of *the reasonable person*. As a learned author put it, "the approach to be derived from *Belize* seems to entail, in the context of contractual implied terms, the replacement of the officious bystander by another character from legal folklore, formerly referred to as the man on the Clapham omnibus" (see John McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus" [2011] CLJ 607 ("*McCaughran*") at p 614). It is important to note that this particular concept of the reasonable person is to be viewed as a *single (and, hence, objective) standard inasmuch as it is the court which stands in the shoes of "the reasonable person"* in determining what the contractual instrument, read as a whole against the relevant background, would *reasonably be understood* to mean. Indeed, despite his more general misgivings on the concept of the reasonable person when it is in effect used in a subjective manner, the invocation of this particular (objective) concept of the reasonable person in the context of implied terms is one which appears to have been mooted by the learned law lord at least as far back as 1995 in the 24th Lord Upjohn Lecture which was delivered on 12 May 1995 at the Inns of Court School of Law (see Lord Hoffmann, "Anthropomorphic Justice: The Reasonable Man and His Friends" (1995) 29 The Law Teacher 127 ("*Anthropomorphic Justice*") (especially at pp 138–140); see also, by the same author, "The Intolerable Wrestle with Words and Meanings" (1997) 114 South African LJ 656 at p 662 and, more recently, "A conversation with Lord Hoffmann" [2010] Law and Financial Markets Review 242 at p 243). Significantly, though, the following (and oft-cited) observations by Lord Radcliffe in the House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (at 728), which were relied upon by Lord Hoffmann in *Anthropomorphic Justice* in support of the "reasonable man" approach in the context of the implication of terms, were made in the context of the doctrine of *frustration* (a point which the learned law lord himself noted (see *Anthropomorphic Justice* at pp 127–128) and which, very importantly in our view, is a doctrine that applies by operation of *law* and therefore does *not* concern the search for the presumed intention of the contracting parties (which is the case where the *implication* of terms is concerned)):

> By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.

33 As already alluded to above, inasmuch as the concept of the reasonable person implies *an objective approach*, that concept must surely be an integral part of the process of the implication of terms. However, the adoption of an objective approach does not, in and of itself, tell us *how* a particular term ought – or ought not – to be implied (*ex hypothesi*, on an *objective* basis). Put simply, *a particular test (or tests) of implication are imperative*. In so far as "terms implied *in fact*" are concerned, these would, in our view, take the form of the "business efficacy" and "officious bystander" tests. These tests constitute (in the manner set out above at [28]) specific as well as concrete guidance for the courts in a situation where the contracting parties have not, *ex hypothesi*, made express provision for the situation concerned in the first place by providing default background guidelines on when the parties may be presumed to have – or not have – a particular unexpressed intention. More importantly, underlying *both* the "business efficacy" and the "officious bystander" tests is a criterion that is *not necessarily* present when applying the broader concept of interpretation, *viz* (with no pun intended), that of *necessity*. In this regard, the following observations

by Lord Clarke MR in the English Court of Appeal decision of *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc, The Reborn* [2010] 1 All ER (Comm) 1 ("*Mediterranean Salvage and Towage*") (at [15]) are particularly significant (reference may also be made to the English Court of Appeal decision of *Eastleigh B C v Town Quay Developments Ltd* [2010] 2 P & CR 2 at [32] (*per* Arden LJ) as well as Lord Grabiner QC, "The Iterative Process of Contractual Interpretation" (2012) 28 LQR 41 at pp 58–61):

> [A]s I read Lord Hoffmann's analysis [in *Belize*], although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term.

It should be noted that the threshold of *necessity* is of little guidance in isolation, and the "business efficacy" and "officious bystander" tests give practical meaning to this criterion. In contrast, a direct practical relationship with the presumed intentions of the contracting parties is absent from the threshold of "reasonable meaning" as a standalone concept.

