# Chow Kwok Chuen v Chow Kwok Chi and Another
# [2008] SGCA 37

**Case Number** : CA 153/2007, 154/2007, 155/2007

**Decision Date** : 13 August 2008

**Tribunal/Court** : Court of Appeal

**Coram** : Chan Sek Keong CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA

**Counsel Name(s)** : Ang Cheng Hock, Tan Xeauwei and Jacqueline Lee (Allen & Gledhill LLP) for the appellant; Jimmy Yim SC, Abraham Vergis, Lim Wei Shin and Clive Myint Soe (Drew & Napier LLC) for the respondents

**Parties** : Chow Kwok Chuen — Chow Kwok Chi; Chow Cho Poon (Pte) Ltd

*Companies – Winding up – Application by non-minority shareholder to wind up company on just and equitable grounds – Whether management deadlock and equitable considerations relating to quasi-partnerships applicable to family companies – Grounds for just and equitable winding up of family companies – Section 254(1)(i) Companies Act (Cap 50, 2006 Rev Ed)*

13 August 2008 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 The present appeals arose from the decision of the High Court judge ("the Judge") in *Re Lee Tung Co (Pte) Ltd* [2008] 1 SLR 800 ("the GD") where she ordered the winding up of Chow Cho Poon (Pte) Ltd ("CCPL"), Lee Tung (Pte) Ltd ("Lee Tung") and Associated Development Pte Ltd ("ADPL") (collectively "the Companies"), which were set up by the late Chow Cho Poon ("Mr Chow") to hold real properties. His eldest son, Chow Kwok Chi ("Chi"), applied to the High Court pursuant to s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for a court order to wind up the Companies on the ground that it would be "just and equitable" to do so. His second son, Chow Kwok Chuen ("Chuen"), and third son, Chow Kwok Ching ("Ching"), opposed the application, although Ching had earlier commenced oppression suits against Chi and Chuen seeking, *inter alia*, for an order that the Companies be wound up. Chuen has appealed against the winding-up orders made by the Judge.

2 The Companies were set up by Mr Chow to hold the assets which he had accumulated over the years. His three sons, *ie* the three brothers, are the only directors of the Companies, with each of them effectively owning more than 25% shares in each company following Mr Chow's death, and their eldest sister, Mrs Betty Sheares, holding a smaller beneficial interest under a trust executed by their late mother, Mrs Chow. The ownership of the Companies was summarised at [11] of the GD as follows:

> The shares in the companies are held by members of the Chow family. Some years before she died, Mrs Chow executed a deed of trust whereby she gave each of her sons 30% of her assets and her daughter 10% of her assets. These assets included her shares in the companies. In the breakdown that follows therefore, although I refer to Mrs Chow's shares, it should be borne in mind that the beneficial owners of those shares are actually her sons and daughter in the percentages mentioned. The shareholdings in the various companies, according to Chi, are:

LEE TUNG

| Shareholder | Number of shares | % |
|---|---|---|
| | | |

| | | |
|---|---|---|
| Estate of Mr Chow | 1,230 | 45.56 |
| Mrs Chow | 1,149 | 42.56 |
| Chi | 247 | 9.14 |
| Chuen | 67 | 2.48 |
| Ching | 7 | 0.26 |

ADPL

| **Shareholder** | **Number of shares** | **%** |
|---|---|---|
| Estate of Mr Chow | 1,500,001 | 33.33 |
| Mrs Chow | 750,001 | 16.67 |
| Chi | 750,000 | 16.67 |
| Chuen | 750,000 | 16.67 |
| Ching | 750,000 | 16.67 |

CCPL

| **Shareholder** | **Number of shares** | **%** |
|---|---|---|
| Estate of Mr Chow | 7,287 | 29.74 |
| Mrs Chow | 84 | 0.34 |
| Chi | 5,712 | 23.31 |
| Chuen | 6,202 | 25.31 |
| Ching | 5,215 | 21.29 |

Taking into account the distribution of Mr Chow's and Mrs Chow's shares, the three brothers' shareholdings in the Companies would be as follows:

Lee Tung

| **Shareholder** | **Number of shares** | **%** |
|---|---|---|
| Chi | 1,048.56 | 38.84% |
| Chuen | 692.84 | 25.66% |
| Ching | 808.56 | 29.95% |

ADPL

| **Shareholder** | **Number of shares** | **%** |
|---|---|---|
| Chi | 1,532,143.53 | 34.05% |
| Chuen | 1,317,857.67 | 29.29% |
| Ching | 1,532,143.53 | 34.05% |

CCPL

| **Shareholder** | **Number of shares** | **%** |
|---|---|---|
| Chi | 8,443.8 | 34.46% |
| Chuen | 7,892.8 | 32.22% |
| Ching | 7,946.8 | 32.44% |

It would be seen that Chuen has enough voting power (more than 25%) to block any proposal for the voluntary winding-up of the Companies.

