Ting Shwu Ping (Administrator of the estate of Chng Koon Seng, deceased) *v* Scanone Pte Ltd and another appeal
[2016] SGCA 65

Case Number	: Civil Appeals Nos 12 and 17 of 2016
Decision Date	: 29 November 2016
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash JA; Tay Yong Kwang JA
Counsel Name(s)	: N Sreenivasan SC, Valerie Freda Ang Mei-Ling and Tan Xin Ya (Straits Law Practice LLC) for the appellant; Vikram Nair, Amy Seow and Tan Ruo Yu(Rajah & Tann Singapore LLP) for the respondents.
Parties	: TING SHWU PING (ADMINISTRATOR OF THE ESTATE OF CHNG KOON SENG, DECEASED) — SCANONE PTE LTD — AUTOPACK PTE LTD

Companies—Winding Up

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2016] 2 SLR 152.]

29 November 2016 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 These appeals are the first cases invoking the court's power to wind up a company on the "just and equitable" ground to come before us since the recent amendment to s 254 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). That amendment introduced a new sub-section, s 254(2A), which has empowered the court to order a shareholder buy-out as an alternative to making a winding up order. The question that arises is whether the additional remedy now available should affect the approach the court takes to an application made to wind up a company on the "just and equitable" ground.

2 The appeals before us arise from winding up applications filed in respect of Autopack Pte Ltd ("Autopack") and Scanone Pte Ltd ("Scanone") (together, "the Companies"). Autopack was incorporated in 1989 and is still an active company carrying on business as a wholesaler of graphic equipment and barcode products. Scanone, incorporated in 1997, has been dormant since the mid-2000s, but owns property which it rents out to Autopack. The Companies are the respondents in the appeals.

3 Autopack was started by Chng Koon Seng ("Chng"), Chan Key Siang ("Chan") and Yeo Seng Poh ("Yeo"). In 1996, Yeo withdrew from the business. Thereafter, the Companies were run by Chng and Chan jointly until Chng's death in 2014. At that time, the shares of Scanone were held in equal proportions by Chan and Chng whilst the shares of Autopack were held equally amongst Chng and his wife (Mdm Ting Shwu Ping) ("Mdm Ting") on the one part and Chan and his wife on the other. It was common ground that the two wives derived their respective shareholdings from their husbands and played no part in the business of the Companies.

4 Mdm Ting is the administrator of Chng's estate ("the Estate") and is the appellant in these appeals. In relation to the appeal involving Autopack, she acts in two capacities: for herself and as administrator of the Estate. In relation to the appeal involving Scanone, she is acting solely as administrator of the Estate.

5 In August 2015, Mdm Ting applied to wind up the Companies under s 254(1)(*i*) of the Act asserting that it would be "just and equitable" to do so. The factual and legal bases of both applications were the same. Mdm Ting also indicated that, as an alternative to a winding up order, the court could exercise the power newly given to it under s 254(2A) of the Act to compel Chan to buy the shares belonging to herself and the Estate ("the Shares"). The applications were successfully opposed by the Companies acting under the direction of Chan. The first instance judge ("the Judge") held that the applications were an abuse of process as an attempt to accomplish an exit at will and that, further, Mdm Ting had not been able to establish any of the grounds that would make it just and equitable to wind up the Companies (see *Ting Shwu Ping and another v Autopack Pte Ltd and another matter* [2016] 2 SLR 152 ("the Judgment")).

6 Mdm Ting has brought these appeals essentially on the contention that the Companies were quasi-partnerships. She says that, therefore, the death of Chng had certain consequences for the continued existence of the Companies such that with his demise it would be just and equitable to wind them up. While the Companies do not contest the quasi-partnership description, they emphasise that they are incorporated bodies under the Act, not partnerships, and therefore the death of a shareholder cannot have the same consequence for them that the death of a partner would have for a true partnership.

Background

The situation during Chng's lifetime

7 Contemporaneously with the incorporation of Autopack on 1 September 1989, Chng, Chan and Yeo entered into a Memorandum of Understanding ("the MOU") in which they set out their agreement as to how Autopack was to be run. On Yeo's departure, Chan and Chng acquired his shares in equal proportions and thereafter they were the sole directors of the Companies. They agreed, however, that the salaries they were entitled to draw should be divided between themselves and their wives. The total remuneration of both sides was equal. Only salaries were taken from the Companies; no dividends were paid at any point. As stated, the wives did not work in the Companies and their salaries were, in essence, part of their respective husbands' remuneration.

8 The parties have relied on the MOU and, more so in the case of the Companies, the terms of their respective Articles of Association ("the Articles"), to indicate what the agreement and expectations were when Autopack was incorporated. In the MOU, a very brief document drawn up without the aid of lawyers, it is stated that the number of partners in Autopack would be three and this number was not to be increased. Each partner was to have an equal number of shares and was allowed to transfer shares only to his spouse. Particularly important in the present context are cll 9 and 10 which deal with the withdrawal of a partner. They state:

> 9) Should a partner decide to withdraw from AUTOPACK PTE LTD, he may either:-
>
> a) remain as a sleeping partner provided both the remaining partners agree to this; or
>
> b) sell of [*sic*] all the shares held under his name and that of his spouse.

> 10) Should a partner decide to sell off his shares in accordance to Clause 9(b) of this Memorandum, a decision is to be made by the remaining 2 partners whether they want a new partner to take over the shares of the withdrawing partner. …
>
> In the event of a disagreement on the admission of a new partner, the withdrawing partner must offer his shares to be bought by the remaining 2 partners. …

9 The Articles also regulate the transfer of the shares in the Companies. The relevant Articles are common to both Companies. Essentially, they state that remaining members have a right of pre-emption if an existing shareholder wishes to transfer his shares (Art 28), and that the price of the shares is to be determined by the company's auditor if there is a dispute between the transferor and transferee as to the fair value of the shares (Arts 31 and 33) (these apply equally if the transfer arises because of the death of a member – Art 36):

> 28. Shares may be freely transferred by a member or other person entitled to transfer to any *existing member* selected by the transferor; but save as aforesaid and save as provided by Article 33 hereof, ***no share*** *shall be transferred to a person who is* ***not*** *a member so long as any member* or any person selected by the directors as on whom it is desirable in the interest of the Company to admit to membership *is willing to purchase the same at the fair value*.
>
> 29. Except where the transfer is made pursuant to Article 33 hereof the person proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice") to the Company that he desires to transfer the same. *Such notice shall specify the sum he fixes as the fair value*, and shall constitute the Company his agents for the sale of the share to any member of the Company or persons selected as aforesaid, at the price so fixed, *or at the* ***option of the purchaser*** *, at the* ***fair value to be fixed by the auditor*** *in accordance with these articles*. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.
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> ...
>
> 3 1 . *In case any difference arises* between the proposing transferor and the purchasing member *as to the fair value of a share, the auditor shall*, on the application of either party *certify* in writing *the sum which in his opinion is the fair value*, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert and not as an arbitrator; accordingly, Arbitration Act. Cap. 10 shall not apply.
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> ...
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> 33. If the directors shall not, within the space of three months after service of a sale notice, find a purchasing member of all or any of the shares comprised therein and give notice in manner aforesaid, or if through no default of the retiring member, the purchase of any shares in respect of which such last-mentioned notice shall be given shall not be completed within twenty-one days from the service of such notice the retiring member shall, at any time within six months thereafter, be at liberty to sell and transfer the shares comprised in his sale notice (or such of them as shall not have been sold to a purchasing member) to any person and at any price.
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> [emphasis added in italics and bold italics]

Events after Chng's death

10 Chng died on 7 April 2014. Thereafter, up to about August 2015, the parties interacted on the basis that Mdm Ting would be selling the Shares to Chan. The problem was with fixing the price. Several offers and counter-offers were made without agreement being reached. As time went on, the parties' initially amicable relationship became strained and, in the ultimate result, Mdm Ting gave up the negotiations and filed the applications for winding up.

11 Events were set in motion on 16 April 2014, when Mdm Ting and her brother-in-law (who we shall refer to as "CKB") met Chan to discuss the future of the Companies. Mdm Ting made it clear that she did not want to be involved in the business but was looking towards selling the Shares. Shortly thereafter, Mdm Ting was appointed as a director of Autopack. Sometime later, she was also put on the board of Scanone. The parties disagree as to the reason for Mdm Ting's appointment – Mdm Ting claims that it was so that she could evaluate whether to continue her involvement in the business as Chan's partner, while Chan claims that she was appointed for the sole purpose of facilitating the sale of the Shares. Mdm Ting was also made a signatory to Autopack's bank account. It is relevant to note that at this time the Companies owed the Estate money arising out of director's loans made by Chng: Autopack owed $1,730,067 while Scanone owed $334,400.

12 At the time of Chng's death, Autopack's directors and their wives were receiving equal monthly salaries from the company. On Chng's death, his salary and Mdm Ting's were pro-rated to the date of his death. Mdm Ting complained about her loss of income and eventually Chan agreed to restore her full payment for the month of April 2014 but he did not make up in any way for the loss of Chng's salary. In May 2014, Chan agreed that Mdm Ting would get a monthly salary of $10,000. The remuneration paid to him and his wife would, however, remain unchanged at $21,752 monthly. This situation continued until November 2014 when because of further disagreements between the parties with regard to salary, Chan and Mdm Ting would not sign each other's salary cheques. Therefore none of them, *ie*, Chan and his wife as well as Mdm Ting, received any salary thereafter. This remained the position at least until the end of July 2015 when Mdm Ting was removed as a director.

13 Chan complained that during the time Mdm Ting was a director, she was uncooperative and refused to sign various documents, including cheques for staff salaries and bonuses, the audited financial statements and a Jurong Health tender.

14 After her appointment, Mdm Ting and CKB attended weekly meetings at Autopack to try and learn more about the business. They also looked into the issue of the price at which the Shares should be sold. On 3 August 2014, Mdm Ting proposed to Chan that Autopack appoint a professional valuer, acceptable to both parties, to value the Companies. In his response on 7 August 2014, Chan said that since mid-April 2014 when Mdm Ting had expressed her intention to sell the Shares, no offer had been made to him. He noted that the common practice was that the selling party should state the offer price and indicated that he was not particular as to who carried out the valuation of the offer price; Mdm Ting could do it herself or engage somebody else, but Autopack would not engage a valuer for this purpose. He also indicated that he would purchase the Shares on condition that the price was a fair one and offered to him within a reasonable time.

15 On 25 October 2014, Mdm Ting informed Chan that she valued the Companies at $22m and was therefore willing to sell the Shares for $11m. She demanded equal management rights and salary prior to the resolution of the share purchase. On 8 December 2014, Chan put in a counter-offer through his lawyers. He was willing to pay $3.62m for the Shares on condition that all loans made by Chng to the Companies would be treated as equity and transferred to him. A few weeks later, Mdm Ting's lawyers responded to reject this offer and put forward a counter-offer of $3.72m for Chan's own shares. Chan then turned around and said he would buy the Shares at that same price of $3.72m. Not surprisingly, nothing came out of these various exchanges.

