Trinity Term
[2017] UKPC 24
Privy Council Appeal No 0038 of 2015

JUDGMENT

Rivnu Investment Limited and another (Appellants) *v* United Docks Limited and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Clarke
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

27 July 2017

Heard on 26 June 2017

Appellants	*Respondent (United Docks Ltd)*
Salim Moollan QC Peter Webster Angelique Desvaux de Marigny (Instructed by Blake Morgan)	Rishi Pursem SC Nadeem Lallmamode Bilshan Nursimulu (Instructed by Carrington and Associates)

LORD MANCE:

Introduction

1. This appeal turns on clause 11 in an agreement dated 30 June 2006 between four shareholders in the second respondent, Axys Group Ltd ("Axys") (then called ACMS Holding Ltd). By clause 11, each granted to the others an option to purchase all or part of its shares "should there be any change in [its] shareholding structure …, resulting in the loss of the controlling interest of the shareholder(s) which/who currently hold(s) such controlling interest in the said party". Following a re-organisation, the four shareholders were at the date of the agreement, the first appellant, Rivnu Investment Ltd ("Rivnu"), the second appellant, Portfolio Investment Management Ltd ("PIM"), Compagnie Desmem Ltée ("Desmem") and the first respondent, United Docks Ltd ("UDL"). The first three companies each owned 20%, while the fourth owned 29.15% of the shares in Axys. Together they therefore owned some 89% of the shares in Axys on 30 June 2006. Desmem later amalgamated with Compagnie d'Investissement et de Développement Ltée ("CIDL"), and is a co-respondent to the appeal.

2. Axys was the holding company of ACMS Ltd, a relatively small company incorporated in 1996 and involved until 2006 in financial advisory and consultancy services and pension fund administration services. UDL is in contrast a large company with extensive interests additional to its interest in Axys. It had some 1,900 shareholders. However, on the evidence (recited more fully below), the position until June 2006 had been that "very low attendance" at annual general meetings meant that three of its shareholders - Promotion and Development Ltd ("P & D"), owning 11.65% of Axys's shares, Anglo-Mauritius Assurance Society Ltd ("AMASL"), owning 6.62%, and La Prudence Mauricienne Assurance Ltée ("La Prudence"), owning 6.51% - "usually represented a very large majority and most substantial percentage of the members present and voting and in fact had appointed the then board of directors of UDL". UDL's 12 person Board was chaired by Mr Jean Piat and the chief executive officer was Mr Michel Rivalland.

3. On 18 July 2006 the position changed. A director of, and a major shareholder holding some 22% of the shares in, La Prudence was Mr Dominique Galéa. He was also the chair, and the major shareholder holding 89% of the shares in, Ducray Lenoir (Investments) Ltd ("Ducray Lenoir"). Ducray Lenoir was in turn party to a joint 50/50 venture in Horus Ltée ("Horus") with Harel Frères Ltd (through the latter's wholly owned subsidiary, Harel Frères Investments Ltd), whose managing director and most senior executive was Mr Cyril Mayer. Horus in July 2006 acquired the shareholdings in UDL previously held by P & D and AMASL, totalling 18.27%, at, it appears, a considerable premium over their general market price.

4. Horus then set about obtaining control of the Board. It eventually required UDL to give notice of a special general meeting to be held on 17 October 2006, to remove and replace all the existing directors, save two, Mr Leclézio and Mr Fondaumière (who appear to have been associated with AMASL and P & D). The ensuing struggle for control of the Board was fought out in letters to the general body of shareholders, with each side advocating the merits of its vision for UDL's future, accompanied by considerable press coverage. Horus's view of the current management of UDL was set out bluntly in a letter to UDL's shareholders dated 21 September 2006. In that letter, Horus noted that the profit on ordinary activities had fallen from Rs 22m in 2001 to Rs 10m in 2005 and suggested that the board had shown little consideration for shareholders. The letter went on to describe Horus's requisitioning of the special general meeting as a purely democratic step, open, as provided by the law, to any shareholder with more than 5% of the shares, to point out that the removal of directors in place and the nomination of the proposed new directors could only be effected by majority vote of the shareholders in general meeting and to state that Horus had neither the means nor the percentage of shares required to take control of the board, the designation of which remained at any moment the prerogative of the general assembly. At the special general meeting held on 17 October 2006, Horus's resolution was passed, and a new Board was constituted, with Mr Galéa as chair, Mr Mayer as its vice-chair and Mr Jean Claude Baissac becoming the manager of UDL.

5. In Horus's accounts issued 31 December 2007 for the period from 17 July 2006 to 30 June 2007, UDL was consolidated as a subsidiary, with the explanation that

> "Horus only holds 18.27% in [UDL]. However, it controls the Board of Directors of [UDL], having nominated more than half of the directors to the Board. Therefore, it effectively controls [UDL] and is treated as a subsidiary."

