IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 87

Companies Winding Up No 221 of 2023

Between

Zhejiang Crystal-Optech Co Ltd

… *Claimant*

And

Crystal-Moveon Technologies Pte Ltd

… *Defendant*

And

(1) Moveon Technologies Pte Ltd
(2) Nixfol Pte Ltd

… *Non-parties*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Grounds for petition]
[Companies — Winding up — Just and equitable ground — Loss of substratum]
[Companies — Winding up — Failure to commence business within a year of incorporation]
[Companies — Winding up — Suspending business for a whole year]
[Companies — Winding up — Discretion — Abuse of process]
[Companies — Winding up — Discretion — Availability of alternative buy-out mechanism]

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v
Crystal-Moveon Technologies Pte Ltd
(Moveon Technologies Pte Ltd and another, non-parties)

[2024] SGHC 87

General Division of the High Court — Companies Winding Up No 221 of 2023
Hri Kumar Nair J
11 March 2024

27 March 2024

Hri Kumar Nair J:

1 Most shareholder disputes involve a disaffected minority seeking to extricate itself from the company, either through a buy-out or liquidation. This case presented the uncommon scenario where the majority wanted to liquidate the company, while the minority desired the status quo. In this instance, the minority misunderstood the law and insisted on forcing a failed relationship. I therefore allowed the majority's application for liquidation and now give my reasons.

Background facts

2 The Defendant (the "Company") was incorporated in Singapore on 14 January 2022.[1] It is a joint venture between the Claimant ("Zhejiang"), which owns 60% of the Company,[2] and Moveon Technologies Pte Ltd ("Moveon"), which owns the other 40%.[3] Zhejiang is listed in China,[4] while Moveon is incorporated in Singapore.[5]

3 The genesis and purpose of the joint venture was an important element of the dispute.

4 In 2018,[6] Moveon became involved in "Project Viserion" – a project to mass produce polymer lenses ("the Lenses") for Apple Inc ("Apple").[7] While Moveon had the expertise to produce the Lenses, the cost of production was significantly higher in Singapore. Conversely, Zhejiang (who was supplying Apple with other products at that time)[8] had the capacity to mass produce the Lenses at lower costs but lacked the technical expertise to do so.[9]

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1 Claimant's Written Submissions dated 4 March 2024 ("CWS") at para 2; Chee Teck Lee's Affidavit dated 12 January 2024 ("Chee's Affidavit") at paras 7(a) and 53; Jin Lijian's Affidavit in support of winding up dated 30 October 2023 ("Jin's 1st Affidavit") at p 27.

2 Jin's 1st Affidavit at para 6; Chee's Affidavit at para 11.

3 Jin's 1st Affidavit at para 8; Chee's Affidavit at paras 1 and 11.

4 Jin's 1st Affidavit at para 5; Chee's Affidavit at para 10(b).

5 Jin's 1st Affidavit at para 7; Chee's Affidavit at para 10(a).

6 CWS at para 19; Chee's Affidavit at paras 18-21.

7 Jin's 1st Affidavit at para 12; Chee's Affidavit at paras 18-23.

8 Jin's 1st Affidavit at para 14; Chee's Affidavit at para 23.

9 Chee's Affidavit at para 23.

5 Consequently, in early 2021, Apple asked Zhejiang and Moveon to collaborate on Project Viserion.[10] Zhejiang and Moveon entered into two written agreements dated 7 October 2021 to govern their collaboration:

(a) the Cooperation Framework Agreement ("CFA"); and

(b) the Joint Venture Agreement ("JVA").

6 The CFA provides that the parties would establish a joint venture in Singapore in respect of Project Viserion, and a separate joint venture company in China for other projects, including a separate project with Apple involving the production of optical light-pipes ("Project Sphinx"). The following provisions of the CFA are relevant:[11]

> **3. Establishment of joint venture**
>
> 3.1 Establishment of joint venture: the two parties intend to establish joint ventures in accordance with the relevant laws and regulations of Singapore and China.(i)a [*sic*] JV Singapore in Singapore (exact name to be determined), responsible for the mass production of Project Viserion (ii) JV Taizhou in the People's Republic of China (exact name to be determined)) [*sic*], responsible for the mass projection of new projects beyond Viserion (including Sphinx). …
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> …
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> **4. Business principles**
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> …
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> 4.2 The two parties work out a "Project Investment and Plan" as soon as possible in line with the market requirements. If the plan is adjusted according to market requirements, the plan shall be formulated by the management of the joint venture and

10 Jin's 1st Affidavit at para 11; Chee's Affidavit at paras 23-25.

11 Jin's 1st Affidavit at pp 39, 42, and 43.

> determined by the board of directors in accordance with the terms of this agreement and the Articles of Association.
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> …
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> **5. Responsibilities of both parties regarding the establishment and operation of the joint venture**
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> 5.1 The two parties should be responsible, cooperate with each other closely to achieve the goal of reasonable profits for the joint venture. COT is the MP business window for APPLE, placing orders respectively to two manufacturing factories (JV Singapore and JV Taizhou), and Moveon is responsible for mo[u]ld and new product development.

7 The JVA mirrors some of the terms of the CFA. It also provides that:

(a) the joint venture in Singapore would be operational for only 10 years, unless extended by agreement (Art 4 of the JVA);[12] and

(b) the parties may at any time agree to terminate the JVA and dissolve the Singapore joint venture, or either party may have the right to do so by giving one month's written notice to the other if any specified events should arise (Art 15 of the JVA).[13]

8 On 14 January 2022,[14] the Defendant was incorporated as agreed under cl 3.1 of the CFA.[15] Pursuant to cl 10 of the CFA,[16] and Art 7.1 of the JVA,[17] Zhejiang controlled the board of the Company, which comprised two nominees

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12 Jin's 1st Affidavit at p 80.

13 Jin's 1st Affidavit at p 85.

14 Chee's Affidavit at paras 7(a) and 53; Jin's 1st Affidavit at p 27.

15 Jin's 1st Affidavit at pp 40-41.

16 Jin's 1st Affidavit at pp 55-59.

17 Jin's 1st Affidavit at p 81.

from Zhejiang and one from Moveon.[18] All important decisions relating to the Company (as set out in cl 10.7 of the CFA and Art 7.4 of the JVA) were to be determined by the majority of the board.[19] In other words, Moveon did not have any veto power with respect to any board decisions.

