IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 196

Suit No 517 of 2014

Between

(1) Almega Investments Pte Ltd

(2) Lim Chong Poon

… *Plaintiffs*

And

Chiang Sing Jeong

… *Defendant*

GROUNDS OF DECISION

[Contract] — [Contractual terms] — [Implied terms]

[Contract] — [Breach]

[Contract] — [Variation]

Almega Investments Pte Ltd and another
v
Chiang Sing Jeong

[2017] SGHC 196

High Court — Suit No 517 of 2014
Debbie Ong JC
25–28 October; 3 November 2016; 16 January; 21 April 2017

15 August 2017

Debbie Ong JC:

Introduction

1 The plaintiffs claimed for breach of two agreements for the transfer of certain shares in Sentosa Tiger Island Pte Ltd ("STI"), which has since gone into compulsory liquidation. One parcel of shares held by Almega Investments Pte Ltd ("Almega") was to be transferred to the defendant, Chiang Sing Jeong ("Chiang"). Almega is owned by Soh Kee Hoon ("Soh"), who is the wife of the second plaintiff, Lim Chong Poon ("Lim"). A second parcel of shares held by Kek Chai Seng ("Kek") was to be transferred to a potential investor, Royal Raffles Resorts Pte Ltd ("RRR"). These two transfers were to take place when the approval of STI's landlord, the Sentosa Development Corporation ("SDC"), was procured. It was also agreed that a third transfer of Lim's beneficial interest in certain STI shares to Chiang would take place at the same time. The claim was that Chiang had an implied contractual obligation to use reasonable

endeavours to procure SDC's approval by a specified date. The plaintiffs further claimed that the agreements were varied on 28 May 2008 to, amongst other things, include a new term that Chiang was to complete the purchase of Almega's and Kek's shares himself in the event that the anticipated transfer to RRR fell through.

2 Chiang's defence was that the obligation to procure SDC's approval rested on STI's board of directors and not on him solely. He also averred that the agreements were not varied or extended on 28 May 2008, the implication being that had they had lapsed upon SDC's failure to approve of the transfers by the date originally specified, 16 May 2008. Even if such an implied term existed, he claimed that he had not breached the term. Further, RRR's unilateral decision to withdraw from the investment was the main reason why the planned transfers were aborted. Chiang also counterclaimed for a return of the deposit he had paid to Almega and Kek for the incomplete transfers.

3 On 21 April 2017, I dismissed the plaintiffs' claim as well as Chiang's counterclaim. The plaintiffs have appealed against my decision to dismiss their claim. No appeal has been filed in respect of the counterclaim. I now provide fuller grounds of my decision.

Background facts

4 STI was incorporated by Chiang on 16 February 2007. It appears that Lim and Chiang had agreed to incorporate STI as a new venture to take over and repackage certain existing attractions in Sentosa previously run by Lim. These existing attractions had run into financial difficulties sometime in 2004. On 26 February 2007, STI began leasing the premises at 11 Siloso Road, Singapore 098972 from SDC for the purposes of developing the site into a

tourist attraction. The lease was granted pursuant to a Building Agreement novated by the previous lessee and a Supplemental Building Agreement dated 26 February 2007 ("the SDC Supplemental Agreement"). Of relevance to this suit is cl 2.15 of the SDC Supplemental Agreement, which obligated STI to obtain SDC's prior written consent before altering the constitution of STI's board of directors and shareholders or disposing of STI's shares in any manner. The material text of cl 2.15 is as follows:

> 2.15 Clause 15 of the Building Agreement is deleted and replaced with the following Clause:
>
> **15. AMALGATION, TRANSFER AND DISPOSAL OF SHARES**
>
> (i) The Lessee shall, on or before the execution of this Agreement, forward to the Lessor for its approval full particulars of its directors and all persons having legal or beneficial interest in any of the shares of the Lessee, the description and amount of such shares held by each such person, such particulars to be certified by a director of the Lessee to be true and correct.
>
> (ii) *The Lessee shall not, without the prior written consent of the Lessor, … alter the constitution of its board of directors or its shareholders or sell, transfer, assign, exchange, allot or issue or pledge or in any manner dispose of any of its shares to any person, corporation, firm or party* and if such consent is granted it shall be subject to such terms and conditions as the Lessor deems fit to impose including but not limited to the payment to the Lessor of a sum equivalent to two per cent (2%) of the full consideration in the event of any disposal. …
>
> …
>
> [emphasis added in italics]

5 The proposed share transfers which form the subject of dispute in this suit were devised as a means of rectifying certain breaches of cl 2.15 of the SDC Supplemental Agreement. At the time of incorporation, Chiang was the sole shareholder and director of STI. It appears that at the time of the entry into the SDC Supplemental Agreement, STI's approved directors were Chiang, Kek and

Tan Tee Seng ("Tan"). Through two allotments of additional shares on 8 March 2007 and 25 September 2007, STI's paid-up capital was increased to $2,000,000 with the resultant composition of shareholders as follows:

(a) Chiang: 1,050,0000 shares;

(b) Kek: 390,000 shares;

(c) Almega: 350,000 shares; and

(d) Tan: 210,000 shares.

In addition, Soh joined STI's board of directors on 27 February 2008. These allotments of additional shares and the change in the constitution of STI's board of directors without SDC's consent amounted to breaches of cl 2.15 of the SDC Supplemental Agreement.

6 Sometime in March 2008, SDC discovered that changes in STI's shareholding and directorship had been effected without its prior consent. On 20 March 2008, SDC notified STI of its various breaches of the Building Agreement read with the SDC Supplemental Agreement. Seeking to rectify the breaches, Chiang's solicitors, Haridass Ho & Partners ("HHP"), wrote to the solicitors acting for Almega and Kek, WongPartnership LLP ("WongP"), on 30 April 2008. This letter noted the existence of an in-principle agreement for Chiang to purchase Almega's and Kek's shares using funds provided by a third party investor, as well as for Soh to resign as director. The letter was directed at working out the payment and transfer terms of this in-principle agreement. This formed the basis for the agreement which was eventually reached on 7 May 2008 (see [8] below).

7 By 2 May 2008, the breaches had not been remedied. SDC wrote to STI requiring the breaches to be remedied by noon on 9 May 2008. On 6 May 2008, STI's solicitors, also HHP, wrote to SDC's solicitors, Rajah & Tann LLP ("R&T"), to seek SDC's confirmation that the breaches would be satisfactorily remedied by a transfer of Almega's shares to Chiang for a consideration of $4m. This letter also informed SDC of an investor's interest in using RRR as a vehicle to acquire Kek's and Tan's shares, and sought SDC's approval of the same. The said investor behind RRR was the future father-in-law of Chiang's son.

