Chan Siew Lee *v* TYC Investment Pte Ltd and others and another appeal [2015] SGCA 40

Case Number : Civil Appeal Nos 149 and 150 of 2014

Decision Date : 13 August 2015

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Eugene Thuraisingam, Cheong Jun Ming Mervyn and Jerrie Tan Qiu Lin (Eugene Thuraisingam LLP) for the appellant in CA 149/2014 and the second respondent in CA 150/2014; Thio Shen Yi SC, Freddie Lim Shaochun and Rachel Tan Pei Qian (TSMP Law Corporation) for the first to fourth respondents in CA 149/2014 and the appellants in CA 150/2014; Chelva Retnam Rajah SC, Sayana Baratham, Chia Ru Yun Megan Joan and Tham Chang Xian (Tan Rajah & Cheah) for the fifth respondent in CA 149/2014 and the first respondent in CA 150/2014.

Parties : Chan Siew Lee — TYC Investment Pte Ltd and others

Companies – Memorandum and articles of association – Management powers – Directors – General meeting

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 4 SLR 1149.]

13 August 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 A company has two organs through which it might act: the board of directors and the shareholders in a general meeting. Where a company adopts Table A in the Fourth Schedule to the Companies Act (Cap 50, 2006 Rev Ed), the management of that company will be the preserve of the board of directors. Section 157A(1) of the Companies Act and Art 73(1) of the Table A regulations, which are identical, provide: "The business of a company shall be managed by or under the direction of the directors." But what if it turns out for some reason that the board is unable or unwilling to act? In such circumstances, should it be implied into the company's constitution that the management power is then reserved to the other organ, the shareholders in general meeting? Or is it the case that only the board may manage the company such that where the board does not function, the remedy, if there be one, is confined to reconstituting the board or commencing proceedings to compel the board to act?

2 The present case raises this conundrum. The company incorporated Art 73(1) of the Table A regulations as part of its articles of association; therefore, under the company's constitution, the board of directors is vested with the power and the duty to manage the company. The board of directors, however, is deadlocked. But sufficient votes were garnered at a shareholders' meeting and resolutions were passed there to address the issues on which the board was deadlocked. This was purportedly done in the exercise of a reserve management power. It then gave rise to the present dispute which centres on whether such resolutions could have been passed in the first place.

3 On 24 September 2013, Originating Summons 895 of 2013 ("OS 895/2013") was filed. The

plaintiffs were the company in question, TYC Investment Pte Ltd ("TYC"), and three wholly-owned subsidiaries of TYC, Lonzo Properties Pte Ltd, Bonzo Properties Pte Ltd and Amstay Properties Pte Ltd. The defendants are the two directors of the company, Dr Henry Tay Yun Chwan ("Dr Tay") and Ms Jannie Chan Siew Lee ("Ms Chan"). The identity of the parties as plaintiffs and defendants in this instance is no indicator of which side of the dispute they are on. It will become apparent, from the facts which follow, that Dr Tay and the companies take the same legal position whereas Ms Chan is alone in taking the opposite position.

The background

The parties and the three agreements

4 Dr Tay and Ms Chan were once husband and wife. In May 2010, they divorced. The present case arose out of their split. The parties entered into some agreements in an attempt to resolve some of the issues between them amicably. However, one clause in one of these agreements gave rise to further, perhaps, unanticipated difficulties.

5 That agreement is the second in a series of three agreements that were entered into by Dr Tay and Ms Chan as part of their divorce settlement. The first agreement was a Deed of Settlement between Dr Tay and Ms Chan dated 9 April 2010 ("the DOS"). By the DOS, Dr Tay and Ms Chan agreed to settle the division of their matrimonial assets as well as Ms Chan's claim for maintenance. The second agreement was an Agreement for Amendment to the DOS and Settlement of Litigation between Dr Tay and Ms Chan dated 15 May 2012 ("the SSD"). This agreement (as its title suggests) made amendments to the DOS and stipulated matters relating to the management of TYC, which is a company holding a substantial part of the family assets. The pertinent clause, around which much of this case revolves, is cl 10 ("the Payment Clause"):

> 10. Payment voucher system for all future payments for TYC. Neither Dr Tay nor Ms Chan will sign a cheque on TYC's bank accounts unless the other has signed a voucher approving.

6 Some background to the Payment Clause is appropriate. About two years before the filing of OS 895/2013, Ms Chan had, or so Dr Tay alleged, unilaterally made unauthorised payments out of TYC's bank accounts. Dr Tay accordingly commenced Originating Summons No 1080 of 2011 ("OS 1080/2011"), seeking an injunction to restrain Ms Chan from making payment decisions unilaterally. However, OS 1080/2011 was discontinued in June 2012. The reason, according to counsel for the plaintiffs, was that the Payment Clause had been devised as a sufficient solution: its insertion in the SSD would ensure that future payments made by TYC would not be improper, capricious or arbitrary.

7 Although TYC was not a party to the SSD, it was envisaged that there would be a third agreement to bind TYC to matters agreed in the SSD. Clause 15 of the SSD expressly provides that:

> If within 1 month from the date of this Agreement:
>
> (i) TYC's shareholders unanimously approve all the matters relating TYC (on terms acceptable to Dr Tay and Ms Chan); and
>
> (ii) TYC enters into a deed of agreement with Dr Tay and Ms Chan relating to such matters (on terms agreed by Dr Tay and Ms Chan); and
>
> (iii) TYC amends its Articles (on terms agreed by Dr Tay and Ms Chan),

("**TYC Matters**") then the parties will seek Court approval by consent ("**Court Approval**") of this Agreement. If the TYC Matters are not approved/done within 1 month from the date of this Agreement, this Agreement is ineffective, null and void.

8 All the conditions contemplated by cl 15 of the SSD were duly satisfied.

9 Pursuant to cl 15(ii), Dr Tay, Ms Chan and TYC entered into a deed of agreement on 11 June 2012 ("the TYC Deed"). Dr Tay and Ms Chan signed the TYC Deed on their own behalf and on TYC's behalf as directors and, for Ms Chan, as company secretary. The effect of the TYC Deed was to confer on TYC all rights and benefits and impose on TYC all obligations, provisions, covenants and conditions "under the [DOS] as amended in accordance with the terms set out in the SSD", as if it were a party thereto.

10 The TYC Deed is also reflected in TYC's articles of association ("the TYC Articles"), Art 16 of which provides:

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

Ms Chan refuses to approve payments by TYC

11 Whereas the Payment Clause seemed to have been devised to prevent either party from making payments in their personal interest out of the company's assets, from July 2012, Ms Chan invoked the Payment Clause to refuse to approve various other payments by TYC. Initially, the expenses which Ms Chan resisted payment of were: (a) advisory fees payable to KPMG Services Pte Ltd ("the KPMG Fees"); and (b) costs, outgoings and taxes incurred in relation to the properties at 40A Nassim Road and 40C Nassim Road ("the Nassim Road Expenses"). The former expenses were eventually paid for by Dr Tay's own company, Amstay Pte Ltd ("Amstay"), and the latter by Dr Tay himself. Amstay and Dr Tay then sought reimbursement from TYC but this could not be effected without Ms Chan's approval. Faced with this impasse, Dr Tay called an extraordinary general meeting ("EGM") of TYC aimed at overcoming what he viewed to be an "administrative deadlock".