16 In January 2015, Mdm Ting engaged Stone Forest Corporate Advisory ("Stone Forest") to assist her with understanding the transactions and the financial position of the Companies. Stone Forest inspected the Companies' documents sometime in April 2015. Thereafter, they put further questions to the Companies regarding the latter's financial affairs and requested further documents. In late-May 2015, Mdm Ting's lawyers asked Chan's lawyers to allow a further inspection of documents by Stone Forest. Some correspondence between the two sets of lawyers followed which culminated with Chan offering inspection of certain categories of documents only. This offer was not taken up or even responded to.

17 The general picture in the first half of 2015 was that Mdm Ting was trying to obtain more information while at the same time hindering payments by Autopack as well as causing some difficulties in its operations. In mid-March 2015, she refused to approve the annual bonus payments for Autopack employees being made by GIRO and insisted that such payments be made by cheque accompanied by individual letters approved by her. Mdm Ting's explanation for her behaviour in relation to payments and other matters was that she was not sure what to do because she was not given enough information and/or was given it very late.

18 In early June 2015, Mdm Ting was asked to sign Autopack's audited financial report for the year 2013 before 15 June 2015 so that the report could be submitted to IRAS before the due date of 26 June 2015. Mdm Ting's response through her lawyers was that she was willing to attend court to explain her delay in filing the financial reports as it was Autopack's fault for failing to inform her of the deadline earlier and for obstructing her access to company documents for the purpose of her own audit.

19 On 3 July 2015, Mdm Ting proposed that she sell the Shares to Chan at a value to be determined by a valuer, with the costs of the valuation to be borne equally by both parties. On 8 July 2015, Chan rejected this proposal, referred to the Articles governing the transfer of shares and indicated that, therefore, the Shares should be valued by the Companies' auditor, M/s Goh Sher Wee ("the Auditor"). He offered to purchase the Shares at the consideration determined by the Auditor's valuation and on condition that the loans made by Chng to the Companies be treated as equity and transferred to him. Mdm Ting's response was that she wished to approach the Auditor for assistance on the financial affairs of the Companies before reverting on Chan's offer.

20 On 21 July 2015, Mdm Ting, on behalf of the Estate, issued statutory demands against Autopack and Scanone for the sums of $1.47m and $334,000 respectively. In response, Chan asserted that the sum of $3,460,134 reflected as loans from the directors in Autopack's financial year 2012 statements had never been advanced by the directors but were merely dividends due to the directors which had been re-invested over the years. He asserted that the agreement between Chng and himself had been that neither of them would call on the loans as long as Autopack's business remained viable.

21 On 30 July 2015, Chan wrote to Mdm Ting in his capacity as managing director of Autopack and as director of Scanone, giving her notice that she had been requested to resign as a director of the Companies pursuant to Art 82(g) of their respective Articles. This Article provides that the office of a director becomes vacant if that director is requested in writing by all his co-directors to resign. Chan took the view that the notices given by him were proper and valid and therefore that Mdm Ting ceased to be a director of the Companies on 30 July 2015 itself. Thereafter, Mdm Ting ceased to play any part in running the Companies. She was also removed as a cheque signatory.

22 In the meantime, Mdm Ting and her lawyers had been corresponding with the Auditor. On 21 July 2015, they wrote to the Auditor asking for copies of the financial statements of the Companies.

There was no immediate response. On 23 July 2015, Mdm Ting's lawyers informed the Auditor that she would like to meet him to go through the financial statements of the Companies. On 3 August 2015, a further letter was sent indicating the dates on which Mdm Ting would be available to meet the Auditor. That same day the Auditor wrote a letter stating that Mdm Ting should write to and obtain the financial statements from the management of the Companies. Mdm Ting found him unhelpful and no further interaction took place.

23 On 23 August 2015, Mdm Ting commenced HC/CWU 178/2015 and HC/CWU 179/2015 to wind up the Companies on the just and equitable ground. The applications were heard before the Judge in October 2015 and both Mdm Ting and Chan were cross-examined on their affidavits. The position taken by Chan was that the applications were an abuse of process taken out in an attempt by Mdm Ting to circumvent the buy-out process prescribed by the Articles.

Mdm Ting's case before the Judge

24 As summarised in her Appellant's Case, Mdm Ting's case before the Judge was that:

(a) The Companies were quasi-partnerships as was apparent from the MOU and the conduct of Chan and Chng over the years. Chan and Chng were the partners and their wives only held shares on behalf of their spouses.

(b) When Chng died, the quasi-partnerships ended and the sub-stratum upon which the Companies were founded ceased to exist.

(c) Mdm Ting received no salary or remuneration because Chan took the position that these were personal to Chng.

(d) Chan insisted on keeping Chng's director's loans to the Companies in the Companies, citing the alleged oral agreement that profits were to be kept in the Companies as long as they were viable.

(e) Mdm Ting was removed as a director when Stone Forest sought information and the Auditor directed her to the "management" for the financial year 2013 accounts when she asked for them.

(f) Mdm Ting's queries were not answered and she had no basis to determine what a fair offer for the Shares would be or whether to make or accept an offer.

(g) The end result was that after Chng died, Mdm Ting and the Estate had valuable shares that could not be sold and did not produce income and the Estate was also owed \$2.06m which remained unpaid.

(h) In terms of the law, once the quasi-partnerships had come to an end, the Estate was entitled to realise the value of its shareholding. Mdm Ting, who received her shareholding as spouse, was not in a position to become Chan's partner. The basis of the relationship upon which the Companies were founded and run no longer existed and the Companies had therefore come to the end of their intended lifespan. It was therefore just and equitable to wind them up.

25 In her written submissions, Mdm Ting cited and emphasised the option given to the court by the new s 254(2A) of the Act which took effect on 1 July 2015. This new provision permits the court, instead of making an order for winding up on an application presented under s 254(1)(*f*) or (*i*), to

order the other shareholders or the company itself to buy out the complainant shareholder.

26 She submitted that this amendment would go some way to mitigate the difficulty encountered by the courts in previous cases where, due to the inflexibility of the s 254(1)(*i*) regime, the court could not grant any remedy other than a winding up order. In this case, whilst she sought winding up, the court retained the discretion to order a buy-out by an independent valuer. She submitted that the court need not be bound by the Articles which specified valuation by the Auditor, especially in the light of her doubts as to the competence and impartiality of the Auditor.

The decision below

27 The Judge started his judgment by cautioning against winding up applications brought as an abuse of process to exert pressure on the other party (the Judgment at [11]). The Judge then considered how s 245(2A) should be interpreted, and held as follows:

(a) The court had to be satisfied that the requirements for winding up were met before the additional/alternative buy-out remedy could be considered (the Judgment at [12]).

(b) Section 254(2A) did not introduce a minority buy-out right or appraisal right for minorities who merely disagreed with management or majority shareholder decisions (the Judgment at [12]–[14]).

(c) The court proposed a three-stage test that applicants must meet to obtain the buy-out remedy under s 254(2A) of the Act (the Judgment at [14]):

> (a) The court must first determine whether the winding-up application is an abuse of process, *ie*, if the applicant appears to be merely commencing a winding-up application for the collateral purpose of being able to exit at will (which was a specific right *not* recommended by the Steering Committee), the application should be dismissed. If the court is of the view that had the new provision not been enacted, the applicant would not have commenced a winding-up application, this would be an indication, though not necessarily conclusive, that the application is an abuse of process and not genuine.
>
> (b) If the court is of the view that there is no abuse of process, the court must then determine, based on the facts of the present case, whether the application qualifies for an order of winding-up, either under s 254(1)(*f*) or s 254(1)(*i*) of the Companies Act.
>
> (c) Only if both requirements are met, will the court then go on to consider an order for buy-out in the context of its remedial discretion.
>
> [emphasis in original]

28 Applying the above three-stage test to the facts, the Judge held:

(a) Mdm Ting's commencement of the winding up applications amounted to an abuse of process for the following reasons (the Judgment at [15]–[17]):

> (i) Mdm Ting never intended to participate in the running of the Companies, but merely intended to sell the Shares and exit.
>
> (ii) A winding up would not be in the interest of either side because the Companies' break-up value would be much lower than if they were valued as going concerns. Mdm Ting

knew this and would prefer the winding up applications to be dismissed *if* the court were not minded to order the buy-out remedy under s 254(2A).

(iii) It was not a coincidence that the winding up applications were commenced shortly after s 254(2A) came into force.

(iv) In the circumstances, the winding up applications were commenced for the collateral purpose of pressuring the Companies and enabling Mdm Ting to exit on her terms.

(b) In any event, there was no merit in the application for winding up of the Companies on the just and equitable ground (the Judgment at [18]–[21]):

(i) The businesses were viable and profitable ones.

(ii) Section 33(1) of the Partnership Act (Cap 391, 1994 Rev Ed) ("the Partnership Act"), which dissolves a partnership on the death of one partner, is not applicable to the situation of the Companies as that statute does not govern companies registered under the Act.

(iii) The grounds advanced by Mdm Ting were not recognised as satisfying the just and equitable ground for winding up; there was no loss of substratum and no basis for Mdm Ting to assert the existence of any understanding or expectation that she would be able to participate in management.

(iv) Mdm Ting and CKB were never prevented from viewing company documents between April and November 2014.

29 The Judge concluded that Mdm Ting had to comply with the Articles in relation to the transfer and valuation of the Shares. The Judge added that there was no reason to doubt or question the impartiality of the Auditor (the Judgment at [22]).

Parties' cases on appeal

Arguments for granting the relief sought

30 In summary, Mdm Ting submits:

(a) The Judge erred in laying down the three-stage test.

(b) The winding up applications were not an abuse of process.

(i) Mdm Ting's intention to obtain a buy-out of the Shares does not make the applications an abuse of process.

(ii) Further, the winding up applications would have been brought regardless of s 254(2A) because Mdm Ting was getting nothing out of her shareholding.

(iii) The winding up applications were not brought to pressurise Chan.

(c) It would be just and equitable to make a winding up order:

(i) The relationship of mutual trust and confidence between Chng and Chan, which was the substratum of the business, ended with Chng's death.

(ii) Further, the Judge should have taken into account the fact that without a winding up order, Mdm Ting and the other beneficiaries of the Estate could not realise the value of the Shares or the $2,064,067 debt owed by the Companies to the Estate, and were receiving no income from the Shares.

(d) The Judge should not have considered the viability of the businesses in determining whether an order should be made under s 254(2A).

(e) Even though Mdm Ting has established her and the Estate's right to wind up the Companies, on the facts before the court a buy-out order should be made instead of winding up orders.

Arguments for dismissing the appeal

31 The Companies submit that:

(a) Mdm Ting should be barred from presenting a winding up application as no attempt has been made to make use of alternative remedies available to her, in this case, the machinery in the Articles governing the buying out of shareholders. Mdm Ting has not provided good reasons for her unwillingness to comply with the sale procedure in the Articles.

(b) Mdm Ting has no proper grounds for winding up the Companies:

(i) The law on dissolution of partnerships has no application in this case and even if any partnership or quasi-partnership has been dissolved, that does not justify the winding up of the Companies.

(ii) The Articles deal with what would happen if one of the partners passes away.

(c) Mdm Ting has come to court with unclean hands. She made unreasonable demands for director's salary, made false accusations against Chan, served statutory demands on the Companies and then prevented them from seeking legal recourse (by failing to agree on a solicitor to represent the Companies) and failed to disclose her conflict of interest.

(d) Mdm Ting had access to the Companies' documents to make an offer for the Shares, but maintained in bad faith that she was denied access to the documents.