3 Lee Tung employs three management staff who run the day-to-day affairs of the Companies. Since Mr Chow's death in August 1997, the Companies have continued their usual businesses of leasing out commercial properties. No substantial business decisions have been made in respect of the Companies or their assets over the past ten years apart from the refurbishment made in 2004 to some common areas of Chow House, which is located along Robinson Road. At the time of his death, Mr Chow owed substantial debts to the Companies. While the exact amounts of the debts are in dispute, Mr Chow's estate owes ADPL approximately $6.1m, Lee Tung $10.7m and CCPL $17.2m. A "desk-top" valuation of the Companies in 2005 estimated that CCPL's real properties are worth $11.1m, Lee Tung's $17.3m, and ADPL's $30.5m. ADPL's main asset is Chow House.

4 Mr Chow's estate has not been able to pay off its debts to the Companies because its principal assets comprise its shares in the Companies themselves. After Mrs Chow died in 2002, and the brothers became the sole trustees of Mr Chow's estate, they made no progress in administering it. In June 2004, Ching applied to court in Originating Summons No 729 of 2004 for an independent party to be appointed to administer the estate. By an order of court dated 5 October 2005, V K Rajah J appointed one Mr Loong, a certified public accountant, as the independent administrator of Mr Chow's estate. In February 2006, Mr Loong recommended that Mr Chow's debts to the Companies be settled by assigning the debts to the beneficiaries in the proportions corresponding to the shares which each of them was entitled to in each of the Companies under Mr Chow's will, so that the Companies would be able to declare dividends which the brothers could use to repay the debts. Chuen rejected this recommendation; Mr Loong's application for a court order in August 2006 was adjourned for the brothers to consider an amicable settlement, and there has been no further progress since.

5 At the trial below, Chi applied for the Companies to be wound up under s 254(1)(*i*) of the Act for two main reasons (see the GD at [24]):

(a) As Mr Chow's estate consisted mainly of shares in the companies which were not readily realisable, the winding up of the companies would enable the long-overdue debts of the estate to the companies to be dealt with and thus allow the estate to be administered.

(b) The three brothers could no longer work together in running the companies or in dealing with the affairs of the family. In addition, for so long as the companies existed, and the late parents' estates remain unadministered, the three brothers could not avoid having to deal with one another and that state of affairs had resulted in numerous disputes and law suits between them.

**The decision below**

6 The Judge, having reviewed all the circumstances of the case, held at [37] of the GD that:

> On the evidence, there is indeed no complete deadlock in the management of the companies. Resolutions have been passed, in the majority of cases because Chuen and Chi have been able to agree on the course of action to be taken. However, even though the articles of association of the companies provide for majority rule, the situation is an unhealthy one because Ching is consistently left out of management decisions by virtue of being outvoted.

Having found that all the brothers had contributed to the poor state of their relations with each other, which Chi and Chuen readily admitted, the Judge reasoned that "it would be wrong to deprive Chi of the remedy which he seeks simply because he was also one of the causes of the current state of affairs" (at [40]).

7 Further, she decided at [43] that the deadlock in the management of the Companies was a ground for winding up because a family company, like a quasi-partnership, was a paradigm case in which equitable considerations should be applied:

> In a situation such as this where the companies were in effect inherited as a family business (such that the brothers became co-directors because of the inheritance and not because they had a common business that they wanted to promote), while the existence of the companies cannot be said to be the sole cause of the breakdown in the relationships, it appears to me that the parties should not be forced to remain as co-directors.

8 Thus, the Judge noted at [44] that the petition brought by Chi was:

> … not the classic case of a winding-up application being brought by a minority shareholder against the majority. This petition was commenced because Chi was of the opinion that a winding up would be in everyone's interest, not because his participation as a director was being sidestepped by the majority.

9 As to Chi's submissions that the Companies should be wound up so that the siblings would be able to make a clean break from one another, the Judge recognised (at [46]):

> The desire for a clean break is not an established ground for a winding-up application. ... In a case like this, however, where the dispute may be considered as springing from domestic relations, it may have some place. Even so, it should be regarded not so much as a basis for making the order as a factor put forward to establish that any remedy short of winding up would be unlikely to resolve the issue before the court.

10 Viewing the case in its totality, the Judge decided (at [51]):

> Looking at the actions of the parties over the years, the outlook for an amicable resolution of their various difficulties with one another appears bleak. … The history of these parties over the past five years shows an increasing tendency to look to the court to resolve one party's disagreement with the others or to break the deadlock that has prevented any forward motion in respect of any particular matter. The court has an interest in discouraging unnecessary litigation. It should also be remembered that while the brothers are feuding, their sister's interest is being affected. … In this situation, one could see that a clean break would benefit not only the brothers by allowing them to move on with their lives freed from the necessity of interacting with each other but would also assist in resolving issues related to the sister's interest and would, in all likelihood, reduce the prospect of future litigation.