8 On 7 May 2008, Chiang, Kek and Almega entered into the Terms of Transfer ("the TOT"). The TOT provided for two transfers ("the Two Transfers"). First, Almega was to transfer its 350,000 shares in STI to Chiang for a consideration of $4m. I shall refer to this as "the Almega-Chiang Transfer". Although this was structured as a purchase by Chiang, the unexpressed intention at the time was for RRR to eventually purchase the entire shareholding of STI from Chiang and for the consideration to be paid by RRR. Second, Kek was to transfer his 390,000 shares to RRR for a consideration of $2.8m. I shall refer to this as "the Kek-RRR Transfer". An initial deposit of $150,000 and $50,000 was to be paid by Chiang to Almega and Kek respectively. Under cl (c) of the TOT, the remainder was to be paid according to the following timeline:

> …
>
> Within 30 days ("**Completion Date**") from the date [SDC] in writing:
>
> (A) accepts the proposed rectification of the breaches set out in paragraph 8 of the letter dated 20 March 2008 (the "**Breaches**") in the manner set out in the letter dated 6 May 2008 from [HHP] to [R&T]; and
>
> (B) approves the transfer of the 390,000 Shares by [Kek] to [RRR].

Thus, it was envisaged that the Two Transfers would occur concurrently, or would at least be made contingent upon SDC's approval of both the proposed rectification and the Kek-RRR Transfer.

9 Of importance were cll (g) and (h) of the TOT which provided for the various courses of action in the event that SDC approved or did not approve of the proposed rectification and the Kek-RRR Transfer:

> (g) *In the event that SDC does not revert to the Company's application by 16 May 2008 or SDC does not approve of the transfer of the 390,000 Shares by [Kek] to [RRR], whichever is the earlier*:
>
> (i) Almega shall refund the sum of S$150,000.00 to [Chiang] without interest; and
>
> (ii) [Kek] shall refund the sum of S$50,000.00 to [Chiang] without interest,
>
> and [Chiang], Almega and [Kek] agree that they shall use all reasonable endeavours to enter into negotiations with alternative investors to procure the sale of all their respective interests as shareholders of the Company; and
>
> (h) In the event that SDC, in writing:
>
> (i) accepts the proposed rectification of the Breaches in the manner set out in the letter dated 6 May 2008 from [HHP] to [R&T]; and
>
> (ii) approves the transfer of the 390,000 Shares by [Kek] to [RRR],
>
> and payment is not made to Almega and [Kek] respectively in the manner set out in paragraph 3(c) above, the Deposits shall be forfeited by Almega and [Kek] respectively, and each of [Chiang], Almega and [Kek] shall have no further or other claims against each other in respect of the Transaction and the terms of the Transaction shall be null and void save that [Chiang], Almega and [Kek] shall use all reasonable endeavours to enter into negotiations with alternative investors to procure the sale of all their respective interests as shareholders of the Company.
>
> [emphasis added]

10 On 7 May 2008, Chiang and Lim agreed to a set of Supplemental Terms of Transfer ("the STOT") under which Chiang agreed to buy out Lim's beneficial interest in 310,000 shares of STI which Chiang was apparently holding on trust for Lim. I shall refer to this as "the Lim-Chiang Purchase". These trust interests formed the subject matter of a separate suit, Suit No 684 of 2014. The completion date for this transaction was contingent on the same events as the Two Transfers under the TOT. Clause (d) of the STOT provided that in the event that SDC approved the Two Transfers under the TOT but Chiang refused to complete the buy-out under the STOT, the terms of the STOT would be null and void.

11 By 16 May 2008, SDC had not responded to HHP's letter of 6 May 2008. In the light of this, WongP wrote to HHP on 20 May 2008 to ascertain Chiang's position. This email specifically cited the provisions in cl (g) of the TOT for the deposits to be refunded and for the contracting parties to use reasonable endeavours to enter into negotiations with alternative investors to procure the sale of all their interests as shareholders if SDC had not responded on the proposals by 16 May 2008. WongP also expressly reserved Almega's and Kek's rights to engage in negotiations with alternative investors past this date. HHP replied the same day to convey instructions that SDC was expected to respond that day and would be meeting Chiang on 21 May 2008. It is relevant to note that HHP did not invoke Chiang's rights under cl (g).

12 The anticipated letter from SDC was received by STI on 22 May 2008. SDC stated that it had no objections to the proposed rectification of the breaches by the Almega-Chiang Transfer and Soh's resignation. It required these steps to be completed within seven days, *ie*, by 29 May 2008. However, SDC was unable to consider the proposed Kek-RRR Transfer without more detailed information

on the investor. If the new investor was keen to invest in STI, then SDC sought full details concerning the new investor, including a list of 10 items such as the curriculum vitae of all shareholders and directors of RRR, its corporate structure, the source of its funds, and all documents to show its track record in specified industries and relevant expertise.

13 In view of SDC's reply, WongP wrote to HHP on 27 May 2008 requesting an update on SDC's request for information and whether SDC had given its approval for the Kek-RRR Transfer. It also queried whether Chiang was ready to complete the approved Almega-Chiang Transfer. WongP stated that the parties had commercially agreed that the Two Transfers should occur concurrently but this was hampered by the fact that SDC had not approved of the Kek-RRR Transfer. Given these circumstances, WongP suggested that Kek's shares be transferred to Chiang instead, concurrently with Almega's. Lastly, the email drew notice to the parties' agreement to use reasonable endeavours to enter into negotiations with alternative investors if SDC did not approve of the Kek-RRR Transfer.

14 HHP replied only to state that they would take their client's instructions. This exchange was in any case overtaken by the events of 28 May 2008. STI held a board meeting on 28 May 2008 at which the share transfers were discussed, amongst other things. This meeting is significant as it was the occasion when the TOT and STOT were allegedly varied, according to the plaintiffs (see [1] above). The minutes of the meeting, recorded by Soh and signed off by Chiang, Kek and Soh, noted the following in relation to the share transfers:

> 6) As per Almega Investments Pte Ltd and Mr Kek CS's requests, Mr Chiang will procure a written reply by Royale [*sic*] Raffles Resort Pte Ltd (the investor) and a further 10% of the

> consideration towards the purchase of Almega and Kek's shares.
>
> Resp. Mr Chiang by 30 May '08.
>
> 7) The completion for the purchase of shares will take place by 15 June 2008 and full consideration ($4,000,000 for Almega and $2,800,000 for Kek) to be paid by then. Mr Chiang will liase [*sic*] with investor to accomplish this deadline.
>
> Resp. Mr Chiang by 15 June 2008.
>
> 8) If (6) & (7) cannot be done, [Soh] will procure investor with offer $17 million and all parties agree to cooperate to work on the proposed sale.