Horus was thus treating UDL as a "subsidiary" within the definition in section 3(2) of the Companies Act 2001, whereby a company

> "shall be a subsidiary of another company where -
>
> (a) that other company ...
>
> (i) controls the composition of the Board of the company;
>
> (ii) is in a position to exercise, or control the exercise of, more than one-half the maximum

number of votes that can be exercised at a meeting of the company …"

6. On 12 December 2006, after taking legal advice, Rivnu, PIM and Desmem wrote to UDL calling upon UDL to transfer its shareholding in Axys to them under clause 11 of the shareholders' agreement dated 30 June 2006. The letter said simply that UDL was bound to offer them "les actions qu'elle detient suite à l'acquisition de 18.27% du capital de United Docks Ltd [sic] par Horus Ltée ainsi par le 'removal' des Directeurs" (ie the shares which it held in consequent of the acquisition of 18.27% of the shares in UDL [sic] by Horus as well as by the removal of the Directors). UDL, under its new management, replied denying that the option conferred by clause 11 had been triggered. After various interlocutory proceedings and an order to safeguard UDL's shareholding in Axys, pending resolution of the issue under clause 11, Rivnu, PIM and CIDL (with which Desmem had by now amalgamated) commenced the present proceedings claiming UDL's shares in early 2009. The trial took place on 26 October 2009 on affidavits with oral argument before Lam Shang Leen J, and, after taking time to consider, he delivered a carefully reasoned judgment on 30 October 2012, dismissing the claims and finding for UDL. The reason for the delay is not apparent. Rivnu, P & D and CIDL gave notice of appeal in November 2012, the appeal was argued on 10 March 2014 and was dismissed by the Court of Civil Appeal (Matadeen CJ and Abdoula J) by judgment given with commendable despatch on 3 July 2014. Leave was on 9 September 2014 granted to Rivnu and PIM to appeal to the Board as of right, with CIDL being joined as co-respondent.

The shareholders' agreement

7. It is at this point appropriate to set out more fully terms of the shareholders' agreement relevant to the parties' respective cases. In recital (H), the four parties recited that they "had agreed to participate in the share capital of the Company [Axys] in the proportions set out in Schedule 1", being those set out in paragraph 1 of this judgment, and that they were "therefore the major shareholders holding jointly more than fifty percent (50%) of the voting rights in and controlling jointly the composition of the Board of Directors of the Company". Other recitals identified various subsidiaries of Axys. In clause 1 the Definitions included a definition of "Shareholders" as meaning "DESMEM, RIVNU, UDL and PIM as shareholders of the Company or the Subsidiaries (as the case may be)".

8. The agreement included further provisions as follows:

"**1.2. General**

Unless the contrary intention appears or the context otherwise requires or admits:

1.2.1 A reference to this Agreement includes the Recitals and Annexes which shall be deemed to form an integral part of this Agreement.

1.2.2 Headings are for convenience of reference only and shall not affect the construction or interpretation of the provisions of this Agreement.

1.2.6 Each and every provision of this Agreement and each and every part thereof shall unless the context otherwise necessarily requires be read and construed as a separate and severable provision and as separate and severable parts thereof so that if any provision or part thereof shall be void or otherwise unenforceable for any reason whatsoever then such provision or part thereof as the case may be shall not only be severed but the remainder shall be read and construed as if the severed provision or part thereof was omitted there from.

2 Consideration

In consideration of the mutual agreements and undertakings herein set out, the Parties grant the rights and accept the obligations set out in this agreement.

10.1 Share Retention

Subject to Clause 11, except with the prior consent of either Shareholder and for Permitted Transfers, no Shareholders shall transfer any of its shares in the issued capital of the company for the three (3) years starting with the Effective Date. At the expiry of the three-year period, the transfer of shares in the issued capital of the Company shall comply with the provisions of clauses 10.2 and 10.3.

10.2 Bona fide offer from a third party

10.2.1 Any party who has received a *bona fide* offer for some or all of its shares (the 'said Shares') and desires to transfer such shares (the 'Seller') shall give to the Company notice in writing of such desire (the 'Transfer Notice') stating the identity of the proposed purchaser, the price of the *bona fide* offer, and the terms as to the payment thereof.

10.2.2 Subject as hereinafter mentioned, a Transfer Notice shall constitute the Company the Seller's agent for the sale of the said shares to the other Shareholders at a price that is at least as high as the price of the above-referenced bona fide offer. Such Transfer Notice shall be revocable at any time prior to the other Shareholders communicating their acceptance in the form of an Acceptance Notice.

10.2.4 The other Shareholders shall have sixty (60) days from the service upon them of a copy of the Transfer Notice to serve on the Seller, copy to the Company, an Acceptance Notice stating whether they are willing to purchase any and, if so, what maximum number of the said Shares at the price and terms of the bona fide offer.

10.2.5 At the expiration of sixty (60) days acceptance period, the Company shall:

10.2.5.1 apportion the said Shares amongst the Shareholders (if more than one) who have expressed an intention to purchase the said Shares and, as far as possible, on a pro rata basis, according to the number of Shares already held by them respectively, or

10.2.5.2 if there is only one Shareholder, all the said shares shall be sold to that Shareholder,

provided that no Shareholder shall be obliged to take more than the maximum number of said Shares stated in that Shareholder's response to such notice.

10.2.8 The Seller shall be free to transfer such said Shares for which no Acceptance Notice was received at the price

referenced in the Transfer Notice to the proposed purchaser referenced in the Transfer Notice for a period of thirty (30) days following the expiry of the acceptance period.

