IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 84

Companies Winding Up Originating Summons No 72 of 2016

Between

(1) Perennial (Capitol) Pte Ltd
(2) New Capitol Pte Ltd

… *Plaintiffs*

And

Capitol Investment Holdings Pte Ltd

… *Defendant*

Companies Winding Up Originating Summons No 73 of 2016

Between

(1) Perennial (Capitol) Pte Ltd
(2) New Capitol Pte Ltd

… *Plaintiffs*

And

Capitol Hotel Management Pte Ltd

… *Defendant*

Companies Winding Up Originating Summons No 74 of 2016

Between

(1) Perennial (Capitol) Pte Ltd
(2) New Capitol Pte Ltd

… *Plaintiffs*

And

Capitol Retail Management Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Kannan Ramesh J
3, 20 January 2017; 3 March 2017

18 April 2017

Kannan Ramesh J:

Introduction

1 In Winding-Up Applications 72 to 74 of 2016 (collectively, "the Applications"), Perennial (Capitol) Pte Ltd and New Capitol Pte Ltd ("the plaintiffs") applied for the court to wind up three companies, Capitol Investment Holdings Pte Ltd ("CIH"), Capitol Hotel Management Pte Ltd ("CHM") and Capitol Retail Management Pte Ltd ("CRM") respectively (collectively, "the defendants") on the "just and equitable" ground in section 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). In the alternative, the plaintiffs sought to obtain a buy-out order under s 254(2A) of the Act against Chesham Properties Pte Ltd ("Chesham"). Chesham resisted the Applications.

2 I dismissed the Applications with detailed oral grounds on 3 March 2017 and the plaintiffs have appealed. These are the full grounds of my decision.

Facts

The parties

3 The plaintiffs are wholly owned subsidiaries of Perennial Singapore Investment Holdings Pte Ltd, which is in turn a wholly owned subsidiary of Perennial Real Estate Holdings Ltd ("PREH"), an integrated real estate owner, developer and manager. Mr Pua Seck Guan ("Mr Pua") is the Chief Executive Officer of PREH and one of its directors.

4 The plaintiffs collectively hold 50% of the shares in each of the defendants. The other 50% is held by Chesham. Chesham was incorporated by Mr Kwee Liong Seen ("Mr Kwee") in May 2010 and is now owned in equal shares by Colonnade Properties Pte Ltd, which is indirectly owned by Pontiac Land Pte Ltd ("Pontiac Land"), and Philean Capital Ltd. Mr Kwee is a director of both Pontiac Land and Chesham. Mr Pua and Mr Kwee are both also directors of each of the defendants.

5 The defendants were incorporated in August 2010 to hold the assets of a development project ("the Capitol Project") which was originally jointly undertaken by Mr Pua, Mr Kwee and Mdm Sukmawati Widjaja ("Mdm Widjaja"), the Executive Chairman of Top Global Limited. The Capitol Project was intended to be a joint venture of special purpose vehicles represented by these three persons.

Background to the dispute

6 On 21 April 2010, the Urban Redevelopment Authority ("the URA") launched a tender for a 99-year lease of a parcel of land situated at Lot 364M TS 10 and a stratum of subterraneous space at Lot 80001L, on which the Capitol Project was sited. The land was situated at the junction of Stamford Road and North Bridge Road and comprised the historic Capitol Theatre, Capitol Building and Stamford House, all of which have been designated by the URA as conservation buildings. These three buildings were to be refurbished to form part of a larger integrated mixed-use development comprising a theatre, a hotel and a retail mall.

7 Mr Kwee, who had experience in developing and managing luxury hotels and commercial buildings, took a keen interest in the tender and invited Mr Pua and subsequently Mdm Widjaja to join him in jointly bidding for the lease. Mr Pua and Mdm Widjaja agreed, and it was decided that the three of them would incorporate companies as special purpose vehicles to hold their respective interests in the joint venture. To that end, Mr Kwee incorporated Chesham on 14 May 2010, Mdm Widjaja incorporated Top Property Investment Pte Ltd ("Top Property") on 8 June 2010 and Mr Pua incorporated Perennial (Capitol) Pte Ltd ("the first plaintiff") on 16 August 2010 (collectively, "the Original Shareholders").

8 On 16 August 2010, the Original Shareholders further incorporated nine companies, including the three defendants, for the purpose of holding various components and assets of the joint venture. CIH was incorporated to hold the assets of the joint venture, employ a management team to oversee all the components of the Capitol Singapore and manage the finances of the joint venture. CRM and CHM were incorporated to manage the retail and

hotel/theatre components of the Capitol Project respectively, and were also appointed the respective managers of two trusts, the Capitol Retail Trust and Capitol Hotel Trust, constituted on 17 August 2010. The residential component of the Capitol Project was to be managed by another of the nine incorporated companies, Capitol Residential Development Pte Ltd ("CRD"). The Original Shareholders each appointed one director to the boards of directors of each of the nine companies. The first plaintiff appointed Mr Pua and Chesham appointed Mr Kwee. It is noteworthy that the Original Shareholders did not deem it necessary to document their relationship at the outset in a joint venture agreement ("JVA"). That underscored the trust and relationship that Mr Pua, Mr Kwee and the Mdm Widjaja reposed in each other.