34 On a related (and no less important) note, the search under the rubric of implied terms is a search for *the presumed intention of the contracting parties*. In other words, *the court ought not to – and, indeed, cannot – simply substitute its view as to that intention*. Put simply, the intention may be presumed, but the court cannot be presumptuous. We accept that a sceptic might well argue that such a search by the court is a fiction. However, even if we accept that argument, not all *legal* fictions are necessarily fictitious in the pejorative sense that the turn of phrase is utilised by a layperson. Indeed, we would go further: We are of the view that there is no legal fiction involved inasmuch as the court concerned does indeed sift through the objective evidence before it in order to ascertain what the presumed intention of the contracting parties is. In doing this, the court is constantly cognisant of the cardinal (and guiding) principle that it will *not* re-write the contract for the contracting parties. It is true that the very nature of an *implied* term necessitates some investigation of sorts on the part of the court. *However, it bears reiterating that the court does not substitute its own view of what the contracting parties should have intended had the gap in their contract been brought to their attention at the time they entered into the contract.*

35 Indeed, there are legal boundaries or parameters which the court will not transgress. One of these is an obvious one: Where there is already an *express* term covering the situation at hand, the court will *not imply* a term which *contradicts* that particular *express* term (see, for example, Pearlie Koh & Andrew Phang Boon Leong, "Express and Implied Terms" in ch 6 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 06.054). Another relates to a principle already emphasised above, *viz*, the criterion of *necessity*. The very nature of this criterion means that the court will imply terms "in fact" *sparingly*. In order to arrive at its decision whether or not to imply a term "in fact", it will utilise the two tests mentioned above (*viz*, the "business efficacy" and "officious bystander" tests) which, by their very nature, are directly related to ascertaining how *the contracting parties* would (or would not) have filled the gap which ought not to have existed had it been covered by an *express* term in the first place. Again, one must, in our view, resist the approach of the sceptic merely because *the court* is involved in this exercise. To put it bluntly, this *is* the court's task, *regardless* of the views of the sceptic. More importantly, the court strives, from its *external* vantage point, to ascertain (through the *objective evidence* available) the *internal* intention of the contracting parties *had they been apprised of the situation concerned*. This is why the search is for the *presumed* – as opposed to the actual and subjective – intention of the contracting parties. The concern of the sceptic is, with respect, a misplaced one. No one would seriously controvert the sceptic's concerns if all that he or she is saying is that the process is an imperfect one. After all, it *was* indeed the imperfection of the contracting parties in *leaving a gap* in their contract in the first place that created the *necessity*

for implying the term. Utilising the criterion of necessity as embodied within the two tests referred to above, the court attempts its level best to ascertain the presumed intention of the contracting parties in order to ascertain whether or not it will imply the term concerned. Indeed, on a more general level, the law of contract is *not* – owing to a variety of both theoretical as well as practical reasons – concerned with the *actual subjective* intentions of contracting parties *per se* but, rather, is (as already alluded to above) concerned with ascertaining such intentions *via objective evidence* (and on the concept of objectivity, see generally the analysis (as well as the literature cited therein) in Andrew Phang Boon Leong & Goh Yihan, "Offer and Acceptance" in ch 3 of *The Law of Contract in Singapore* at paras 03.006–03.020). What is clear, however, is that adopting the approach of the sceptic is to regress down a slippery slope into legal oblivion and disempowerment. In this regard, it would not, perhaps, be inappropriate to refer to some observations from a lecture delivered at the University of Hong Kong in 2009 which were also referred to in *MFM* (at [138]) (see Andrew Phang, "Doctrine and Fairness in the Law of Contract" in *The Common Law Lecture Series 2008–2009* (Jessica Young & Rebecca Lee gen eds) (The University of Hong Kong, 2010) pp 17–100 at pp 18–24):