9 Between February and May 2022, Moveon commenced preparatory work to design, develop, and manufacture components to meet the specifications for the Lenses to be produced for Project Viserion.[20] Unfortunately, on or about 9 June 2022, and before any production took place, Apple informed the Company that it would not be engaged for Project Viserion.[21]

10 Following this, the board of the Company agreed to work on a tender for Project Sphinx.[22] Although cl 3.1 of the CFA provides that this would be undertaken by the parties' joint venture in China,[23] that joint venture had not yet been incorporated.[24] As there was some urgency to the matter, Apple requested that Zhejiang and Moveon work on Project Sphinx together.[25] The parties decided to use the Company as the vehicle for this.[26] In that regard, on 28 June

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18 Jin's 1st Affidavit at p 56 and 81.

19 Jin's 1st Affidavit at pp 56-59 and 81-82.

20 Jin's 1st Affidavit at para 22.

21 CWS at para 27; Moveon's Written Submissions dated 4th March 2024 ("MWS") at para 19; Jin's 1st Affidavit at para 26; Chee's Affidavit at para 72.

22 CWS at para 30.

23 Jin's 1st Affidavit at p 39.

24 Chee's Affidavit at para 26; Jin Lijian's 2nd Affidavit dated 4 February 2024 ("Jin's 2nd Affidavit") at paras 23-24.

25 Jin's 2nd Affidavit at paras 23-24.

26 Jin's 2nd Affidavit at paras 23-24.

2022, the Company's board passed a resolution approving the proposed budget for the Company to undertake preparatory work for Project Sphinx.[27]

11 However, on or about 11 August 2022, Apple terminated Project Sphinx.[28] Although the parties discussed keeping the Company alive,[29] it did not tender for, or undertake, any further projects and there were none in the pipeline.[30] Neither party adduced any evidence on the financial position of the Company – this was unsatisfactory as such evidence would have been relevant. Nonetheless, the evidence was that:

(a) The Company hired three employees of its own,[31] but terminated their employment on 16 June 2022 after Project Viserion was terminated.[32]

(b) Moveon seconded 64 of its own employees to the Company whilst Zhejiang seconded four, but all these secondments were terminated by October 2022 at the latest.[33]

(c) The tenancy agreements entered by the Company (with Moveon) have been terminated. The date of termination is the subject of ongoing proceedings in HC/OC 421/2023 ("OC 421") – Zhejiang claimed they were terminated on 31 May 2022 when the Company returned vacant

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27 CWS at para 34; Jin's 2nd Affidavit at para 26.

28 Jin's 2nd Affidavit at para 29; Chee's Affidavit at para 69.

29 Chee's Affidavit at paras 76-77.

30 Jin's 1st Affidavit at para 32.

31 Jin's 1st Affidavit at para 23.

32 Jin's 1st Affidavit at para 28; Chee's Affidavit at para 62.

33 Jin's 1st Affidavit at paras 22, 24, and 28; Chee's Affidavit at pp 254-255.

possession of the premises to Moveon, while Moveon claimed the tenancy agreements were in place until 28 June 2023.[34]

OC 421

12 Moveon claims that the Company was indebted to it for substantial amounts comprising: (a) capital expenditure incurred by Moveon for or on behalf of the Company; (b) costs of the employees Moveon had seconded to the Company; and (c) payments due under the tenancy agreements between Moveon and the Company.

13 On 30 June 2023, Moveon commenced OC 421 against the Company for, *inter alia*, the sums of US$9,953,522.25 and S$5,650,026.78. The Company, at the direction of Zhejiang's nominees on its board, defended the claim.

14 On 5 July 2023, a company allegedly related to Moveon,[35] Nixfol Pte Ltd ("Nixfol"), commenced DC/OC 932/2023 against the Company for the sum of S$252,347.60 for production materials allegedly purchased, and storage fees allegedly incurred, by the Company. Nothing turned on whether Moveon and Nixfol are related, and I therefore made no finding on this.

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34 Chee's Affidavit at paras 43(b) and 52.

35 Jin's 1st Affidavit at para 38; Chee's Affidavit at para 90.

15 On 28 July 2023, Zhejiang purportedly invoked the share transfer mechanism in the Company's Constitution,[36] and offered to sell its shares in the Company to Moveon for US$6m.[37] Moveon did not accept the offer.[38]

16 On 31 October 2023, Zhejiang filed this application to wind up the Company (the "Application"). Both Moveon and Nixfol appeared as non-parties and opposed the Application.

The Application

17 The Application was brought on the following grounds:

(a) the Company had failed to commence business within a year after its incorporation, alternatively, the Company's business had been suspended for over a whole year, under s 125(1)(*c*) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"); or

(b) it was just and equitable for the Company to be wound up, under s 125(1)(*i*) of the IRDA.

18 I deal with the second ground first.

The just and equitable ground under s 125(1)(*i*) IRDA

19 Zhejiang's case was that the Defendant should be wound up because it had lost its substratum. The main object for which it was set up (*ie*, the mass

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36 Jin's 1st Affidavit at para 35(a).