12 On 4 September 2013, the EGM was convened. 18 resolutions were tabled, all of which were passed by Dr Tay and his son, Tay Wee Jin Michael, who respectively held 46% and 5% of the voting rights in TYC. Ms Chan and the couple's daughters, Audrey Tay May Li and Tay May Yi, Sabrina, were not present at the EGM; although even if they had been, their respective voting shares of 44%, 2.5% and 2.5%, whether individually or collectively, could not have defeated the resolutions as these could be carried by a simple majority.

13 Resolutions numbered 4(1), 4(2), 5(1), 5(2), 6(1) and 6(2) approved the reimbursement of the Nassim Road Expenses to Dr Tay and of the KPMG Fees to Amstay Pte Ltd, and authorised Dr Tay to unilaterally sign the cheques and vouchers to effect such reimbursement. Further resolutions numbered 4(3), 5(3) and 6(3) authorised Dr Tay to take all steps and actions on TYC's behalf, including the appointment of solicitors to act for TYC and commence court proceedings against Ms Chan, as may be necessary or desirable to secure the reimbursement of the Nassim Road Expenses and the KPMG Fees. The remaining resolutions related to an issue of Ms Chan's failure to redeem and return TYC's 6,534,562 shares in The Hour Glass Limited ("the Outstanding THG Shares"). These had been borrowed by Ms Chan to be pledged with a bank as security for some personal loans. The latter issue has fallen away in the course of the proceedings and is no longer relevant.

14 As a result of the resolutions passed at the EGM, TSMP Law Corporation ("TSMP") was engaged by TYC. In due course, legal fees were and continue to be charged by TSMP ("the TSMP Fees"). Ms Chan refused also to approve the payment of these fees.

15 Moreover, subsequent to the EGM, corporate secretarial fees were charged by Express Co Registration & Management Ltd ("the Express Co Fees"). Part of the Express Co Fees was for services rendered in relation to the 4 September 2013 EGM. The rest was for services rendered in relation to subsequent EGMs held on 11 September 2013 and 4 October 2013. Ms Chan refused to approve the payment of any of the Express Co Fees.

16 OS 895/2013 was commenced and the prospect of litigation evidently caused Ms Chan to refuse to approve yet further payments by TYC. By 2 December 2013, when TSMP applied to amend the Originating Summons, the number of TYC's creditors whose debts remained unpaid had grown more than tenfold and they ranged from drycleaners to the Comptroller of Income Tax. Two lists of creditors were appended to the amended Originating Summons filed on 8 January 2014: a list of "immediate creditors" and a list of "long-term recurring creditors".

Ms Chan agrees to settle most of the payment disputes

17 Prior to the hearing of OS 895/2013, the dispute over most of these expenses, including all of the expenses owed by the second to fourth plaintiffs, were resolved. This led counsel for the plaintiffs, Mr Thio Shen Yi SC, to clarify that the second to fourth plaintiffs no longer had any interest in the proceedings. What remained unresolved were the KPMG Fees, the Nassim Road Expenses, the TSMP Fees and the Express Co Fees owed by TYC. Of these, the Nassim Road Expenses were also settled by consent in the midst of trial.

18 Two consent orders were recorded by the Judicial Commissioner ("the Judge"). The first was granted on 27 March 2014, under which, Ms Chan was to take steps to procure the redemption and return of the Outstanding THG Shares to TYC. The second order was granted on 21 April 2014, and under this, Ms Chan was to sign the relevant cheques or payment vouchers to enable TYC to (a) reimburse Dr Tay for his earlier payments of the Nassim Road Expenses; and (b) "make payment of all expenses owing to [TYC's] long-term recurring creditors … save for [the Express Co Fees] and [the TSMP Fees]".

19 Ms Chan subsequently failed to comply with the second consent order as she refused to approve TYC's payment of the expenses incurred in relation to 40C Nassim Road, which incidentally was where Dr Tay was residing. But there is no longer an issue with respect to these expenses since an application was made by way of Summons No 4612 of 2014 ("SUM 4612/2014") to enforce the consent order and further orders were made (a) permitting Dr Tay to unilaterally sign the cheques; and (b) directing the banks to honour the cheques notwithstanding the lack of supporting payment vouchers signed by Ms Chan.

20 Hence, only the KPMG Fees, the TSMP Fees and the Express Co Fees remained live before the Judge and before us in this appeal.

The reliefs sought

21 The primary relief prayed for in respect of the KPMG Fees, the TSMP Fees and the Express Co Fees is a declaration that TYC's cheques signed by Dr Tay "are valid, binding and are to be honoured by [TYC's] banks … notwithstanding that [the] cheques are not accompanied by a supporting payment voucher signed by [Ms Chan]". The issue at the heart of whether this relief may be granted

is whether TYC's shareholders could validly resolve in a general meeting to approve these payments, when Ms Chan had refused to do so. The view taken was that Ms Chan had declined to approve the payments in her capacity as a director and the question then was whether the shareholders could act in place of an unwilling director to approve the payment in question. On appeal, TSMP accordingly rephrased the relief it sought as follows:

> A declaration that TYC's shareholders have reserve powers of management to approve specific payments where the board of directors is deadlocked, and that the identified payment is to be made by:
>
> i) Imposing an obligation on the directors to sign the necessary payment vouchers and/or cheques; or
>
> ii) Allowing the shareholders the power to authorise one director to unilaterally sign the relevant cheques on behalf of TYC.

22 Between the filing of OS 895/2013 and its amendment on 8 January 2014, further allegations that Ms Chan had "wilfully disregarded" her contractual obligations under the DOS, the SSD and the TYC Deed were raised. Alternative prayers were therefore added to OS 895/2013 seeking specific performance of an implied term said to arise under the agreements, the result of which was to mandate that Ms Chan "[sign] all necessary payment vouchers and/or cheques" to enable TYC to pay the expenses which it ought to pay. If Ms Chan failed to do so, a similar declaration was sought that TYC's cheques signed by Dr Tay alone would be valid.

23 A second basis for the alternative relief was raised at the eleventh hour in the plaintiffs' supplementary submissions dated 16 May 2014. It was alleged that Ms Chan was also in breach of her fiduciary duties under s 157 of the Companies Act in not approving these payments. Based on that, it was submitted that an injunction should be issued pursuant to s 409A of the Companies Act directing that Ms Chan specifically perform her obligations.

The decision below

24 The Judge approached the issues in two steps. First, he considered the validity of the resolutions passed at the 4 September 2013 EGM. This was a critical issue for the plaintiffs, because if it was found that the EGM did have the power to appoint TSMP to commence the present action as well as the power to authorise Dr Tay to unilaterally sign cheques, the grant of the primary relief should ordinarily follow. And if the primary relief were granted in the form set out at [21] above, it would establish that there were "2 payment mechanisms to break the deadlock". The effect of such a ruling would go further than resolving the specific payment disputes which were the subject of OS 895/2013 as it could conceivably apply to future payment disputes. But if the plaintiffs were to fail on the first issue, the TSMP Fees and part of the Express Co Fees would not have been validly incurred, given that they would then have resulted from decisions that the shareholders at the EGM were not empowered to make.