> Put simply, the central thesis of the present lecture is this: The rules and principles which constitute the *doctrine* of the law are not ends in themselves but are, rather, the means through which the courts arrive at *substantively fair* outcomes in the cases before them in *every* area of the law.
>
> [It should be added] that neither is more important than the other. In other words, the desire to arrive at a fair outcome does not mean that the courts can manipulate legal doctrine in an arbitrary fashion. Indeed, part of [the] task in the present lecture is to demonstrate – through illustrations from the law of contract – that legal doctrine is a coherent body of rules and principles which contain many common threads or linkages. Hence, any attempt to manipulate them in order to arrive at a predetermined result would be both artificial as well as unacceptable, and would instead lead to a loss of legitimacy in the law in the eyes of both the legal profession as well as the public alike. [It should also be mentioned], at this juncture, that academic literature is also important in the analysis as well as formulation of legal doctrine, especially with regard to the consideration of nascent and/or controversial areas of the law. However, [one pauses] to mention (parenthetically) that, whilst there is the need for the consideration as well as citation of academic writings, there is also the need for such writings to be *relevant* inasmuch as, *inter alia*, esoteric and/or highly abstract discourse ought to be avoided. In other words, whilst academic writings must always maintain their intellectual rigour, it must never be forgotten that their *highest* calling (and achievement) consists, in the final analysis, in their contribution to the legal *profession* as a whole.
>
> On the other hand, legal doctrine is not an end itself. Its primary function is to guide the court, in a reasoned fashion, to arrive at *a fair result* in the case before it. Here, too, academic literature has a potentially significant (perhaps even pivotal) role to play. This is because, in some quarters, there has – particularly with the advent of postmodern legal thought – been an increased (and, unfortunately, increasingly) skeptical view taken of the law in general and legal objectivity in particular. Such an approach is, on any view, both corrosive as well as destructive. Whilst one cannot deny that the *application* of objective rules and principles is a *dynamic process* which may therefore give rise (on occasion at least) to some unpredictability as well as uncertainty (particularly in an imperfect world), it is certainly the *very antithesis* of the law to argue that the law is wholly subjective and that (putting it crudely) 'anything goes'. Indeed, as [was] observed in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd*:

> [I]t is important to stress that notwithstanding many academic critiques to the effect that commercial certainty and predictability are chimerical, it cannot be gainsaid that the *perception* of their importance is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular. It may be worth observing that most of these critiques stem from a radical view of the law. To put it bluntly, many of such views stem from the premise that objectivity of the law is not merely elusive but positively illusory. In particular, such a sceptical approach is based on the idea that everything is subjective. This is, of course, the very antithesis of the very enterprise of the law itself. Such an approach also conveniently misses its own absolute cast. Unfortunately, though, it is an absolute view that dispirits and disempowers. It is profoundly negative and ought to be avoided at all costs.

Indeed, the view that the law is subjective (and, consequently, arbitrary) would cause an irreparable loss in the *legitimacy* of the law in the eyes of *the public*. And, as just mentioned, it would also dispirit as well as disempower lawyers, judges and students alike. And, from just a logical perspective (as also pointed out in the judgment just mentioned), the very view that all law is subjective is *itself* an 'absolute' proposition that thus involves circularity and (more importantly) self-contradiction.

...

[S]implistic reductionism must, [it should be added], be assiduously avoided by all concerned (including the courts) – if nothing else, because life is too complex. [The preferred approach is] viewing doctrine and fairness as an *interactive* process, although the attainment of a fair result in each case is the ultimate aim of the court.

[emphasis in original]

The status of the Belize test in Singapore

36 In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a *specific form or conception of interpretation* which is *separate and distinct from* the *more general* process of interpretation (in particular, interpretation of the *express* terms of a particular document). Indeed, the process of the implication of terms *necessarily* involves a situation where it is precisely because the *express* term(s) are *missing* that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks *ought* to be the contractual relationship between the contracting parties. The court is concerned only with the *presumed* intention of the contracting parties because it can ascertain the *subjective* intention of the contracting parties *only* through *the objective evidence which is available before it* in the case concerned. *In our view, therefore, although the* Belize *test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore* (as noted above at [27]–[28])*.*

A Coda – Post-Belize decisions as well as academic literature

37 Indeed, a survey of the English case law as well as academic literature since the *Belize* test was first promulgated will reveal what seems to us to be an overall ambiguity (particularly in the former) and no small measure of negative critique of that test (particularly in the latter).