11 As to the question whether the administration of Mr Chow's estate could be considered in deciding whether the petition to wind up the Companies should be allowed, the Judge opined at [56] that:

> [T]he administration of the estate is a relevant factor to consider in relation to the winding-up application. It is a major argument in favour of a winding-up order that such order would allow the administration of the estate of Mr Chow to be completed expediently and that putting the companies into liquidation would ensure that they come under the direction of an independent third party …

12 Finally, the Judge considered that the question of unfairness in the present case had to be gleaned from the consequence of the winding-up application *not* being granted (at [57]–[58]):

> This is not a typical winding-up application brought by a minority against the majority: unfairness here has to be gleaned from the consequence of the winding-up application not being granted – whether it is fair to allow the companies to continue functioning at a completely meaningless and operational level, or whether it is "fairer" to order a winding up and allow the parties to go their own way.
>
> In my view, little injustice, if any, would be caused to Chuen or Ching if a winding up is ordered. If Chuen would like to continue Mr Chow's legacy, he could always set up another company in memory of his father. … Attendant problems pursuant to a winding-up order as highlighted by Chuen, such as difficulties as regards the existing tenants of Chow House and the extensive costs and time required for the process, are standard consequences of any winding-up order. … But at the very least, the end will be in sight and parties will know exactly where they are headed. Moreover, the companies are essentially holding companies whose "operations" will not be very badly affected when wound up.

She thus decided that it would be fairer to order the winding up of the Companies so that the parties could go their separate ways.

**The appeal**

13 In this appeal Chuen contended that the Judge erred in ordering the winding up on a novel ground under s 254(1)(*i*) of the Act. He submitted that:

(a) deadlock in management was not a ground for winding up a company that was not a quasi-partnership;

(b) the parties' desire to make a clean break from one another was not a ground for ordering a winding up;

(c) the administration of Mr Chow's estate was not relevant in determining whether a winding up should be ordered; and

(d) there did not exist unfairness warranting the order to wind up.

**Grounds for a "just and equitable" winding up**

14 Section 254(1)(*i*) of the Act merely provides that the court "may order the winding up if the Court is of opinion that it is just and equitable that the company be wound up". The Act does not define or set any parameters for determining what would constitute "just and equitable". However, as early as in 1916, in *In re Blériot Manufacturing Aircraft Company* (*Limited*) (1916) 32 TLR 253, Neville J said at 255:

> The words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.

15 While case law has established that certain grounds would be sufficient to constitute "just and equitable", such grounds are not a closed list. As Lord Wilberforce stated unequivocally in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*") at 374–375:

> [T]here has been a tendency to create categories or headings under which cases must be

brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.

16 Lord Wilberforce further elaborated at 379:

> The "just and equitable" provision does not … 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.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. … The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some … of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.

17 Two things should be noted about these passages in *Ebrahimi*. First, the character of a company being small or private is not of itself sufficient to constitute a "just and equitable" basis to wind up a company. Something more must be present. Second, the elements which his lordship listed which could make it just and equitable to wind up the company were nothing more than just examples or illustrations. By using the expression "typically may include" he clearly recognised that there could be other elements or situations and there was no reason why such other elements or situations had to be of the same nature or genre as those listed. The concept of "just and equitable" is a dynamic one and we should not circumscribe its scope by reference to case law when the cases themselves do not seek to do more than just apply the concept of "just and equitable" to the circumstances of each case. The views of Lord Wilberforce quoted in [15] above are pertinent.

18 Thus, the authors of *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) (Tan Cheng Han gen ed) ("*Walter Woon*") have listed as examples "not meant to be exhaustive" the following situations which could constitute sufficient bases to establish just and equitable causes (at paras 17.54–17.74):

(a) where the main object of the company cannot be achieved or has been departed from;

(b) where the company's business has been carried on in a fraudulent manner;

(c) where the company is really no more than an incorporated partnership and members can no longer work in association with one another;

(d) where minority members have been oppressed or treated unfairly by controlling members and have justifiably lost confidence in the management of the company; and

(e) where the petitioner has been deliberately excluded from the management of the company in contravention of an understanding that he will be allowed to participate in managing the company.

19 Understandably, the recourse to wind up a company under s 254(1)(*i*) should not be readily available to a minority shareholder on the ground that he does not see eye to eye with the majority. The memorandum and articles of association of a company provide the framework within which the shareholders and directors should operate. Lord Wilberforce alluded to this in *Ebrahimi* when he said that a party should not be allowed to "disregard the obligation he assumes by entering a company, nor [should] the court [be entitled] to dispense him from it" (see [16] above). Caution must therefore be exercised before a winding-up order is made. In each instance where a winding-up order is sought, there must be sufficient grounds before the court makes the order as that would have the effect of dispensing the petitioner from complying with the scheme of things provided in the memorandum and articles of association.

***Whether deadlock in management is a ground for just and equitable winding up in companies that are not quasi-partnerships***

20 Chuen submitted that deadlock in management was not a ground for just and equitable winding up where the company in question was not a quasi-partnership, and, in any event, there was no actual deadlock in the present case. The respondents did not dispute, and the Judge accepted, that the Companies are *not* quasi-partnerships. However, the respondents submitted that there was a practical deadlock in the management of the Companies and that this was a sufficient ground for winding up because the Companies were private companies in the fullest sense, with very few shareholders and directors, upon whose harmonious relations the functioning of the Companies depended. In particular, the Companies lacked the necessary mutual confidence between their members to operate meaningfully. There are thus two parts to the inquiry: first, whether there is in fact a deadlock, and second, if so, whether the deadlock should be regarded as a ground upon which winding up of a family company can be made even though it is not a quasi-partnership.