25 Second, the Judge considered the possibility of ordering specific performance of an implied obligation owed by Dr Tay and Ms Chan not to exercise the power to approve (or disapprove) any payment by TYC under the Payment Clause dishonestly, for an improper purpose, capriciously or arbitrarily ("the Implied Term"). The answer to this was thought to depend on whether any withholding of payment or of approval by Ms Chan entailed a breach of fiduciary duty or a breach of contract by her.

26 The Judge held that the plaintiffs succeeded partially on the first issue but not at all on the second issue.

27 As a starting premise, the Judge acknowledged that, under s 157A of the Companies Act, there is a division of powers between directors and shareholders, with the powers of management vested in the board of directors. The power to authorise the payment of obligations owed by the company would fall within the ambit of such management powers and the shareholders cannot *ordinarily* control the board's exercise of such powers by passing a resolution to override or reverse it: at [85] of *TYC Investment Pte Ltd and others v Tay Yun Chwan Henry and another* [2014] 4 SLR 1149 ("the GD").

28 The inclusion of the qualifying word "ordinarily" by the Judge was deliberate. The Judge held that, as a matter of principle, s 157A and Art 73 of the Table A regulations are predicated on the subsistence of a board of directors that is both competent and willing to manage the affairs of the company: at [105] of the GD. So where the board is found to be unable or unwilling to act, shareholder reserve powers may be implied under a company's constitution on the basis of *necessity*: at [108].

29 On the facts of the case, the Judge found that it was necessary to imply "the limited power to appoint solicitors to commence proceedings to determine the rights and obligations of the relevant parties under [the DOS, the SSD and the TYC Deed], so as to break the deadlock in management": at [122]. This finding was "fortified" by the fact that the proceedings were against a director, Ms Chan, and directly or indirectly concerned the exercise of her powers and functions as a director. If such a power were not implied, such a director would be in a position to prevent the company from taking steps to resolve and determine this issue: at [123].

30 Ms Chan's counsel, Mr Eugene Thuraisingam ("Mr Thuraisingam"), had argued that the existence and availability of s 216A of the Companies Act, which permits the filing of a derivative action with the leave of the Court, should preclude the implication of a shareholder reserve power to appoint solicitors to commence proceedings. The Judge rejected this on the basis of the "important conceptual differences between a derivative action and an action brought by the general meeting": at [132] and see generally [131]–[143].

31 As for the power to authorise Dr Tay to unilaterally sign cheques on TYC's behalf, the Judge found that it could not be necessary to imply it for two reasons. First, TYC is bound by the SSD by virtue of the TYC Deed, and no provision of the SSD can be amended unless all the shareholders of TYC agree: at [152]. Second, implying such a reserve power would "allow the EGM to determine payment matters for itself, or worse, to rewrite the rights and obligations of the parties under the SSD": at [154].

32 Turning to the alternative prayers, the Judge observed that the Implied Term contended for did not satisfy the three-step framework described in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193; it merely satisfied the first of the three steps. The first step concerns the question of whether there was a gap in the SSD: at [159]. The Judge answered this affirmatively as he found that Dr Tay and Ms Chan had not addressed their minds to the possibility of either party preventing TYC from making payments despite approval having already been given by the other party: at [167]. The second step is to determine whether the agreement will not be efficacious by reason of the gap: at [170]. The Judge held that the gap caused by the Payment Clause was adequately ameliorated by the existing duties imposed on Dr Tay and Ms Chan as directors pursuant to s 157(1) of the Companies Act and at general law: at [185]. Hence, there was no need to imply a term. As to the third step, this entails an inquiry to determine the least intrusive way in which the court may fill a gap in order to make the agreement efficacious. The court does this

by identifying the presumed intention of the parties and in this regard, it considers the term to which the parties would respond "Oh, of course! That should form part of the parties' agreement": at [215]. Assuming that the second step had been satisfied, the Judge held that Dr Tay and Ms Chan would not have responded in that way to an implied term in the form envisaged by the alternative prayers: at [220].

33 The Judge therefore held that there was no Implied Term and therefore no possibility of an order for its specific performance. In any case, the Judge held that if there was such an Implied Term, it was doubtful that Ms Chan had breached it. He held that Ms Chan's refusal to approve payment of the TSMP Fees, the Express Co Fees and the KPMG Fees stemmed from her honest, *bona fide* belief that the expenses were not valid. For the same reason, he held that there was no breach of fiduciary duty by Ms Chan: at [221]–[222], [225]–[234] and [236].

34 Both sides appealed. Ms Chan disputes the Judge's holding that there is a shareholder reserve power to appoint solicitors and commence the present action. Conversely, TYC disputes the Judge's holdings that there is no shareholder reserve power to authorise Dr Tay to unilaterally sign cheques on TYC's behalf, no Implied Term in the SSD, no breach of the Implied Term by Ms Chan and no breach of fiduciary duty by Ms Chan.

Our decision

35 These appeals revolve around the same primary issue that was raised below: whether, in what circumstances and to what extent the management powers of a company may be reserved to the shareholders when the board is deadlocked. TYC was faced with expenses that had to be met. Pursuant to the Payment Clause, the board was only able to effect any such payment if it was agreed to by both Dr Tay and Ms Chan. In circumstances where they were not in agreement, could the shareholders step in to authorise the company to meet these expenses and to give effect to such authorisation by permitting the payment to be made?

The law on the implication of reserve powers

36 We agree with the Judge that the analysis of whether there is a reserve power vested in the general meeting is one that must be situated in the context of implied terms. The division of power between the board of directors and the shareholders in a general meeting is a matter of contract, or a "compact" as the Judge put it at [89], [90] and [105] of the GD, which is set out in the company's constitution. That contract is between the shareholders and the company, and between the shareholders *inter se*: s 39 of the Companies Act. In general, the court will lean towards preserving this division, not least because it has no power to alter the company's memorandum or articles, save on limited grounds (*eg*, under s 216 of the Companies Act); but also because there is no reasonable basis for thinking that management responsibilities should also be allocated to the shareholders, where there is a general provision that they are allocated to the directors. This accords with good commercial sense because the directors are constrained to act in accordance with their fiduciary duties. Shareholders, on the other hand, are not. The preference for vesting management power in the board of directors alone is thus grounded in the fact that the risk of managerial abuses is best curbed by allocating the responsibility to manage the company to the directors, who in turn are constrained by the fiduciary duties they owe to the company.