38 Turning, first, to the English case law, although *Belize* has been cited in a fair number of cases, it is by no means clear that both the "business efficacy" and the "officious bystander" tests have been relegated to the sidelines of the English law relating to terms implied "in fact". Indeed, in the English Court of Appeal decision of *Stena Line Limited v P & O Ferries Limited* [2010] EWCA Civ 543 ("*Stena Line*"), Arden LJ (with whom both Toulson and Rimer LJJ agreed), whilst of the view (at [36]) that "[t]he *Belize* case constitutes an important and recent development in the principles of interpretation" also expressed the view that that decision was one "which the courts are probably still absorbing and ingesting". More importantly, the learned judge also observed (at [44]) that "[t]he *implications* of *Belize* on the case law on implied terms, which puts forward the different formulae referred to above, *is not wholly clear*" [emphasis added]. Although the court in *Stena Line* did nevertheless appear to apply the *Belize* test, there did not seem to be any definitive pronouncement on the precise status of the "business efficacy" and "officious bystander" tests post-*Belize*. In a related vein, Davies was of the view that the court in *Mediterranean Salvage and Towage* was not at all enthusiastic with the *Belize* test (see *Davies* at p 147). The English High Court decision of *Spencer and another v Secretary of State for Defence* [2012] 2 All ER (Comm) 480 might also be usefully noted. In that case, although Vos J embarked on an comprehensive survey of the relevant precedents and purported to apply the *Belize* test, the learned judge did also observe as follows (at [52] and [96]):

> The other cases after the *A-G of Belize* case do not entirely speak with one voice: some seem to consider that Lord Hoffmann was merely encapsulating the existing law, and others recognise the case as a persuasive departure from what was thought to be the law on implied terms up until 2009. Mr McCaughran's article expresses forcefully the latter view, whilst Lord Grabiner's article ((2012) 128 LQR 41, pp 58–61) declines to recognise any substantive change at all. Many of the subsequent cases do not really take the matter much further, but for the sake of completeness, I will mention the more important passages from each of them.
>
> ...
>
> I have not thought it necessary in order to decide this case to comment on the differences of academic and judicial opinion as to the effect of the *A-G of Belize* case ... . I am sure there will be many commentators ready and willing to continue that debate in the months and years to come.

39 Whilst it might be argued that the reference to the reasonable person test in *Belize* in the case law suggests that the "business efficacy" and "officious bystander" tests are no longer central to the test for terms "implied in fact", there does not appear to be any clear (and *independent*) statement in the case law itself as to how the reasonable person test is to be applied and/or what the precise statuses of the "business efficacy" and "officious bystander" tests are (see, for example, the English Court of Appeal decisions of *Mediterranean Salvage and Towage* (at [8]–[15]); *Chantry Estates (Southeast) Ltd v Anderson and another* (2010) 130 Con LR 11 (at [14]–[16]); *Garratt v Mirror Group Newspapers Ltd* [2011] ICR 880 (at [46]); *Groveholt Limited v Alan Hughes and another* [2010] EWCA Civ 538 (at [45]); *Thomas Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444 ("*Thomas Crema*") (especially the summary by Aikens LJ at [38]); *K G Bominflot Bukergesellscharft für Mineralöle mbH & Co v Petroplus Marketing A G, The Mercini Lady* [2011] 2 All ER (Comm) 522 (at 44]); and *Makram Boarsoum Estafnous v London & Leeds Business Centres Limited* [2011] EWCA Civ 1157 (at [28]), as well as the Privy Council decision (on appeal from the Court of Appeal of Jamaica) of