37 Jin's 1st Affidavit at p 109.

38 Jin's 1st Affidavit at pp 111-116.

production of the Lenses for Project Viserion) could no longer be achieved,[39] and the Company had no, or no prospects of, other projects.[40] It argued that it was unfair to keep it locked into the Company when the Company could no longer carry out the business it set out to do.[41] Further, Zhejiang argued that the joint venture was based on the parties cooperating closely, but their relationship had irretrievably broken down.[42]

20 In response, Moveon argued that:

(a) the Company had not lost its substratum as its purpose was still alive and its business could, and should, have been maintained;[43] and

(b) the Application was an attempt to "smother" Moveon's claim in OC 421 and was an abuse of process.[44]

The law

21 In *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others and another appeal* [2019] 1 SLR 1046 ("*Kathryn Ma*"), the Court of Appeal identified two scenarios where the loss of substratum argument is available to justify winding up a company (at [63]–[64]):

> 63 … A company's substratum is the main object which it was formed to achieve and when it is no longer able to carry on

39 CWS at para 62.

40 CWS at para 67.

41 CWS at para 63.

42 CWS at para 70-79.

43 MWS at para 27.

44 MWS at para 29.

> that object, *any* member may petition for a winding-up order on the just and equitable ground (see *Re Goodwealth Trading Pte Ltd* [1990] 2 SLR(R) 691 at [25]). This is only fair because in situations where the main objective of the company can no longer be achieved through no fault on the part of the parties, the unfairness lies in holding the parties to the association despite the loss of substratum, and a winding-up order under s 254(1)(*i*) is often justified (Hans Tjio, Pearlie Koh & Lee Pey Woon, *Corporate Law* (Academy Publishing, 2015) at paras 11.103–11.104 cited with approval in *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2018] 1 SLR 763 ("*Perennial*") at [45]).
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> 64 Another situation where the loss of substratum argument is available to an aggrieved shareholder is where the company is effectively dormant at the time of the application (contrary to what it was set up to do) and its finances are poor such that the company is no longer viable (*Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 at [23] and [173]). In such a situation, it can be said that the company had stopped conducting the business it was set up to do and, given its poor financial state, there is no longer any reasonable prospect that the company will achieve its substratum.

22 In both scenarios, the guiding principle is whether it would be unfair to keep the aggrieved shareholder locked into a company which is no longer carrying out, or can no longer carry out, the business it set out to do (*Kathryn Ma* at [65]).

23 However, as with all grounds under s 125(1) IRDA, the Court retains the discretion to make a winding up order (*Foo Peow Yong Douglas v ERC Prime II Pte Ltd and another appeal and other matters* [2018] 2 SLR 1337 at [59]). In exercising that discretion, the Court should "consider all the relevant factors, including the utility, propriety and effect of a winding-up order as well as the overall fairness and justice of the case" (*Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 ("*Lai Shit Har*") at [33]).

24 The court may reject the winding up application where it is brought for a collateral purpose such as to amount to an abuse of process (*Lai Shit Har* at [11] and [23]), or where the petitioner fails to invoke a viable buyout mechanism (see *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*") at [56] and *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 ("*Ting Shwu Ping*") at [76]).

Issues to be determined under s 125(1)(i) IRDA

25 Accordingly, the following issues arise for determination:

(a) Whether the Company had lost its substratum?

(b) Whether the Application was an abuse of process?

(c) Whether there was a viable buyout mechanism that Zhejiang failed to invoke?

Whether the Company had lost its substratum

26 The evidence is clear that the Company had lost its substratum. With the loss of Project Viseron, the reason the Company was established had failed. The Company's attempt to get involved in Project Sphinx also failed and it had not engaged, or even attempted to engage, in any other projects.

27 Moveon argued that the purpose of the Company was still alive and its business could, and should, have been maintained. In this regard, Moveon relied on:

(a) Article 3 of the JVA, which provides that the scope of the Defendant's business is the "design, research and development

and manufacturing of micro-optical products",[45] and therefore not limited to Project Viserion or Project Sphinx;

(b) the Company's Deputy General Manager (appointed by Zhejiang), Mr Daniel Ding's email dated 29 May 2023 ("Ding's Email"),[46] where he expressed the hope "to maintain the [Company]"[47] and that if a consensus could be reached on how that could be achieved, Zhejiang would not oppose the Company continuing to incur expenses;[48] and

(c) the Company's board meeting held on 10 July 2023,[49] where Zhejiang's nominee conveyed Zhejiang's intention "for the joint venture to proceed despite the legal dispute between the shareholders".[50]

28 I reject these as evidence that the Company had not lost its substratum.

29 First, the JVA and CFA must be read together. While Art 3 of the JVA sets out the broad business scope of the Company, cl 3.1 of the CFA explicitly provides that the Company was specifically established to carry out mass production of the Lenses for Apple under Project Viserion (see [6] above). It is undisputed that this purpose had failed given that Apple decided not to engage the Company for Project Viserion. Zhejiang and Moveon were of course entitled

45 Jin's 1st Affidavit at p 80.

46 Jin's 1st Affidavit at pp 103-105.

47 Jin's 1st Affidavit at pp 104.

48 Jin's 1st Affidavit at p 105.

49 Chee's Affidavit at para 78 and pp 320-322.

50 Chee's Affidavit at para 78 and p 321.

to agree to the Company engaging in other projects. They did so by passing a board resolution to enable the Company to undertake the preparatory work for Project Sphinx (see [10] above). But that venture also failed in August 2022 when Apple terminated Project Sphinx.[51] Zhejiang was not obliged to enter any other project or venture with Moveon through the Company, nor could it be compelled to do so. Indeed, it is not Moveon's evidence that it had even *proposed* any such project or venture to Zhejiang.

30 Second, Ding's Email was only expressing a tentative position that the Company could continue "[i]f [the parties could] reach a certain consensus on the previous points discussed",[52] which included the Company having sufficient funds and Moveon accepting various obligations.[53] No evidence was led that any consensus was reached.

31 Lastly, the hope expressed by Zhejiang's nominee at the board meeting was only that – a hope. The fact remained that given Zhejiang's position that it no longer wanted to collaborate with Moveon, there was no prospect of the Company carrying out any business. Moveon's Counsel, Mr Eusuff Ali argued that it was possible that parties could reach an agreement in the future. That was not only speculative but also wishful thinking given the parties' relationship and the Application.

32 In the circumstances, the Company was no longer able to carry out its intended purpose and had lost its substratum.

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51 Jin's 2nd Affidavit at para 29; Chee's Affidavit at para 69.