Necessity is the touchstone for implication

37 That said, this cannot be an inflexible or unyielding rule – in exceptional circumstances, reserve powers may be implied in favour of the shareholders in general meeting. As with implied terms in

general, the basis for doing so is necessity. There are two important corollaries of this. First, management powers are reserved to the shareholders in a general meeting only where the board of directors is deadlocked or is unable or unwilling to act. Second, their scope is limited to what is *necessary* to resolve the deadlock. The general principles on implying reserve powers were distilled by the Judge as follows at [108] of the GD:

> (a) Reserve powers do not devolve to the shareholders unless the board is unable or unwilling to act.
>
> (i) In relation to unwillingness, the fact that shareholders disagree with a *bona fide* board decision will not in itself be sufficient.
>
> …
>
> (b) If the deadlock in management may be broken in some other way under the company's constitution (as was the case in *Massey*), then the court should refuse to recognise that shareholders have reserve powers of management.
>
> (i) The reason for this proposition is that reserve powers are implied under a company's constitution on the basis of necessity. The corollary to this proposition is that mere convenience will not justify the exercise of management powers by shareholders.
>
> (ii) In this regard, I note that in *Massey*, the deadlock in management could have, as a matter of contract, been broken by appointing additional directors.
>
> (c) The scope of the reserve powers which the shareholders may exercise would depend on the facts of each case.
>
> (i) The cases have not established any general proposition governing the issue of scope. In my view, it is clear that reserve powers may not be exercised to contravene an express term in a company's articles.
>
> (ii) A convenient test, in my view, can be stated as what is reasonably necessary in the circumstances of the case. The reference to necessity recognises that reserve powers arise because of a deadlock in management and hence their scope should ordinarily go no further than what is necessary to break that deadlock. It reinforces the point that reserve powers are narrow in scope.
>
> (iii) The reference to reasonableness, on the other hand, recognises the practical difficulties and uncertainties which shareholders face in the purported exercise of reserve powers. Necessity must therefore be judged with a degree of latitude.
>
> (d) Keeping in mind that it is all a matter of contract, the resolution in general meeting to commence proceedings must be passed in accordance with the requisite majority as prescribed by the company's constitution. Absent any super majority requirement contained in the company's constitution, the power to commence proceedings may be authorised by an ordinary resolution.

38 We generally agree with this.

39 Mr Thuraisingam contends that the foregoing statement of the applicable principles goes too

far. He submits that direct management power can *never* vest in the shareholders. At most, he submits, the shareholders in general meeting have the reserve power to appoint additional directors who may break the deadlock, but they may not ever intervene directly in management decisions, which, pursuant to s 157A(1) of the Companies Act and Art 73(1) of the Table A regulations as adopted in the TYC Articles, are required to be made by the board of directors. Mr Thuraisingam's attack was therefore based in the first instance on the proposition that in truth, there are no management powers reserved to the general meeting at all.

40 In our judgment, this is incorrect. First, there will be cases, however infrequently they may occur, where the appointment of additional directors will not break the deadlock. The present case is such a case (see [72] below). Where it is possible to break the deadlock by the simple device of appointing additional directors, then it will often be the case that the threshold for implying a reserve power in favour of the general meeting will not have been met at all. Second, although it is true that shareholders do not have fiduciary duties, they do, on the other hand, carry the economic risk of corporate failure. Hence, it is not obviously illogical that in limited circumstances, they may be vested with limited powers to the extent necessary to enable the company to function.

41 We turn to the cases which illustrate that the concept of necessity may underlie the implication of reserve powers. In *Re Commonwealth Printing Press Ltd* [1974] HKCFI 59 ("*Commonwealth Printing Press*"), a petition was brought to wind up a company. The running of the company was crippled by a power struggle between two factions as a result of which the company could not get the relevant persons to sign cheques that it needed to issue. The company's articles of association required two out of the managing director, a director nominated by the board of directors and the general manager to sign the cheques. There was a dispute as to the appointment of the managing director, who was to be elected by the board of directors from amongst themselves. While there had been one election amongst the directors of a managing director, this appeared to be invalid and the court held (at [10]) that the directors in fact "fail[ed] to exercise their power". There was also a difficulty of nominating a director to sign cheques as the directors from one faction refused to act with those from the other faction. The court concluded (at [9]–[10]) that this was a case where "there is such power on the directors to appoint a managing director to sign cheques, to keep accounts etc. and to manage the company's day-to-day affairs … but [the directors] are unable or unwilling to do so simply because two factions of directors fail to see eye to eye and fail to exercise their power." In these circumstances, the court was asked to wind up the company but it declined to do so, holding instead (at [10]) that "[the shareholders] can, in the general meeting, carry forward whatever resolution that the directors are empowered to do and fail to do."

42 A similar setting was presented in *In re Argentum Reductions (UK) Ltd* [1975] 1 WLR 186 ("*Argentum Reductions*"). There, a petition was brought by a shareholder, Mrs Jenkins, to wind up the company. The company had two directors: Mr McAllister and Mr Jenkins. All the shares in the company carrying voting rights were held by their wives: Mrs McAllister had 48 shares, and Mrs Jenkins had 47. At the time of the presentation of the petition, the directors had fallen out with each other and there was "an unhappy state of deadlock" at the board level (at 188). Before the substantive hearing of the petition, Mr McAllister, Mrs McAllister and the company applied for an order that payments out of the company's bank account for the purpose of meeting debts incurred after the date of the application in the ordinary course of business be permitted; without such an order, the bank account would effectively be "frozen" and inoperable (at 189). Mr and Mrs Jenkins took a preliminary objection that none of them had standing to make the application. This in turn raised the question of whether Mr and Mrs McAllister either together or separately could authorise the company to make the application. Megarry J considered the matter in some detail and eventually based his decision on the narrower ground that Mrs McAllister herself had standing as a shareholder to make the application. But on the wider question, he said (at 189):

> If one accepts to the full that the shareholders cannot reverse a decision of the directors, or compel them to do what they do not want to do, one does not necessarily reach the conclusion that where the directors are in deadlock as to a course of action, the majority of the shareholders are powerless to come down on one side or the other.

43 Hence, it appears that Megarry J thought the majority of the shareholders (essentially, Mrs McAllister) could make the application on the company's behalf where there was a deadlock among the directors. Megarry J also acknowledged that in the first place "[s]teps might be taken to remove Mr. Jenkins as a director, or to appoint another director" but seemingly rejected it on the basis that "[t]hese matters would, however, take a little time" because Mrs Jenkins was refusing to attend any company meeting (at 189).

44 If we were to draw from these observations in *Argentum Reductions*, it would follow that the first resort when faced with a deadlocked board would be to reconstitute the board; but if that were impracticable, or unlikely in any event to overcome the deadlock, the court would be entitled to imply a reserve power for the majority of the shareholders to act on behalf of the company to the extent necessary. The underlying principle is that a company should not needlessly be hamstrung by a deadlock on the board but should be allowed to get on with managing its affairs provided there is a functioning majority of shareholders.

45 In our judgment, however, at least as a general rule, even such a reserve power must be limited and that limitation may be found in two cumulative requirements: (a) the dispute must relate to the performance of a *bona fide* obligation owed by the company to a third party; and (b) there is no material suggesting that it will not be in the company's best interest to honour these obligations. These limitations serve to ensure that the power reserved to the general meeting is not to do whatever the board may do and hence, in effect, to step into the shoes of the board. Rather, it is limited to the minimum necessary to keep the company going by enabling it to meet its *bona fide* obligations as long as it is not shown that the company would be better off not meeting them.

46 This is of course rooted in the notion that the implied power and its scope should both be limited to and by occasions of true necessity. In addition, some support for it, albeit tangential, can be found in *Massey & Anor v Wales & Ors* [2003] NSWCA 212 ("*Massey*"). Hodgson JA, with whom Meagher JA and Beazley JA agreed, wrote at [49]: "the possibility that the company may have been in a situation where interests of creditors had to be taken into account is of some significance where there is a question whether commencement of proceedings can be authorised by members, or only by directors." Hodgson JA was saying in effect that in considering whether the commencement of proceedings may be authorised by the shareholders instead of the board, it will be relevant to have regard to the interests of creditors. He relied on *Kinsela & Anor v Russell Kinsela Pty Ltd (in liq)* (1986) 10 ACLR 395 ("*Kinsela*") for this proposition. That case concerned the purported ratification by the shareholders of a breach of duty to the company on the part of the directors. In a slightly different context, the court there observed that the shareholders do not have the power or authority to absolve the directors from [a breach which prejudiced the creditors in an insolvency context]" (at 404) because the interests of creditors may be regarded as synonymous with the company's interests when the company in question is insolvent (at 401–403).