(e) A buy-out order should not be made under s 254(2A) of the Act because the threshold requirement – that is, the satisfaction of the grounds for making a winding up order – has not been met. Further, the winding up applications were an abuse of process as they were an attempt to circumvent the Articles and exit the Companies at will.

General outline of issues to be decided

32 There are general and specific issues arising for our decision. The general issue involves the approach to be taken to an application to wind up a company under s 254(1)(*i*) in the light of the recent addition of s 254(2A) and whether the three-stage test laid down by the Judge is correct. The second general issue is whether in this case Mdm Ting has satisfied the requirements for obtaining relief under the provision and if so what would be the appropriate relief, *ie*, whether instead of the more usual winding up order, the Companies or Chan should be ordered to buy the Shares. In this

connection, we will have to consider more specific issues dealing with the grounds put forward by Mdm Ting. We will, however, start by considering how the legal regime now in place may be affected by the new remedy.

The legal regime – operation of s 254(1)(*f*) and (*i*) and s 254(2A)

33 Sections 254(1)(*f*) and (*i*) and s 254(2A) of the Companies Act state:

> **Circumstances in which company may be wound up by Court**
>
> 254.—(1) The Court may order the winding up if —
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> ...
>
> > (*f*) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members;
> >
> > ...
> >
> > (*i*) the Court is of opinion that it is just and equitable that the company be wound up;
> >
> > …
>
> (2A) On an application for winding up on the ground specified in subsection (1)(*f*) or (*i*), instead of making an order for the winding up, the Court may if it is of the opinion that it is just and equitable to do so, make an order for the interests in shares of one or more members to be purchased by the company or one or more other members on terms to the satisfaction of the Court.

34 As is well known, prior to the introduction of s 254(2A) in 2015, the court's only remedial option under s 254(1)(*f*) and (*i*) was an order of winding up. Section 254(2A) was introduced to give effect to one of the recommendations of the Steering Committee appointed by the Ministry of Finance to review the Act. The Steering Committee recommended (see *Report of the Steering Committee for Review of the Companies Act* (June 2011) ("*Steering Committee Report*")) that a court hearing a winding up application based on s 254(1)(*f*) or (*i*), should have the power to order a share buy-out instead of ordering a winding up "if it is of the opinion that it is just and equitable to do so". The *Steering Committee Report* (at para 131) stated that in cases where the company is still viable it would be a more efficient solution for the majority to buy-out the minority or vice versa, instead of compulsorily winding it up. Thus, the Steering Committee considered that the buy-out remedy would be a useful additional power for the courts. It would readily be observed that as a result of the addition, the court's powers under this section are now more in line with those it has in relation to applications under s 216 of the Act.

35 Sections 216 and 254(1)(*i*) of the Act have been described as the "two statutory exits" for minority shareholders in private companies who desire to liquidate their investments (Lee Pey Woan, "The Minority Shareholder's Statutory Exits" [2007] 1 SJLS 184 at 184). They differ in terms of (i) the remedial options available to the courts; and (ii) the grounds to be satisfied for invoking the provisions. The remedial options now available under s 254 have always been available under s 216, but the latter section also provides some much less draconian remedies which can be tailored to the harm complained about. In respect of s 216, winding up is regarded as the remedy of last resort.

36 In *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*"), this court considered the basis and operation of both s 254(1)(*i*) (before the amendment) and s 216. Noting at [35] that both provisions empower the court to wind up a company, the court declared that they should be treated as prescribing different grounds to warrant winding up rather than raising the threshold of the just and equitable jurisdiction to allow winding up as a higher order remedy for the more severe oppression cases. Secondly, a plain reading of the two sections shows that relief under them is founded on different bases (at [36]). The categories of conduct covered by s 216 are described in a limited fashion whereas the phrase "just and equitable" in s 254(1)(*i*) is more general and cannot be confined to any particular type of conduct. Thus, the s 254(1)(*i*) jurisdiction is broader than the s 216 jurisdiction. However, the court went on to observe (at [37]) that the jurisdictions do overlap in many situations because the concept of unfairness is common to both. Thus, the court stated, "in order to reconcile the concurrent jurisdictions under the two provisions in a principled manner, the degree of unfairness required to invoke the 'just and equitable' jurisdiction should be as onerous as that required to invoke the 'oppression' jurisdiction". In our view, the addition of the buy-out remedy to the s 254(1)(*i*) jurisdiction does not change this burden.

37 In *Evenstar*, this court also clarified that an applicant may apply for and succeed in obtaining a winding up order under s 254(1)(*i*) even if a s 216 remedy were available (at [38]). In theory, this seems to imply that subject to the application not being an abuse of process (which is an important qualification), it is easier for an applicant to satisfy s 254(1)(*i*) than the narrower s 216 and that an applicant who has grounds for succeeding in a s 216 application but wishes to obtain a winding up order would do better to simply apply under s 254(1)(*i*) (which seems to render at least s 216(2)(*f*) superfluous). *Evenstar* accepted this as an acceptable state of affairs because it considered that aggrieved shareholders would not want to bypass the more moderate remedies available under s 216 (if they had a choice) and seek a winding up order, which would only be sought as a last resort (at [39]). Further, the court always has the residual jurisdiction to strike out vexatious winding up applications.

38 The introduction of s 254(2A) potentially modifies the dynamics of this interaction in the following ways:

(a) Section 254(2A) does not change the grounds for invoking ss 254(1)(*f*) or (*i*), but gives the court an *additional remedial option* when faced with a winding up application brought under either of these provisions. *Prima facie*, this makes a shareholder buy-out remedy *more available* to shareholders given that the jurisdiction under s 254(1)(*i*) may in some cases be broader than that under s 216.

(b) Further, subject to judicial restrictions which may be imposed by this court on the availability of a s 254(2A) remedy, applicants who may be looking to achieve a share buy-out may choose to apply under ss 254(1)(*f*) or (*i*) rather than s 216 given that an applicant who may qualify for a remedy under s 216 is nevertheless entitled to present a winding up petition as long as the complaint, if substantiated, is also a sufficient ground to wind up the company (*Tang Choon Keng Realty (Pte) Ltd and Others v Tang Wee Cheng* [1991] 2 SLR(R) 1 ("*Tang Choon Keng*") at [39]).

(c) Section 254(2A) may, potentially, have implications on when the court will deem it an abuse of process to bypass more "moderate" alternative remedies and present a winding up petition. In *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 at [7] ("*Summit*"), the High Court held that a shareholder who tries to wind up the company under s 254(1)(*i*) in order to bypass the more appropriate and moderate remedies under s 216 of the Act is at risk of having his petition being struck out. Now that winding up is not the only available

> remedy under ss 254(1)(*f*) or (*i*) and the more moderate s 254(2A) remedy is available, in those fact situations which would allow a complainant recourse to relief under either s 216 or s 254, the courts may potentially find it more difficult to evaluate if the presentation of a winding up petition under ss 254(1)(*f*) or (*i*) can necessarily be considered an attempt to "bypass ... more appropriate and moderate remedies".

39 Turning to the operation of s 254(2A) itself, that section does not expressly require that the grounds for ordering a winding up under s 254(1)(*f*) or (*i*) *must* be satisfied before the court may "make an order for the interests in shares of one or more members to be purchased by the company or one or more other members". The only express "precondition" is that there must be "an application for winding up on the ground specified in subsection (1)(*f*) or (*i*)". If so, the court *may* order a buy-out instead of an order for winding up "if it is of the opinion that it is just and equitable to do so". The provision is silent on whether the facts before the court must be able to justify a just and equitable winding up.

40 Nevertheless, the Judge (at [12] of the Judgment) and the parties are in agreement that the test for ordering a winding up under s 254(1)(*f*) or (*i*) *must* be met before the remedy under s 254(2A) may be granted. We agree that this is the correct approach bearing in mind the reason for the introduction of the new remedy and the language used in the section itself which clearly indicates that the remedy is an alternative to winding up in that it may be applied "instead of making an order for the winding up" of the company concerned.

41 The Judge's decision was influenced by the Steering Committee's views in relation to the purpose of the section. The *Steering Committee Report* at para 133(c), footnote 40 states:

> The Steering Committee took the view that an application under the amended section 254(1)(*i*) is not really a question of the applicant seeking a buy-out remedy, because the applicant would still have to apply for a winding-up. Therefore, when an application for a winding-up is made, the usual consequences follow. *The court would have to form the view that it is just and equitable to wind up the company.* The buy-out is merely an alternative remedy. [emphasis added]

42 It is clear from the above that: (i) s 254(2A) is not intended to be a direct buy-out remedy; (ii) in making an application under s 254(1)(*f*) or (*i*), applicants are still applying for a winding up and not a buy-out remedy; and (iii) the court will still have to form the view that the requirements for winding up are satisfied before affording any remedy at all. In this context it is important that the Steering Committee also specifically recommended that a minority buy-out right or appraisal right to provide an efficient exit for unhappy minority shareholders in mainly private companies should *not* be introduced (*Steering Committee Report* at paras 125–126).

43 In justifying the introduction of s 254(2A), the *Steering Committee Report* noted as follows (at paras 131 and 132):

> 131 ... Having taken the view not to adopt the minority buy-out right/appraisal right ... the Steering Committee agrees that it would be useful to amend section 254(1)(*i*) to explicitly provide the court with the power to order a buy-out of the shares in an application for the winding-up of a company on the "just and equitable" ground. This additional remedy would allow a court to order a buy-out instead of a winding-up in cases where the company is still viable and it would be a more efficient solution for the majority to buy out the minority (or vice versa). At present, there have been occasions where the courts have suspended the winding-up order to allow the parties to consider an amicable solution which could involve a buy-out [citing *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362].

> 132 Most of the respondents to the consultation agreed with this recommendation. One respondent expressed the view that it was a curious anomaly that the buy-out order is available under the "oppression" regime but not under the "just and equitable" regime, particularly given the drastic effect of granting an order to wind up a company. ...

44 The *Steering Committee Report* was sent to the Ministry of Finance which issued a formal written response dated 3 October 2012 ("*MOF Response*"). Paragraphs 49 and 51 of the *MOF Response* accepted the Steering Committee's recommendation to introduce s 254(2A), adding that the court was intended to be the safeguard against any potential abuse of process.

45 This court's observation in *Evenstar* was that s 254(1)(*i*) does not allow a member to "exit at will" as is plain from its express terms (at [31]). That observation was made prior to the introduction of s 254(2A). The Steering Committee clearly did not want to change that position. Nor did the Ministry of Finance express any disagreement with that stand. Interpreting s 254(2A) as allowing a buy-out in the absence of proof establishing a right to wind up on the just and equitable ground would come much closer to allowing an exit at will and be counter to the express intentions of the Steering Committee and the Ministry of Finance.