***Whether there is deadlock***

21 Lord Wilberforce held in *Ebrahimi* (at 376) that "deadlock" was to be understood in a general rather than a technical sense, and that "just and equitable" need not and should not be confined to situations of true or absolute deadlock (*viz*, between two equal director shareholders, as in *In re Yenidje Tobacco Company*, *Limited* [1916] 2 Ch 426 ("*Yenidje*")). Nor did the fact that the company was still viable and profitable preclude a finding of deadlock. In *Yenidje*, despite taking judicial notice of the fact that the company in question was "prosperous, making large profits, rather larger profits than before the disputes became so acute" (at 432), it was held (at 433) that this would not "remove the difficulty which exists. It is contrary to the good faith and essence of the agreement between the parties that the state of things … should be allowed to continue".

22 Chuen also argued that there could not in fact be any deadlock because any alleged "deadlock" could be broken through mechanisms such as the chairman's casting vote, and that there was, as far as the Companies were concerned, "clearly no real deadlock or irretrievable breakdown bringing the day-to-day management of the Companies to a standstill".[note: 1] The Judge noted that the day-to-day running of the Companies was done by Lee Tung's three employees, who acted "for the most part … on instructions from Chi and Chuen who were usually in agreement about what needed to be done" (at [18] of the GD). However, it is presently quite clear that even the relationship between Chi and Chuen has now deteriorated to the point where they would far less often be in agreement about the Companies' operations (for example, they had previously filed common defences

to Ching's oppression suit, but have now departed from that common stance and are opposing parties in the present appeals). While the odd number of three directors may suggest that the board of directors should in theory be able to arrive at a decision by majority, that does not necessarily follow if there is total mistrust among the directors as is the position here. The net result which we see is that no decision could be made because any proposal by one brother would be shot down by the other two. This is a case of a three-way impasse. The Companies are just limping along with the three employees managing the daily affairs with no leadership provided from the board of directors. Accordingly, we would agree with the Judge that there is a case of real deadlock amongst the three brothers-directors. The management of the Companies is at a stalemate.

23 Chuen also submitted that "in the absence of a lack of probity or unfairness, the courts will not interfere with majority rule and/or impose their value judgment on the manner in which a company is run".[note: 2] This may be so, but as the Judge pointed out (at [44]), "the absence of a lack of probity should not factor" in the present case because this is not a case of the minority's participation being "sidestepped by the majority". There is no requirement for a finding of lack of probity when the issue is whether the directors of a company are in fact unable to continue their management due to an inability to work with one another.

***Whether deadlock may apply to family companies***

24 Existing case law would appear to suggest that where the company is not in substance an incorporated partnership, such matters as a deadlock or, more generally, members' inability to work in association with one another, may not be relied upon as a ground for winding up, as the rationale for allowing a winding up on such grounds would be absent (see *Walter Woon* at para 17.66). It is perhaps useful for us to pause and consider from first principles why winding up should be allowed on the basis of a deadlock or the breakdown or reneging of obligations common to partnership relations, and why these considerations should be limited only to companies that are in substance quasi-partnerships.

25 The respondents relied on *Ebrahimi* ([15] *supra*) for authority that deadlock in management may be a ground for just and equitable winding up even in companies that are not quasi-partnerships, citing Lord Wilberforce at 380:

> A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and *it is through the just and equitable clause that obligations, common to partnership relations, may come in*. [emphasis added]

Of course *Ebrahimi* is a classic instance of an incorporated partnership. However, the respondents contended that, in other circumstances, whether just and equitable obligations common to partnership relations would come in must depend on the *context* in which the company was incorporated.

26 Adopting the language of Lord Wilberforce, does it mean that "obligations common to partnership relations" can never arise except in an incorporated partnership situation? While in most instances that may well be the case, we do not see why in situations analogous to incorporated partnerships such obligations may not also arise. One such analogous situation could be the case where a patriarch set up a company for himself and his children. We will return to this scenario a little later.

27 In this regard, we think it important to bear in mind that Lord Wilberforce in *Ebrahimi* did not rule that the "just and equitable" analysis was only to be applied in situations of quasi-partnership.

We would reiterate the following illuminating passage of his (at 379):

> The "just and equitable" provision does not … 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.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise.

28 At this juncture, we would refer to the case of *Loch v John Blackwood*, *Limited* [1924] AC 783, an appeal from the West Indian Court of Appeal to the Privy Council, where a company was formed in order to carry out the testator's business and the shares of the company were divided among members of his family according to his will. Although the main issue there concerned the question of whether the "just and equitable" ground should be construed *ejusdem generis* to the specific grounds enumerated in the preceding subsections in s 127 of the Companies Act 1910 (Barbados) (the equivalent of our s 254(1) of the Act), which the Privy Council answered in the negative, it also seemed to suggest that family companies were a special category of their own. There the petitioner alleged that he no longer had any confidence in the controlling directors and that there were also some wrongdoings by those directors, who were trying to buy out their relatives' shares in the company at an undervalue. The Privy Council granted the winding-up remedy in part because of the domestic character of the company. Lord Shaw of Dunfermline said (at 786):

> [I]n the event of a division of opinion in the family between what may be called the McLaren interest [the controlling directors' interest] on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just alluded to.