Thompson and another v Goblin Hill Hotels Ltd [2011] 1 BCLC 587 (at [27]) and the English High Court decisions of *Durham Tees Valley Airport Ltd v bmibaby Ltd and another* [2009] 2 Lloyd's Rep 246 (at [89]); *Inta Navigation Ltd and another v Ranch Investments Ltd and another* [2010] 1 Lloyd's Rep 74 (at [42]–[44]); *Alessandro Benedetti v Naguib Onsi Naguib Sawiris* [2009] EWHC 1330 (Ch) (at [216]–[217]); *Excelsior Group Productions Limited v Yorkshire Television Limited* [2009] EWHC 1751 (Comm) (at [105]–[106]); *A E T Inc Ltd v Arcadia Petroleum Ltd (The "Eagle Valencia")* [2010] 1 Lloyd's Rep 593 (at [4]); *C D V Softward Entertainment A G v Gamecock Media Europe Limited* [2009] EWHC 2965 (Ch) (at [74] and [77]); *E N E Kos 1 Ltd v Petroleo Brasileiro S A (No 2)* [2010] 1 All ER (Comm) 669 (at [41]); *Malcolm Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB) (at [18]); *The P N F Trust Company Ltd v Geoff Taylor and others* [2010] EWHC 1573 (Ch) (at [130]–[132]); *Re Agrimarche Ltd (In Creditors' Voluntary Liquidation)* [2010] BCC 775 (at [15]); *Enterprise Inns Plc v Forest Hill Tavern Public House Ltd* [2010] EWHC 2368 (at [23]–[25]); *North Shore Ventures Ltd v Anstead Holdings Inc and others* [2011] 1 All ER (Comm) 81 (at [242]); *Lomas and others v J F B Firth Rixon Inc and others (International Swaps and Derivatives Association intervening)* [2011] 2 BCLC 120 (at [57]); *Miscela Limited v Coffee Republic Retail Limited* [2011] EWHC 1637 (QB) (at [48]–[49]); *F & C Alternative Investments (Holdings) Limited v Francois Barthelemy* [2011] EWHC 1731 (Ch) (at [225] and [260]–[274]) and *Ross River Limited v Waveley Commercial Limited* [2012] EWHC 81 (Ch) (at [218]–[219], in which all parties in fact agreed (at [218]) that the principles set out in *Belize* should be applied and where the summary by Aikens LJ in *Thomas Crema* referred to above was cited (at [219])). If, indeed, the reasonable person test has (as we have noted above) been pitched at too general a level of abstraction and recourse must therefore be had to the more specific criteria embodied in both the "business efficacy" and "officious bystander" tests, then we would be back to "square one", so to speak.

40 We would add that in so far as the case law merely refers to *Belize* as encompassing the concept of interpretation or construction (see, for example, the English High Court decision of *The Procter & Gamble Company v Svenska Cellulosa Aktiebolaget* [2012] EWHC 498 (Ch) (at [8])), this is, with respect, also unhelpful. As we have noted above, the process of the implication of terms is neither incompatible nor inconsistent with the concept of interpretation or construction. However, this does not answer the more specific issue which we have raised and dealt with above, *viz*, the true nature of the process of the implication of terms and the centrality of the "business efficacy" and "officious bystander" tests in this process.

41 Finally, turning to the academic literature, although Sir Kim Lewison has observed (in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at para 6.03) that *Belize* "has now been referred to many times as the starting point for deciding whether a term should be implied into a contract" and that "[i]t may be taken to represent the current state of the law of England and Wales", that decision has by no means been unequivocally and uniformly endorsed in the academic literature itself. In fairness, there are comments on *Belize* which are very favourable (see, for example, Kelvin F K Low & Kelry C F Loi, "The Many "Tests" for Terms Implied in Fact: Welcome Clarity" (2009) 125 LQR 561 ("*Low & Loi*") and Chris Peters, "The Implication of Terms in Fact" [2009] CLJ 513 ("*Peters*")). However, despite their endorsement of the *Belize* test, the learned authors of the first piece just cited do nevertheless point to the difficulty in effecting the gap-filling *via* implied terms (see *Low & Loi* at pp 566–567). The "business efficacy" and "officious bystander" tests do constitute the means by which such gap-filling is effected and are, as explained above, more specific and particular than (as well as different from) the broad concept of interpretation. As importantly, perhaps, it is significant to note that the author of the second piece has noted that the *Belize* test "also appears to represent something of *a departure from* the traditional focus on *necessity*" [emphasis added] (*Peters* at p 514) – a departure which, as already noted above (at [33]), is not an approach that ought to be adopted in the context of terms "implied in fact".