52 Jin's 1st Affidavit at p 105.

53 Jin's 1st Affidavit at p 105.

Whether there was an abuse of process

33 Nonetheless, the Application may be refused, despite the loss of substratum, if it was an abuse of process (*Lai Shit Har* at [11] and [23]). In this regard, Moveon argued that:

(a) Zhejiang brought the Application for the collateral purpose of "smothering" its claim in OC 421;[54] and

(b) Zhejiang's own misconduct had caused the circumstances giving rise to the basis for the Application.[55]

34 I reject both these arguments.

Whether the Application was brought for a collateral purpose

35 Moveon attempted to draw a parallel between this case and *Lai Shit Har* to argue that Zhejiang brought the Application for the collateral purpose of "smothering" its claim in OC 421. That comparison is misconceived. In *Lai Shit Har*, the subject company was caught in a long-standing dispute between the majority shareholders and a minority (the petitioner), who was also a director of the company. As a result of the dispute, the company could not, and did not, carry on business for five years. The majority caused the company to bring proceedings against the petitioner for breach of director's duties (amongst other things). At the doorstep of the trial against him, the petitioner applied to wind up the company on the basis that it had suspended its business for more than a year. The Court of Appeal found that the substantial delay and timing of the winding up application "unequivocally affirmed that it must have been brought

54 MWU at paras 6(g), 17, and 29.

55 MWU at paras 32-34.

solely for the collateral purpose of either seriously delaying or wholly derailing the [company's suit]" (at [24]). Moreover, the Court of Appeal found that the petitioner had unwittingly admitted in his affidavit that he had filed the application to "smother" the litigation against him (at [27]). This was an abuse of process, which justified the dismissal of the winding up application.

36 These facts are markedly different from the present case. First, in *Lai Shit Har*, the legal action was directed against the petitioner himself and brought for the benefit of the company. The claim was – as the High Court found – the company's only asset and it was therefore legitimate to keep the company alive to pursue its rights. It was also evident that the petitioner was using the winding up application to delay or derail the action against him. In this case, OC 421 was brought by Moveon *against* the Company. Moveon may consider the Application to be against *its* interests in OC 421, but that plainly does not extend to the Company.

37 In any event, it is difficult to see how the Application "smothers" Moveon's rights. If the Company is wound up, Moveon would be entitled to prove its claim in the liquidation, or, if necessary, ask for leave to continue OC 421 under s 133(1) IRDA. I note that OC 421 is still at a relatively early stage – no directions for trial have been given and no trial dates have been fixed. Moveon argued that the appointment of a liquidator would increase costs, but that may not be so. If the liquidator accepts Moveon's claim, it would obviate the need for OC 421 entirely and save considerable time and costs. Further, even if the liquidator decides to oppose Moveon's claim, he would be bound to act in a proper manner, thus reducing costs and even enhancing the prospects of a compromise. This is relevant, given Moveon's complaint that the Zhejiang-

controlled board of the Company had been conducting the defence to OC 421 improperly (see [40]–[41] below).

38 Second, in *Lai Shit Har*, the application was brought five years after the company had suspended its business. This is important as the application to wind up was made on the ground that the company had suspended its business for a year (under s 254(1)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed)). The Court found that the petitioner could not adequately explain this substantial delay, and this was evidence of his collateral purpose. In the present case, there was no delay in bringing the Application. After Project Viserion was terminated, the Company engaged in preparatory work for Project Sphinx. When that ceased in August 2022, it is undisputed that parties engaged in discussions to continue the Company and to resolve the disputes between them (see [11] above). Moveon filed OC 421 in June 2023 when the dispute could not be resolved. On 28 July 2023, Zhejiang offered to sell its shares in the Company to Moveon. When that offer was not accepted, it filed the Application shortly thereafter.

39 Third, the petitioner in *Lai Shit Har* had an alternative and more appropriate remedy – the Court of Appeal observed that if he was genuinely concerned that the suit brought against him was being used to oppress him, his proper cause of action would be to file a minority oppression claim under s 216 of the Companies Act 1967. Here, given that Zhejiang no longer wanted to collaborate with Moveon – and could not be compelled to do so – its only viable course (other than to sell its shares: see below at [46]–[51]) was to wind up the Company. It bears reiterating that Moveon did not propose any project or business the Company could engage in, and could not therefore even say that Zhejiang had acted unreasonably in not exploring those opportunities.

40 Fourth, it was Moveon's position that its claim in OC 421 is strong and that Zhejiang was abusing its majority position on the board to advance unmeritorious defences and applications to delay the matter.[56] If so, Moveon should welcome the appointment of a Court-appointed liquidator. In the current state, the parties (and their nominees) are in conflict – any payment to Moveon would be to the disadvantage of Zhejiang and *vice versa*. In contrast, the liquidator will be subject to the supervision of this Court and bound by law to act independently and fairly, ensuring that the Company's affairs – including any litigation – are conducted in the interests of the Company and its creditors (see *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458; *Pham Thai Duc v PTS Australian Distributor Pty Ltd* [2005] NSWSC 98).

41 In this regard, Zhejiang complained that Moveon had repeatedly refused to authorise the payment of fees to the Company's solicitors for defending OC 421 as well as the payment of the costs due from the Company to Moveon in OC 421.[57] Moveon explained that its nominee had sought certain clarifications and confirmations from Zhejiang's nominees on the proposed payments which were not forthcoming. There is insufficient material before me to decide who is at fault in these matters. What is important is that the appointment of a liquidator will address this impasse and avoid similar disputes in the future.

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56 Chee's Affidavit at para 88(b).

57 CWS at para 75.

Whether Zhejiang's misconduct was causative of the basis for winding up the Company

42 Moveon relied on the Hong Kong decision of *In the Matter of the Companies Ordinance, Cap 32 and in the Matter of Power Point Engineering Limited* [2000] HKCU 501 ("*Re Power Point Engineering*") for the proposition that "where the relevant *misconduct* [of the petitioners] was causative of the circumstances giving rise to the discretion, *prima facie*, the absence of clean hands would disentitle the petitioners to the relief sought [emphasis added]".[58] Moveon argued that the Company's inability to have carried on its business is entirely due to the actions of Zhejiang and that Zhejiang should therefore not be allowed to rely on its own "misconduct" to wind up the company.

43 This argument is plainly flawed. In *Re Power Point Engineering*, the petition was brought on the ground that the company had suspended its business for a whole year under s 177(1)(b) of the Companies Ordinance (Cap 32) (HK) which is identical to s 125(1)(*c*) IRDA. The court found that the suspension of the company's business was solely attributable to the petitioners' *breach of fiduciary duty*, as they had diverted the company's projects toward a newly formed company owned by the petitioners' associates.