15 The next day, WongP wrote to HHP purportedly to record the parties' agreement to vary the TOT as follows:

> …
>
> 2) Our clients instruct that our respective clients have agreed to the following terms:
>
> a) Mr Chiang will procure a written confirmation ("**Written Confirmation**") executed by [RRR] that RRR will complete the purchase of Almega's and [Kek's] shares in [STI] for the full consideration stipulated in the Terms of Transfer dated 7 May 2008, no later than 15 June 2008, and the Written Confirmation duly executed by RRR is to be furnished to Almega and [Kek] no later than **30 May 2008**;
>
> b) When the Written Confirmation is delivered to Almega and [Kek] respectively, Mr Chiang and/or RRR will concurrently pay a further deposit ("**Further Deposit**") equivalent to 10% of the full consideration payable to Almega and [Kek] respectively for the purchase of their respective shares in the Company, but in any case, no later than **30 May 2008**. We are further instructed that the Further Deposit will be used towards setting off the total consideration payable for the Almega's shares [*sic*] and [Kek's] shares in the Company, and notwithstanding the Terms of Transfer, the parties have agreed that the initial deposit of S$150,000 and S$50,000 (collectively, the "**Initial Deposit**") paid to Almega and [Kek] respectively will also be used towards setting off the total consideration payable to Almega and [Kek] respectively;
>
> c) In the event that any of paragraphs 1(a) or 1(b) is not satisfied by 30 May 2008, our respective clients have agreed to commence negotiations with alternative investors for the sale of

> the entire issued share capital of the Company. In this regard, the parties will authorise [Soh], a director of the Company, to negotiate and liaise with the alternative investors, and the parties will authorise Soh to commence such negotiations and do all things necessary and expedient to effect the transfer of the entire issued share capital to the alternative investors and the board will pass the necessary resolution to recognise such appointment and to authorise the Company to facilitate such sale; and
>
> d) In the event that SDC does not grant its approval for RRR to acquire [Kek's] shares in the Company by 15 June 2008, Mr Chiang will complete the purchase of all of Almega's and [Kek's] shares in the Company **no later than 15 June 2008**, failing which Almega and [Kek] shall be entitled to forfeit the Initial Deposit and the Further Deposit but without prejudice to any further rights and remedies that they may have.
>
> …

16 These shall be referred to collectively as the "Varied Terms". Specifically, I shall refer to the four terms set out above in paragraphs 2(a) to 2(d) of WongP's email as the "RRR Confirmation Term", the "Further 10% Deposit Term", the "Alternative Investors Term" and the "Chiang Buy-Out Term" respectively.

17 In response to WongP's email of 29 May 2008, Chiang instructed his son to reiterate the condition triggering the completion of the purchases under the TOT (namely SDC's approval of the Two Transfers) in an email that evening. In this email, Chiang's son denied the alleged Varied Terms by stating the following:

> Please also note that investors will be officially introduced to SDC on the 5th of June 2008, and after which when approval is given we will proceed on the necessary. *Please do not try to suggest any thing* [*sic*] *else than what that has been signed.* [emphasis added]

18 Following this, HHP on behalf of STI, wrote to R&T (SDC's solicitors) on 2 June 2008 to address SDC's

request for full details of RRR. A meeting was proposed to officially introduce RRR so as to "furnish the information requested" and "to discuss and confirm … its investment … with a view to obtaining [SDC's] approval in principle". It is significant to note that in this letter, an extension of time was also sought to complete the Almega-Chiang Transfer and Soh's resignation, on the basis that the parties intended for Chiang to purchase Almega's shares only if RRR's purchase of Kek's shares was approved. In other words, it seems that the intention at this stage was still for the Two Transfers to occur concurrently.

19 On 6 June 2008, SDC's representatives met with STI's representatives and RRR's representatives, Johnny Tan and Chiang's son. Chiang and two other STI personnel appeared on STI's behalf. None of the other directors were present at this meeting. The plaintiffs disputed that Chiang introduced RRR to STI on this occasion. The notes of the meeting recorded by one of SDC's officers showed that the parties discussed the concept plan for the attraction, the need for higher gross floor area ("GFA") and the total investment commitment for the attraction. SDC provided its feedback on STI's concept proposal and requested that STI review its GFA requirements, financial projection and layout and update on its final shareholding. The discussions on the attraction's concept, required investment and GFA were also captured in Chiang's notes of the meeting. The plaintiffs highlighted that the notes of the meeting provided no indication that Chiang had introduced RRR's representatives to SDC. According to Chiang, the queries regarding the GFA were brought up by RRR's representatives, who were keen to set up the meeting in order to confer with SDC on the proposed land use and the GFA issue. Chiang conceded that the meeting minutes did not record a discussion about the details of RRR which were supposed to have been furnished at this meeting. However, Chiang

maintained that RRR was introduced to SDC because there would not have been a meeting otherwise.

20 On 18 June 2008, by way of follow up, SDC sent a letter to STI. The letter was not sent to STI's office address but to the address of another Sentosa attraction helmed by Chiang. Among its requests for updates regarding matters discussed at the meeting, SDC asked about the role of Johnny Tan in the project, sought confirmation that RRR would be an investor and shareholder of STI, and requested again for the 10 categories of information set out in its letter dated 22 May 2008.

21 On 19 June 2008, RRR informed SDC that it was withdrawing from participating in the STI project after performing its due diligence. RRR listed a number of reasons which caused them serious concerns. These included: the legal impact of ongoing litigation involving Treasure Resort Pte Ltd (of which STI's shareholders were substantial shareholders); the "less than friendly relationship" between SDC's lawyers and STI's lawyers; the fact that SDC "shot down additional plans to add value, beauty and profit" to the attractions during RRR's first meeting with SDC, a move which, in its view, would limit the attraction's appeal to the Middle East market; the length of time it took to sort out the rectification of the breaches of the SDC Supplemental Agreement relating to STI's shareholding; and finally STI's limited time to launch the attraction before it would be liable to pay liquidated damages to SDC.

22 It was unclear when Chiang informed the other directors that RRR had pulled out of the investment but it seems to be common ground that the other directors discovered this fact only a few months later. However, SDC replied RRR on 10 July 2008 to clarify that it was not SDC which required or sourced

for new investors and changes to STI's existing development proposal. SDC further clarified that it was STI's delay which prolonged the process of rectifying the breaches of the SDC Supplemental Agreement and resulted in late commencement of design and construction works.

23 With RRR out of the picture, throughout July and August 2008, the parties attempted to remedy the breaches of the SDC Supplemental Agreement through other means. Their options included seeking SDC's approval for Almega's shareholding and Soh's directorship, or removing Soh as director. These subsequent events were not strictly relevant to the plaintiffs' claim.

24 As the events panned out, STI failed to commence construction or development work on the proposed attraction and failed to launch the attraction by the Temporary Occupation Permit date of 25 August 2008. STI also continued to be in breach of the certain terms of the SDC Supplemental Agreement. Eventually, STI was compulsorily wound up on 2 March 2012.

The parties' cases

25 There were essentially two thrusts to the plaintiffs' case. First, the plaintiffs argued that the TOT and STOT contained an implied term that Chiang would take all steps and/or use all reasonable endeavours to procure SDC's approval of the rectification of the breaches (*ie*, by the Almega-Chiang Transfer and Soh's resignation) and the Kek-RRR Transfer. In the statement of claim, it was pleaded that Chiang's implied obligation extended until 16 May 2008 – the date when the deposits would be refunded and the obligation to seek out alternative investors would be triggered under cl (g) if SDC had not responded. The pleaded breach was that Chiang failed to take all steps or to use reasonable endeavours to procure SDC's approval in writing by *16 May 2008*. It was

claimed that Chiang was fully aware that SDC required full particulars of any new investor in order to grant approval but had not furnished any information by 16 May 2008.