10.3 No Bona Fide Offer from Third Party

10.3.1 Any party who desires to sell or transfer any of the shares registered in its name ('the Seller') and has not received any offer from a third party shall first propose to sell or transfer such shares to the other Shareholders, indicating the price and terms at which it is prepared to sell the shares (the 'said Shares'). A Transfer Notice shall constitute the Company the Seller's agent for the sale of the said shares to the other Shareholders. Such Transfer Notice shall be revocable at any time prior to the Other Shareholders communicating their acceptance in the form of an Acceptance Notice.

10.3.2 Where the Transfer Notice includes several Shares, it shall not operate as if it were a separate notice in respect of each such Share, and the Seller shall be under no obligation to sell or transfer some only of the Shares specified in such Notice.

10.3.3 The other Shareholders shall have sixty (60) days from the service upon them of a copy of the Transfer Notice to serve on the Seller an Acceptance Notice stating whether they are willing to purchase any and, if so, what maximum number of the said Shares, or to request a fair value appraisal (the 'Fair Value Request') as follows:

(a) if an Acceptance Notice is received for the said Shares, and no Shareholder requests a fair value appraisal, then the other Shareholders shall purchase from the Seller, and the Seller shall sell to them, the said Shares at the price referenced in the Transfer Notice within thirty (30) days of the Acceptance Notice, the provision of Clauses 10.2.5 and 10.2.6 applying mutatis mutandis.

10.3.5 The Seller shall be free to transfer to any third party such said Shares for which no Acceptance Notice has been

received, at a price which cannot be less than the fair price determined by the Auditors for a period of thirty (30) days following the date of expiration of the Acceptance Notice Period.

10.4 No pledge

Neither Shareholder shall, without the prior consent of the other Shareholders, create or suffer the creation of a pledge, lien or other encumbrance on the shares it holds in the Company. The Shareholders, however, record that they may need to raise loans from financial institutions for the acquisition of shares in the Company and agree that in the event that the lenders of a Shareholder requires a pledge of the shares held by that Shareholder in the Company as security for any loan disbursed to that Shareholder in that respect, the other Shareholders shall consent to the creation of such encumbrance.

10.5 Tag Along

If any Shareholder (a 'Seller') wishes to sell all of its shares in the Company, and if the other Shareholders (the 'Non Selling Shareholders') do not exercise their pre-emptive rights, then any of the Non Selling Shareholders shall have the right to require the Seller to procure the sale of all its shares in the Company on the same terms and conditions as those on which the Seller is disposing of its share (the 'Tag Along Right'). The Non-Selling Shareholder shall notify the Seller of its decision to exercise the Tag Along Right within sixty (60) days from the service upon him of a copy of the Transfer Notice by the Seller or within ten (10) days of the receipt of the Auditor's Fair Valuation, whichever is the later. The purchase by the third party of the Non Selling Shareholder's shares pursuant to the Tag Along Right shall be a condition precedent to the sale of the said shares by the Seller to the third party.

10.6 Permitted Transfers

10.6.1 Notwithstanding clauses 10.1, 10.2 and 10.3 each Shareholder shall have the right to transfer of shares in the Company to any related party for company. For the purposes of this clause, related company for party shall be

defined in accordance with the Act and shall include natural as well as legal persons.

10.6.2 For the avoidance of doubt, in the case of Desmem, a related party shall include Mon Loisir Compagnie Limitée, Compagnie d'Investissement et de Développement Limitée and their respective related companies as well as the existing shareholders of the Company whose names appear on Annex 4.

10.8 Share transfer and deed of adherence

Unless the Parties agree to the contrary, any Transfer of Share shall be conditional upon the transferee adhering to the present Agreement, by execution and delivery of an agreement in the form set out in Annex 2 (at the cost and expense of the transferee), prior to the acquisition by it of the Shares and undertaking to comply with all the terms and conditions of such Agreement, it being understood that the transferring Party shall in any case stand as joint guarantor in relation to the obligations thus falling on the transferee.

11. Call option in case of change of controlling interest within a shareholder

11.1 Should there be any change in the shareholding structure of any of the parties, resulting in the loss of the controlling interest of the shareholder(s) which/who currently hold(s) such controlling interest in the said party, the other parties shall have an option to purchase all or part of the shares of such party.

11.2 For the purpose of this Clause 11, 'controlling interest' shall be interpreted as the interest held by a controlling shareholder as per the Listing Rules of the Stock Exchange of Mauritius.

11.3 Upon the occurrence of the change of shareholding in any party referred to in paragraph 11.1 above, or upon written request of any of the other parties informed of such occurrence, the concerned party ('the Transferor') shall forthwith propose to transfer its shares to the other parties in accordance with the following provisions:-

11.3.1 The Transferor shall deliver a written notice to the other parties stating its intention to transfer all its shares at the fair price determined in accordance with the provisions of Clause 10.3.3(d) and (e) of the present agreement (the 'Auditor's Fair Valuation')

11.3.2 Within 90 days of the receipt of such notice, the other parties shall have the option to purchase the shares of the Transferor at the price determined under paragraph 11.2(a) above, in proportion to their existing shareholding. The Company shall act as agent for the transfer of the said shares.

11.3.3 Should any of the parties to whom shares are offered for acquisition in accordance to its respective shareholding decline to acquire such shares, the said shares shall be offered anew to the remaining parties (excluding the Transferor) in accordance with their respective shareholdings. The said parties shall then inform the Company of their intention to purchase the said shares within a further period of 30 days.