42 More importantly, there is also commentary that is in fact quite critical of the *Belize* test, as exemplified, for example, by an article to which we have already referred (see generally *Davies* as well as above at [31]). Another author also expresses the view that the *Belize* test might be too liberal, introducing (implied) terms which do not in fact fulfil the intentions of the contracting parties (see generally Elizabeth Mcdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97). We would, finally, observe that there is yet other commentary which adopts a neutral stance as between the *Belize* test on the one hand and the traditional "business efficacy" and "officious bystander" tests on the other (see, for example, *McCaughran*; *cf* also Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th Ed, 2011), especially at paras 6-032–6-033 and *Chitty on Contracts – Third Cumulative Supplement to the Thirtieth Edition* (Sweet & Maxwell, 2011) at pp 150–151).

43 In summary, therefore, neither the English case law nor the academic literature furnishes clear support for the *Belize* test. The entire picture is mixed at best and ambiguous at worst, and constitutes further support for the approach adopted by this court (set out above at [36]).

Application to the facts

44 We turn now to consider (applying both the "business efficacy" as well as "officious bystander" tests) whether a term conferring a power on the Management Committee to remove office bearers may be implied in the Rules. The Appellants' case was simply that he who appoints an office bearer, *ie*, the Management Committee, must necessarily also have the power to remove this office bearer. It was also argued that the Rules did not specify the term of office for the office bearers in the Executive Committee; if a power of removal were not implied, it would mean that the office bearers could remain in office indefinitely.

45 We were not persuaded by the Appellants' argument, and considered that the *overall context* of the Rules pointed to a contrary conclusion. The purpose of the Rules is to set out the rights and obligations of the members *inter se* and to create an effective governance structure that would enable the Association to achieve its objectives, listed in Rule 3, of promoting the welfare of the Hainanese community and fostering interaction and a sense of identity amongst the community. Rules 12(1) and 15 vest the overall mandate to conduct and manage the affairs of the Association in the Management Committee as a whole, and the Executive Committee – which consists of all the office bearers – carries out the day to day running of the Association under the general instruction of the Management Committee. Rule 9 sets out the procedure for the election of office bearers, as follows:

> **RULE 9**
>
> (1) The elected Management Committee Members shall elect amongst themselves by secret ballots the President, the three Vice-President and the heads and deputy heads of the ten committee [sic].
>
> (2) The post of President and the posts of respective Vice-Presidents shall not be held by the same person for more than two consecutive terms. The Honorary Treasurer/Deputy Honorary Treasurer and the Internal Auditors shall not be immediately re-elected to the same or related positions.

The Rules are silent on the removal of office bearers. Rule 19, however, provides for the expulsion of members by the Management Committee for misconduct, and also prescribes certain procedural safeguards and voting majorities.

46 It was clear to us that both the "business efficacy" and "officious bystander" tests were not satisfied, and that this implied power of removal could not therefore have been part of the presumed intentions of the members. We did not think it was necessary for the effective management of the Association's affairs for the Management Committee to be given the power to remove particular office bearers. The Management Committee still retains the decisive power to supervise the conduct of the office bearers, manage finances and to formulate the general policy direction for the Association. We were cognisant of the fact that many clubs and unincorporated associations, unlike companies, are run on a non-profit basis and many office bearers take on positions of responsibility on a voluntary basis. While it is conceivable that a change in leadership may sometimes be desirable, we did not think that it was *necessary* for leadership change to be effected through a blunt power of removal wielded exclusively by the Management Committee, instead of through sensible compromise and consensus. It was also noted that the First Respondent averred that it was the first time in the 157-year history of the Association that a President had been removed before the expiry of his term of office. [note: 8] While we accept that there is always a first time when unanticipated problems arise and that this does not *per se* mean that a term conferring a power of removal is unnecessary, in this particular factual context, it did suggest that the Association is capable of governing itself within the existing framework set out in the Rules without an ad-hoc gap filling mechanism in the form of the implied term.