29 Lord Shaw continued at 788:

> It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

30 In *Re John While Springs (S) Pte Ltd*; *Re Segno Precision Pte Ltd* [2001] 2 SLR 248 ("*Re John While Springs*") it was held that the inability of the members to get along would be insufficient to warrant winding up unless the company was in essence a quasi-partnership in which the partners could no longer work together. However, we note that it was not pleaded in that case that deadlock as a ground should be extended to situations where quasi-partnership was not involved. In the result, the petitioners, having failed to show a quasi-partnership, failed to have the company wound up. The assumption of the parties and the court in *Re John While Springs* thus appears to be that deadlock

and a quasi-partnership are inseparable elements of this one "just and equitable" basis for winding up, which really just begs the question of why this should be the case.

31 We have at [19] above pointed out that a person who joins a company should accept and work within the framework set out in its memorandum and articles of association. 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. Compare that situation with that of a company formed by a patriarch for the family: it would be clearly the expectation of the patriarch that the children would cooperate, work the company and make it grow for the common good of themselves and their descendants. When a child receives shares in such a company from the patriarch, either during the latter's lifetime or under his will, the child is not really entering into the company of his or her own free will. So the rationale alluded to at [19] above does not apply to such a scenario. Quite naturally he or she should aim to work harmoniously with his or her siblings in managing the company and in fulfilling the hopes of the patriarch, and in turn to prosper the company. Cooperation and mutual trust among sibling shareholders or directors are central to such a family company and their absence is as critical as in a quasi-partnership, and would accordingly warrant its winding up. Where such a company is at a deadlock because the siblings cannot see eye to eye, it is difficult to perceive why it is necessary to insist that unless a company is set up in the way which was done in *Yenidje* ([21] *supra*) and *Ebrahimi*, resort to the just and equitable jurisdiction of the court to order a winding up should not be available. Ultimately, whether equity should intervene in such a situation must necessarily depend on the justice of the case. In a situation like the present, the unfairness comes in the sense that it would be unfair to insist that the siblings remain together in the company instead of allowing them to go their separate ways, a point which the Judge below postulated. Similarly the court can temper the remedy to ensure that it is fair. As this court has held in the case of *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 ("*Evenstar*"), in order to alleviate the harshness of a winding-up order, the relief can be granted subject to conditions such as, for example, that time should be given to the feuding siblings for one to buy out the shareholding of the others before the winding-up order takes effect.

32 In the present case, the Companies were incorporated by Mr Chow with the intention of using them to hold properties for the family's benefit, and he made special provision in the articles of association of each company to ensure that his wishes of wealth distribution and management involvement for male descendants were achieved. This was described by the Judge in the GD as follows (at [6]):

> Mr Chow devoted most of his life to building up his fortune, acquiring real properties and incorporating the companies to hold the properties. He intended the companies to be family companies and he made special provision in the articles of association of each company in order to ensure that his wishes were achieved. In ADPL, the articles provided that Mr and Mrs Chow would be the governing directors and could not be removed from office by any director or shareholder. Further, every male descendent of Mr Chow in the male line who turned 21 years of age and notified ADPL of his desire to be appointed had to be appointed as a director of the company. In CCPL too, Mr Chow was the governing director who could not be removed and his adult male descendents in the male line were entitled to be appointed as directors of the company. In Lee Tung, Mr and Mrs Chow were the governing directors. Membership in that company was restricted to Mrs Chow, male descendents of Mr Chow in the male line and Mr Chow's lawful daughter. It can be discerned that, all in all, Mr Chow was a very traditional man.

33 The three sons had direct shareholdings in the Companies and also inherited substantial shares from Mr Chow. While Ching was a director along with Mr Chow and Mrs Chow in their later years, it was Mrs Chow who "ensured that Chi and Chuen also became directors" of the Companies after Mr Chow's death (see the GD at [8]), presumably in the hope, *inter alia*, of fostering positive interaction amongst the brothers. Therefore, in our opinion, the Companies may be considered akin to quasi-partnerships because of their private, domestic nature and the inherent assumption, in the setting up of the Companies, that the shareholders and directors, as descendants of the patriarch, would work in concert to grow the Companies, enhance the family fortune and perpetuate the legacy. Admittedly, not all family companies in the broader sense of the term would automatically be analogous to quasi-partnerships. Only where the family interest is closely related to the *raison d'être* of the company, will mutual trust and confidence be as important as in a quasi-partnership. For example, if three siblings decided to incorporate a company to start manufacturing toys, their family relationship would be incidental to the business of the company, and the court would have to consider how the business was being run to see if there existed partnership-type obligations of mutual trust and confidence, in order to begin the inquiry of whether there were just and equitable grounds to wind it up. But where, as in the present case, the family interest is fundamental to the purpose of the company, then the inextricability of the family relations from the business relations amongst the directors may provide justification for equitable winding up of the company because in such a set-up mutual trust and confidence are paramount.