44 Here, there was no "misconduct" on Zhejiang's part to speak of. Zhejiang only agreed to collaborate with Moveon via the Company on Project Viserion and (subsequently) Project Sphinx. It was not suggested that Zhejiang was in any way responsible for Apple's decision not to engage the Company for those projects. Further, Zhejiang did not agree, and could not be compelled to

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58 MWU at para 32.

agree, to use the Company for other ventures. In any event, as noted above, no such ventures were even proposed by either party.

45 The evidence was clear that Moveon simply wanted to keep the Company alive to obtain judgment against it in OC 421. Mr Ali acknowledged that in that event, Moveon would likely have to wind up the Company to enforce that judgment. There was therefore no real desire on the part of Moveon to keep the Company alive as a going concern. Indeed, the evidence suggests that while Zhejiang had expressed a desire to keep the Company as a going concern, Moveon's response was to insist that its claims must first be satisfied.[59]

Whether Zhejiang attempted to invoke the buyout mechanism

46 As winding up is usually a solution of last resort, it is relevant to the exercise of the Court's discretion if there are other methods of resolving the unfairness to the disaffected shareholder. In particular, where there is a buyout mechanism which allows that shareholder to exit that company, it should, in most cases, invoke the same before bringing a winding up application (*Perennial* at [56]). In Prakash JA's (as she then was) words:

> … the presence of a buyout mechanism in the company's constitution would be a vital consideration when examining whether it was just and equitable to order a winding up. In the usual case, *an applicant who had not even attempted to invoke the share buy-out mechanism would be unlikely to establish the "unfairness" necessary to invoke the court's just and equitable jurisdiction to wind up a company*. There were, however, atypical situations in which unfairness would be established notwithstanding the presence of the buy-out mechanism. These included situations where the disaffected shareholder legitimately did not expect to have his shares valued in the manner prescribed by the agreed mechanism, where the shareholders had conducted the company's affairs in bad faith

[59] Jin's 1st Affidavit at pp 103-116.

> or improperly, and where there was a defect in the valuation mechanism – *ie*, it was arbitrary or artificial (*Ting Shwu Ping* at [107(c)].
>
> [emphasis added]

47 In this case, Zhejiang attempted to invoke the share buy-out mechanism in Art 27 of the Company's Constitution. The relevant portions are:

> 27. (1) Any member who wishes to transfer shares or any interest in shares ("the Offeror") shall give to the company a notice in writing ("the Transfer Notice") of his intention to do so. The Transfer Notice shall constitute the board of directors as the Offeror's agents for the sale of the said shares and shall specify:-
>
> (a) the total number of shares being offered for sale by the Offeror ("the Subject Shares");
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> (b) the sale price for the Subject Shares fixed by the Offeror as the fair market value for such shares ("the Sale Price");
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> …
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> (3) Upon receipt of a Transfer Notice, the board of directors shall promptly, by notice in writing, offer to the other members ("Offerees") the Subject Shares in proportion to their respective shareholdings in the company the Sale Price. The offer shall be open for acceptance for a period of 30 days from the date of the notice ("the Acceptance Period").
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> (4) The offer may be accepted in writing by one or more of the Offerees ("Offeree's Notice") within the Acceptance Period stating:-
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> (a) either that:-
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> (i) that he accepts the offer from the Offeror;
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> (ii) whether he offers to purchase, at the Sale Price, any of the Subject Shares not accepted by the other Offerees ("Excess Shares") and if so, the

> number of Excess Shares he is willing to accept; and
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> (iii) if not at the Sale Price, the price at which the Offeree will pay for the Subject Shares and, if applicable, the Excess Shares ("Offeree's Price");
>
> …
>
> (11) Where in any Offeree's Notice, the Offeree's Price is below the Sale Price (and the Offeror and the Transferee shall not have reached an agreement on the price for the shares within 7 days from the date of the Offeree's Notice), the price for those shares shall as certified by the auditors of the company (acting as experts and not as arbitrators) to be in their opinion the fair value of those shares as at the date of the Transfer Notice ("Auditor's Price"), as between a willing seller and a willing buyer contracting on arm's length terms and having regard to the fair value of the business of the company and its subsidiaries as a going concern, taking into account any premium or discount by reason (if it be the case) that the Subject Shares constitute a majority or minority interest but not the fact that other Offerees have accepted the Sale Price. The board of directors shall within 7 days of the issue of the auditors' certificate send a copy to the Offeror and to the Transferee. The auditors' certificate aforesaid shall be binding upon the parties concerned.

48 On 28 July 2023, Zhejiang offered to sell its shares in the Company to Moveon for US$6m (*ie*, at US$1 per share).[60] As required under Art 27(3), the offer remained open for a period of 30 days. Moveon rejected the offer on the basis that it "fail[ed] to make any attempt to address Moveon's interest in recovering monies owed by [the Company] and is not a genuine attempt to resolve the matter".[61] Moveon's response conflated two separate issues – its claim against the Company and Zhejiang's offer. If Moveon was of the view that Zhejiang's offer was not a fair value because it failed to account for the Company's liabilities, it could have accepted the offer but at a lower price – in

60 Jin's 1st Affidavit at p 109.

61 Jin's 1st Affidavit at p 112.

accordance with Art 27(4)(a)(iii). If parties are then unable to agree on a price, the price would be certified by the auditors of the Company in accordance with Art 27(11). Instead, Moveon insisted that Zhejiang revise its offer – which Zhejiang was not obliged to do. For all intents and purposes, Moveon rejected Zhejiang's offer.

49 It was Moveon's prerogative not to accept Zhejiang's offer. However, the fact remained that Zhejiang did attempt to exit the Company using Art 27 but that failed.