11.3.4 Should any of such shares remain unsold, the Transferor shall remain a shareholder of the Company and shall continue to be vested with all the rights and obligations attached to the remaining shares still held by it.

11.3.5 Should any party fail to give Notice of its intention to acquire the shares offered to it within the prescribed delay, it shall be considered to have declined the offer.

12. Non-Competition

No shareholder shall sell and transfer its shares in the Company without entering into appropriate non-competition undertakings, and substantially in the form and substance of Annex 3, with the Company and the Subsidiaries, to the satisfaction of the remaining Shareholders."

9. As to clause 11.2, the term "controlling shareholder" was defined in the Listing Rules of the Stock Exchange of Mauritius as:

> "any person who is (or in the case of a related party transaction only was within the 12 months preceding the date of that transaction) entitled to exercise, or control the exercise of, 20% or more of the voting power at meetings of shareholders of the issuer or one which is in a position to control the appointment and/or removal of directors holding a majority of voting rights at board meetings on all or substantially all matters."

The issues in greater detail

10. Before Lam Shang Leen J, the claim advanced by Rivnu, PIM and CIDL was supported by an affidavit sworn on 10 February 2009 by Mr Michel Guy Rivalland and two others. Mr Michel Guy Rivalland is not to be confused with Mr Michel Rivalland mentioned in para 2 above, but he produced and relied on an affidavit dated 15 May 2007 which had been filed by Mr Michel Rivalland in the interlocutory proceedings to which the Board has referred in para 6 above. Mr Michel Rivalland's affidavit included these passages:

> "(6) The option set out in Clause 11 is a mutual undertaking given by all the parties which could be exercised upon the happening of an event, such event being a change in the controlling interest within any one of the parties. The said option to purchase and forced sale is one which *'cuts both ways'*, that is to say, it could be an option in the favour of UDL, in the event there was a change in the controlling interest within any of Desmem, Rivnu or PIM, or it could be the reverse, forcing UDL to sell its shares in the Company in the event of a change in [the] controlling interest within UDL.
>
> (7) The Agreement was entered in all good faith by UDL and Clause 11 did not target anyone in particular. It is a standard clause set out in various agreements and very common in employment contracts where shares are given to executive employees for so long as they are in employment and the employee may be forced to sell his shares in the event of termination of employment. I am advised that in connection with *sociétés*, it is specifically provided for in the Civil Code respect of certain events such as insolvency (article 1860) or death (article 1867) of one of the partners. It is also a common clause in shareholders' agreements in closely held companies. It is a clause not entered into in isolation by UDL but UDL signed similar clauses in other agreements as well.

(8) In view of the fact that the Company was an investment holding company it was important for UDL, Desmem, Rivnu and PIM that the persons at the helm of each one of Desmem, Rivnu, PIM and UDL all shared similar investment policies, vision and way of doing business in relation to the Company. The parties agreed to protect this preferred relationship by inserting Clause 11 which forced a sale of the shares in the event this relationship was disturbed by any raider or for some other reason resulting in the change of control within any one of the parties. This change of control would result in a change of the persons at the helm of any one UDL, Desmem, Rivnu and PIM, a situation in which the parties did not wish to be placed in relation to the Company. Clause 11 precisely catered for such a situation and is the situation in which UDL finds itself by the change in the controlling interest on the board of UDL.

(13) In fact Horus paid to Promotion and Development Ltd and The Anglo Mauritius Assurance Society Ltd some Rs 204m for the said shares. In view of the exceptional weight Promotion and Development Ltd and The Anglo Mauritius Assurance Society Ltd had in the voting at the members meetings (added with the shareholding of La Prudence) Horus knew that in purchasing these shares it could take control of the board of directors of UDL. In view of the very low attendance of members at the AGM of UDL, Promotion and Development Ltd and The Anglo Mauritius Assurance Society Ltd and La Prudence usually represented a very large majority and most substantial percentage of the members present and voting and in fact had appointed the then board of directors of UDL."

11. After setting out these passages, Mr Michel Guy Rivalland continued in his own affidavit as follows:

"59. UDL's objections were fully argued before the Honourable Judge in Chambers. UDL argued inter alia that since no shareholder had the control of UDL prior to the purchase of the shares by Horus there could not be any change in control in UDL. It is averred that this argument is fallacious in as much as such argument:

(1) is contrary to representations made by UDL itself in the agreement;

> (2) was never disclosed to the other parties during the numerous discussions regarding the Agreement;
>
> (3) renders Clause 11 absurd as in Desmem also there is no one shareholder having a controlling interest;
>
> (4) is contrary to what all parties to the Agreement had in mind and the bargain reached when signing the Agreement;
>
> (5) does not make sense as even if there was no shareholder which had the control of UDL at the time of the Agreement, the fact remains that (i) a new shareholder which acquires a block of shares giving control is a 'change' in control and (ii) a major change at board level where the persons managing UDL are different from those who were at the helm of UDL at the time of the Agreement is also a 'change' in the control."

12. In reply, Mr Galéa swore an affidavit dated 23 March 2009, in which he averred (para 10(a)) that:

> "Since there was no controlling interest at the time the Agreement was entered into, there has been no change in the controlling interest whatsoever at that time or anytime thereafter as provided in Clause 11 of the Agreement."