34 Although the Companies were not quasi-partnerships, it was clear that mutual trust and confidence among the brothers was the cornerstone of the entire set-up. We agree with the Judge that the Companies and their directors' relationships shared certain characteristics with quasi-partnerships: not only were the shares of the Companies closely held and not easily transferable to outside parties, and not only did the directors hold their positions due to ties of blood rather than to business acumen or commercial considerations, but the parties really had not on their own accord voluntarily entered into legal relations with one another to promote some common business interest. Instead, they inherited or were endowed their shares and directorships by their parents, based on the latter's understanding or aspiration of furthering the family's interests cohesively. What is in issue now is whether the stalemate in the present circumstances so frustrates the basis of a family company that it justifies a winding-up order. To begin with, there is no dispute that the Companies were vehicles to accumulate wealth rather than profit-driven business ventures. All the directors and shareholders are members of the same family whom the late patriarch expected to get along and uphold the family name and legacy. Thus mutual trust and confidence were inherently essential to Mr Chow's objective in incorporating the Companies. Upon the breakdown of such mutual trust and confidence, the entire purpose of the Companies was destroyed, notwithstanding that the Companies' properties continued to yield rental income. This is to be distinguished from a case of loss of substratum, since the Companies continued to function operationally as holding companies and the substratum of the Companies is not in issue.

34 We also recognise that there is no lack of probity among the three brothers, but there is nevertheless a practical deadlock in the management due to the brother directors' conduct, which, because of their acrimonious relationships, tends to be irrational, emotional, unreasonable and non-objective. Their private affairs are inextricable from the conduct of the company's business because they are incapable of interacting civilly and separating their personal hostility from their business obligations. Both Mr Chow's vision of a family legacy, as well as Mrs Chow's hopes for her sons' reconciliation in appointing Chi and Chuen directors after Mr Chow's death, have been entirely frustrated, as has the *raison d'être* of the Companies. Unfortunately, as the Judge observed at [2] of the GD, "in a sad but all too commonly encountered situation, [the three brothers] have, despite the advantages of education and wealth, fallen out with each other, and may end up dismantling their father's legacy". Indeed, the acrimonious situation was equally created by all three brothers, with the

result that now the majority of the family members want to have a clean break from each other. Given that the brothers have no desire to cooperate with each other and that all the siblings, other than Chuen, want the Companies wound up so that their assets may be liquidated and each sibling can deal with his or her share as they wish, we see little reason to keep the Companies a going concern and to force the siblings to work together when they really cannot. In *Evenstar* ([31] *supra*), which concerned a case of corporate partnership, this court held (at [36]) that there was obvious unfairness in the opposing shareholder's insistence on locking the petitioning shareholder in the company despite the stalemate reached in running the company. In the same vein, the insistence by Chuen not to have the Companies wound up, and instead to continue to lock in the interests of the other two brothers (and their sister) in the Companies, is itself a form of unfairness (see [40]–[44] below).

***Whether the Companies should be wound up to allow the parties to make a clean break from one another***

35 The appellant argued that the Judge erred in creating a novel ground for winding up: the parties' desire to make a clean break from one another. In our opinion, this is a mischaracterisation of the Judge's decision. She recognised at [46] of the GD that:

> The desire for a clean break is not an established ground for a winding-up application. … [I]t should be regarded not so much as a basis for making the order as a factor put forward to establish that any remedy short of winding up would be unlikely to resolve the issue before the court.

The Judge thus did not actually decide that the Companies should be wound up so that the parties would have a clean break as such; rather, she bore their desires in mind and assessed the circumstances holistically, concluding at [60] that in the light of "the litigation history and the complex nature of the relationships among the brothers, it does not make sense for this court to stand aside and allow the situation to deteriorate further".

36 Therefore the Judge did not hold that the breakdown in relations in family companies would, *per se*, be a ground for just and equitable winding up without the need to show deadlock in management. She did not create a novel ground for winding up as the appellant appears to suggest; instead she considered the parties' desires and accordingly weighed these factors in coming to her decision. To this extent, we agree with her conclusion and would add that this "clean break" argument simply reinforces the importance of mutual trust and confidence in a family company, so that when such trust is completely destroyed, it can only be just and equitable to wind up the company so that the parties can go their separate ways.

***Relevance of the administration of Mr Chow's estate***

37 The appellant also pursued the argument that the Judge erred in considering the state of the administration of Mr Chow's estate as a ground for winding up the Companies, and that "any '*special circumstances*' which would justify the Court taking into account matters relating to the administration of the estate would also have to relate directly to the running of the Companies" [emphasis in original].[note: 3] He asserted that the administration of Mr Chow's estate presented no stumbling block to the running of the Companies.[note: 4] On the other hand, the respondents submitted that the court's just and equitable jurisdiction "has a wide ambit"[note: 5] and "in appropriate *circumstances*, the court *may* properly consider the administration of an estate as a relevant factor when considering a winding up application"[note: 6] [emphasis in original].