46 The recognition of s 254(2A) as providing an alternative which can only be looked into when grounds to wind up have been proved is also in line with the position in other jurisdictions which have statutory provisions to the same effect as ss 254(1)(*i*) and 254(2A) like the Cayman Islands and British Columbia. Applying such legislation, the courts in those jurisdictions have held that where an application to wind up a company on the just and equitable ground is brought, the court must be satisfied that it is just and equitable that the company be wound up before it considers whether the buy-out remedy should be ordered instead. In *Camulos Partners Offshore Limited v Kathrein and Company* [2010] (1) CILR 303 ("*Camulos*"), the Cayman Islands Court of Appeal observed (at [54]) that the "*gateway*" to the buy-out relief was that the court was satisfied that it was just and equitable that the company be wound up. The buy-out relief was not, the court said, "a free-standing remedy". This position was re-emphasised by the same court in 2015 when it held in *Asia Pacific Limited v ARC Capital LLC and Haida Investments Limited* [2015] (1) CILR 299 (at [39]) that when making a buy-out order the court would not be dismissing the winding up petition for the obvious reason that, if it were to dismiss the petition, it would have no jurisdiction to make the buy-out order. The court explained:

> The true analysis is that the court allows the petition, holding that the petitioner has established grounds upon which it would be just and equitable to wind up the company, but it goes on to hold that, in the circumstances, it would be appropriate "as an alternative to the winding-up order" to make an order under s.95(3). It may be said that a failure to appreciate that there is no free-standing jurisdiction to make a buy-out order under the Companies Law infected the appellant's approach in the present case.

Abuse of process

Meaning of abuse of process in this context

47 It is well-established that a winding up petition can be struck out or dismissed on the basis that it is an abuse of process if it is brought to harass the company or for a collateral purpose (see *Evenstar* at [39] and *Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 ("*Lai Shit Har*") at [23]). Generally speaking, the court's power of summary dismissal or striking out would be exercised only in the clearest of circumstances to wit those where the court was satisfied that a full trial was not required to resolve disputed facts. As summarised in a well-known textbook, Robin Hollington QC,

Hollington on Shareholders' Rights (Sweet & Maxwell, 7th Ed, 2013) at para 10-73, the basis of the striking out would be that the application for winding up is bound to fail. According to *Camulos* (at [77]), a court can take the view that an application is bound to fail if it can be shown that (i) there is an alternative remedy open to the applicant; and (ii) the applicant is acting unreasonably in not pursuing that alternative remedy.

48 In the present case, the Judge found that Mdm Ting was not really seeking a winding up order but wanted instead to be able to exit the Companies under s 254(2A) of the Act. This was held to be an abuse of process. Mdm Ting questions, however, why the bringing of an application for the purpose of obtaining a remedy available under statute should be considered an abuse of process. The meaning and nature of an abuse of process in this context must therefore be given further consideration. There are three distinct circumstances which must be looked at when considering whether it is an abuse of process for an applicant to bring a winding up petition with the primary objective of obtaining a s 254(2A) remedy (and not a winding up order). These are if: (i) the alternative s 216 remedy is available; (ii) the company's articles contain shareholders' buy-out rights and a s 254(2A) remedy would effectively allow the circumvention of that procedure; and (iii) the shareholder has no alternative way of seeking a buy-out.

No alternative buy-out route available

49 We first consider the third situation – an applicant who has no other recourse to a buy-out remedy, and presents a winding up petition with the main objective of obtaining a s 254(2A) remedy and *not* a winding up order. The argument would be that the *only* proper purpose of bringing a winding up petition is to obtain a winding up order; any other purpose (including the seeking of a s 254(2A) remedy) must be a collateral or improper purpose. This appears to have been the reasoning relied on by the Judge.

50 To us, however, if s 254(2A) was intended to address the situation where sufficient cause is found for a winding up order to be made (for example, because of a loss of mutual trust and confidence), but where a winding up order may be unduly harsh in the circumstances, an applicant cannot be faulted for bringing a winding up petition with the knowledge that his application may fall within the category of cases to which s 254(2A) would apply, and for seeking such a remedy. This could include situations where the company is viable and a winding up order would clearly be undesirable, which appears to be precisely when s 254(2A) was intended to apply. Seeking a remedy in the *precise* circumstances intended by the statute cannot be considered an abuse of process. Therefore, it cannot be said that an applicant would necessarily be abusing the process of the court by bringing a winding up petition for the sole/main purpose of obtaining a s 254(2A) remedy. There are circumstances under which that would be entirely justified.

Where a s 216 remedy is available

51 If a shareholder has recourse to a share buy-out remedy under s 216 of the Act, should the decision to present a winding up petition *instead* (for the purpose of obtaining a s 254(2A) remedy) be considered an abuse of process? *Prima facie*, based on existing authorities, the answer should be "no".

52 In *Evenstar* at [38], this court opined that a court hearing a s 254(1)(*i*) application would *not* be precluded from ordering winding up simply because a s 216 remedy would otherwise be available because there is no statutory requirement that a petitioner must first have pursued available alternative remedies. It observed that our statutory framework does not contain any equivalent to s 125(2) of the UK Insolvency Act 1986, which allows a court hearing a winding up application on the

just and equitable ground to refuse to order winding up because of the petitioner's unreasonableness in omitting to pursue an alternative remedy.

53 Also, in *Tang Choon Keng* at [39], the High Court held that "a member's right to present a winding up petition against his company cannot be restrained even if his complaint is sufficient to found another action for which another remedy is available, so long as the complaint, if substantiated, is also a sufficient ground to wind up a company"; it is only an abuse of process if "the member does not really seek the remedy that is *available under the law* but is using the process of the court for a collateral object" [emphasis added] (at [41]). Presently, the s 254(2A) remedy is clearly a remedy "available under the law". It may thus be argued that the introduction of s 254(2A) should not affect this legal position.

54 However, there is the countervailing concern that the very commencement of a winding up petition may be detrimental to a company, especially if the company is otherwise a going concern and in little danger of being wound up. Therefore, in so far as the introduction of s 254(2A) may increase the number of winding up petitions brought against viable companies by shareholders seeking a buy-out remedy, the courts must be vigilant to ensure this procedure is not abused. In the *Steering Committee Report* at para 133(c), it was noted that some academics had raised the following concern:

> [Section 254(2A)] might result in unintended procedural problems caused by inserting a buy-out remedy into a part of the Companies Act that was primarily intended to deal with winding-up. In many of the claims under the proposed section 254(1)(*i*), particularly where large viable companies are involved, the aggrieved shareholder will be seeking a buy-out remedy and not a winding-up. However, even in such cases, where there will be a small chance of a winding-up being ordered, the section 254(1)(*i*) petition will be considered a winding-petition and *trigger the procedural requirements of such a petition* (e.g. advertising of the winding-up). This will result in *unfair and costly consequences* (e.g. the disruption of credit) for companies that are the subject of s 254(1)(*i*) oppression-style claims but are unlikely to be wound up. [emphasis added]

Indeed, in *Tang Choon Keng* at [40], the High Court noted that a s 216 petition "is not a winding-up petition ... and, for that reason, does not subject the company to the statutory disabilities as in a winding-up petition and which are likely to cause damage to the company".

55 The Steering Committee's only response to this is found at footnote 40, which has been cited at [41] above. Essentially, the Committee took the view that "an application under the amended section 254(1)(*i*) is not really a question of the applicant seeking a buy-out remedy, because the applicant would still have to apply for a winding-up". Whilst this statement is not entirely clear, it may be that what the Committee intended to convey was that while an applicant may prefer a buy-out, as s 254(1)(*i*) requires him to establish to the court's satisfaction that it would be just and equitable to wind up the company, he must discharge the burden of that requirement first before attempting to argue that the circumstances call instead for the application of the alternative remedy to ameliorate the harshness of winding up. With respect, it is not clear how this addresses the concern raised at para 133(c).

56 The question that arises is whether, in view of that concern, the court should hold that s 254(2A) is available only in the situation where the shareholder has no other recourse to a buy-out remedy. To so hold contemplates finding an abuse of process where a shareholder brings a winding up petition for the purpose of obtaining a s 254(2A) remedy even though he has alternative statutory recourse under s 216. However, this court in *Evenstar* and the High Court in *Tang Choon Keng* have held that the availability of alternative remedies does not preclude the possibility of a successful

winding up petition; from this, it must follow that the mere fact of available alternative remedies does not render a winding up petition an abuse of process. It is possible to argue, however, that the introduction of s 254(2A) changes the analysis somewhat.

57 In both *Evenstar* at [38] and *Tang Choon Keng* at [55], the courts observed that the ultimate remedy obtainable under ss 254(1)(*i*) and 216 may differ: a winding up order is an order of last resort in an oppression action whereas previously, a winding up was the only order available under s 254(1)(*i*). In *Tang Choon Keng*, this was the basis upon which the High Court dismissed the argument that it was an abuse of process for the petitioner to present a winding up petition when an oppression petition was available despite the harsh consequences of a winding up petition (see [54]). At [55], the court held:

> However, I do not accept the argument for the reason that the two petitions cover different types of complaints and the petitioner is entitled to different remedies, except for the common remedy of winding-up. In *Chong Lee Leong Seng* ([40] *supra*), I expressed the view that a petitioner who proves his case in a winding-up petition is entitled to a winding-up order *ex debito justitiae*, whereas a petitioner in a s 216 petition has no such right as the court has a discretion not to grant such a remedy. It follows that even if TWC is able to prove facts justifying a winding-up order in a winding-up petition, he may not necessarily be granted such an order in an oppression petition. An oppression petition may not be adequate to remedy wrongs which support a winding-up petition: see *Re Lundie Brothers* ([25] *supra*) and *Re Weedmans Ltd* [1974] Qd R 377, at 398D.

58 In other words, an applicant is justified in presenting a winding up application even if an alternative remedy under s 216 is available to him because he would not necessarily obtain a winding up order under s 216. This, in turn, is because a winding up order is an order of last resort for an oppression application (*Evenstar* at [38]). Underlying this argument is the notion that a shareholder has a *right* to have recourse to all statutorily available remedies; the pursuit of a winding up remedy in circumstances where the test for the grant of such an order is met cannot be said to be an abuse of process even if more moderate remedies were available under s 216.

59 Things are quite different if a shareholder brings a winding up application under ss 254(1)(*f*) or (*i*) with the primary objective of obtaining a buy-out remedy under s 254(2A). In such circumstances, if a s 216 remedy were judged to be available to the shareholder, the court may have basis for inferring that the winding up application was preferred to a s 216 application because the applicant wished to harass/vex/pressure the company with the consequences that attend the presentation of a winding up application. This is because, unlike a winding up order, a share buy-out order available under ss 216(2)(*d*) and (*e*) is *not* an order of last resort under the court's s 216 jurisdiction. Nevertheless, the abuse of process inquiry should still be a fact specific one and the court should not automatically infer that there is an abuse of process from the fact that a share buy-out remedy is pursued under s 254(2A) when it could have been pursued under s 216.

60 To conclude, where a s 216 remedy is available but a winding up application under ss 254(1)(*f*) or (*i*) is brought instead, the court would not find an abuse of process if the remedy sought is a winding up order as such a remedy would not ordinarily be available under s 216; but where a s 254(2A) remedy is sought, depending on the facts, the court may have basis to infer that the filing of a winding up application rather than a s 216 application was motivated by a collateral purpose.

61 Of course, this analysis only pertains to the situation where a s 216 remedy is *also* available to the applicant. As noted previously, the grounds for obtaining relief under s 216 are narrower than the grounds for obtaining relief under s 254(1)(*i*). Therefore, if the facts do not fall within the categories

of conduct that justify the invocation of a s 216 remedy but could be sufficient cause under ss 254(1)(*f*) or (*i*), a shareholder cannot be faulted for commencing winding up proceedings.