26 In their closing submissions, however, the plaintiffs argued that the implied obligation to use reasonable endeavours extended until *15 June 2008* under the alleged Varied Terms. This was on the basis that Chiang's existing obligations under the TOT and STOT, insofar as they were not varied at a later juncture, continued to subsist. In his oral reply submissions, counsel for the plaintiffs explained that the breach of the implied term was secondary in relation to the Varied Terms, as the primary breaches that Chiang was liable for by the later deadline of 15 June 2008 were breaches of the Varied Terms themselves.

27 The Varied Terms were thus the second thrust of the plaintiffs' case. It was pleaded that when the TOT and STOT lapsed, the parties agreed to the Varied Terms on 28 May 2008. As I understand their case, the variation did not constitute a standalone agreement but was an agreement that the TOT and STOT continued to subsist along with four additional terms (*ie*, the Varied Terms). The plaintiffs claimed that Chiang breached the Varied Terms by failing, refusing or neglecting to:

(a) procure a written confirmation from RRR by 30 May 2008 that it will complete the purchase of shares under the TOT by 15 June 2008;

(b) pay or procure RRR to pay a further deposit of 10% of the purchase price for the shares by 30 May 2008; and

(c) complete the purchase of Almega's, Kek's and Lim's shares himself by 15 June 2008, when SDC failed to grant approval for RRR's acquisition of Kek's shares by 15 June 2008.

28 In his defence, Chiang argued that the responsibility for procuring SDC's approval lay on STI and was shared by the board of directors as a whole. He denied the existence of any implied term obliging him personally to use reasonable endeavours to procure SDC's approval. Insofar as the alleged breach up to 16 May 2008 was concerned, Chiang argued that he did not know and had no way of knowing the particulars required by SDC until its letter dated 22 May 2008. He pleaded that he exercised reasonable endeavours in any event by proposing a meeting between SDC and RRR and it was RRR's decision to withdraw from investing in STI on 19 June 2008.

29 Regarding the plaintiffs' second thrust, Chiang's case was that only the TOT and STOT were binding agreements. No agreement was reached to vary the terms of the TOT and STOT on 28 May 2008. By that time, the parties were simply engaged in discussions to do their best to secure a transfer to an investor. In particular, Chiang or his son or solicitors had repeatedly resisted the suggestion that the parties had agreed to the Varied Terms, in particular the purported Chiang Buy-Out Term. He also highlighted that after 16 May 2008, the plaintiffs acted in accordance with cl (g) of the TOT by exercising their right to negotiate with alternative investors; the plaintiffs could not at the same time seek to revive the transfers provided for under the TOT and STOT because cl (g) necessarily only applied where the envisaged transfers had lapsed.

30 There were therefore two issues before me:

(a) Was there an implied term for Chiang to use reasonable endeavours to procure SDC's approval of the Two Transfers by 16 May 2008 or 15 June 2008? If there was, did Chiang breach this term?

(b) Were the TOT and STOT varied on 28 May 2008 and if so, on what terms?

Alleged Varied Terms

31 I deal first with the alleged Varied Terms and the effect of the events of 28 May 2008. This will clarify my findings about the status of the TOT and STOT after 16 May 2008, which in turn had a bearing on my findings regarding Chiang's alleged failure to use reasonable endeavours after 16 May 2008.

32 As evidence of the oral agreement to the Varied Terms, the plaintiffs relied on the meeting minutes dated 28 May 2008 and WongP's email dated 29 May 2008 (see [14]–[15] above).

33 The meeting minutes were a handwritten document titled "Action Minutes of Board Meeting Held on 28 May 2008 at 3pm". As noted at [14] above, the meeting minutes recorded the alleged Written Confirmation Term, Further 10% Deposit Term, Alternative Investors Term as well as Chiang's responsibility to liaise with the investor to achieve completion of the transfers by 15 June 2008. It did not record the Chiang Buy-Out Term.

34 WongP's email dated 29 May 2008 was an attempt to memorialise the alleged agreement at the meeting. It set out the Written Confirmation Term,

Further 10% Deposit Term, Alternative Investors Term and an additional Chiang Buy-Out Term.

35 Since Kek was not a plaintiff in this suit, by virtue of the alleged Varied Terms, Almega and Lim were essentially claiming the benefit of: (a) a further 10% deposit of the consideration for the purchase of Almega's shares; and (b) the completion of the Almega-Chiang Transfer by 15 June 2008 with full consideration, regardless of whether RRR invested or the Kek-RRR Transfer was approved. The Varied Terms did not appear to touch on the Lim-Chiang Purchase.

36 I was not satisfied that the parties had agreed to the alleged Varied Terms. As a preliminary matter, it is important to clarify the effect of cl (g) of the TOT, the material clause containing the "deadline" of 16 May 2008. For ease of reference, I set out cl (g) again:

> (g) In the event that SDC does not revert to the Company's application by 16 May 2008 or SDC does not approve of the transfer of the 390,000 Shares by [Kek] to [RRR], whichever is the earlier:
>
> (i) Almega shall refund the sum of S$150,000.00 to [Chiang] without interest; and
>
> (ii) [Kek] shall refund the sum of S$50,000.00 to [Chiang] without interest,
>
> and [Chiang], Almega and [Kek] agree that they shall use all reasonable endeavours to enter into negotiations with alternative investors to procure the sale of all their respective interests as shareholders of the Company …

37 The point that bears highlighting is that cl (g) *did not set a deadline* of 16 May 2008 for the Two Transfers to be carried out. It will be recalled that under cl (c), the Two Transfers were to be completed 30 days from the date that SDC accepted the proposed rectification of the breaches and approved of the

Kek-RRR Transfer. It was cl (c) which set out the timeline and conditions precedent for *completion*. Instead, cl (g) provided for certain rights and obligations to be triggered upon the occurrence of certain events. The trigger events were SDC's failure to respond by 16 May 2008 or SDC's disapproval of the Kek-RRR Transfer, whichever was the earlier. As recounted earlier, the first trigger event did occur because SDC did not respond to STI's request for approvals by 16 May 2008. Thus, if cl (g) were adhered to, Almega and Kek were obligated to refund the deposits to Chiang and all three parties were obligated to use reasonable endeavours to enter into negotiations with alternative investors. The assumption underlying cl (g) was that the TOT would no longer be binding as the parties would procure an alternative deal. Thus any suggestion that the alleged Varied Terms "extended" the 16 May 2008 deadline to 15 June 2008 was erroneous. While 16 May 2008 was the time that the parties were prepared to wait for SDC's response under the TOT and STOT, 15 June 2008 was the time set for *completion* under the alleged Varied Terms. The two dates did not correspond to the same legal events.

38 Having clarified the effect of cl (g), I begin with the legal effect of the meeting minutes. The meeting minutes were a record of the parties' agreement to carry out certain acts within certain time frames, but I was of the view that these were purely practical action items to complete the Two Transfers on the existing terms in the TOT. They did not vary, supplement or override the condition in cl (c) of the TOT, namely that the Two Transfers were to be completed within 30 days from the date of SDC's approvals. Tellingly, the RRR Confirmation Term and Further 10% Deposit Term were practical steps to secure *RRR*'s commitment to the proposed deal and were dependent on RRR's keenness to invest. They did not alter the transaction structure under the TOT.