38 We agree that the state of the administration of the estate of Mr Chow cannot *per se* be a ground upon which it would be just and equitable to grant a winding-up order. But the circumstances surrounding the administration of the estate, which consisted mainly of the shares in the Companies, less the debts owed by Mr Chow to the Companies, go to show even more forcefully the state of impasse among the brothers. It was Chuen who previously objected, for no discernible rhyme or reason, to Mr Loong's practical suggestion that the debts of the estate be assigned to the beneficiaries proportionately (see [4] above). Chuen may be considered at least partly, if not largely, responsible for the present difficulties relating to the estate. The articles of association of the Companies only create a lien on the shares and empower the directors to sell the shares subject to the lien. They do not and cannot ensure that there is a willing buyer amongst the members or at all. His proposed solution of the estate selling its shares in the Companies without concrete suggestions as to whom to approach as likely potential purchasers, is not in the least useful, given the substantial shares which the estate holds in the Companies as well as the substantial debts owed by the estate to the Companies. We also do not see how selling the shares of the Companies to third parties would help maintain the legacy of the family, which would be something of paramount importance in the mind of Mr Chow, the patriarch. Similarly, Chuen's offer to buy out Chi's shares subject to the administration of their late father's estate, without suggesting specifically how that administration is to take place, is again less than constructive. Therefore, the administration of Mr Chow's estate is a relevant circumstance which the court may take into account in determining whether to exercise its just and equitable jurisdiction under s 254(1)(*i*) of the Act.

39 Accordingly, we are of the view that the Judge did not err in considering the administration of Mr Chow's estate as a relevant circumstance weighing in her decision to make a winding-up order. She was mindful that the present case is clearly different from *Baxted v Warkentin Estate* [2007] 10 WWR 521 ("*Baxted*") (see [54] and [56] of the GD). The appellant over-states his case in arguing that "the learned Judge had erred in accepting *Baxted* as constituting good authority for the general proposition that the courts may take into account matters unrelated to the running of a company in deciding whether to order that the company be wound up".[note: 7] Admittedly, the Judge might have given more weight than permissible to the administration of Mr Chow's estate when she said at [56], "It is a major argument in favour of a winding-up order that such order would allow the administration of the estate of Mr Chow to be completed expediently". Be that as it may, the administration of Mr Chow's estate was a relevant circumstance which the Judge was entitled to take into account in determining the state of deadlock among the brothers and, in turn, to determine whether there existed the requisite unfairness to warrant a winding-up order. Of course, only unfairness, not expediency, can provide a "just and equitable" basis for winding up.

***Whether there exists unfairness warranting the order to wind up***

40 In the light of the general language of s 254(1)(*i*) of the Act and the court's just and equitable jurisdiction, the present inquiry boils down to a determination of whether there existed unfairness which warranted a winding-up order. As has been cited by the Judge and both the parties, this court in *Evenstar* ([31] *supra*) held at [31]:

> We accept that the notion of unfairness lies at the heart of the "just and equitable" jurisdiction in s 254(1)(*i*) of the [Act] and that that section does not allow a member to "exit at will", as is plain from its express terms. Nor does it apply to a case where the loss of trust and confidence in the other members is self-induced. … However, unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the "just and equitable" jurisdiction under s 254(1)(*i*) has been successfully invoked can be re-characterised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can

also arise in the loss of substratum cases.

41 Is there unfairness warranting a court-ordered winding up in the present case? The impasse and delays have been caused in substantively equal parts by each brother. The Judge found, and the brothers readily admit, that the brothers disagree simply because they distrust each other and do not get along. There have been no allegations of lack of probity or broken promises or frustrated legitimate expectations – only personal animosity among the brothers.

42 Nor is the present case a situation where one director has been responsible for the others' loss of confidence in him and thus cannot rely on his own acts to exit the company at will. As the Court of Appeal of New Zealand commented in *Thomas v H W Thomas Ltd* (1984) 2 ACLC 610 at 618, "Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company." Furthermore, "fairness in relation to a family company … can only be considered in the light of the history of the company and of the family with which that history is intimately bound up" (*Re Lowes Park Pty Ltd* (1994) 62 FCR 535 at 552, *per* Burchett J). Having played an equal part in contributing to the acrimony and breakdown in relations, Chuen cannot now insist on his strict legal rights in refusing to allow his siblings to liquidate their assets. Here, it would be unfair to let Chuen hold his siblings to ransom by virtue of his more than 25% shareholding in the Companies.

43 As Lord Wilberforce held in *Ebrahimi* ([15] *supra*) at 381, "[t]o confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words". It cannot be the case that Chuen can only be compelled to wind up the Companies if he has been guilty of some wrongdoing. In *Evenstar* (at [36]), citing *Yenidje* ([21] *supra*) as the "obvious example … involving a deadlock between equal shareholders [where] it may be difficult to attribute oppressive or unfairly discriminatory conduct on either party" but where the courts have nevertheless "been ready to grant winding-up orders pursuant to their 'just and equitable' jurisdiction", this court reiterated:

> The inequity justifying a winding-up order in such situations does not lie in the oppressive or wrongful conduct of the other shareholder in the *management of the company or the conduct of its affairs*, but in the opposing shareholder's insistence on locking the applicant shareholder in the company *despite the stalemate they have reached concerning the conduct of the company's business*. [emphasis in original]

44 The present case might be characterised as oppression, ironically, *by* the minority, rather than oppression *of* the minority, with one person holding just in excess of 25% in each company and locking in the others by relying on the default rule that at least 75% shareholding is required for voluntary winding up. This situation is readily distinguishable from the case of *Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd* (1999) 34 ACSR 469 ("*Guerinoni*"), where the petitioner was largely responsible for the difficulties associated with running the family business and the other members of the family company very much wanted to keep it a going concern. Having recognised the wide power of the court as well as the importance of context and background in judicially determining "fairness" on the facts of each individual case (at [36]–[37], citing *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098–1099 *per* Lord Hoffmann), Kennedy J nevertheless dismissed the petitioner's appeal for the following reason (at [42]):

> It is clear on the evidence … that it was [the petitioner's] conduct in declining to cooperate with his brother and sister in the joint management of the business which has created the present problems within it. … The position in this case is quite different from that in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, where there was a deadlock due to a mutual failure on the part of both

parties to endeavour to make the relationship work.