47 The point in the end is this. It is true that the court when confronted with the issue of the shareholders' reserve powers is dealing with an issue of the management of the company's affairs and the balance of powers between the (usually competing shareholders) on the one hand and the (usually divided) board on the other; yet in determining that issue, it is plainly right that the interests of innocent creditors will have to be considered and will often have a bearing on how the court should strike a balance among the competing factions whose disputes *within* the company threaten to

paralyse the company and prejudice innocent third parties *outside* it.

There must be a deadlock

48 We have placed our emphasis thus far on whether the circumstances present a *necessity* to imply reserve powers as a result of the board's inability to function. It should be noted that the predicate of such necessity will generally be the existence of a deadlock within the board.

49 The need to invoke even these limited reserve powers will therefore not arise where there is either (a) no deadlock; or (b) the deadlock can be broken by the appointment of additional directors and/or the removal of existing directors in a general meeting. It is important to note this when considering the cases that the Judge referred to in the GD. Some 11 cases were referred to as bearing on the issue of the division of power. However, seven of these cases involved no real or intractable deadlock in the sense of the directors being unable or unwilling to act and with shareholders powerless to affect this by reconstituting the board. Instead, these were cases where:

(a) the majority shareholders at a general meeting sought to:

(i) override the views of:

(A) the board of directors (*Automatic Self-Cleansing Filter Syndicate Company, Limited v Cuninghame* [1906] 2 Ch 34; *Marshall's Valve Gear Company, Limited v Manning, Wardle & Co, Limited* [1909] 1 Ch 267);

(B) a managing director who had veto power (*Quin & Axtens, Limited and Others v Salmon* [1909] AC 442 ("*Quin & Axtens*")); or

(C) the permanent directors (*John Shaw and Sons (Salford), Limited v Peter Shaw and John Shaw* [1935] 2 KB 113); or

(ii) ratify an action taken by the board of directors (*Bamford and Another v Bamford and Others* [1969] 2 WLR 1107); or

(b) the meeting of the board of directors had not yet been convened to consider:

(i) the institution of legal proceedings (*Breckland Group Holdings Ltd v London & Suffolk Properties Ltd & Others* (1988) 4 BCC 542); or

(ii) the appointment of accountants and solicitors to investigate the affairs of the company (*Credit Development Pte Ltd v IMO Pte Ltd* [1993] 1 SLR(R) 68).

In almost all these cases, the directors had or could have acted. In one case, *Quin & Axtens*, where the board was divided, it was not apparent that the board could not have been reconstituted. Hence, there was no discussion at all on the necessity of implying a reserve power in favour of the shareholders. The main issue that was raised in these cases centred instead on whether the shareholders were entitled to do what they did.

50 As for the remaining four cases, two concerned the issue of whether the company has the particular reserve power, acting in a general meeting, to appoint additional directors (*Barron v Potter* [1914] 1 Ch 895) or a managing director (*Foster v Foster* [1916] 1 Ch 532). In these cases, any deadlock would in fact be broken by the reconstitution of the board. Hence, these were not cases concerning the conferring of management powers on the general meeting.

51 As to the last two cases, only one might have necessitated the implication of a reserve management power to the shareholders. In *Alexander Ward & Co Ltd and Another v Samyang Navigation Co Ltd* [1975] 1 WLR 673, the issue was whether the company was competent to act at a time when it had no directors, such that a liquidator of the company could later ratify the acts done. Lord Hailsham of St Marylebone held that the company was competent because it *could* have done the acts by "appointing directors, or … by authorising [the acts] in general meeting, which in the absence of an effective board, has a residual authority to use the company's powers" (at 679). Although it is not entirely clear on the facts, it seems it would not have been possible to appoint directors at this stage and if that is so, then this seems consistent with the position we have outlined above. In the remaining case, *Massey*, the deadlock in the board of two directors clearly could be broken by the appointment of additional directors in a general meeting and therefore, it was held not to be necessary to imply any general reserve powers (at [47]).

52 In our judgment, upon a careful analysis of the cases, it will become evident that it will be rare indeed that a case proceeds to the point where it may be found by a court that it is *necessary* to imply a term that places a particular power in the shareholders. Even if it does, a litigant will still have to be satisfied that the intended resolution can likely be carried at a general meeting with the requisite majority prescribed by the company's constitution (see [108(d)] of the GD).

53 In cases of dispersed shareholding, there will often not be sufficient votes to effect control or direction of corporate actions and the question of whether it is necessary to imply the reserve power will have no practical import in such circumstances. In cases of closely held companies, while there may well be sufficient votes in the general meeting, it may also be open to effect the more straightforward solution of altering the company's constitution (for instance, by passing a special resolution) to overcome the particular difficulty. In such a situation, again there will be no *need* to resort to the implication of terms. In many other cases, where there is some but not considerable cohesiveness amongst the shareholders, there may be sufficient votes to push through an ordinary resolution to reconstitute the board. This too will obviate the need to imply any terms. Put simply, it seems to us that few cases of this kind will ever reach the court because there will first have to be a deadlocked board; second, there must be enough shareholder votes to procure the passing of a resolution with the necessary majority; and third, it will have to be shown that despite enjoying such a majority, those shareholders are not able to break the deadlock by voting in new directors or removing existing ones.

54 Lastly, if a claim can be appropriately resolved by a derivative action commenced under s 216A of the Companies Act, there will be even less reason in that case to imply a term. The interaction between s 216A and implication of terms was the subject of extensive argument by the parties, and it is to this that we now turn.

The relationship between s 216A of the Companies Act and implying reserve powers

55 One of the principal arguments raised by Mr Thuraisingam was that shareholders ought, if at all, only to commence legal proceedings on behalf or in the name of the company under s 216A of Companies Act. In effect, Mr Thuraisingam's argument was that where a management power was at issue, even assuming a deadlocked board prevented the exercise of that power, the shareholders in general meeting could not exercise that management power. Instead, their recourse should be limited to acting under s 216A to force the directors to act in the company's interest or to pursue the directors for a remedy, including, for any loss suffered by the company due to their failure to act. He submitted that this mechanism incorporated the safeguards that are designed and prescribed in that provision to prevent any abuse by a dominant shareholder.

56 The argument has two threads. First, the existence of an avenue to commence a derivative action under s 216A which will have the effect of breaking the deadlock on the board level would suggest that it cannot then be *necessary* to imply any reserve powers in favour of the shareholders. Second, it is a matter of good corporate governance that the ability of shareholders to act be regulated by the court, as would be the case if shareholders were limited to pursuing a derivative action under s 216A, since leave of the court would have to be obtained for such an action. For leave to be granted, the applicant would have to convince the court, among other things, that, at least *prima facie*, it is in the interests of the company to pursue the action. Without requiring a shareholder to meet these requirements under s 216A, the company could be exposed to raw shareholder power which, unlike the power exercised by the directors, is unconstrained by any fiduciary duty owed to the company. Taken to its logical conclusion, this will mean that there can never be any need for implying reserve powers.