47 Further, the power of removal was not, in our view, so obvious that it would go without saying that such a term ought to be implied under the "officious bystander" test. The Rules include specific rules governing the removal of trustees and expulsion of members for misconduct (see Rules 14 and 19, respectively) and therefore contemplate the possibility that individuals with certain positions of responsibility or members may need to be removed in the interests of the Association. It is thus difficult to believe that the members did not advert themselves to the possibility of removal of office bearers or did not expressly say so because they had considered it so obvious that it would go without saying. We also do not think that the members would have considered it obvious that the Management Committee itself should have free rein to remove an office bearer. The members could have preferred the power of removal to be vested in the General Meeting or for the power to be exercised only when stringent voting margins or procedural pre-conditions are met; alternatively, as the Judge observed, the members could equally have intended that this apparent "gap" in the Rules should mean precisely that office bearers cannot be removed and must be allowed to serve out their complete two-year term of office in order to ensure stability and continuity in the management of the Association. The Appellants submitted to us that the Judge's reasoning on this point was flawed because the Rules did not expressly provide for a fixed term of office for an office bearer, but we were unable to agree with the Appellants' – somewhat ironically – unduly literal interpretation of this aspect of the Rules. Rather, a purposive interpretation of Rule 9 in conjunction with Rule 7, which provides for a two-year term of office for Management Committee members, indicates that the term of office for an office bearer must logically also be two years. An office bearer elected from amongst the members of the Management Committee can only be an office bearer for as long as he is also a Management Committee member, and his term as an office bearer must therefore necessarily also be limited by his term as a Management Committee member. If an office bearer were to have an indefinite term of office, it would clearly contradict the express purpose of Rule 9(2), which places restrictions on office bearers occupying the same position for *consecutive terms*.

48 Indeed, if the officious bystander had asked whether the Management Committee had the power to remove the office bearers at will, the members would not have unequivocally thought that the term was obviously necessary for the effective management of Association and unanimously suppressed him with a testy "Oh, of course!" The limited term of office – both for office bearers and members of the Management Committee – ensures that control of the Association will not always fall

into the hands of a single individual, and a fixed period of office without the threat of removal encourages consensus and unity, instead of divisive power struggles and acrimony. If the Management Committee or general members have irreconcilable differences with a particular office bearer, the solution is to vote him out at the next election for a new Management Committee and/or office bearers. And, if an office bearer has behaved in a particularly egregious manner, the last resort would and should be expulsion.

49 We hence declined to imply a term conferring a power on the Management Committee to remove office bearers in the Executive Committee.

The validity of the 20 October 2011 Meeting

50 The Respondents submitted that the 20 October 2011 Meeting was invalid as Foo Jong Peng did not have power under the Rules to convene a Management Committee meeting. It was argued that only the President was vested with the authority to do so under Rule 17 and that this position was in line with the Association's "customary practice".

51 Rule 17 provides as follows:

> **RULE 17**
>
> (1) The President shall have *the authority to deal with all matters* except that he shall only have the power to authorise the expenditure of any sum of money not exceeding $5000.00 per month in respect of any one matter not provided for in the budget.
>
> (2) The President and, in his absence, the respective Vice-Presidents shall preside in all General, Management and Executive Committee meetings.
>
> [emphasis added]

The Rules do not set out the procedures to be followed for convening a Management Committee meeting, apart from specifying who should chair the meeting and the required quorum.