Contrarily, the present case is quite clearly more akin to *Yenidje* than it is to *Guerinoni*. In view of the brothers' equal contributions to the three-way impasse in the Companies' management, it would not be right, in the circumstances, to allow Chuen to effectively freeze the assets of his two brothers and sister, since Chuen cannot afford to buy them out, nor would a sale of their shares to third parties be practically viable. Therein exists the unfairness in the present case warranting a court-ordered winding up. Such unfairness does not have to rise to the level of iniquity by any one party, but is to be determined on a holistic assessment of all the circumstances.

45 Furthermore, it must be shown that a winding up is necessary, and not merely expedient, in the present case. This court, in declining to order winding up in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745, said at [91] (*per* Chan Sek Keong CJ):

> We note that the appellants have clearly stated their desire that Borden be wound up. Their main reason for this is that the familial and close-knit management that was originally conceived is no longer possible and Borden's business would only continue to be exploited by the respondents for their own advantage. We are not minded to accept this submission. As I stated in *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114 at 1142, [58], the court's discretion under s 216 of the [Act] should be exercised with a view to bringing to an end or remedying the matters complained of. If the state of affairs in a particular case can be remedied by an order other than winding up, there is no reason for a court to wind up the company. Further, we are of the view that winding up should only be ordered if, having taken into account all the circumstances of the case, it is the best solution for all the parties involved. In general, the courts are not minded to wind up operational and successful companies unless no other remedy is available.

Instead, the court held that "the most appropriate remedy [was] for the respondents to purchase the appellants' shares" (at [92]).

46 Such sale and purchase is not a viable option in the present case, given that Chi's shares are substantial and Chuen's own wealth is largely locked up in the Companies. Chuen has also not offered to buy Ching out, and it is plain that nothing would change if only Chi exited from the Companies. We are mindful of the irreversible and drastic nature of a winding up as a court-ordered remedy. We also realise that as Chi and Ching are agreed that the Companies should be wound up, they could well buy over sufficient shares from Chuen to obtain the shareholding necessary to effect a voluntary winding up. But, bearing in mind that Chuen clearly does not want the Companies to be wound up, it is most unlikely that he would agree to sell his holdings in the Companies to Chi and Ching. Thus winding up is the only solution in the present case.

**Conclusion**

47 The relationship amongst the three brothers appears regrettably ruined, and the very premise on which they became involved (rather than voluntarily joining to do business together) in the Companies has been frustrated even though the Companies presently remain operational. This has resulted in practical deadlock and loss of mutual trust and confidence, making it futile to remain as fellow directors of the Companies. Given the clear desires of the majority of the family members to wind up the Companies, liquidate their assets and go their separate ways, it is unfair to allow one sibling to thwart the intentions of the other three (including Betty Sheares, whose beneficial interest in the Companies would be 5.55% shareholding in Lee Tung, 2.61% in ADPL and 0.88% in CCPL) just because he holds enough shares in each of the Companies to prevent voluntary winding up. This is

especially so since winding up will not prevent Chuen from achieving the wishes he has expressed – to perpetuate his father's legacy through the ownership of Chow House and perhaps the use of the name Chow Cho Poon (Pte) Ltd. Under s 254(1)(*i*), the court has a wide discretion to do justice and achieve the parties' real interests through flexible solutions.

48 In *Evenstar* ([31] *supra*) at [47]–[48], this court exercised its power to wind up the company on the facts of that case. But it also left the door open for the parties to reach a mutually acceptable solution to their dispute, which they eventually did. In the present case, we propose to do the same. We affirm the Judge's order to wind up the Companies but will suspend it from taking effect for one month to allow the parties to come to an amicable settlement to preserve the legacy of Mr Chow that one or more of the sons desired. If no settlement is reached on the expiry of suspension, the winding-up order will take effect immediately. The parties will have liberty to apply for directions.

49 In the result, the winding-up order of the Judge is affirmed, subject to the directions indicated in [48] above. As the appellant has effectively failed in this appeal, we order that he pays the respondents' costs of this appeal, with the usual consequential orders.

---

[note: 1] Appellant's case at para 93.

[note: 2] Appellant's skeletal arguments, p 9 at para 25.

[note: 3] Appellant's skeletals at para 40.

[note: 4] Appellant's case at paras 201 to 206.

[note: 5] Respondent's case at para 91.

[note: 6] Respondent's case at para 95.

[note: 7] Appellant's case at para 169.