57 In our judgment, this argument fails because it reaches too far. It is one thing to say that the option of proceeding under s 216A may in certain circumstances *diminish or displace the necessity* for implying any term in fact. It is altogether another thing to say that that its existence automatically and entirely excludes the possibility of implying a reserve power.

58 The purpose of the derivative action, as it was developed in the common law, was to enable shareholders to maintain an action in respect of alleged wrongs done to the company which would not otherwise be remedied because the decision to pursue that by an action is one that can only be taken by the directors who may themselves be the wrongdoers (see *Edwards and Another v Halliwell and Others* [1950] 2 All ER 1064 at 1067). It was viewed as an "obvious avenue of redress [when one sought] to compel directors to live up to their fiduciary duties in conducting the company's business" (see Stanley M Beck, "*The Shareholders' Derivative Action" (1974)* 52 Canadian Bar Review 159 at 162). The same purpose now underlies the statutory derivative action under s 216A. In the first reported decision on an application under s 216A, *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426, Lai Kew Chai J observed (at [13]) that the intention for such derivative actions is "to improve the standards of private corporate governance since directors who breach their duties to the company could be made accountable". To trigger s 216A, therefore, what must be disclosed is a wrong to the company. If a corporate action will lie against the directors for misfeasance and it is *prima facie* in the interest of the company that such an action be brought, s 216A provides shareholders the means to do so and in the process to hold the directors to account, even if the directors, were it left to them, would have had the company forgo its claim against them. In this narrow situation, the shareholders are in a position in effect to override the decision of the directors.

59 But s 216A does not afford an open door for disgruntled shareholders to challenge the business decisions of the directors, where there has not been a breach of duty on their part. The shareholders may well take a different view from the board of directors as to the course that should be adopted in relation to a possible action that may be available to the company or in which it may be involved and which is unconnected to any breach of duty by a director, for instance, a debt which the company owes to a third party. But the decision as to how best this should be dealt with is one that resides in the board of directors; and the shareholders may not interfere with the board's decision in this respect because the management of the company is generally within the sole jurisdiction of the directors. The short point in the end is that s 216A does not confer upon the shareholders a right to disregard the division of power that is contemplated in s 157A(1) of the Companies Act or by the company's constitution.

60 The exception to this, which follows from what we have already noted above, is where the shareholders allege that the very decision of the director(s) as to how the company's liability *vis-à-vis* its creditor should be resolved is itself a breach of duty. The latter can then, at least in theory, be

made the subject of a derivative suit for the same reason that the directors may not naturally give serious consideration to initiating an action on the company's behalf against themselves. But this is separate from the decision pertaining to the resolution of the claim against the company by the creditor and the merits of the two actions will not always or necessarily coincide. For instance, even if it was established that the company does owe a debt to a third party claimant, it does not inevitably follow that a director who declines to authorise the company to pay that debt is therefore in breach of his fiduciary duties. The point simply is that there may be valid commercial considerations, including the possibility of achieving a settlement at a lower sum, to explain such a decision by the director and in such circumstances, a derivative claim against the director alleging a breach of fiduciary duty for failing to pay the debt may not proceed very far.

61 It follows from this that where the nature of the relief sought is in truth to require a director to do a particular thing or to refrain from doing so in his capacity as a director, it cannot be presumed that s 216A affords a suitable remedy. That must depend on the facts, first in relation to whether there is any basis for bringing an action under s 216A against the director (see, for example, *Re Winpac Paper Products Pte Ltd* [2000] 1 SLR(R) 415). But beyond this, it will also depend on whether the successful prosecution of the s 216A action will indeed (or at least could realistically) result in the desired change in the director's decision as to how he will discharge his functions. Otherwise it would be futile. Extending these observations to the context of a decision of the director which causes a deadlock on the board, we are unable to see how an action under s 216A could be an appropriate avenue for a dissatisfied shareholder in the vast majority, if not in all, of such cases. It would seem that the second consideration we have outlined above is especially compelling because two halves of a board may in good faith decide differently and be deadlocked. Moreover, a court would not be in a position to rule that a director should exercise his functions in a particular way or, to put it another way, to substitute the judicial discretion for the commercial discretion, and the fiduciary responsibility that goes with it that is reposed in the directors. And in the final analysis, all of this runs against the basic objection that the management powers are generally not in the hands of the shareholders, let alone the courts.

62 Aside from all these difficulties, even if an action brought under s 216A action were to succeed, the remedy granted might only cure the extant deadlock and not forestall further deadlocks. It cannot be sensible to require the shareholders to invoke s 216A and go through the process of getting leave and then take the matter to trial each time there is a deadlock over the payment of a *bona fide* debt which, in the interests of the company, should be honoured. Such a process would likely take months, by which time breaches by the company could have already occurred. Not only is this onerous to the shareholders concerned, it is also unfair to the company which would have to endure the cumbersome process and incur the accompanying costs each time a deadlock emerges.

63 It is true that hurdles are set up as part of the s 216A framework in order to curtail abuse by the shareholders of their statutory ability to bring actions in the name of the company where these may not in fact be in the company's best interests. However, the evaluation of whether a shareholder should be allowed to pursue such a remedy is inevitably a fact-sensitive one and we do not think it would be appropriate to conclude presumptively that whenever it may be appropriate to imply a reserve power in favour of the shareholders, a suitable remedy will instead necessarily be found by invoking s 216A.

64 Rather, in our judgment, the availability of s 216A will in certain circumstances be relevant as a factor in the overall analysis of whether it is necessary to imply a reserve power in favour of the shareholders as well as the terms and extent of such a power. In this respect, a distinction can be drawn between disputes that concern holding directors to account and disputes which do not. As we have already observed, the classic case where it will be appropriate to pursue a claim under s 216A is

where it is directed against the very people who are otherwise empowered or entrusted to decide on this such as where what is contemplated is an action for an alleged breach of the director's duties. This was expressed at various points during the parliamentary debates at the time of the introduction of s 216A into the Companies Act: Mr Leong Horn Kee observed that it would "allow a complainant, who could be a member of the company, to take action against the directors in the name of the company should there be a breach of right or duty owed to the company"; and Mr Chng Hee Kok "welcome[d] this law" for the reason that, at the time of speaking, the minority shareholders … [were] not able to take action on behalf of the company against the directors who abuse their position" (*Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at cols 236 and 240–241). There is good reason why such a matter will usually be best dealt with through this route rather than by implying a reserve power. The interposition of the court helps to reduce the possibility that the proceedings are being brought for tactical reasons stemming from corporate infighting rather than to address a genuine grievance that a director has acted in breach of his duties.

65 To summarise, there can be no guarantee that an application under s 216A will necessarily be sufficient to address the difficulties that would arise in the narrow category of cases that we have outlined above at [45] and [53] in which it may be necessary to imply a reserve power in favour of the shareholders. Moreover, the leave stage for an action under s 216A may not even be satisfied. Mr Thuraisingam argued that in such a case it would not be unjust to leave the affected shareholder without a remedy. But this is too simplistic. The present situation is a case in point. The Judge held that Ms Chan's refusal to approve the payments was not a breach of her fiduciary duties because he found that she honestly believed she was entitled to do so. It is conceivable that leave might have been refused if an application under s 216A had been made in such circumstances. But this says nothing about whether a remedy is nonetheless needed to enable the company to meet its obligations – a point that was manifested in Mr Thuraisingam's candid admission that if some of the debtors in question were to sue TYC, the company would have no defence.