Circumventing the company's articles

62 Finally, it must be considered whether seeking a s 254(2A) remedy would be an abuse of process, notwithstanding the presence of sufficient cause to justify an application under s 254(1)(*i*), if the company's articles lay down clear procedures for a share buy-out. This is the Companies' position in this case. According to the Companies, in such a situation, a shareholder can only invoke the court's s 254(1)(*i*) jurisdiction if a winding up order is the only remedy that will address the injustice.

63 The Companies cite a number of authorities for the above proposition. The first two are Re *John While Springs (S) Pte Ltd*; Re *Segno Precision Pte Ltd* [2001] 1 SLR(R) 484 ("*John While Springs*") and the Australian case of *Mincom Pty Ltd v Murphy* (1982) 7 ACLR 370 (Supreme Court of Queensland) ("*Mincom*"). In our opinion neither stands for the proposition that the Companies propound.

64 In *John While Springs*, the High Court dismissed a winding up petition brought under s 254(1)(*i*) because the applicant was unable to establish the ground. The Companies rely on the judge's concluding observation (at [12]) to the effect that a shareholder cannot be allowed to exit at will and that the relationship between the shareholders is a contract which must be given every reasonable opportunity to be performed. In that case there was no issue regarding any buy-out mechanism in the articles and the learned judge was not directing his mind to whether the shareholder concerned should have resorted to such a mechanism instead of trying to wind up the company. The court was merely surmising the effect of the present statutory regime: the statement made that the contract "must be given every reasonable opportunity to be performed" simply emphasised that shareholders are bound by the articles unless they can show the existence of oppression or other cause which enables them to use the route provided by the legislature for bringing the contract to an end.

65 In *Mincom*, the company concerned sought an injunction restraining its shareholder Mr Murphy from presenting a winding up petition. An injunction was granted because the court found that the winding up petition was bound to fail (at 378) and that there was no case of oppression. Having already made this finding, the court went on to observe (at 379):

> I have come to the conclusion that Murphy no longer wishes to remain a shareholder in the company and that he is asking his fellow shareholders to pay what would appear to be an unreasonably high price for his interest in the group. ... The articles of association provide a procedure for the sale of shares by a shareholder who is desirous of selling his holding. That procedure has not been followed in this case. ... I am of the view that the procedure contained in the articles should be followed. ...
>
> Given the fact that it is unlikely that a petition would succeed ... I am of the opinion that the presentation of a winding up petition should be restrained until the procedure for the sale of shares set forth in article 10 has been concluded. That is an "alternate remedy" that must be pursued.

66 The court was indeed expressing the view that the procedure in the company's articles for the sale of shares should be followed. However, the critical premises underlying the order of an injunction were that: (i) the winding up petition would not have succeeded; and (ii) the statute provided that a winding up order should not be made if the court was of the opinion that there was an alternative remedy available to the shareholder and the shareholder was acting unreasonably in not pursuing that

other remedy. This case therefore does not stand for the proposition that a shareholder can never apply for a winding up if he has not followed the share sale procedure in the company's articles. We reiterate that in Singapore, there is no statutory requirement that alternative remedies be pursued before a winding up application is filed (*Evenstar* at [38]).

67 Three English cases cited by the respondent are, however, more helpful on the relationship between a buy-out mechanism in the Articles and possible abuse of process. All three are decisions of Hoffmann J (as he then was).

68 In *Re a Company (No 007623 of 1984)* [1986] BCLC 362, a company was set up by S, A and two others who all became its shareholders and directors. Relations between A and S later deteriorated leading to S resigning his directorship. The company continued paying S an allowance. The company then proposed to make a rights issue under which the shares not taken up by any shareholder were to be offered to the other shareholders. S did not want to take up his allocation of shares, but if other shareholders took it up, his shareholding would be reduced from 25% to 0.125%. He also rejected A's offer to buy him out as he felt the price was too low. The company's articles contained pre-emption provisions that are similar to those in the present case (including the provision that the shares would be sold at a fair value certified by the company's auditors). Hoffmann J dismissed the unfair prejudice petition. He held as follows (at 367e-f):

> … It is therefore open to the petitioner at any time to invoke this article and test whether the majority are willing to pay a fair value for his shares. If the majority are unwilling to pay the certified fair price but none the less insist on going through with the rights issue or refuse to pay the petitioner any dividend or pension, he may well be able to complain of unfairly prejudicial conduct. *But so far the petitioner has not invoked the articles and the auditors have not been asked to certify a fair price. In those circumstances I cannot say that the conduct of the majority has been unfair.* … [emphasis added]

69 Thus, in Hoffmann J's view, the fact that the majority fails to pay dividend or pension, or the fact that the majority may insist on a rights issue which would dilute the petitioner's shareholding, would only be unfair if the majority were unwilling to pay the certified fair price. Commenting on the mechanism provided for by the articles, Hoffmann J stated (at 367g):

> … Certification by the auditors is a swift and inexpensive method of arriving at a price and it has the merit of being the method to which the parties are contractually bound. Where such machinery is available, it seems to me wrong for a shareholder to insist on the same valuation exercise being undertaken by the court at far greater expense.

Finally, Hoffmann J stated that "it should not be necessary to resort to [the unfair prejudice provision] unless and until the operation of the articles has failed to provide an adequate solution" (at 368a).

70 In Re *a Company (No 004377 of 1986)* [1987] 1 WLR 102 ("*Re a Company (No 004377 of 1986)*"), the respondent applied to strike out the petitioner's unfair prejudice petition and alternative winding up petition. Hoffmann J held (at 110F–H, 111H):

> ... [I]f the articles provide a method for determining the fair value of a party's shares, a member seeking to sell his shares on a breakdown of relations with other shareholders should not ordinarily be entitled to complain of unfair conduct if he has made no attempt to use the machinery provided by the articles. I say nothing about cases in which there has been bad faith or plain impropriety in the conduct of the respondents or about cases in which the articles provide for

some arbitrary and artificial method of valuation. But a provision that the auditors, or some other independent person, shall fix a "fair value" for the shares gives the auditors precisely the function which a court would have to perform under section 459. ...

I am satisfied that, having regard to the articles, the petitioner could have had no legitimate expectation that in the event of a breakdown of relations between himself and T., they would not be relied on to require him to sell his shares at fair value. To hold the contrary would not be to "superimpose equitable considerations" on his rights under the articles but to relieve him from the bargain he made. …

71 In *Re a Company (No 006834 of 1988) ex parte Kremer* [1989] BCLC 365, the company's articles contained the standard pre-emption clause providing that the shares of a member selling his shares were to be valued by agreement or, failing that, by the auditors of the company setting a fair value. The petitioner rejected the majority shareholder's offer to appoint an independent valuer to value the shares, and sought an order for a share buy-out under s 459 of the Companies Act 1985 (the unfair prejudice provision). The respondent successfully applied to strike out the petition as an abuse of process. The court held (at 367e and 368a–b) that when it was plain that the appropriate solution to a breakdown of relations is for the petitioner to be able to sell his shares at a fair price and the articles contain provisions for determining a price which the respondent is willing to pay or the respondent has offered to submit to an independent determination of a fair price, the presentation or maintenance of an oppression petition will ordinarily be an abuse of process.

72 Hoffmann J therefore held that it may be an abuse of process to present an unfair prejudice petition if there is a mechanism in the articles to exit the company and the possibility of exit negates any unfairness from the falling out between shareholders. Further, Hoffmann J clarified his remarks relating to impropriety in *Re a Company (No 004377 of 1986)* (cited above at [70]) (at 368f):

The remark was made in the context of the use of the valuation provisions in the company's articles, and what I meant was that there might be cases of impropriety on the part of the respondent which had so affected the value of the shares in the company as to make it inappropriate for the matter to be dealt with by a straightforward valuation.

73 Finally, Hoffmann J helpfully framed the question that was before the court in the following way (370a):

… The question is whether it is unfair for a petitioner who has bought into a company with an article in the form of art 7 to have to accept these aspects of the valuation. In my judgment, it is not.

74 In Singapore, in *Evenstar* at [29] we accepted the House of Lord's jurisprudential approach to the nature of the court's "just and equitable" winding up jurisdiction in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahim*") at 379:

… The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, *enable the court to subject the exercise of legal rights to equitable considerations*; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. [emphasis added]

Thus, the courts have labelled their intervention under s 254(1)(*i*) as a jurisdiction to "superimpose equitable considerations" (*Evenstar* at [30]). It may therefore be argued that the fact that the company's articles stipulate a shareholder exit procedure cannot in and of itself be conclusive – the whole point of the "just and equitable" jurisdiction is that it subjects the exercise of legal rights laid down in the company's articles to equitable considerations.

75 Bearing that limitation in mind, Hoffmann J's approach is well established in England and has much to commend it. In the absence of any justifiable reason for not resorting to that mechanism, the existence of a shareholder exit mechanism in the company's articles can affect the exercise of the court's s 254(1)(*i*) (and s 216) jurisdiction in the following ways:

> (a) it can negate any unfairness arising from shareholder disputes or exclusion – unfairness has to be assessed in light of the shareholder's ability to exit the "unfair situation" under the procedure provided for in the articles;
>
> (b) it may render the application an abuse of process because the existence of a viable alternative gives rise to the question whether the shareholder has a collateral purpose in bringing a winding up petition for the same share buy-out remedy available; but
>
> (c) the court has a residual discretion to assess if the procedure laid down in the articles is itself unfair rendering it "just and equitable" to allow the shareholder to rely on the statutory exit mechanisms.

76 To sum up, while it cannot be said that the existence of a procedure for a share buy-out in a company's articles automatically, as a matter of law, bars winding up applications, it does have a significant impact on the court's analysis of whether "sufficient cause" has been demonstrated to justify a winding up and on whether the application was in fact brought with a collateral purpose such as to amount to an abuse of process.

At what stage should the possibility of abuse of process be considered?

77 Mdm Ting takes issue with the Judge's holding that the court must determine, as the first stage of a three stage judicial test for invoking s 254(2A), whether the winding up application is an abuse of process (the Judgment at [14]). In our view, once the application has reached the stage of a full hearing, it is really not appropriate to determine it in such stages. While it may be argued that if the issue of abuse of process is raised by the parties, it makes no *practical difference* whether that issue is phrased as a threshold requirement, the first stage of a three-stage test, a subsequent final threshold to cross, or simply a necessary consideration in determining the application, we do not find this argument persuasive. If there are three stages in considering such an application and the first is whether there is abuse of process, then the result should be that a finding of abuse would lead to summary dismissal rather than on to the second stage of whether the ground has been established. In many cases, the circumstances may be such that this cannot be done because to find abuse the court would have to find there was no good reason not to resort to the buy-out procedure mandated in the articles and the applicant's whole point was that confining him or her to the articles would be unfair. Thus, the investigation of whether there is an abuse is often inextricably tied up with an investigation of the grounds presented and whether the applicant has acted reasonably or has been impelled by improper motives. Therefore, on the hearing of any application to wind up a company on the just and equitable ground, matters must be determined in the round. If the respondent is convinced that the application is an abuse of process having been brought for a collateral and improper purpose, the correct step to take is to apply to strike out the application at an early stage before too much damage can be done. It would be noted that this was the course adopted in two of the decisions of Hoffmann J that we have referred to above. Once the application proper comes on

for hearing the court must investigate it in full. Of course, in so doing it must consider not only the grounds of the application but also, where appropriate, whether the applicant had alternative remedies available to him and if so why no recourse was had to such remedies and the probable motivation of the applicant. If the applicant is shown to have had a collateral motive and/or no reasonable basis to apply under s 254(2A) rather than avail himself of the procedure under the articles, the application will be dismissed, possibly with severely adverse cost consequences.