He also averred that Horus did not by acquiring 18.27% of UDL's share capital acquire a controlling interest in UDL or control the appointment or removal of directors of UDL who held a majority of voting rights at all board meetings on all or substantially all matters (para 6(c)(i) and (ii)). He went on to point out that shareholders attending at the meeting on 17 October 2006 had held 8,001,225 shares, representing 75.7% of the total issued share capital of UDL, and that the 12 directors elected on that date had been elected by percentages ranging from 67.3% to 74.9% of the 8,001,225 shares voted, while Horus held only 24.1% of such 8,001,225 shares. He concluded that Horus could easily be outvoted by the other shareholders present and voting on any of the resolutions and that at the relevant time, no shareholder held a controlling interest.

13. In reply, Rivnu, PIM and CIDL filed a further affidavit on 19 June 2009, stating inter alia:

> "(7) The relevant clause 11 of the Agreement was inserted in the agreement at the specific request of Rivnu. The parties knew the factual situation as regards controlling interest. The clause and the wording thereof were to cater any change *[sic]* in the controlling interest of each one of the parties including Desmem and UDL which did not have a particular controlling shareholder. The applicants fail to see how Mr Galéa, who was not present and never participated in any of the discussions at the relevant time, may give an interpretation of the clause which is in the teeth of what was discussed and agreed upon by the parties."

14. At the trial on 26 October 2009, whatever the purport of the letter dated 12 December 2006, the case advanced by Mr Ribot for Rivnu, PIM and CIDL was that the change of boardroom control at the shareholders' meeting on 17 October 2006 attracted the operation of clause 11, and that what was in issue was "the proper interpretation of that clause in relation to the position of UDL after the general assembly" (record pp 419, lines 30-31 and 420 lines 34-36). In response, Mr Pursem for UDL repeated that Mr Michel Guy Rivalland's affidavit "did not establish any existing controlling interest which had been lost", relied on Mr Galéa's averment that "there was no [such] controlling interest at the point in time Horus acquired the 18.[2]7% shareholding of UDL". In short, it was Mr Pursem who identified the need, at least under the literal wording of the clause, for a controlling interest which pre-existed Horus's acquisition of the 18.27% shareholding and had been "lost" and replaced by another. Mr Sauzier for Axys then supported the case advanced by Rivnu, PIM and CIDL, submitting

> "… it is not the acquisition per se. It is when in this case Horus or Mr Galéa exercises the voting rights in order to remove the majority of directors on board. This is the change of control."

He also emphasised that, under the code civil, what mattered was the common intention of the parties, rather than the literal sense of the terms used. As to Mr Pursem's submission, put to Mr Sauzier by the judge, that what clause 11 required was a "loss of the controll[ing] interest of the shareholders who currently hold such controlling interest", Mr Sauzier said:

> "This is what he said. So we have been according to this paragraph 57. They have been negotiating for a long time. They have been reducing it in writing and the clause is a nonsense. The whole agreement is a nonsense because there was no controlling interest. So meaning that if Horus let us go along another path, if they have acquired 90% of the shares of UDL we will be in the same situation. There would be no controlling interest because there was no control at the time they signed the document. This is not the

> intention de partie. This is certainly not. It means a change of control. Change of control ultimately comes to the board and there is a change."

Like Mr Ribot, Mr Sauzier was therefore focusing on the boardroom change in October 2006.

15. Lam Shang Leen J recited the terms of clause 11, concluded that, since, prior to Horus's purchase of the 18.27% shareholding, "there was no shareholder having a controlling interest or who is in a position to control the appointment and/or removal of directors holding a majority [of] voting rights at Board meetings", there "cannot be a shareholder having a controlling interest losing that controlling interest when Horus came into the picture" and that "on that score itself, the application must be refused".

16. However, Lam Shang Leen J also went on to consider the change of boardroom control on 17 October 2006. In that connection, he observed that, since "Horus and [La Prudence] together held only 24.78% of the voting rights at the shareholders' meeting in UDL", they must, in order to be able to have their candidates appointed on the Board "have obtained the favours of the other shareholders who [were] convinced with their arguments as to why there must be a change in the management of UDL". He pointed out that the election of the board ousted on 17 October 2006 must itself have been "by consensus of the majority or all the shareholders of UDL", and that this was "a healthy democratic exercise of the roles and powers of the shareholders of a company". That consensus and its outcome might disappear at some future date, if the other minority shareholders were then to decide to join forces to defeat Horus and La Prudence. Conversely, as Lam Shang Leen J also noted, a majority shareholder (had there been one) could appoint directors and control the board, and further

> "It would be the same situation in the case of a shareholder having subsidiaries or associates … in the same company who would be joining forces and the minority shareholders will never be able to 'take over' the management put in place by the majority shareholder."

As to Horus's accounts issued 31 December 2007, the judge explained them as based on Horus's actual control, with La Prudence and through its nominated directors, of UDL's board.

17. On appeal to the Court of Civil Appeal, Rivnu, PIM and CIDL developed a more elaborate case, submitting that (1) the judge should have found that there had been a change in UDL's shareholding resulting in the loss of the controlling interest of the shareholder(s) previously holding such an interest; (2) he should have found that such

a controlling interest had previously existed, having regard to the evidence of Mr Michel Rivalland (para 10 above) and UDL's own "representations"; (3) he was anyway wrong to hold that the absence of a particular controlling shareholder meant there could be no loss or change of controlling interest; and (4) he should have found that Horus and La Prudence were in a position to control the appointment and removal of UDL's board "as they were in concert holding a majority of voting rights at board meetings on substantially all matters and that this was sufficient to trigger the effect of Clause 11".