For completeness, they also did not alter the transaction structure under the STOT. Moreover, neither the TOT nor STOT were mentioned in the minutes.

39 In support of their case that the meeting minutes had legal effect, the plaintiffs relied on the case of *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 ("*Ong Chay Tong & Sons*") as authority that board meeting minutes could constitute a variation of a pre-existing agreement. In that case, the appellant-company and the respondent had entered into a sale and purchase agreement ("SPA") which contained a special condition that the respondent shall not transfer or otherwise dispose of the flat except to the appellant-company at a specified price. This special condition was included to give effect to an earlier board resolution of the appellant-company. Several years later, at a board meeting, the appellant-company passed a resolution varying parts of the earlier resolution in a manner which nullified the special condition. A director of the appellant-company handed a copy of the minutes of that board meeting to the respondent, who signed the minutes. The question was whether the SPA had been varied by the later resolution. The Court of Appeal found that the company's conduct of proffering the minutes evidencing a board resolution to the respondent for his signature constituted a valid offer to vary the existing SPA, even though the minutes did not expressly mention the SPA. The respondent was found to have signified his acceptance of the company's offer by initialling on the minutes.

40 In my view, vital distinctions exist between *Ong Chay Tong & Sons* and the present case. The Court of Appeal was considering the question of "whether a board resolution of a company … is capable of varying an existing contract *to which the company is a party*" [emphasis added] (at [21]). STI was not a party to the TOT and STOT, so its meeting minutes could not have the effect of

constituting a variation to an external agreement. The limited effect of its meeting minutes was that they served as documentary evidence of the alleged oral variation, but as will be seen below, I found sufficient evidence that the parties either did not agree to the alleged Varied Terms documented within or did not mutually intend for them to be contractually binding. Further, the Court of Appeal was concerned with a family company in *Ong Chay Tong & Sons*, a fact which persuaded it "not [to] take too formalistic or legalistic an approach in relation to its affairs" (at [26]). This stands in contrast to the present case where, in their capacities as directors and individuals, all parties to the TOT and STOT were accustomed to dealing with one another via their solicitors. It should be recalled that the original proposed terms for rectification of the breaches of the SDC Supplemental Agreement were captured in a letter prepared by Chiang's solicitors on 30 April 2008 (see [6] above), while the TOT and STOT were both prepared by solicitors and with legal advice. This cautions against any conclusion that a binding variation agreement was reached orally and documented informally in handwritten minutes without legal advice.

41 More critically, Chiang or his representatives consistently denied agreeing to any new terms beyond what was contained in the TOT and STOT. First, when WongP emailed HHP on 29 May 2008 to set out the four alleged Varied Terms, Chiang's son replied the same day to reaffirm the conditions precedent for the Two Transfers and reject the suggestion of any further agreement. His exact words were: "We have all been through the painful negotiations already … Please do not try to suggest any thing else than what that has been signed." Second, with reference again to WongP's email dated 29 May 2008, Chiang instructed his then-solicitors, Lim & Lim, to write to WongP on 30 May 2008 to formally set out his position. The letter was a strong repudiation of any alleged Varied Terms:

> We are instructed by Mr Chiang that there was a board meeting on 28 May 2008. At the meeting matters were discussed, as was to be expected. *There was certainly no intention to vary amend or terminate the Terms of Transfer.* He has spoken with Mr Kek yesterday evening and your client has informed my client that he shares Mr Chiang's position. Your email was received with surprise and Mr Chiang is disturbed by its contents.
>
> *The Terms of Transfer still stand. Mr Chiang does not accept the "terms" set out in your email.* We are instructed that your email also contains certain matters, which were not even discussed.
>
> [emphasis added]

The plaintiffs submitted that the Lim & Lim letter made no sense given Chiang's clear evidence that it was necessary to vary the TOT and STOT to take into account the expired deadline of 16 May 2008. I will deal with this argument below (at [46]), but suffice it to say for now that I accepted that Chiang had, by this letter, communicated his rejection of the Varied Terms contemporaneously and in no uncertain terms.

42 Third, Chiang's denial of the Chiang Buy-Out Term in particular is evidenced by HHP and WongP's negotiation on draft letters to be sent to SDC to propose a meeting between SDC and RRR. In one iteration of the draft letter, WongP had included a paragraph stating that, as an alternative to the Kek-RRR Transfer, STI was also seeking SDC's consent for Kek to transfer his shares to Chiang instead of RRR. This draft was accompanied by a cover email from WongP dated 30 May 2008 which asserted as follows:

> … Also, as we understand that Mr Chiang has agreed to purchase Almega's and [Kek's] shares by 15 June 2008 in any event if SDC does not grant its approval for RRR to acquire [Kek's] shares in [STI] by then, [STI] has to seek SDC's consent, in the alternative, for [Kek] to transfer his shares to Mr Chiang, which we have provided for in paragraph 3 of the Draft Letter.

43 In other words, this was an attempt to implement the alleged Chiang Buy-Out Term. HHP replied WongP

on 2 June 2008 to convey that Chiang "did not say that [Kek's] shares should be transferred to [him]". Accordingly, HHP deleted the paragraph in question and it did not appear in the final letter to SDC dated 2 June 2008. Considering HHP's response, I was unable to accept the plaintiffs' submission that HHP never disputed the contents of WongP's email dated 30 May 2008. Further, in the letter to SDC dated 2 June 2008, the parties were content to convey to SDC that their intention was still for the Almega-Chiang Transfer and Kek-RRR Transfer to proceed concurrently (see [18] above). I also noted that WongP's email was sent on the same day as Lim & Lim's letter referred to at [41] above.

44 My view that no binding agreement was reached to vary the TOT and STOT was bolstered by the following observations about the content of the specific Varied Terms:

(a) The RRR Confirmation Term and Further 10% Deposit Term sought to impose fresh obligations on Chiang vis-à-vis *RRR*'s commitment to the proposed transfers, whereas the TOT and STOT only made completion conditional upon approvals by *SDC*. Hence, these alleged terms regarding RRR are readily encompassed within Chiang's rejection of WongP's attempt to "suggest any thing else than what that has been signed". Moreover, I did not accept that Chiang came under an obligation to guarantee RRR's performance of these outcomes.

(b) Second, discussion of the Chiang Buy-Out Term was not recorded in the meeting minutes. Given Chiang's specific rejection of this onerous term, the conspicuous omission of it in the meeting minutes raised significant doubt about whether it was discussed at all, much less agreed to contractually. Soh explained that this term was omitted from the meeting minutes because the share purchase related to "individual"

> matters, not company matters. I was not persuaded by this explanation; if Chiang's default buy-out of Almega's and Kek's shares were treated as an "individual" matter, then it would follow that the alleged RRR Confirmation Term and Further 10% Deposit Term were also "individual" matters since they also related to the parties' attempts to sell their shares. Furthermore, I found it implausible that Chiang would agree to buy out the rest of the shareholders in the event that RRR pulled out, when Chiang himself was hoping to sell his shares onwards to RRR and had always maintained that he would only purchase Almega's shares if SDC gave approval for RRR to acquire Kek's shares. The parties continued to hold this position in the letter to SDC dated 2 June 2008. This letter was vetted and approved by both HHP and WongP, demonstrating that Almega was aware of and assented to Chiang's position on the concurrent transfers. Moreover, as shown above, Chiang's denial of this term was conveyed to the other contracting parties on more than one occasion.