50 Moveon then argued that Zhejiang failed to engage another mechanism,[62] namely Art 15 of the JVA, which allows Zhejiang to terminate the JVA and dissolve the Company by giving one month's written notice (see [7(b)] above). That did not assist Moveon, and in fact, undermined its case. First, this was not a mechanism for one of the parties to exit the Company, but to provide for its liquidation. This was precisely what Zhejiang was seeking to do by the Application. Moveon accepted that the JVA did not preclude Zhejiang from exercising its statutory rights to achieve the same result. Second, Art 15 provides that either party may invoke it in certain prescribed circumstances, one of which is that the Company has ceased operations for six months. The Company had no operations after Project Sphinx was terminated in August 2022. If Zhejiang could achieve the same result by issuing a one-month written notice regardless that this would, on Moveon's case, "smother" OC 421, then its application to achieve the same result using its statutory right could not be an abuse of process.

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62 MWS at para 49.

51 Finally, Moveon, citing *Perennial*, highlighted that there was no deadlock in the management of the Company: Zhejiang controlled the board, and the only point of disagreement was Moveon's claims which should be resolved in OC 421.[63] But this ignored a fundamental point. The fact that the subject company is able to continue to do business is relevant when it is the party not in control (typically the minority) who wants to exit. In that event, the Court is understandably reluctant to wind up a going concern against the wishes of the majority and looks for other solutions. However, in this case, the unfairness lay in compelling Zhejiang to continue to be in a joint venture where the agreed business could not be carried out, and Zhejiang no longer had an interest, nor could be compelled, to collaborate with Moveon on any other business. Indeed, as highlighted above at [29], Moveon had not even proposed any business and only wanted to keep the Company alive to prosecute its claims in OC 421.

52 In the circumstances, I reject Moveon's case that Zhejiang is acting in abuse of process in bringing the Application. I see no reason to deny Zhejiang the reliefs sought in the Application.

The failure to commence business within a year or suspension of business for a whole year under s 125(1)(*c*) IRDA

The law

53 Section 125(1)(*c*) IRDA provides that the Court may wind up a company if the company:

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63 MWS at para 49.

(a) does not commence business within a year after its incorporation; or

(b) suspends its business for a whole year.

54 The rationale for this ground is said to be "to provide shareholders with a means of recovering their investment from a company which fails to engage in its intended business" (Andrew Keay, *Mcpherson & Keay, the Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 4-020).

55 There is a dearth of local case law dealing with this provision – there are only two published decisions: *Grimmett, Andrew and others v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 ("*Grimmett*") and *Lau Yu Man v Wellmix Organics (International) Pte Ltd* [2007] SGHC 96 ("*Lau Yu Man*").

56 In *Lau Yu Man*, the subject company had no commercial activities for over five years prior to the filing of the winding up application. The High Court rejected the argument that the company's business had not been suspended because it, amongst other things, continued to receive mail (*Lau Yu Man* at [11]). On appeal, the fact that the business was suspended was not contested, and there was therefore little discussion on this issue (see *Lai Shit Har*).

57 In *Grimmett,* the subject company was a holding company with no substantive business of its own. The shares it was holding were sold off and it was not disputed that its business had been suspended for over a year by the time the winding up application was brought (at [83]). The Court, referring to English authorities, set out the following principles in relation to s 125(1)(*c*) IRDA:

> 81 To establish this ground, the court will enquire whether the business has been abandoned in its entirety, either wilfully or simply due to the inability to carry on trading for other reasons (see *Re Madrid and Valencia Railway Co* (1850) 19 LJ Ch 260). Consequently, there is no suspension of business when the cessation of business activities can be satisfactorily explained on other grounds, such as, for example, that the company does very little business in the winter months (*Re Tomlin Patent Horse Shoe Co Ltd* (1886) 55 LT 314), or that trade in the area of operation is depressed and the directors are waiting for better times (*Re Middlesborough*).
>
> 82 From the abovementioned, a common thread running through the cases is that the petition will generally be dismissed if the majority of shareholders are opposed to winding up and the company's inactivity can be explained (*Re Metropolitan Railway Warehousing Co Ltd* (1867) 36 LJ Ch 827). This ground for winding up is designed primarily to provide shareholders with a means of recovering their investment from a company which fails to engage in its intended business (*McPherson & Keay* ([46] *supra*) at p 253).

58 Applying these principles, the Court found that the ground of winding up under s 125(1)(*c*) IRDA was not made out because: (a) the shareholders of the company had expressed their intention to carry on the business of the company and were opposed to the winding up; and (b) the inactivity of the company could be explained on the basis that it was in judicial management (*Grimmett* at [83]). In doing so, the Court appeared to hold that the shareholders' intention and the underlying reason for the company's dormancy went towards *establishing* the ground under s 125(1)(*c*), and not toward the court's *exercise of its discretion* whether to wind up the company.

59 In my view, based on the plain language of s 125(1)(*c*), whether a business fails to commence or has been suspended for a year is a question of fact, which turns on the nature of that business. Nonetheless, the shareholders' intention(s) and the reason for the suspension (or non-commencement) of business are relevant factors to be considered when the court exercises its

discretion whether to wind up the company. Indeed, this appears to be the approach taken by the English authorities referred to in *Grimmett* as well as the High Court in *Lau Yu Man* (at [11]).

60 In *Re Middlesborough Assembly Rooms Co* (1880) 14 Ch D 104 ("*Middlesborough*"), a company was incorporated in 1874 to purchase and renovate a property into assembly rooms for the purpose of leasing them out. The property and some adjoining lands were purchased, and the assembly rooms were partially constructed by 1875. However, the company had under-estimated the costs of construction. The situation worsened in 1876 as trade in the district became depressed. The directors and shareholders of the company agreed that it was desirable to stop works and wait for better times. In 1879, a group of minority shareholders brought a petition to wind up the company on the ground that the company had suspended business for more than a year (equivalent to s 125(1)(*c*) IRDA). The court agreed that the company had suspended its business, thus establishing the basis for winding it up, but nonetheless exercised its discretion to reject the winding up application. In Cotton LJ's words (at pp 110–111):

> *[T]hough the circumstances are such that the Court* ***can*** *make a winding-up order, it has a* ***discretion*** *as to whether it will make one on his application.*
>
> The Petitioner acquired his shares in 1874. In 1876 the company ceased taking any steps to carry out their undertaking, and, *as I agree, suspended business for more than a whole year.* The Petitioner does nothing till 1879, and then almost immediately after the meeting of May in that year … he presents this petition. If he could satisfy the Court that the business of the company had been suspended on account of inability to carry it on, or by reason of an intention to abandon the undertaking, the case would be very different. It is true that there is no evidence that the company will proceed with their building within any given time, but I cannot look upon the delay as arising from anything but a wish to wait for a time when the