52 We disagreed with the Respondents that the effect of Rule 17 was to confer *exclusive power* on the President to convene a Management Committee meeting. Rule 17(1) is simply an enabling provision that gives the President *authority to act on behalf* of the Association on all matters, subject to a monetary limit for the authorisation of expenditure, and we could not construe this provision so broadly so as to give *exclusive power* to the President to decide on *residual* matters relating to the affairs of the Management Committee or the Association that are not explicitly provided for in the Rules.

53 In our view, there were no discernable procedural limitations in the Rules mandating that Management Committee meetings could only be convened by the President. The internal administration procedures of unincorporated associations are usually conducted on an informal and flexible basis, and the Rules do not set out any decision-making hierarchy within the Management Committee. It may be that an office bearer such as the President or Honorary Secretary General will generally be responsible for convening a meeting as a matter of administrative convenience, but it is an entirely separate proposition altogether to state that other members of the Management Committee do not have the *legal power* to convene a meeting even with the requisite notice. The Management Committee is constitutionally entrusted with the general duties and powers to administer the affairs of the Association, and each elected Management Committee member has an equal

responsibility to participate in meetings and contribute to the decision-making process of the Management Committee. The authors of David Ashton & Paul W. Reid, *Ashton and Reid on Club Law* (Jordan Publishing, 2005) observe, as follows (at para 6-36):

> ... [If] through indolence or neglect or for any other reason, no committee meeting was convened when plainly it should have been, we consider that any member of the committee would probably have an inherent right to convene a committee meeting on reasonable notice; otherwise the management and control of the club's affairs would become rudderless, to the obvious detriment of the club.

We thus considered that any member of the Management Committee may convene a meeting upon reasonable notice, and, accordingly, the 20 October 2011 Meeting was validly convened by Foo Jong Peng. We would add that this power is not a disruptive one that can be abused by an individual member to call needlessly frequent meetings for vexatious purposes, with other members being compelled to attend at the risk of careless decisions being made in their absence. The 50% quorum required for a Management Committee meeting under Rule 13 ensures that at least a majority of Management Committee members must be present, and if superfluous meetings are convened, they are likely to be inquorate and invalid.

54 For completeness, we would note that the Respondents also advanced an argument that it was the "customary practice" of the Association that only the President had the power to convene a Management Committee meeting. This argument was only canvassed briefly in the court below and without the citation of authority. In *Golden Harvest Films Distribution (Pte) Limited v Golden Village Multiplex Pte Ltd* [2007] 1 SLR(R) 940, this court accepted (at [39]) that it was in principle possible to invoke past practice to fill in gaps in the articles of association of a company; however, concrete evidence must be adduced to show that this practice was "the unvarying course" of the company (*In re Imperial Mercantile Credit Association (Marino's Case)* (1867) LR 2 Ch App 596 at 598 *per* Sir G J Turner LJ). The only evidence before us on such "past practice" was the correspondence included in the Respondents' affidavits documenting an isolated incident in June 2009 where the then Honorary Secretary General and another Management Committee meeting had expressed the view that only the President, acting upon the advice of other key office bearers, had the power to convene a Management Committee meeting. This was insufficient for us to conclude that the Management Committee had, as a matter of course, always acted upon this convention.

Conclusion

55 For the above reasons, we dismissed the appeal substantially as the Appellants had not succeeded on their key contention, *ie*, that the Management Committee had the power to remove an office bearer of the Executive Committee. Costs here and below were fixed at $25,000 in favour of the Respondents, inclusive of disbursements.

[note: 1] Appellants' Core Bundle Vol II ("2ACB"), p 21.

[note: 2] *Ibid*, p 25.

[note: 3] *Ibid*, p 27.

[note: 4] *Ibid*, p 30.

[note: 5] *Ibid*, pp 38–39.

[note: 6] *Ibid*, p 40.

[note: 7] *Ibid*, p 41.

[note: 8] Record of Appeal, Vol III (Part A), p 25.