45 Furthermore, it is trite that consideration is required for a variation of a contract (see *Ong Chay Tong & Sons* at [29]–[30]). The plaintiffs pleaded that the consideration for the alleged variation was the plaintiffs' promise to refrain from selling their shares in STI to any parties other than Chiang and/or RRR prior to 15 June 2008. However, Lim was not at the board meeting on 28 May 2008 and could not have made such a promise. Even if this were the proffered consideration, the plaintiffs did not adhere to this promise as there was evidence that Soh was engaging in negotiations with alternative investors even before 15 June 2008.

46 The plaintiffs claimed that Chiang had candidly conceded under cross-examination that it was necessary to vary the TOT and STOT because the deadline of 16 May 2008 had lapsed. This was before he later reverted to the position that only the terms of the TOT were binding. In my view, Chiang was adamant in his evidence that no terms were contractually binding except for the TOT and STOT. Even if he had conceded that some variation was necessary given the lapse of the 16 May 2008 deadline for SDC to respond, this does not make it any more likely that the additional Varied Terms were agreed to. The passing of 16 May 2008 only rendered it necessary, and hence more likely, that a time extension for procuring SDC's response and approvals was agreed to. However, the alleged Varied Terms went further to introduce new terms relating to *RRR*'s commitment – which was not a legal condition precedent for completion under the TOT – and purportedly bound Chiang to buy out Almega and Kek's shares independent of RRR's investment. The alleged Varied Terms also attempted to impose a deadline of 15 June 2008 for RRR or Chiang to complete the Two Transfers. As I noted above, under the TOT and STOT, no date was specified as the deadline for completion; instead, the 30-day period for completion only started running upon receipt of SDC's approvals. Given Chiang's consistent and contemporaneous denials, the more likely position was that the meeting minutes merely recorded action items by the board of directors to secure RRR's investment. They were not intended to have contractual effect or to alter the structure and timing of the transfers under the TOT and STOT.

47 Having said this, I was prepared to find that the parties impliedly agreed to extend the time under the TOT for SDC to respond and approve of the Two Transfers before moving on to an alternative deal. In effect, considering my construction of cl (g) at [37] above, the parties by conduct agreed to waive cl (g) of the TOT insofar as it provided for certain consequences to follow in the

event that SDC did not respond by 16 May 2008. This finding should be set in the context that the parties clearly intended even after 16 May 2008 that the proposed Two Transfers should still proceed if possible:

(a) The parties' discussions and conduct showed that they were still hopeful that approvals would be obtained and the Two Transfers could be completed. When SDC did not respond by 16 May 2008, Chiang was specifically queried by WongP on 20 May 2008 whether he intended for the deposits to be refunded under cl (g). Instead of invoking his contractual entitlement to a refund of the deposits or triggering the obligation on all parties to negotiate with alternative investors, his solicitors represented that he was still endeavouring to procure SDC's approvals. They stated that SDC would be responding that day and Chiang was slated to meet SDC the next day. They later conveyed on 23 May 2008 that Chiang's meeting with SDC's representatives was "short and positive" and a reply from SDC's lawyers would follow – referring to SDC's letter dated 22 May 2008 which HHP had yet to be notified of. Likewise, Chiang's efforts to arrange a meeting between RRR and SDC also demonstrated that he was working towards completing the transfers agreed to under the TOT and STOT.

(b) Chiang's representatives had also made positive averments to this effect. On 28 May 2008, the parties met to discuss, *inter alia*, how to proceed with the proposed transfers under the TOT. Following this meeting, Chiang's son stated on 29 May 2008:

> Please also note that investors will be officially introduced to SDC on the 5th of June 2008, and after which *when approval is given we will proceed on the necessary. … We are all working hard towards completion.* [emphasis added]

This must have been a reference towards completion of the Two Transfers under the TOT. Again, Chiang's then-solicitors, Lim & Lim, asserted to WongP on 30 May 2008 that "the Terms of Transfer still stand" despite the fact that, without an extension of the date stated in cl (g) or a waiver of the trigger event in cl (g), the only subsisting obligation after 16 May 2008 was to use reasonable endeavours to negotiate with alternative investors. Almega, Kek and their solicitors did not contradict these assertions that the TOT continued to be binding because they too were hoping that the Two Transfers would materialise.

(c) Finally, under cross-examination, Chiang conceded that he wanted more time to make the deal succeed and that in writing to SDC on 2 June 2008, he was proceeding on the basis that completion was "pushed off because SDC had not given approval" for the Kek-RRR Transfer.

48 In the face of cl (g) of the TOT, the manner in which the parties conducted themselves was only explicable by a finding that the parties agreed to extend the deadline for SDC to respond before the TOT would be abandoned, or alternatively to waive the rights to which they would otherwise have been entitled upon SDC's failure to respond by 16 May 2008.

49 Since I did not accept that the parties agreed to the Varied Terms as pleaded, it was unnecessary for me to determine whether they were breached. However, even if I had accepted that the Varied Terms formed part of the agreement, it appeared to me that some of the Varied Terms could not be enforced against Chiang. The RRR Confirmation Term was contingent upon performance by RRR and could not be

guaranteed by Chiang. The Further 10% Deposit Term was in turn contingent upon RRR giving such confirmation. More importantly, paragraph 8 of the meeting minutes and paragraph 2(c) of WongP's letter provided for the parties' recourse in the event that the RRR Confirmation Term and Further 10% Deposit Term could not be satisfied, for whatever reason: the parties were to negotiate with alternative investors, and in particular, work on an alternative sale to an investor engaged by Soh for $17m. This was the Alternative Investors Term. Thus, even on the plaintiffs' own case, the Varied Terms themselves did not contemplate pursuing Chiang for losses arising from the aborted transfers if RRR's confirmation or the further 10% deposit could not be procured.

Alleged implied obligation to use reasonable endeavours

Was there an implied term for Chiang to use reasonable endeavours to procure SDC's approval by the specified date?

50 I move on to the issue of the implied term for Chiang to use reasonable endeavours to procure SDC's approval by 16 May 2008 (as pleaded) or 15 June 2008 (as submitted). While it was pleaded that this could have been an *express* term, this argument was not pursued in the plaintiffs' closing submissions. In any event, on the face of the TOT and STOT, there was no specific express provision that Chiang was personally responsible for procuring the approval of SDC in respect of the Two Transfers.

51 The law on implied terms in fact was summarised as follows by the Court of Appeal in *Sembcorp Marine v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [101]:

> … the implication of terms is to be considered using a three-step process:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

52 In order for a term to be implied in a contract, the court must first be satisfied that there is a gap in the contract and the gap was not contemplated by the parties. As the Court of Appeal stated in *Sembcorp Marine* at [94]–[95]:

> 94 …There are at least three ways in which a gap could arise:
>
> > (a) the parties did not contemplate the issue at all and so left a gap;
> >
> > (b) the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it; and
> >
> > (c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.
>
> 95 In our view, scenario (a) is the only instance where it would be appropriate for the court to even consider if it will imply a term into the parties' contract…

53 The plaintiffs argued that the terms were silent on who bore the responsibility for procuring SDC's approval of the rectification of the breaches and the Kek-RRRTransfer. Thus, a gap arose which ought to be filled by the court to give effect to the parties' presumed intentions.