> business can be carried on more profitably than at present. Under these circumstances, I think that a winding-up order ought not to be directed when a vast majority of the shareholders wish to go on, and the only result of a compulsory winding-up would be a great and unnecessary expense.
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> [emphasis added in italics and bold]

61 Similarly, in *Re Metropolitan Railway Warehousing Co Ltd* (1867) 15 WR 1121 ("*Metropolitan*"), the court explicitly found that "[the] company has not commenced business within a year" (at p 1122). However, this did not give the shareholders "a vested right to say that the company *shall* be wound up [emphasis added]" (at p 1123). Where the delay for the commencement of the company's business is satisfactorily explained, and where there is a reasonable prospect that the company will be able to resume its business within a reasonable time, the court will exercise its *discretion* to dismiss the petition (at p 1123).

62 This was also the position taken in Australia (*Devmin International Pty Ltd v Belconnen Developments Pty Ltd* (2022) 12 QR 170), and Hong Kong (*In the Matter of the Companies Ordinance, Cap 32 and in the Matter of Power Point Engineering Limited* [2000] HKCFI 800 cited with approval by the Court of Appeal in *Lai Shit Har* at [32]).

The meaning of "business"

63 Unfortunately, the preceding cases do not discuss the meaning of "business" or what constitutes the "commencement" or "suspension" of the same. In my view, these are foundational questions for this ground. Indeed, how narrowly or widely the "business" is defined will invariably affect whether the activities of the company amount to a commencement, or are relevant to whether there has been a suspension, of the "business".

The "commencement" or "suspension" of a business

(1) Commencement of a business

64 The question here is whether there was a sufficient level of commercial activity, such that the company could properly be said to have "commenced" its business. This does not necessarily require the company to have produced commercially viable goods and services. Much will depend on the nature of the intended business. For instance, there are businesses engaged in projects which require a substantial amount of preparatory work. The preparation phase may extend beyond a year, and it would be unreasonable (indeed, absurd) to justify winding up such a company simply because it fails to deliver or offer its product or service within a year of its incorporation.

(2) Suspension of a business

65 As a matter of interpretation, "suspension" and "termination" of a business must carry different meanings. The plain meaning of "suspension" connotes a *transient* state of affairs, whereas "termination" connotes a degree of *permanence*. This distinction ensures that the ground under s 125(1)(*c*) is not rendered otiose by the "just and equitable" ground under s 125(1)(*i*) where the *termination* of a business can constitute a loss of substratum (see *Kathryn Ma* at [64]). That is why under the "just and equitable" ground, there is no need for the termination of the business to have been for more than a year. Nonetheless, where it has been over a year since the business was terminated, s 125(1)(*c*) will likely be satisfied.

66 The fact that a business continues to incur expenses should not be conclusive evidence that it has not been suspended. After all, the mere suspension of a business does not require a complete lack of activity. This is

especially true when the expenses comprise liabilities (such as salaries and rental) that have already been committed and will need to be paid regardless of the ceasing or suspension of the business. For instance, in *Middlesborough*, the court found that the company had suspended its business even though it continued to incur expenses including a salary to the secretary and interest payable on the loan it took out to purchase the property (at p 110). Likewise, where the company continues to receive mail (*Lau Yu Man* at [11]).

The court's discretion

67 Finally, as stated above at [23]–[24], even if the failure to commence or suspension is established, the court retains the discretion to deny the winding up of a company, having regard to all relevant factors including the utility, propriety and effect of a winding-up order as well as the overall fairness and justice of the case (*Lai Shit Har* at [33]; *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [5]).

68 *Lai Shit Har* is a useful example of this exercise of discretion. In that case, the court below (*Lau Yu Man*) had found that the condition under s 125(1)(*c*) of IRDA had been established given that the subject company had ceased business for 5 years and was being kept alive by the majority to sustain its legal action against the petitioner for breach of his fiduciary duties. The High Court gave the company a deadline to comply with its regulatory obligations, and when it failed to do so, ordered it to be wound up. The Court of Appeal allowed the appeal, finding that although the statutory ground for winding up "may have been technically established" (at [33]), it exercised its discretion against winding up the company given its finding that the application had been brought in abuse of process, and the court below had failed to consider whether

the petitioner could have caused the company's business to have been suspended and whether the company had a *bona fide* claim against him (at [42]).

69 It is important to keep in mind the rationale for making a winding up order under s 125(1)(*c*), namely to provide shareholders with a means of recovering their investment where the company fails to engage in its intended business (see [54] above). The court should therefore consider the shareholders' intentions, and other underlying reasons for the failure to commence or the suspension of business. If the suspension or failure to commence is justifiable, this would be a factor against the winding up of the company (*Metropolitan; Middlesborough*). Likewise, where the majority of the shareholders intend to commence or continue the business, and present reasonable plans to do so (*Middlesborough*). It follows that where the majority do not wish to continue the business and are not legally obliged to do so, a winding up order should almost always be made – this factor is relevant to this case.

70 As with the just and equitable ground, an abuse of process and the attempt to invoke an exit mechanism are also relevant factors to consider at this stage (see above at [24]).

Issues to be determined under s 125(1)(c) IRDA

71 In light of the foregoing principles, the following issues arise:

(a) What was the "business" of the Company?

(b) Whether the Company's "business" failed to commence within the first year of its incorporation or had been suspended for a whole year prior to the filing of this application?

(c) If so, whether the court should exercise its discretion to grant a winding-up order?

What was the Company's "business"

72 Zhejiang's arguments on this ground were premised on the Company's business being limited to the "mass production of Project Viserion" as defined in cl 3.1 of the CFA (see [6] above).

73 On the other hand, Moveon refers to the more broadly defined object clause under Art 3 of the JVA:[64]

> **Article 3 Business Scope of the Joint Venture Company:** design, research and development and manufacturing of micro-optical products.