18. In supporting submissions before the Court of Civil Appeal, Mr Ribot highlighted the need to read clause 11 in the context of the agreement as a whole and, in particular, of clauses 10 and 12 as well as in accordance with the parties' common intentions, rather than literally. If read as UDL contended or if there were no previous controlling shareholder(s) or if the clause was otherwise inapplicable in the events which had occurred, clause 11 would, in his submission, make no sense and would be a commercial absurdity.

19. The Court of Civil Appeal in dismissing the appeal started by referring to clause 1.2.6, thereby no doubt intending to dispose of the submissions based on clauses of the agreement other than clause 11. It went on to say that clause 11 itself was clear and unambiguous, and that it would be artificial and contrary to the express terms of clause 11.2 and would "*dénaturer*" or "*modifier*" clause 11 to interpret the phrase "loss of controlling interest" in clause 11.1 as "change of control". On that basis, it upheld the judge's judgment.

20. Before the Board, Mr Salim Moollan QC developed an elegantly presented series of submissions as to why the courts below had been in error. The first was that the terms of clause 11 were satisfied on the facts, even if clause 11 has the meaning given it by UDL and by the courts below. All the shareholders party to the agreement must have thought that clause 11 applied to each of them. Mr Moollan did not go so far as to suggest that UDL was in some way precluded from showing that there was or were no controlling shareholder(s), when the agreement was made. But he submitted that clause 11 showed the parties' understanding that there were. Further, the evidence of Mr Michel Rivalland (set out in para 10) led to the conclusion that there were.

21. Mr Pursem in response points out that this was not a case that was advanced before the judge, where Rivnu, PIM and CIDL made clear that they relied on the boardroom change on 17 October 2006, and did not suggest that Horus's prior purchase of 18.27% of UDL's shares triggered clause 11. Mr Pursem goes so far as to submit that the new case would amount to the introduction of a new cause of action. The Board need not consider that last submission further. Even if clause 11 indicates that all parties probably thought that each had one or more controlling shareholder(s), that does not mean that each actually did have, and there is no basis in its language or otherwise for any suggestion that each represented to the others that such controlling shareholder(s)

existed. Further, the brief passage in Mr Michel Rivalland's affidavit relied on is incapable of showing that UDL had any controlling shareholder(s). All it means, as Lam Shang Leen J pointed out, is that the previous board had been appointed by consensus of shareholders present and voting at the relevant shareholder meetings. It makes sense to speak of a group of associated shareholders acting together in concert as controlling shareholders. But individual shareholders voting in the same direction at general meetings, but not acting in concert, do not fall within the concept of controlling shareholders for the purposes of the Listing Rules or clause 11 of the agreement. Further, when Mr Galéa in his affidavit in response to Mr Michel Guy Rivalland's affidavit put squarely in issue the existence of any controlling interest at the time of the agreement, no further evidence was adduced on this point by Rivnu, PIM and CIDL. There is also force in Mr Pursem's further point that, if the new case had been presented in the evidence or before the judge as it is now sought to be, UDL would have had the opportunity to investigate, and, as may be, respond with further evidence as to, whether there was any basis for suggesting that P & D, AMASL and La Prudence were acting in concert and/or together held a controlling interest in relation to UDL.

22. Mr Moollan's further submissions challenge the "literal" meaning given to clause 11 by UDL and the courts below. First, he submits that the Court of Civil Appeal erred in so far as it relied on clause 1.2.6 and construed clause 11 in isolation. The Board agrees with this submission. Clause 1.2.6 is directed not to interpretation, but to validity of the remainder of the agreement, in the event of any particular clause being found to be invalid or otherwise unenforceable. It does not require courts to undertake the wholly artificial exercise of construing individual clauses, all of which are valid, in isolation, rather than in the light of each other and in the setting of the agreement as a whole. On that basis, Mr Moollan goes on to submit, as did Mr Ribot below, that clauses 10 and 12 demonstrate the parties' evident intention to achieve a closed relationship to which outsiders could not gain access, at least without compliance with the requirements of those clauses. In a general sense, the Board accepts this submission. However, it still remains necessary to consider the actual scope of the obligations undertaken by the parties to each other.

23. On the face of it, clause 11 only applied if there was a change in UDL's shareholding structure, (which must mean in the identity of those holding shares in UDL) which resulted in the loss of their controlling interest by the shareholder(s) currently holding such controlling interest in UDL. But Mr Moollan submits that the clause can and should be read as if the word "loss" read "change" or "acquisition", and, if necessary, ignoring the reference to such change or acquisition relating to or being from "shareholder(s) which/who currently hold(s) such controlling interest". The submission, in substance, is that parties who were concerned about transfer of an existing controlling interest would naturally be just as concerned about acquisition or emergence for the first time of a controlling interest.