54 I was satisfied that there was a gap which was not contemplated by the parties. The completion of the Two Transfers was conditional on SDC's approvals, yet there was no express specific provision on who should procure the approvals. Thus it was necessary to imply a term in order to give the contract efficacy. Chiang's counsel submitted that there was no gap because the TOT and STOT identified "the Company" (*ie*, STI) as the applicant seeking SDC's approvals. Hence the obligation to procure SDC's approvals was said to rest on the STI's board of directors as a whole. The flaw in this argument is that STI was not a party to the TOT and STOT, which could not impose obligations on a third party. As far as the contracting parties were concerned, there was a gap with regard to who was to procure SDC's approvals. I was satisfied that the parties had not contemplated that the TOT and STOT were silent in this respect.

55 What remains is to identify the term to be implied to fill the gap. This must be a term to which the parties, having regard to the need for business efficacy, would have responded with "Oh, of course!" had the proposed term been put to them at the time of the contract (*Sembcorp Marine* at [101(c)]). The officious bystander test "is the device that enables the court to define that term which can be said to reflect the parties' presumed intention *vis-à-vis* the gap in the contract" (*Sembcorp Marine* at [91]).

56 The evidence demonstrated that this gap was to be filled with an implied term that Chiang had an obligation to use reasonable endeavours to procure SDC's approvals. First, Chiang conceded under cross-examination that it was understood by all the parties that he would obtain the approvals:

> Q I put it to you that all the parties to the [TOT] and the [STOT] would have been in agreement that you are supposed to

> procure SDC's rectification of the breaches to the [SDC Supplemental Agreement], Mr Chiang.
>
> Chiang: I agree. …
>
> …
>
> Q It must have been understood by all the parties to the [TOT] that you were supposed to get SDC's approval for RRR because only you had RRR's particulars, or only you were in a position to get RRR's particulars?
>
> Chiang: That is correct, but I did not have the complete set of [RRR's] information.

57 There was substantial evidence pointing towards Chiang as the dominant director of STI. This was reflected in his own lawyers' understanding that he was the "managing director" and "Chief Executive Officer" of STI and was the only director with authority to instruct the company's solicitors. SDC almost always dealt with Chiang when it dealt with STI. He also often held meetings with SDC in the absence of other directors. Chiang's later conduct of matters relating to the Two Transfers was in line with this manner of dealing. There was evidence that Chiang went ahead with meetings with SDC without informing the other directors, including the 6 June 2008 meeting with RRR which was fixed without the other directors' knowledge. Their requests for updates on these meetings were also frequently ignored. It was evident from Tan's testimony that though he was also a director, he was not involved in STI's day-to-day operations and was not even aware that SDC's approval was required for the transfer of shares. Moreover, as the investor behind RRR was related to Chiang's son, Chiang was the director negotiating the deal with RRR and who had access to any information on RRR that SDC might have required.

58 Therefore, the parties knew of Chiang's extensive and near-exclusive control over the task of obtaining SDC's approvals. I found that, if asked at the material time who ought to be responsible for procuring the approvals, the

parties would have identified Chiang as the one who bore this responsibility. No other party appeared, practically, to be in the position to do so. It was thus the parties' presumed intention that Chiang would exercise reasonable endeavours to obtain SDC's approvals.

Did Chiang breach the implied term to use reasonable endeavours?

59 Turning to the issue of breach, it is imperative to first identify the acts and omissions relied upon by the plaintiffs to suggest that Chiang breached the implied term. It is pertinent to bear in mind that the plaintiffs' pleaded case was for this implied obligation to last until 16 May 2008 only. The defence appeared to have proceeded on this basis. Until 16 May 2008, the alleged breach was premised on (a) Chiang being aware of the particulars of RRR required by SDC in order for SDC to approve of the Kek-RRR Transfer; and (b) Chiang failing to provide such particulars before 16 May 2008.

60 The alleged failure to use reasonable endeavours for the period after 16 May 2008 was introduced in the plaintiffs' closing submissions. The plaintiffs alleged that between 16 May 2008 and 15 June 2008, Chiang failed to exercise reasonable endeavours because he failed to (a) procure and furnish the details of RRR requested by SDC in its letter of 22 May 2008 before 15 June 2008; (b) introduce RRR to SDC and furnish RRR's details at the meeting on 6 June 2008; and (c) take any other reasonable step to procure SDC's approval. I note that in the reply submissions, the defendant did not take issue with the fact that this extended implied obligation was not pleaded. For completeness, I considered both time periods and found no breach in either case.

61 The legal test for determining whether an obligation to use "all reasonable endeavours" has been fulfilled is whether the obligor did all that was reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed (*KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy Services*") at [47]). This would entail taking all reasonable steps which a prudent and determined man, acting in the obligee's interests and anxious to procure the contractually-stipulated outcome within the available time, would have taken (*KS Energy Services* at [46] citing *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 at [22]). The inquiry as to whether there has been a breach of the "all reasonable endeavours" obligation is an objective and fact-intensive one (*KS Energy Services* at [47] and [62]). It is also pertinent to bear in mind the High Court's remarks in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 at [42], approved by the Court of Appeal in *KS Energy Services* at [46]:

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the beat endeavours to obtain the result within the agreed time. Nor does it require the covenantor to do everything conceivable; *the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.* [emphasis in original]

62 In *KS Energy Services* at [93], the Court of Appeal laid down these guidelines on the scope of "all reasonable endeavours" clauses:

(a) The obligor is required to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted;

(b) The obligor only has to do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome;

(c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved;

(d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it might be required to do so where the nature and terms of the contract indicated that it was in the parties' contemplation that the obligor should make such sacrifice;

(e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken; and

(f) Once the obligee pointed to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

63 In my view, there was no breach of the implied obligation by the original deadline of 16 May 2008, which was the plaintiffs' pleaded case. Chiang had written to SDC to seek their approval of the rectification and RRR's investment on 6 May 2008. There was no evidence that he knew of the full particulars of RRR that he had to provide in order to procure SDC's approval until SDC's

letter dated 22 May 2008. The SDC Supplemental Agreement did not state what information had to be provided when seeking approval.

64 Assuming that the implied term continued to be binding when the parties waived the deadline of 16 May 2008 for SDC's response (see [48] above), I also found that Chiang did not breach this obligation between 16 May 2008 and 15 June 2008. First, Chiang made the effort to meet with SDC on 21 May 2008. It appears that the issue of the approvals was raised at this meeting because Chiang was informed that SDC would reply that day and SDC did in fact reply on 22 May 2008. Chiang obtained SDC's approval of the Almega-Chiang Transfer and Soh's resignation.