66 It follows that the mere existence of s 216A cannot be a bar to the implication of a reserve management power in favour of the shareholders. Inevitably, this will be a matter that bears upon the overall analysis of necessity. The court will scrutinise the facts of each case and will in this context also consider whether s 216A provides an adequate remedy and, if so, how it can then be said that there remains a necessity to imply any reserve powers. But there is no rule that just because Parliament has enacted s 216A, reserve powers cannot then be implied.

A structure that anticipated a deadlock

67 A final argument made by Mr Thuraisingam was that TYC had been *intentionally* set up with a structure in which a deadlock is a distinct possibility, in which case the court should not imply any reserve powers in favour of the general meeting. He cited *Brett Paul Hawksford and another v Michael Jeffrey Hawksford and others* [2005] NSWSC 463 ("*Hawksford*") in support of this. There, two brothers who were the only directors in two companies were deadlocked. One brother (Brett) brought an action against the two companies. The other brother (Michael) purported to act on behalf of the companies to instruct solicitors to conduct the defence. The question was whether Michael had the authority to act on behalf of the company. Arguments were raised on the "doctrine of agency of necessity": at [72]–[74]. Campbell J decided that the deadlock could be broken by "a range of ways" provided under the Australian Corporations Act 2001 (Cth), including the commencement of a statutory derivative action: at [80]. Having found that the deadlock could be broken, Campbell J went on to observe that *if* the deadlock could not be broken using the measures he had identified, "the continuation of the deadlock would simply be the consequence of Michael and Brett being shareholders and directors in two companies which were set up with a structure in which deadlock is

a distinct possibility": at [80]. Mr Thuraisingam relied on the last 12 words of that statement.

68 There are two significant differences between *Hawksford* and the present case. First, *Hawksford* was not a case concerning the implication of reserve powers in favour of the shareholders in the face of a deadlock on the board. Michael had acted unilaterally on behalf of the company, as a director, and later sought to argue that his actions were authorised as a matter of necessity. Second, the only non-corporate shareholders of the two companies in *Hawksford* were Brett and Michael. It was also argued that "Brett and Michael were equal partners in an incorporated partnership": at [10]. Although it is not entirely clear from the judgment, it seems to be the case that the only ultimate shareholders were Brett and Michael and they were equal shareholders. If so, even if powers were reserved to the shareholders, the deadlock would persist.

69 Seen in that context, the observations of Campbell J in *Hawksford* might be confined to a situation where it is not possible even for the shareholders to break the deadlock. That has little relevance to the present case.

70 In the light of the principles as we have set them out above, we turn to consider the facts before us.

Application to the facts of this case

71 There is no doubt that a clear and undisputed breakdown exists in the relationship between Dr Tay and Ms Chan. This has given rise to a deadlock in respect of payment matters in TYC. Three payments were sought to be made by Dr Tay on behalf of TYC but approval for these has been refused by Ms Chan. As Dr Tay and Ms Chan are the only two directors in TYC, there is a deadlock at the board.

72 There will be cases where the appropriate response is to reconstitute the board to break the deadlock; but this is not such a case. By virtue of Art 8 of the TYC Articles, (a) Dr Tay and Ms Chan cannot be removed by TYC's shareholders; (b) additional directors may not be appointed without Dr Tay's and Ms Chan's agreement; and (c) any additional director appointed would not have any power outside of those "define[d], limite[ed] and restrict[ed]" by Dr Tay and Ms Chan. Article 8 provides:

> Subject to Article 3, *the said Dr Tay Yun Chwan and Mdm Chan Siew Lee shall be the permanent Governing Directors of the Company until they resign from the office*, that is they will not whilst they hold such office be taken into account in determining the rotation of retirement of directors and the provision of Section 153 of the Companies Act will not apply to them and whilst they retain the said office, they will have authority to exercise all the powers, authorities and discretion by these Articles expressed to be vested in the directors generally including the power to convene a general meeting of the Company, and of all the other directors, if any, for the time being of the Company, shall be under their control and shall be bound to conform to their discretion in regard to the Company's business.
>
> Subject to Article 3, *the said Dr Tay Yun Chwan and Mdm Chan Siew Lee whilst they hold the office of Governing Directors, may from time to time, and at any time, appoint any other persons to be directors of the Company, and may define, limit and restrict their powers and may fix and determine their remuneration and duties and may at any time, remove any director howsoever appointed*. Every such appointment or removal must be in writing under the hands of Dr Tay Yun Chwan and Mdm Chan Siew Lee.
>
> Subject to Article 7, in the event of the death of any of the two Governing Directors, the

surviving person shall be entitled to exercise all or any of the powers previously held by the Governing Directors jointly.

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

[emphasis added in italics]

In essence, the shareholders of TYC are incapable of breaking the deadlock between Dr Tay and Ms Chan by appointing or removing directors.

73 In the circumstances, what Dr Tay did was to procure a shareholder resolution to enable the company by its general meeting to overcome the deadlock in the board and enable payments to be made to the company's creditors without Ms Chan's involvement. The question is whether the shareholders have the reserve power to do this. The main contention advanced by TYC and Dr Tay is that the board has become dysfunctional in respect of making payments even in the usual course. They stress that even when consensual arrangements (which were enshrined in a consent order dated 21 April 2014) were put in place for Ms Chan to approve certain payments, she failed to act on this. As a result, on 21 November 2014, the court granted the plaintiffs' application in SUM 4612/2014 to enforce the order by enabling the payments to be made without Ms Chan's approval. Looking ahead, TYC has suggested that it is necessary to "[give] shareholders the power to approve payments" relating to "identified transactions where the directors are in deadlock".

74 In our judgment, such a power is too broad. As we have already said, not every outstanding payment must necessarily be made. Necessity will depend on the characteristics of the payments *ie*, whether they are *bona fide* obligations owed by the company and whether it has been shown that it is *not* in the company's best interests for some reason to honour these obligations (see [45] above). Only if these conditions are met can the reserve power to authorise payments then be implied to the shareholders.

75 In the court below, the reserve power to authorise payments was thought not to be necessary at all (see [31] above). On this basis, the shareholders would be unable to authorise Dr Tay to unilaterally sign cheques on TYC's behalf. The Judge came to this conclusion, among other things, because he considered that empowering the shareholders to authorise these payments would contravene the company's constitution. To recapitulate, Art 16 of TYC Articles prevents the TYC Deed from being altered, unless unanimous shareholder consent is obtained; the TYC Deed makes TYC privy to the rights and obligations set out in the SSD; and the Payment Clause in the SSD requires payments out of the company's accounts to be jointly approved by Dr Tay and Ms Chan.

76 But, with respect to the Judge, we do not consider that the implication of a reserve power to authorise payments is precluded by or inconsistent with the company's constitution. The payment voucher system that was encapsulated in the Payment Clause was a mechanism that was devised to regulate how payments were to be made and it was introduced in order to prevent improper payments being made from company resources to fund personal expenses and liabilities. To this end, it required that where payments were to be made, the check signatory and the person signing the payment voucher had to be different. In truth, this served to structure the payment process in such a way that it incorporated a system of checks and balances so that no single director could act unilaterally. This arrangement was conveyed to the banks much like a resolution of the board stipulating who was authorised to operate a company's bank accounts. This system was predicated on the board being able to come to a decision as to whether or not a particular payment should be made.