78 In the *MOF Response*, several concerns about a potential abuse of process in relation to s 254(2A) were noted (at para 48). MOF considered that the court would have control over the situations under which such an order will be made, and since there are legal costs involved in bringing the application to court, such costs would help safeguard against speculative litigation and prevent the abuse by minority shareholders (see para 49). There are therefore clearly concerns relating to minority shareholders abusing s 254(2A) which the courts must be, and are, alive to. But the existence of the concerns does not justify mandating preliminary consideration of the issue in each and every case where the applicant in a s 254(1)(*i*) application is possibly desirous of a buy-out remedy. The issue need only be explored if the opposing party raises it as an issue or if the court itself in the light of the evidence before it considers examination of the point necessary.

Application of s 254(2A)

79 The issue as to how the court should decide whether to exercise its discretion under s 254(2A) has not been directly addressed thus far. To our minds, the key question should be whether, although the court has determined that the applicant is entitled to a winding up remedy, it would in all the circumstances of the company be more equitable to allow a buy-out. This is consistent with the view expressed in the *Steering Committee Report* (see [41] above). Relevant considerations would include whether the company is still viable, and the inquiry may involve a comparison of the consequences for the parties in the event of a winding up as opposed to a buy-out. We do not agree with Mdm Ting that the Judge should not have had regard to the viability and profitability of the Companies in considering the issue of the appropriate remedy.

80 Little more guidance can or should be given in the abstract and the appropriate principles are likely to develop on a case by case basis as more fact patterns come before the court. It may be worth pointing out that certain Canadian courts have taken the view that because of its drastic nature and the adverse effect it would have on the company's employees, where the company is capable of operating profitably a winding up order should be granted only as a last resort and a buy-out order should be made whenever equity may be achieved without dissolving the company (see *Clarfield v Manley* [1993] O.J 878 at [44]).

Sufficient cause under s 254(1)(*i*) on the facts

81 Having discussed the legal regime in which the "just and equitable" ground for winding up will operate post the introduction of s 254(2A), we now turn to a consideration of whether Mdm Ting has been able to show that the facts in this case justify the exercise of the court's just and equitable jurisdiction.

The appellant's case on the grounds for winding up

82 From Mdm Ting's written submissions here and below, the main grounds for just and equitable winding up put forward by her are:

(a) the death of Chng *ipso facto* dissolved the quasi-partnership between him and Chan (though, at the oral hearing before us, this was conceded not to operate automatically);

(b) there is no more trust and confidence between the shareholders;

(c) the basis for the partnership was personal in nature, with each partner bringing his own expertise into the partnership; and

(d) Mdm Ting had no way of obtaining a fair value for the Shares and she could extract no value from them otherwise (because of Chan's actions and because the Auditor cannot be trusted to be fair).

83 The specific issues that arise from these grounds and the submissions of the parties are as follows:

(a) The ***first issue*** is what implication Chng's death has for the quasi-partnership. Both parties agree that the partnership came to an end, but they take different views of what this means. Mdm Ting submits that if the quasi-partnership dissolved with death, the Companies should be wound up. The Companies, however, submit that by bringing the quasi-partnership to an end, Chng's death removed any basis for superimposing equitable considerations on the Companies and/or Chan as the expectations Chng legitimately held pursuant to the quasi-partnership with Chan did not transmit to Mdm Ting or the Estate.

(b) The ***second issue*** is whether the absence of trust and confidence between the shareholders, or the fact that Chng can no longer contribute his personal expertise to the business, removes the basis or substratum of the association such that it would be just and equitable for the Companies to be wound-up.

(c) The ***third issue*** is whether Mdm Ting's inability to extract value from the Shares due to her lack of salary and the Companies' policy not to pay dividends creates unfairness.

(d) The ***fourth issue*** is whether the existence of an exit mechanism in the Articles would mitigate any unfairness Mdm Ting complains of.

84 It should be noted that while there were some management issues affecting the business when Mdm Ting and Chan were co-directors, Mdm Ting's case is not premised on any sort of deadlock in management or an irretrievable breakdown in the relationship between shareholders such as to cripple the business. Even if it were, such a case is unlikely to succeed on the facts given (i) Mdm Ting has no business ability or interest in running the business; (ii) she is looking for a buy-out; and (iii) Chan has in any event managed to break any deadlock (in salary payments, signing contracts, audited financial accounts, *etc*) by removing Mdm Ting as director.

The first issue – quasi-partnership and death

85 A quasi-partnership may be defined as "an association formed or continued on the basis of a personal relationship, involving mutual confidence" (*Ebrahimi* at 379, cited in *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 ("*Lim Kok Wah*") at [105]). In *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*"), this court held that while "legal rights and expectations are usually enshrined in the company's constitution in the majority of cases, a special class of quasi-partnership companies form an exception to this rule" (at [78]). The finding of a quasi-partnership allows the court to take into account informal understandings and assumptions in determining whether the minority shareholders have been unfairly treated (*Over &*

Over at [84]).

86 In the same vein, in *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") at [31], this court observed:

> … The reason an incorporated partnership is treated somewhat differently is because of the express or implicit understanding among the partners before incorporation as to how the new company is to be run or managed and equity will not allow a person who is a party to that understanding to renege on that understanding. …

87 Mdm Ting's case in her written submissions seems to be that because the death of a partner dissolves a partnership, it also dissolves a company which is a quasi-partnership. On appeal, Mdm Ting's counsel, Mr N Sreenivasan SC ("Mr Sreenivasan"), conceded that the death of a partner in a quasi-partnership does not *ipso facto* mean that the company should be wound-up. Quite apart from Mr Sreenivasan's concession, there are good grounds to conclude that the death of a shareholder in a company run as a quasi-partnership should not automatically justify the winding up the company.

88 First, the analogy of a partnership has been borrowed because it is a convenient way of expressing the various obligations the court may recognise in the exercise of its just and equitable jurisdiction, above and beyond what is spelt out in the law (*Ebrahimi* at 380). The expression, however, should not obscure the fact that the parties are not partners, but co-members in a company who have accepted new obligations in law (*Ebrahimi* at 380). Thus, as Jonathan Parker J held in *Re Guidezone* [2000] 2 BCLC 321 at [177] and [179], it is *incorrect* to say that if a company is a quasi-partnership, then "the court will make a winding up order if the circumstances are such that, had the company been a partnership, the court would have made a dissolution order".

89 Second, principles from partnership law have been borrowed because conceptions of "probity, good faith and mutual confidence" have been developed in the law of partnership and these concepts are summed up by the term "just and equitable" (*Ebrahimi* at 379). This, however, does not mean that everything in the law of partnership should be imported and applied to quasi-partnerships under the court's just and equitable jurisdiction. Instead, in so far as certain principles or concepts within partnership law do *not* relate to concepts of justice or equity, they lose their relevance to the court's just and equitable jurisdiction. In this regard, it is well-established that the death of any one partner dissolves the entire partnership (s 33(1) of the Partnership Act). This rule of partnership law flows from the personal nature of a partnership, which the incorporation of a company (whether a quasi-partnership or not) significantly detracts from. The rule does not stem from considerations of justice or equity. There is therefore no basis to import this rule from partnership law and apply it to quasi-partnerships under the court's just and equitable jurisdiction.

90 Third, and related to the second point, it is not clear why the death of a partner to a quasi-partnership should necessarily *always* give rise to just and equitable grounds for winding up the company. There may be cases in which the death of a partner, coupled with other circumstances, creates some unfairness which justifies the invocation of the court's just and equitable jurisdiction. But to advance a more absolute rule than that seems untenable. Thus, on its own, Chng's death does not establish a just and equitable ground for winding up Autopack and Scanone.

Are the mutual understandings and rights in a quasi-partnership transmissible upon death?

91 As discussed above, a quasi-partnership is often the factual basis upon which unfairness sufficient to justify a just and equitable winding up has been found. When dealing with a quasi-partnership, the court applies "an extended measure of unfairness [which] takes into account

otherwise unenforceable expectations which arise from the members' personal relationship of mutual confidence rather than from the company's constitution" (*Lim Kok Wah* at [106], citing *Over & Over* at [79]). If a quasi-partner dies, the question arises whether his estate or his heirs can rely on the rights and obligations the quasi-partner had under the quasi-partnership. In short, are the additional rights a shareholder enjoys in a quasi-partnership (at least, in the context of the court's just and equitable jurisdiction) personal rights belonging to the shareholder himself, or are they rights attached to the shares he holds such that they are transmissible to whoever he transfers the shares to?

92 The Companies have highlighted a number of authorities which suggest that rights under a quasi-partnership do *not* transmit to the deceased shareholder's heirs or estate.

93 In *Cheung Shu Chuen v Lee Der Industrial Co and anor* [2009] HKCU 478 ("*Cheung Shu Chuen*"), the Hong Kong Court of First Instance held at [24] that a quasi-partnership was a personal relationship that did not survive death and therefore the administrator of the deceased "partner's" estate could not claim that he had succeeded the deceased as a quasi-partner. In so holding, the court cited *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd* [1993] BCLC 1437 ("*Murray*").

94 In *Murray*, the deceased was a director and shareholder of a private company, which was also a quasi-partnership. After his death, the judicial factor appointed to administer his estate applied to court for directions as to how the deceased's shares in the private company should be dealt with (*ie*, whether they should be liquidated, or distributed evenly among the heirs, *etc*). One issue that arose was whether the judicial factor or the deceased's heirs had grounds for applying for a just and equitable winding up on the basis of the informal understandings that existed within the quasi-partnership. The Scottish Court of Session held (at 1449f and 1450i) there was no ground for thinking that the deceased had any legitimate expectation that his executor or his heirs should have rights to participate in the management and profits of the company. It could be contended that the decision in *Murray* did not completely reject the possibility of a deceased shareholder's estate or heirs enjoying rights under the quasi-partnership; the question was what legitimate expectations the deceased had, and whether the informal understandings between the quasi-partners extended to granting their heirs rights above and beyond what was laid down in the company's articles.

95 Finally, the Companies cite *Re Halcyon Heights Estates Ltd* [1980-84] LRC (Comm) 583 ("*Re Halcyon*"), a decision of the Barbados Supreme Court, involving a company established by brothers Kenneth and Telford Rice. The shares were held in equal proportions by Kenneth's and Telford's families. Upon Kenneth's death, his wife and son sought direct representation on the board of directors. Telford Rice objected. Kenneth's son then applied for the company to be wound-up on the ground that it was not just and equitable for his side of the family not to have representation given that they held 50% of the shares. In dismissing the petition, the court held (at 587g–h):

> … This is not a case in which the petitioner can … po[i]nt to "some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved." *Kenneth is dead and Telford cannot be regarded as having a quasi-partnership with any of the surviving members of Kenneth's family.* Any special business relationship in the nature of partnership which Telford may have had with his brother would have ceased on Kenneth's death, and *no obligation arising therefrom can enure to the benefit of persons outside that special relationship*. … [emphasis added]

96 *Re Halcyon* seems to take a stricter view of things than *Murray* did. The holding appears to be that regardless of the content of the mutual understandings between the quasi-partners, no

obligations arising from the quasi-partnership can "enure to the benefit of persons outside that special relationship". It is worth mentioning that *Cheung Shu Chuen* also appears to take the position that the quasi-partnership relationship simply ends with death, leaving nothing behind. Indeed this is consistent with the rationale that puts paid to a partnership proper when one of the partners dies. We are more persuaded by the logic behind these cases than by a wide reading of *Murray*. Accordingly, our view is that in the absence of any express provision in a company's articles of association that would enable the heirs of a deceased quasi-partner to enjoy the same rights and benefits as the deceased, all such rights and privileges would end with the deceased's death. Rights under a quasi-partnership are, generally, not transmissible and would not continue to bind the remaining quasi-partners after a partner's death.