65 Second, in response to SDC's letter dated 22 May 2008, Chiang endeavoured to introduce RRR to SDC at a meeting held on 6 June 2008. I was satisfied that RRR's representatives were introduced to SDC, otherwise there would have been no reason for the meeting to be called. I accepted Chiang's evidence that the discussions about the GFA and allocation of land use were prompted by RRR's concerns. This was consistent with RRR's letter dated 19 June 2008 which listed SDC's rejection of alternative uses for the land as one of the reasons for its withdrawal. In fact, SDC had written to STI on 18 June 2008 to state that it was unable to accede to requests made on 6 June 2008 for a higher percentage of GFA to be allocated to commercial use.

66 The question was whether Chiang had failed to exercise reasonable endeavours because he did not furnish SDC with the required information on RRR as requested in SDC's 22 May 2008 letter. Chiang pleaded that he did not do so because "it was understood that RRR would no longer be investing in STI".

67 Bearing in mind that RRR withdrew from the investment on 19 June 2008, it was not unreasonable to surmise that in the weeks leading up to this date, RRR was not in a position to confirm its participation. It may be inferred that this could be why RRR did not provide Chiang with the complete set of information he needed to furnish to SDC. It appeared that Chiang was aware of RRR's reservations sometime at the end of May 2008 but was endeavouring to assuage its concerns and secure its commitment. In an initial draft of the letter to SDC to set up the 6 June 2008 meeting, it was stated that the "long delays in rectifying the breaches [of the SDC Supplemental Agreement] have also caused considerable concern and uncertainty to RRR", though this line was omitted from the final draft to avoid the impression that STI was looking for alternative investors. Chiang was also aware of RRR's queries about the GFA and land use.

68 Since Chiang was only bound to do that which had a significant or real prospect of success in procuring SDC's approval (*KS Energy Services* at [93]), I found it reasonable for Chiang to fix the meeting of 6 June 2008 instead of rushing ahead to furnish SDC with RRR's details as requested. After all, SDC only requested for full details of RRR "if [it] is keen to invest in STI". Before and after this meeting, one who was in Chiang's position would have weighed whether it was prudent to continue to procure SDC's approval for an investor who may not go through with the proposed business deal. There were clearly outstanding concerns on RRR's part. Chiang did not fail to exercise reasonable endeavours because he was seeking to secure RRR's commitment to the deal while maintaining contact with SDC regarding the deal. As the Court of Appeal recognised in *KS Energy Services* at [93], if there was an insuperable obstacle, as RRR's reservations were in this case, the obligor is not required to do anything more to overcome other

obstacles which might have been resolved.

69 Even if I was wrong to conclude that Chiang did not breach the implied term, I was of the view that the plaintiffs' alleged loss was not caused by Chiang's breach. The failure to complete the Two Transfers was caused by RRR's independent decision to pull out of the STI venture.

70 Further, in my view, even if a breach were established, the plaintiffs were not entitled to the loss claimed. The plaintiffs submitted that the measure of damages was to place the plaintiffs in the same position as if the TOT and STOT were not breached. It was claimed that the shares could have been sold to other investors but this was not sufficiently proved. Indeed, Chiang gave undisputed evidence that, in May to June 2008, Soh was already engaging with another investor regarding a sale of shares for $17m but this sale did not go through. The plaintiffs asserted that as at 13 April 2007, STI had a net present value of about $30m, based on a valuation report by Chesterton International Property Consultants Pte Ltd, assuming that the proposed new facilities were satisfactorily completed. This valuation was tied to the successful development of the land and its business operations. However, the evidence before me did not paint a picture of a company with cooperative directors, healthy financial resources and the ability to develop the land and business. As mentioned at [24] above, STI eventually became embroiled in disputes with SDC in 2009 over STI's failure to commence development work and commence business by the agreed date. Apart from the difficult state of affairs of the company at the material time, any sale to an alternative investor would also have been subject to the requirement of obtaining SDC's approvals.

71 Another germane point, in my view, was that the TOT and STOT themselves contemplated and provided for the "worst case scenario" for the plaintiffs. Clause (h) of the TOT provided:

> (h) in the event that SDC, in writing:
>
> (i) accepts the proposed rectification of the Breaches … and
>
> (ii) approves the transfer of [Kek's shares] …
>
> and payment is not made to Almega and [Kek] respectively in the manner as set out … the Deposits shall be forfeited by Almega … and each of [Chiang], Almega and [Kek] shall have no further or other claims against each other in respect of the Transaction and the terms of the Transactions shall be null and void.

72 Thus, even if Chiang had in fact obtained SDC's approval of the Two Transfers, but then refused to complete the purchases, Almega's remedy was limited to retaining the deposit of $150,000 already paid to it.

73 Likewise, cl (d) of the STOT provided that in the event that SDC approved the Two Transfers under the TOT but Chiang refused to complete the buy-out of Lim's beneficial interest in 310,000 shares under the STOT, the terms of the STOT would be null and void (see [10] above).

74 Therefore, even if Chiang were liable for breach, it appeared that under the express terms of the TOT and STOT, the plaintiffs were not entitled to claim any loss beyond a retention of their deposits. However, as the parties did not raise or address this point, it is not necessary for me to pursue it further. In the light of my finding that Chiang did not breach the implied term, I did not need to rely on this point for my decision.

Chiang's counterclaim

75 This leaves me to state a brief word about my decision to dismiss the counterclaim, which has not been appealed. Chiang counterclaimed for Almega's return of the deposit of $150,000 paid under the TOT. The basis of the counterclaim was cl (g) of the TOT which entitled Chiang to a refund in the event that SDC did not respond to STI's application for approvals by 16 May 2008, or in the event that STI did not approve of the Two Transfers, whichever was earlier.

76 As mentioned, SDC in fact did not respond to STI's application by 16 May 2008. Based on this fact alone, Chiang would have been entitled to a refund. However, the plaintiffs submitted that when 16 May 2008 came and passed, the parties entered into the alleged Varied Terms on 28 May 2008. At [38]–[45] above, I explained the reasons for my finding that the parties did not agree to vary the TOT and STOT. However, I explained at [47]–[48] above why I was prepared to accept that the parties had waived cl (g) of the TOT insofar as it provided for certain consequences to follow in the event that SDC did not respond by 16 May 2008. For the same reasons, Chiang was not entitled to claim a refund of the deposit on the basis that STI had failed to respond by 16 May 2008.

77 The other trigger event for a refund in cl (g) was that SDC did not approve of the Kek-RRR Transfer. Since RRR withdrew from participating in the venture before SDC was placed in a position of having to approve or refuse to approve RRR's investment, the event of SDC positively disapproving of the Kek-RRR Transfer did not materialise. SDC's reply of 22 May 2008 to ask for more information was not a positive rejection of the application. Since the second trigger event in cl (g) did not

occur, Chiang was not entitled to a refund.

Conclusion

78 For all of the above reasons, I dismissed both the claim and the counterclaim.

Debbie Ong
Judicial Commissioner

Choo Zheng Xi, Elaine Low, Ng Bin Hong
(Peter Low & Choo LLC) for the plaintiffs;
Pratap Kishan (Ho Wong Law Practice LLC) for the defendant.