24. In this connection, Mr Moollan submits that it is critical to appreciate the difference in approach to construction of an agreement which Mauritian civil law takes, when compared with English common law (or indeed with German law). Whether or not clause 11 is by itself clear, it must, in Mr Moollan's submission, be read in the light of and in such a way as to give effect to the parties' actual common intentions. The civil law approach in this respect subsumes under the head of construction issues which would at common law have to be resolved, if at all, by reference to the separate principles governing rectification. What matters is not the *volonté exprimé* but the *volonté réelle* of the parties. The principle is indicated in article 1156 of the code civil:

> "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

25. The meaning of this principle in practice is examined in Juris Classeur Civil Code, article 1156 à 1164 Fasc 10: CONTRATS ET OBLIGATIONS - Interprétation des contrats. - L'instrument: Notion, normes, champ d'application, as follows:

> "**40. Méthode: volonté déclarée - Le principe est une chose, la méthode en est une autre:** étant admis qu'il faut, par priorité, respecter l'intention des parties, comment les intentions peuvent-elles être perçues par le juge? Si l'on raisonne sur l'hypothèse la plus commune, où il existe un écrit, il faut assurément scruter d'abord le contenu de l'acte. Aussi imparfait que soit le langage comme véhicule de la pensée, si la formulation est claire et dénuée d'ambiguïté, elle doit être tenue pour exacte, pour des raisons évidentes de sécurité du commerce juridique. Telle est la justification du contrôle par la Cour de cassation de la dénaturation des clauses claires et précise.
>
> Pourtant, l'article 1156 recommande de rechercher la commune intention plutôt que s'arrêter au sans littéral des termes. Cela ne signifie-t-il pas que l'intention profonde doit toujours l'emporter sur la lettre, celle-ci fût-elle claire et précise?
>
> A cet égard, on opposait naguère les systèmes français et allemand, le premier étant réputé donner plein effet à la volonté interne, le second étant censé s'en tenir à la volonté déclarée. La démonstration a cependant été faite que les deux systèmes, qui reposent, en effet, sur des approches théoriques opposées, se rejoignent en pratique par le biais d'aménagements convergents, au point qu'en définitive le constat d'une réelle unité

jurisprudentielle a pu être dressé (*A Rieg, Le rôle de Ia volonté dans l'acte juridique en droit civil français et allemand: LGDJ 1961, n 365 s*).

Une volonté qui serait restée purement interne est à l'évidence hors d'atteinte du juge et, au surplus, rebelle à toute preuve par celui qui l'a prétendument conçue. Seule une volonté perceptible, donc extériorisée de quelque manière, peut produire des effets juridiques (sur les modes d'extériorisation, *V P Godé, Volonté et manifestations tacites: PUF 1977, spécialement n 242 s*). Réciproquement, le droit allemand ne s'en tient pas aveuglément à la volonté déclarée, mais en corrige le sens chaque fois qu'une volonté réelle différente peut être établie, ce qui suppose, à nouveau, qu'elle ait été exprimée et ait laissé des traces ou des indices.

41. Méthode: commune Intention - Au reste, l'article 1156 oppose au sens littéral des termes non la volonté interne, mais la 'commune intention' des parties *(V Cas 1re civ, 20 jan 1970, cité supra n 36).* Or, cette expression implique qu'il y ait eu accord des parties par un échange des consentements, qui requiert nécessairement une déclaration des volontés. Au minimum, l'intention de l'une des parties doit avoir été perçue, comprise et non contestée par l'autre. En définitive, l'article 1156 n'oppose pas, dans ses deux propositions, une volonté interne à une volonté déclarée. II envisage seulement l'hypothèse de la discordance entre la volonté effectivement déclarée, pour peu qu'elle puisse être prouvée, et son imparfaite expression écrite (V pour un legs d'une certaine somme, interprété comme ne désignant pas des francs nouveaux, quoique le testament fût postérieur à leur instauration, mais des anciens francs, *Cass 1re civ, 6 janv 1971 JCP G 1971, II, 16709, M D* - Pour l'emploi du terme 'jour', alors que les autres clauses de l'acte révélaient clairement l'intention de constituer une servitude de 'vue', par la création d'une fenêtre, *C A Rouen, 15 mai 2007, n 06/02490: JurisData n 2007-340509* - V aussi, à titre de pièce d'anthologie, à propos du sens de la conjonction 'copulative' 'et' et de celle, alternative, 'ou', *C A Dijon, 26 oct 1988: JurisData n 1988-604259).* L'esprit, en d'autres termes, doit l'emporter sur la lettre *(V A Sériaux, op ci, n 43*).

On ne peut totalement exclure l'hypothèse de l'interprétation d'une convention verbale *(V JCI Civil Code, article 1156 à 1164, fasc 20, pr*éc), mais l'économie générale des articles 1156 *à* 1164, comme aussi certaines formules précises (emploi répété du terme

> clause, référence à ce qui est ou n'est pas exprimé dans le contrat ...), indiquent que c'est à l'interprétation des écrits que le législateur a songé *(V J Dupichot, article préc, n5*).
>
> Au total, la signification de l'article 1156 est assez simple. Dès lors qu'il est établi, par quelque moyen que ce soit, qu'il y a discordance entre la volonté réelle, par hypothèse exprimée, fût-ce tacitement, et la formulation - écrite ou même orale - de cette volonté, la première doit l'emporter. Il n'y a là aucune contradiction avec la théorie de la dénaturation. Une clause peut n'être claire et précise qu'en apparence. Tel est précisément le cas si la discordance ci-dessus décrite est établie. Rien ne justifierait que l'apparence l'emportât, dans cette hypothèse, sur la réalité *(V Cass 1re civ, 18 févr 1986: Bull civ, 1986, I, n 31; Defrénois 1987, article 33913, p 398, obs Aubert* L'arrêt ajoute au contrat qui, par lui-même, n'avait rien d'ambigu, des obligations qui avaient fait l'objet d'un accord antérieur à la signature du contrat, resté muet sur ces obligations)."