The second issue – loss of substratum

97 Mdm Ting's submission is that the absence of trust and confidence between the shareholders and the fact that Chng can no longer contribute his personal expertise to the business removes the basis or substratum of the Companies such that there are just and equitable grounds for winding up.

98 The evidence, however, does not establish that there was any mutual understanding between Chan and Chng that the Companies could only continue if both partners were able to contribute their personal expertise to the business. That was certainly what was happening when both partners were alive, but this did not mean that they had necessarily also agreed to wind up the business if either partner could no longer contribute his personal expertise. On the contrary, the facts seem to negate such an understanding. First, the partnership continued even after the original third partner, Yeo, left. Secondly, the Articles expressly provide for what should happen upon the death of one of the partners – the shares are to be transferred to an existing member (see Art 36). There is no evidence of an intention that the Companies should be wound-up in that situation.

99 On a related note, in so far as Mdm Ting may assert that she has a right to participate in the management of the Companies, this is not supported by the evidence. Mdm Ting can have no legitimate expectation that she should have a say in management:

(a) First, Mdm Ting does not have the skills to manage the business. It is unlikely that either Chng or Chan would have agreed or contemplated that their wives would step into their shoes if they were to die.

(b) Second, cl 9 of the MOU states that should a partner wish to withdraw, he may either remain as a sleeping partner provided the other partners agree, or he shall sell all of the shares held under his name and that of his spouse. The remaining partners may decide whether to admit a new partner or whether to take over the shares themselves (cl 10).

In the circumstances, the partners clearly never contemplated that their *wives* could take over management in their place – the most they were allowed to do was to transfer the shares in their names to their wives (cl 3 of the MOU) as long as they themselves remained in the business.

100 Likewise, Mdm Ting cannot rely on the fact that the trust and confidence between shareholders no longer exists. While trust and confidence formed the basis of the incorporation of the Companies there is no reason to hold that the absence of mutual trust and confidence among the present shareholders justifies a just and equitable winding up. Mutual trust and confidence existed between Chan and Chng – but should the court expect the same trust and confidence to exist between Chan and Mdm Ting, and on the basis that it does not, wind up the Companies? It is, in our view, irrelevant that presently there does not exist any mutual trust and confidence between Chan

and Mdm Ting since such relationship, if it ever existed, had nothing to do with the incorporation and running of the Companies. Neither Company was ever based on mutual trust and confidence between Chan and Mdm Ting.

The third issue – lack of salary and dividends

101 We now turn to the most likely basis upon which Mdm Ting may establish unfairness: that is, that she will be unable to extract any value from the Shares if she and the Estate continue to hold half the issued share capital of the Companies. It is undisputed that the Companies never paid dividends over the years – the partners drew both salary and profits from the Companies in the form of salary. After Chng's death, Chan indicated that he would no longer pay Mdm Ting salary because, he reasoned, salary was only to be paid as reward for labour. While he initially agreed to pay Mdm Ting half of Chng's salary, subsequent disputes between the parties made it such that Mdm Ting no longer received any income from the Companies at all. Chan has not shown any willingness to change the dividend policy of the Companies either. In the circumstances, it would appear that Chan has clearly indicated his unwillingness to distribute profits in any way other than by payment of salary. This would deprive the holders of half the stock in the Companies of any share in their earnings while still allowing Chan and his wife to earn a sizeable income from the Companies. That, clearly, would be unfair.

102 Indeed, in *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137, Chao Hick Tin J (as he then was), held that the fact that respondents had, for five years, "lined their pockets with the profits of the company in the form of either salaries and bonuses (for four of the five respondents) and/or directors' fees", without distributing dividends to the petitioners, meant that the benefits they had obtained from the company were "out of all proportion to the benefits which the petitioners had gained". In the circumstances, Chao J found that there was clearly oppression and unfairness.

103 Further, Paul L Davies, *Gower & Davies: Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at para 20-11 states that while –

> … minority shareholders have no legitimate expectation that dividends will be paid just because they are shareholders in a quasi-partnership company. ... there may be particular circumstances in which the payment of no or only derisory dividends will amount to unfair prejudice, for example, where there was an arrangement that all the profits of the company would be taken out of the company in one way or another; that the fiscally efficient way of doing this had been to pay large remuneration to the directors; and that the fact that the petitioner was not a director deprived the petitioner of any share of the profits. …

104 There is no indication from the evidence that Chan is likely to re-evaluate whether the dividends policy should change in light of Chng's death. To date, he has not suggested that he has considered doing so. Judging by his first reaction of cutting off Mdm Ting's source of income and his subsequent refusal to reinstate her salary to encompass what Chng earned as well, it would seem that without judicial or other intervention, he is unlikely to be willing to fairly share profits with Mdm Ting, a 50% shareholder.

105 On this basis, *prima facie*, there is unfairness justifying a just and equitable winding up. This conclusion, however, is subject to whether Chan's willingness to buy Mdm Ting's shares in accordance with the buy-out mechanism in the Articles negates any unfairness arising from the situation Mdm Ting is in. To this, we now turn.

The fourth issue – the effect of the buy-out provision in the Articles

106 Following our earlier discussion (in [62]-[78] above), it is plain that the existence of a buy-out provision in the articles of any particular private limited company could affect whether there are just and equitable grounds for a winding up. It is in this light that we have to consider the Companies' position that it would not be just and equitable to allow Mdm Ting's application to succeed, indeed that the application is an abuse of process and brought for a collateral purpose as she should have had recourse to the buy-out provision in the Articles instead of pursuing it.

107 Taking a step back, it is useful to reiterate the key points of Hoffmann J's reasoning in the three cases cited earlier:

(a) While unfairness may be *prima facie* established in the circumstances (*eg*, because the applicant's shareholding was going to be diluted, or because dividends were not paid, or because the applicant has been excluded from management), the court must still consider whether the presence of an option for the applicant to be bought out of the company at fair value would negate the unfairness. This is especially since the parties are likely to have contemplated that they would have to part ways should the relationship between the partners break down. In many cases, the unfairness lies in requiring the disaffected shareholder to maintain his investment in a company where he has fallen out with the other shareholders and/or is being unfairly treated. If so, an option to exit would resolve the unfairness.

(b) In the above situation, the focus of the court's inquiry is likely to be on the terms of separation – who should buy who out, and on what terms the share buy-out should proceed on.

(c) If the company's articles provide a mechanism by which a shareholder may be bought out, and the other shareholders are willing to purchase the disaffected shareholder's shares under that mechanism, the mechanism in the articles should generally be adopted. This is unless (i) the disaffected shareholder has a legitimate expectation that he is entitled to have his shares valued in some way other than that provided in the articles; or (ii) there is bad faith or plain impropriety in the respondents' conduct (*eg*, by conduct which has affected the value of the shares); or (iii) the articles provide for some arbitrary or artificial method of valuation.

(d) If the applicant has not attempted to invoke the share buy-out mechanism in the company's articles and the auditors have not been asked to certify a fair price, unfairness is unlikely to be established on the facts.

(e) A provision that the auditors shall fix a "fair value" for the shares gives the auditors precisely the function the court would undertake in valuing the shares; it is hence generally a fair provision. In this regard, it is noted that the three cases cited involved a buy-out mechanism in the company's articles which was similar to that in the present case.

(f) While it is true that it would be difficult to challenge an auditor's valuation, especially if the basis for arriving at the valuation is not disclosed, it must be remembered that: (i) any wrongdoing on the auditor's part does not constitute unfair conduct on the part of the other shareholders; (ii) the applicant is free to sue the auditors for negligence or set aside the valuation; (iii) while the valuation has a rough and ready aspect to it, this is the trade-off for a far quicker and cheaper method for resolving disputes about share price; and (iv) the petitioner consented to this mechanism by buying into a company (or incorporating a company) with such a share buy-out mechanism in its articles and careful consideration must be given to whether the court is merely superimposing equitable considerations, or relieving the applicant from his bargain entirely.

108 In the present case, it is plain that the appropriate solution to the impasse all parties find themselves in with the death of Chng is for Mdm Ting to be able to sell the Shares at a fair price. The Articles provide a buy-out mechanism for her to sell the Shares, and Chan appears willing to purchase the Shares at a price fixed by the Auditor. Indeed, he would have to do so to avoid another winding up application. In this regard, a proper application of the buy-out mechanism would mean paying the price fixed by the Auditor for the Shares and not insisting on the transfer of the Companies' indebtedness to Chng to him for nothing. If Chan insisted on that he would not be following the buy-out mechanism and Mdm Ting would have undoubted grounds for complaint. A proper application of the buy-out mechanism would seem to take care of the unfairness Mdm Ting complains of, whether it be the fact that she is not getting income from the Shares, or that she is forced to keep her investment in companies over which Chan has exclusive control.

109 The question we must now consider is if there are legitimate grounds to doubt the mechanism provided for in the Articles. Hoffmann J suggested a few rather limited bases for questioning the mechanism provided for in a company's articles (see [107(c)] above). Applying them to this case, it is fairly clear that there is no evidence, nor is it Mdm Ting's case, that she, much less Chng or Chan, had any *legitimate expectation* that the buy-out mechanism in the Articles would not apply should Chng wish to sell his shares. There was no informal understanding between Chan and Chng that, contrary to the Articles, the share buy-out process would operate in some other way. Mdm Ting's main complaints are that (i) Chan only invoked the Articles at the last minute, and (ii) the Auditor is not impartial and/or competent.

Chan's delayed invocation of the Articles

110 As to point (i), it is clear that from the start, to wit their meeting on 16 April 2014, the parties contemplated a possible purchase of Mdm Ting's shares by Chan. Chan was waiting for Mdm Ting to offer him a price for the shares (as shown by his 7 August 2014 e-mail to Mdm Ting). In the interim, Mdm Ting was trying to learn more about the Companies and get a sense of their value. It is clear that Chan was rather uncooperative in this respect. Nevertheless, between October 2014 and January 2015, Chan and Mdm Ting did exchange offers to purchase each other's shares. It was only after Mdm Ting proposed that an independent valuer be appointed to value the Shares, that Chan mentioned in July 2015 that the Auditor should determine their fair value in accordance with the Articles.