74 I find that *both* of these provisions are relevant to determining the Company's business. Clause 3.1 of the CFA states that the Company was incorporated for the mass production of the Lenses envisaged under Project Viserion. However, the parties are entitled to vary that agreement to enable the Company to engage in any other projects (which they did in respect of Project Sphinx).[65] Article 3 of the JVA is also relevant as it delineates the *scope* of the business to the "design, research and development and manufacturing of micro-optical products".

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64 Jin's 1st Affidavit at p 80.

65 Jin's 2nd Affidavit at paras 23-24.

Whether the Company commenced or suspended its business

Whether the Company commenced business within a year after its incorporation

75 The Company was incorporated on 14 January 2022.[66] Hence, for this ground to be satisfied, Zhejiang had to prove that the Company failed to commence its business by 14 January 2023.

76 Zhejiang argued that the business of the Company was to manufacture optical lenses and since none were produced, the Company failed to commence business within a year of its incorporation. I do not accept that argument. As explained at [64], it is wrong to equate the absence of an end-product with the failure to commence the business. The manufacture of the Lenses under Project Viserion was a large undertaking – parties were expected to invest a total of US$30m, of which US10m was to be injected up front.[67] Such a major project would have been expected to involve a significant amount of preparatory work. From the time of its incorporation, the Company undertook activities relevant to, and in pursuit of, Project Viserion. Zhejiang acknowledged that "between February 2022 and May 2022, the Company had commence[d] preparatory work to design, develop and manufacture components to meet the specifications for the micro injection lenses required for Project Viserion".[68] These included:[69]

(a) the renting of premises for the manufacturing of the components;

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66 Jin's 1st Affidavit at p 27.

67 Clause 3.2 of the CFA at Jin's 1st Affidavit at p 40.

68 Jin's 1st Affidavit at para 22.

69 Jin's 1st Affidavit at para 22.

(b) the secondment of 64 of Moveon's employees and four of Zhejiang's technicians to the Company;

(c) Moveon providing the Company with the equipment and machinery required for the production of the components;

(d) Moveon, on the Company's behalf, working with Apple's personnel to tweak the specifications of certain equipment to match Apple's requirements; and

(e) the Company hiring three employees of its own.[70]

77 As elaborated on earlier (at [64]), such preparatory work can amount to a commencement of the business. Given the activities set out above, I find that the Company had commenced business after its incorporation and this ground of the Application therefore fails.

Whether the Company suspended its business for a whole year

78 The winding up petition was brought on 31 October 2023.[71] Hence, the question is whether the Company's business had been suspended since 31 October 2022.

79 While there was no dispute that the Company had no live or pending projects after 11 August 2022 when Project Sphinx was cancelled,[72] Moveon argued that the Company had not suspended its business because: (a) parties were in discussions over continuing with the Company; and (b) the Company

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70 Jin's 1st Affidavit at para 23.

71 Originating Application dated 31 October 2023.

72 Chee's Affidavit at para 69 and p 308.

was incurring expenses, including operational expenses such as water, electricity and rent.[73]

80 In relation to the first argument, the fact that parties may have been in discussions to explore continuing the Company did not amount to an ongoing "business". Although parties are entitled to agree on projects other than Project Viserion, nothing was in fact agreed on other than Project Sphinx, which was then cancelled. Indeed, it is not disputed that no specific projects were even proposed by either party, much less discussed.

81 In relation to the alleged expenses, these are expenses which the Company were already committed to paying (see above at [66]). Further, as explained at [65]–[66] above, just because such expenses were being paid is not inconsistent with the Company's business being suspended. The fact remains that the Company was, following the cancellation of Project Sphinx, not engaged in any commercial activity, or even preparatory works for such activity.

82 Therefore, I find that the business of the Company had been suspended since 11 August 2022. This was more than a year before the Application was filed, and s 125(1)(*c*) IRDA is therefore satisfied.

Whether the court should exercise its discretion to grant a winding up order

83 I saw no reason to exercise my discretion against granting the Application. Indeed, all the relevant factors favoured ordering the winding up of the Company.

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[73] Referring to Ding's Email as evidence that as of 29 May 2023, the Company was still incurring "personnel salaries and operational expenses related to facilities such as water electricity and rent": Jin's 1st Affidavit at p 105.

84 The Company had no plans to do any business and had no intention of developing such plans. Zhejiang's decision to no longer collaborate with Moveon, and its desire to wind up the Company, put that issue beyond doubt. As I emphasized to Mr Ali at the hearing, Zhejiang is the majority shareholder and controls the board, and without its agreement, the Company could not move forward. Neither did this Court have the power to compel Zhejiang to collaborate with Moveon and agree on new projects. Moveon's argument that parties may in future reach an accommodation had no factual basis. Further, if there was an accommodation to be reached, one would have expected that to have happened before the Application was heard.

85 For the reasons explained above, the Application is not an abuse of process. Importantly, Moveon had no real desire for the Company to continue its business and its sole reason for keeping the Company alive was to prosecute OC 421. The winding up of the Company will not prevent Moveon from proving its claim or otherwise pursuing its (alleged) rights.

86 In the circumstances, I find in favour of the Application under s 125(1)(*c*) IRDA as well.

Conclusion

87 In summary, I find that:

(a) The just and equitable ground of winding up under s 125(1)(*i*) was established as the Company had lost its substratum.

(b) The ground of winding up under s 125(1)(*c*) was also established as the Company had suspended its business for more than a year.

(c) The circumstances warranted exercising my discretion to wind up the Company.

88 I therefore ordered the winding up of the Company, and appointed Mr Abuthahir S/O Abdul Gafoor and Ms Yessica Budiman as joint and several liquidators. I also ordered costs of S$12,000 (all-in) to be paid by Moveon to Zhejiang.

Hri Kumar Nair
Judge of the High Court

Lim Mengguan and Clarie Ong Bee Sim (Drew & Napier LLC) for the claimant;
Zheng Shengyang Harry and Yeo Qi Cheryl (Kelvin Chia Partnership) for the defendant;
M K Eusuff Ali and Lee Yen Yin (Tan Rajah & Cheah) for the first non-party;
Yeo Kee Teng Mark (Fortress Law Corporation) for the second non-party (watching brief).