77 Undoubtedly, in the ordinary case, that decision is a matter for the board, but where the directors are deadlocked and it becomes apparent that the obligation owed by the company is *bona fide* and in the interest of the company to be honoured (see [45] above), then it seems to us that a reserve power may be implied to the shareholders to make that decision if this is necessary to do; and if this may be implied, then we cannot see how it can be said that the Payment Clause can nonetheless pose an insuperable obstacle to carrying out that decision. To put it another way: *the Payment Clause could not meaningfully stand in the way of a legitimately authorised liability of the company being met once the shareholders pursuant to and within the limits of a reserve power had determined that it should be met*. Nor does Art 16 of the TYC Articles, which merely limits the ability of the parties to alter the Payment Clause, address the situation of a deadlock or the need to resolve it by implying reserve powers. While it might be possible to exclude altogether the possibility of reserve powers being implied in relation to payments, this would have to be provided in sufficiently clear terms. We do not consider the language of Art 16 and the Payment Clause to be sufficiently clear to have that effect. As we have said, that clause was directed at safeguarding improper payments rather than at excluding the implication, in limited circumstances, of reserve powers to authorise a payment in the interest of the company in the face of a board deadlock.

78 In the present case, there are three outstanding expenses: the KPMG Fees, the Express Co Fees and the TSMP Fees. We find that the payment of the first, the KPMG Fees, satisfies the test of necessity. KPMG Services Pte Ltd was contracted to advise TYC and its shareholders on accounting and tax issues arising from the DOS, the SSD and the TYC Deed. Ms Chan's main objection is that she was not consulted by KPMG Services Pte Ltd prior to the issuance of the final report. But the fact is that KPMG Services Pte Ltd has done the work and has earned its fee. Nothing has been put before us that could justify not paying the KPMG Fees. Indeed, Mr Thuraisingam conceded that there would be no defence if KPMG Services Pte Ltd had sued for payment. Nor has any plausible reason been advanced for thinking that it would not be in TYC's best interest to meet their payment. We are therefore satisfied that this payment needs to be made and in the face of a deadlock on the board, it was open to the shareholders in general meeting to authorise the making of this payment.

79 Turning to the Express Co Fees and the TSMP Fees, Ms Chan's refusal to approve the payments stems from a dispute of a different nature. Her objection to payment centred on the argument that shareholders do not have the reserve powers to authorise (a) payments; (b) the appointment of solicitors; and (c) the commencement of legal proceedings. On this basis, she contends that neither the legal expenses incurred in relation to the appointment of solicitors and the commencement of proceedings nor the secretarial expenses incurred in holding the general meeting to pass the resolutions authorising each of these can be valid expenses.

80 Contrary to Ms Chan's position, we have held that the shareholders do have the reserve power to authorise payments when the twin criteria set out at [45] are met. It follows from this that where there is a deadlock on the board, the shareholders would also have the reserve power to authorise the company to appoint solicitors to advise and, if necessary, to commence legal proceedings insofar as it is to determine whether the reserve powers may be invoked. We therefore consider the Express Co Fees and, subject to a limitation, the TSMP Fees were appropriately incurred by the company and there is no reason to think that it is in the company's interest not to pay these sums. Consequently, it was open to the shareholders in general meeting to authorise the making of these payments.

81 We turn to the qualification in respect of TSMP's Fees. We have said above that where there is a deadlock on the board and this raises the question of whether the company should act against a director for an alleged breach of duty owed to the company, this will generally be best left to the process prescribed in s 216A. In those circumstances, there will be no need to imply a power authorising the shareholders to cause the company to bring such proceedings without going through

the process set out in s 216A.

82 This leads us to consider the two other claims brought by TYC. The first is a claim for an alleged breach of fiduciary duty by Ms Chan in respect of her conduct in refusing to approve the payments of the KPMG Fees, the Express Co Fees and the TSMP Fees. The second is a claim for an alleged breach of contract by Ms Chan also in respect of that conduct. The breach is said to be of an implied term in the Payment Clause that TYC's directors cannot exercise their discretion to approve payments dishonestly, for an improper purpose, capriciously or arbitrarily. A part of the TSMP Fees plainly relate to the litigation of these other claims.

83 In our judgment, these allegations that are being made against Ms Chan can and should properly be pursued, if at all, through proceedings under s 216A, which are well-suited for this purpose. This is not a case where the company has a due obligation to others that it should honour. Rather, it is alleged that a director has breached her duty to the company. There is no need to imply a reserve power for the shareholders to be able to authorise the company to commence proceedings against Ms Chan in such circumstances. Instead, the aggrieved shareholder(s) should, if it wishes to, pursue this pursuant to s 216A. Accordingly, any part of the TSMP Fee that relates to this aspect of the litigation has not been validly incurred by the company.

84 To this extent, we differ from the Judge who said as follows (at [66] and [123] of the GD):

> 66 It would seem intuitively logical, and practically sensible, that shareholders with majority control over a company should be able to authorise the commencement of legal proceedings against an errant director, if the board of directors of that company cannot act by virtue of that director having the ability to veto any board resolution authorising such proceedings. …
>
> …
>
> 123 … in the present case; the proceedings were commenced against a director who herself could prevent the company from suing. In circumstances where the board itself was incapable of making a disinterested decision, I was fortified in my view that it was reasonable for the EGM to exercise the power to do so.

The Judge thought that the implication of a reserve power was necessary because the deadlock on the board involved a director who was the subject of the possible suit and so under a potential conflict of interests. Emphasis was placed on the fact that Ms Chan could have prevented TYC from suing her for the alleged wrongdoings on her part against TYC.

85 While this may be true in one sense, it does not justify the implication of reserve power for the shareholders to cause the company to act because there is an adequate remedy for this under s 216A.

86 The result is that TYC has not properly brought the claims of breach of fiduciary duty and breach of contract against Ms Chan. The shareholders purported to authorise these claims on behalf of TYC but they had no power to do so. In the premises, these claims do not arise for our consideration, much less the question of the relief in respect of them. Moreover, TSMP may not recover that part of its fees from the company.

Conclusion

87 Following from our conclusions on the limited circumstances in which shareholder reserve

powers may be implied, we allow CA 149 of 2014 in part to the extent that we hold that the scope of the reserve powers in this case does not extend to the matters set out at [81]–[86] above. We also allow CA 150 of 2014 in part to the extent that we grant the declaration that TYC's shareholders have the reserve power to authorise Dr Tay to unilaterally sign, on TYC's behalf, cheques for the payment of the KPMG Fees, the Express Co Fees and part of the TSMP Fees incurred in relation to the litigation relating to the implication of shareholder reserve powers.

88 This leaves the matter of fixing the quantum of the TSMP Fees that may be properly be charged to the company. In our judgment, this is best dealt with by taxation at which Ms Chan's solicitors may also be heard.

89 In view of the partial success that each appeal was met with, we make no order as to the costs of the appeals; and we also make the usual consequential orders for the payment out of the security.