26. It is evident from these passages that, if a common intention is to shape the meaning which a written contractual clause would otherwise bear, it will have to have been in some way expressed and accepted by both parties, even if only tacitly. The Board also notes that none of the examples of the application of the principle cited in this text, or put before the Board by way of caselaw from France or Mauritius, comes close to the present case. (In parenthesis, the Board is happy to regard the shareholders' agreement as a commercial agreement, so that, as Mr Moollan submits, there is no question of article 1341 of the code civil applying. Where article 1341 applies, it may limit the ability of a party to go behind the terms expressly agreed in writing: *Harpal v Prayag* 1969 MR 154, citing a passage from Planiol et Ripert, *Droit Civil Français*, t 6, no 103. But the position is even then nuanced: see S Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in A Burrows and E Peel's *Contract Terms*, p 123 at pp 135-136.)

27. In the present case, the words of clause 11 are by themselves clear, and the facts do not fall within them. In invoking the principle of article 1156, Mr Moollan submits that the parties' "intention" was that clause 11 should be effective in relation to each of them; that they must have intended that circumstances such as the present would give the other shareholders a right to acquire UDL's shareholding; and so that the clause must be read as applicable to what has occurred. The difficulty which these submissions face is that, on Rivnu and PIM's own case, the parties to the shareholders' agreement did not have - or, still less therefore, express - any actual intention with regard to the situation which actually existed. Mr Michel Rivalland's affidavit (quoted in para 10 above) suggests that clause 11 was in fact adopted not to "target anyone in particular",

but as a "standard clause set out in various agreements", a procedure which carries some risk that it may prove not to cater for actual circumstances.

28. At most, clause 11 suggests that the parties believed that each party to the agreement had one or more current controlling shareholder(s). Their belief was, so far as the evidence goes, mistaken, but that by definition means that they did not form or express any common intention regarding the position if no such controlling shareholder(s) existed. It may be that they would have addressed the present situation with different words if they had contemplated it. But there is nothing to show what substitute or additional provisions they might have included. If they had focused on what, on one view, may have been the underlying concern, that the current directors should remain "at the helm" (to use Mr Michel Rivalland's phrase), there may have been legal and other objections to such a clause, relating to the propriety of such a purpose and/or the current directors' authority to give effect to it; so Lam Shang Leen J pointed out with reference to *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28; [2004] 1 WLR 1846. If they had focused on the position arising where minority shareholders set out to oust and/or succeed in obtaining enough support from other shareholders to oust the current board, which may well be the correct analysis of the present situation (see below), it is far from easy to know what further provision(s) they might have contemplated. The upshot is that the Board sees no basis on which Mauritian civil law should be understood or developed so as to enable a court to rewrite or adapt the clear wording of clause 11 to cover the present situation. The Board is also comforted in this conclusion by the consideration that no case cited to it comes close to undertaking any such exercise, and that neither of the courts below in their clearly reasoned judgments contemplated any interpretive exercise of the radical nature which Mr Moollan advocates.

29. The Board also adds some observations about the basis on which this case was brought and about the further reasoning of Lam Shang Leen J summarised in para 16 above. It appears to the Board not without significance that the Listing Rules define a controlling shareholder as being "in a position to control the appointment and/or removal of directors holding a majority of voting rights at board meetings on all or substantially all matters", that there was no suggestion, following Horus's purchase of 18.27% of UDL's shares on 18 July 2006, that this criterion was satisfied, that it was only after Horus had won a hard-fought battle for control of UDL's boardroom at the general meeting on 17 October 2006 that clause 11 was invoked, and then only on the basis that the change in the board itself was the key change, and that it was only much later, on the appeal to the Court of Civil Appeal, that attention was also directed to the original share acquisition.

30. The fact is, as Lam Shang Leen J noted, that it can have been far from inevitable or even probable that Horus would with P & D's support win the boardroom battle, ousting a well-established board. In the event, it did so, with votes in the region of only one-third of the 67% to 75% majority by which the various resolutions to replace

directors were passed. There is no suggestion that the other two-thirds of voters who supported the resolutions were acting in concert with Horus or P & D. They simply agreed with the resolutions. And there was no guarantee that position would continue (although, so far as the Board is aware, it has done so, and there has been no subsequent fundamental boardroom change). In these circumstances, there is in the Board's view considerable force in the judge's view that, even if one ignores the requirement of "shareholder(s) which/who currently hold(s) such controlling interest", Horus could not, with or without P & D, be said - either as a result of its acquisition of shares on 18 July 2006 or as a result of the actual success of its resolutions on 17 October 2006 - to have been "in a position to control the appointment and/or removal of directors holding a majority of voting rights at board meetings on all or substantially all matters". It had the directors it wanted on the board, but their appointment and/or removal resulted from and depended on the will of the shareholders at large. That is not however a necessary part of the Board's reasoning in resolving this appeal.

31. For the reasons given in paras 1 to 28, the Board dismisses this appeal. The parties are invited to make written submissions on costs within 21 days of the delivery of this judgment.