111 We are not inclined to hold Chan's delayed mention of the Articles too strongly against him for a number of reasons. These are:

(a) first, it seems that Chan was trying to settle the matter without having to resort to the legal rights spelt out in the Articles and initiating the valuation process for which some expense would no doubt be incurred – hence the discussions with Mdm Ting about the possible purchase of the Shares and an exchange of offers and counter-offers;

(b) second, while Chan's late invocation of the Articles may suggest that they were not immediately on his mind when Chng passed away, this does not mean that Chan and Chng had an alternative understanding about how their shares should be transferred upon their deaths – short of contrary evidence, what is spelt out in the Articles is taken to be what the parties agreed to;

(c) third, Chan did not benefit substantially from prolonging the buy-out discussions given the trouble Mdm Ting was putting him through; and

(d) fourth, even if Chan was trying to take advantage of Mdm Ting by getting the Shares for less, this should not affect the court's analysis of whether the mechanism in the Articles should be adopted given Chan and Chng's consent to it when the Companies were incorporated and the fact that Mdm Ting at all times had the means of ascertaining what the Articles provided for.

The Auditor

112 Next, we consider whether there are grounds for doubting the impartiality or competence of the Auditor. In this regard, two issues arise – (i) what is the appropriate *standard of review* the court should apply in evaluating the viability of the share buy-out mechanism in the Articles; and (ii) are those grounds made out in this case?

113 In terms of the standard of review, Hoffmann J proposed that the test should be whether (i) there is bad faith or plain impropriety in the respondents' conduct (*eg*, by acting to affect the value of the shares); or (ii) the articles provide for some arbitrary or artificial method of valuation. This is a workable test to apply, though the facts of this case demonstrate that a third limb should be added: (iii) whether the impartiality or fairness of the valuer is open to *serious doubt*.

114 In this case, (i) and (ii) are not an issue. There is no allegation of bad faith or impropriety on Chan's part in relation to manipulating the share buy-out mechanism or otherwise acting to devalue the Shares. Similarly, the buy-out mechanism is not "arbitrary or artificial" as the Auditor is tasked to set a fair value. While much is left to the discretion of the Auditor, this type of clause was accepted as reasonable in the English cases cited earlier and it seems, based on the authorities, to be quite commonplace.

115 As to the impartiality and fairness of the Auditor, Mdm Ting raises the following issues:

(a) the Auditor is a long-time friend of Chan;

(b) there are grave questions about the Companies' financial documents;

(c) the accounts audited by the Auditor are questionable and full of discrepancies;

(d) the Auditor did not reply to Mdm Ting's queries for over a month; and

(e) there is no evidence that the Auditor is willing to carry out the valuation.

116 It is true that the Auditor is a long-time friend of Chan and has been doing business with him for a very long time. However, it should be noted that during his lifetime Chng also trusted and worked with the Auditor and accepted the audited accounts every year after each Company was incorporated. Further, in most cases involving a valuation by the company's auditor, there is likely to be a long-standing relationship between the auditor and the surviving partner. If this relationship is sufficient, without more, to impugn the impartiality of the auditor, then these clauses would have been frequently struck down by the courts. Without more, the mere fact that Chan and the Auditor have a long-standing relationship is not enough to reject the mechanism in the Articles.

117 Next, it is also true that the Auditor was not very cooperative or responsive when Mdm Ting wrote to him. However, the reason for his unresponsiveness is not clear. Further, Mdm Ting's first letter to him was dated 21 July 2015, and he responded (albeit unhelpfully) on 3 August 2015. This delay is not unduly long. Also, it was not unreasonable for him to ask her, as a shareholder, to get a copy of the audited accounts from the management. It is hard to infer bad faith or partiality from this alone. As to the Auditor's willingness to carry out the valuation, no evidence from the Auditor himself

is before the court. On the state of the evidence we are not able to find that the Auditor is unwilling or unable to carry out the valuation.

118 The biggest concern is the credibility of the Companies' accounts and financial documents. There is some merit to Mdm Ting's submission that if the accounts are questionable, the Auditor himself is unlikely to question them and conduct the valuation on an amended basis given that he prepared those same accounts. There would then, to an extent, be a conflict of interest.

119 The issues Mdm Ting has with the accounts can mainly be found in Stone Forest's questions to the Companies. They concern the 2013 and 2014 accounts. Specifically, Stone Forest questioned (only the questions which raise doubts about the veracity of the accounts are listed):

(a) the reasons for the increase in the discounts allowed between 2013 and 2014;

(b) the reasons for the increase in professional fees and office maintenance costs between 2013 and 2014;

(c) the reasons for the notable increase in inventory held by the company between 2013 and 2014;

(d) the significant increase in trade creditor amounts between 2013 and 2014 (from $2,966,213.50 to $3,393,024.11);

(e) the reason why a number of creditor amounts were significantly overdue; and

(f) the reasons for the decreased accumulated depreciation from 2013 to 2014.

120 The 2013 and 2014 accounts are not before this court. Only the 2012 audited accounts have been exhibited. Nevertheless, on the face of it, none of the questions raises serious alarms. They do not suggest any improper conduct in relation to the business or accounts that would significantly undermine the valuation of the Shares. They merely raise certain noticeable changes in the business from 2013 to 2014. In this regard, the burden must lie on Mdm Ting to prove that there are genuine concerns regarding the Companies' accounts. She has not discharged this burden. In 2013, Chng was still alive and would have been aware of the Companies' financial condition. There is no evidence that he raised any concerns about the accounts at that time. His death must have had a financial impact as he and Chan had each run their own division of Autopack's business very independently and Mdm Ting could not take his place. Indeed, the Companies have made the point that much of the outstanding indebtedness of Autopack related to Chng's division. They also contend that the majority of the questions posed by Stone Forest could be answered by reference to documents and knowledge in the possession of Mdm Ting and Stone Forest and have in their written submissions explained why this is so. We accept this contention.

121 It is noted that Chan did concede under cross-examination that the management accounts for 2013 and 2014 were inaccurate. However, Chan clarified that the inaccuracies extended only to the monthly management accounts for the period 1 January 2013 to 31 December 2014 and were due to a software problem. He also emphasised that the 2012 Audited Accounts were accurate and that the mistakes in the subsequent management accounts only affected the accuracy of the subsequent profit and loss figures. In regard to other matters such as the assets of the Companies, however, the management accounts were accurate and therefore a valuation could be made.

122 In this regard, it should be pointed out that the questions posed by Stone Forest seem to be

based on what Chan concedes to be the erroneous 2013 and 2014 management accounts. If so, some of the issues they have may not arise from the audited accounts of the Companies for 2013 and 2014 when these are completed and the mistakes corrected. Indeed, it seems that no issues have been raised with the 2012 audited accounts except by way of the Appellant's Reply which pointed out that a significant sum of $2,119,759 was owing from Autopack in the 2012 financial statements, without any information on whether the sums could be paid. This is a query rather than a criticism relating to the accuracy of the accounts.

123 The inaccuracies in the management accounts do not suffice to prove that the audited accounts are or will be inaccurate. Their existence merely means that in conducting a valuation, the Auditor would have to probe more deeply into the figures revealed in the management accounts and ensure all errors in the same had been corrected before the profit and loss figures are calculated.

124 To conclude, while a conflict of interest does exist in theory, in that the Auditor is unlikely to go behind his own audited accounts, this is true whenever this provision is applied. Undermining this sort of provision on the basis of mere suspicions would have potential implications on all other companies with a similar provision. As Hoffmann J points out, if parties have consented to a rough and ready method of valuation as a trade-off for a quicker and cheaper method of resolving disputes, the court should be slow to undermine that agreement. Without more concrete proof that there are genuine problems with the accounts, the court should be slow to find just and equitable grounds for winding up on this basis.

Access to information

125 A final issue is Mdm Ting's alleged lack of complete access to financial information about the Companies. In this regard, her position is that Chan was reluctant to provide her with full documentation and information which were relevant to the valuation of her shares. The Companies refute this and point to her concession in cross-examination that Chan had not obstructed her but had cooperated as much as he could while trying to maintain confidentiality. She also admitted that she had not taken up the last offer to inspect made on 5 June 2015.

126 It is apparent from the evidence that Mdm Ting and, subsequently, Stone Forest, were given a great deal of financial information about the Companies. This was also the finding of the learned Judge. Even if this were not the case, however, to what extent would Mdm Ting's case be strengthened?

127 It is useful to refer to the High Court decision in *Summit*. The petitioner company ("Summit") petitioned to have the respondent company ("Pacific") wound up under s 254(1)(*i*) of the Act. Pacific was a joint venture between Summit and the majority shareholder, PPPL. Summit wanted to withdraw from the joint venture and the parties agreed that PPPL should buy Summit's minority shares. Before discussing the price for its shares, Summit wanted a due diligence to be carried out on Pacific to assist in determining its fair value. PPPL insisted that most of the documents requested were unnecessary. The parties could not agree to a fair price for the share buy-out. Summit maintained it was just and equitable to wind up Pacific as, *inter alia*, the relationship between itself and PPPL had irretrievably broken down.

128 The High Court held:

> (a) The differences between the shareholders related to the lack of consensus as to the terms on which they were to amicably sever their relationship, and not the conduct of the company (at [29]).

(b) There is no jurisdiction to wind up a company on the just and equitable ground under s 254(1)(*i*) merely because shareholders cannot reach an agreement as to the terms on which they are to sever their relationship (at [35]).

(c) While Summit submitted that it was improperly denied information about Pacific's affairs, there were no proven improprieties but only suspicions. Summit had to show that PPPL lacked probity in the conduct of Pacific's affairs and that required a finding that PPPL's object in keeping Summit in ignorance of Pacific's state was to acquire its shares at an undervalue (at [37]).

129 Further, in *Murray*, in response to the argument that the petitioner needed information to come to an informed view on the value of his shares, the Scottish court observed (1450i–1451b):

> … It is not at all clear to me upon what basis they maintain that there was a failure of the directors to make information available to them. ... Moreover, in para 4, there is no suggestion that either [J] or the [heirs] themselves have any contractual right to receive information of this kind from the directors. Likewise no averments are made to the effect that in failing to provide this information the directors were in breach of any fiduciary duty, and accordingly that cannot be the basis upon which it is suggested that the s 459 application should be made.
>
> It is not suggested in para 4 that the directors were in breach of any duties imposed upon them by the statute or by the articles, and the question must be whether there is something beyond the articles which imposes upon the directors a duty to make this information available. …

130 From these authorities, it would seem that even if Mdm Ting's access to information was limited, that is not a ground for just and equitable winding up because:

(a) First, she has not established that Chan is reluctant to provide her with further information because he wants to acquire the Shares at an undervalue.

(b) Second, she has not shown the basis upon which she is entitled to the documents and information she asks for, above and beyond those that have already been provided to her.

(c) Third, and most importantly, if the Auditor is going to conduct the valuation, it is not clear why Mdm Ting would need access to the Companies' detailed financial documents. The documents she has already had sight of should be sufficient for her to detect an egregiously unfair valuation (should it come to that). Above and beyond that, it seems fair to require her to live with this "rough and ready" method of valuation – *ie*, the Auditor's valuation, a method which her late husband agreed to on the incorporation of the Companies.

Conclusion on cause under s 254 (1)(i)

131 For the reasons given above, we agree with the Judge's finding that Mdm Ting has not been able to establish any cause which would justify the court in holding that it would be just and equitable to wind up the Companies.

Conclusion

132 These appeals must, therefore, be dismissed with costs to the Companies to be taxed if not agreed. The security deposits shall be released to the Companies toward account of their costs in the appeals.