9 On 18 August 2010, two bids were submitted through the incorporated companies to the URA based on two different concept proposals, "Scheme A" and "Scheme B", with two different bid prices. On 27 October 2010, the URA awarded the tender to the bidders of Scheme A. The shares in each of the defendant companies were accordingly held by the first plaintiff, Chesham and Top Property in the respective proportions of 40%, 30% and 30%, this being the shareholding that Mr Pua, Mr Kwee and Mdm Widjaja had agreed on in the event that Scheme A won the bid.

10 The Original Shareholders met on 2 November 2010 to discuss how to take the Capitol Project forward. They agreed, *inter alia*, to execute a JVA and a joint development deed ("JDD") to order their relationships, interests and rights. On 12 January 2011, CRM, CHM and CRD executed the JDD. The JVA underwent three drafts (17 November 2010, 17 December 2010 and 16

March 2011) but, for reasons on which the plaintiffs and Chesham do not agree, was never signed.

11 Notwithstanding the absence of a JVA, in and around December 2010, the Original Shareholders agreed that the first plaintiff, Chesham and Top Property would be responsible for developing the retail, hotel/theatre and residential components of the Capitol Project respectively. This split of responsibilities reflected the respective expertise of Mr Pua, Mr Kwee and Mdm Widjaja. The idea seemed to be to leverage on Mr Pua's experience in retail management, Mr Kwee's experience in developing luxury hotels and Mdm Widjaja's experience in developing and marketing luxury residential projects. To this end, the Original Shareholders agreed to engage Perennial (Singapore) Retail Management Pte Ltd ("PSRM"), of which Mr Pua was a director, and Patina Hotels & Resorts Pte Ltd ("Patina"), of which Mr Kwee was a director, to develop and operate the retail and hotel components of the Capitol Project respectively.

12 In March 2012, Top Property decided to leave the Capitol Project. Following negotiations, which are described in greater detail at [79] below, Chesham purchased two-thirds of Top Property's shares and the remaining shares were purchased by the second plaintiff, which had been incorporated by the first plaintiff specifically for this purpose, by means of a sale and purchase agreement dated 7 March 2012. Thereafter, the plaintiffs and Chesham were equal shareholders in the Capitol Project, whose corporate structure is depicted at Annex 1 below. However, the relationship between them soured soon thereafter. There were too many disputes to enumerate here but the chief one centred on the timing of the execution of the JVA and Retail Property Management Agreements ("RPMAs").

Execution of the JVA and RPMAs

13 Around the same time as Top Property's exit in March 2012, PSRM and Patina began negotiating the terms of their respective management agreements. PSRM was to execute two RPMAs, one with CRM for the retail units to be located in a building to be newly constructed ("the New Build RPMA") and one with CHM for the retail units to be located within the conservation buildings and galleria ("the Conservation RPMA"). Patina was to execute a Hotel Management Agreement ("the HMA") and licence agreement with CHM for the purpose of managing and operating the hotel. According to the plaintiffs, there was a mutual understanding that the RPMAs would be executed at around the same time as the HMA, to ensure that the terms of the two agreements, to the extent possible, would mirror one another. Chesham, on the other hand, denied any such agreement. As it turned out, the HMA had to be signed with some urgency. This was in order to provide more lustre to the residential units by marketing them as having access to the concierge services and amenities provided by the hotel. Operationalising the hotel expeditiously became a matter of some importance. As such, the HMA and licence agreement were executed on 29 April 2013. This meant that while Patina had locked in its role as the hotel operator by the HMA, PSRM had not done so as the RPMAs remained to be negotiated and signed.

14 In July 2013, a working group was set up to negotiate the terms of the RPMAs. Subsequently, the plaintiffs provided Chesham with drafts of the two RPMAs on 1 September and 18 September 2013 respectively. However, despite multiple attempts to negotiate, the plaintiffs and Chesham were unable to agree on the terms of the RPMAs.

15 Sometime in May 2014, Mr Pua informed Mr Kwee of the plaintiffs' intended participation in a reverse takeover, by which the plaintiffs' shares would be transferred to PREH (then named St James Holdings Ltd). Mr Kwee was concerned that this would result in a change in the plaintiffs' management and therefore sought to formalise the terms of the shareholders' relationship in a JVA. Chesham sent a draft JVA to Mr Pua on 28 May 2014, and discussions about the terms of the draft JVA ensued.

16 On 24 July 2014, Chesham asked for the RPMAs to be executed contemporaneously with the JVA. The plaintiffs agreed to negotiate the RPMAs and JVA concurrently without the need to have them executed contemporaneously. Subsequently the plaintiffs felt the RPMAs to be more urgent and requested on 29 August 2014 that they be finalised before resuming discussion about the JVA. The position that Chesham adopted in response to this is a matter of dispute. According to Chesham, the plaintiffs' proposal was made on the footing that although the RPMAs would be finalised before the JVA, they would be *signed at the same time*. Chesham agreed to this proposal, which it termed the "October 2014 Agreement". The plaintiffs, however, denied ever having agreed that the RPMAs and JVA be signed contemporaneously.

17 By 13 March 2015, the New Build RPMA was ready for execution. The plaintiffs and Chesham then began negotiating the JVA and the Conservation RPMA but were unable to agree on the terms of the JVA. In around April 2015, Mr Pua requested that the RPMAs be signed but Mr Kwee refused to sign the RPMAs until the JVA was finalised, citing the October 2014 Agreement. The plaintiffs denied that any such agreement existed, and perceived Chesham's delay in executing the RPMAs as a violation of the

alleged prior understanding that the RPMAs would be executed at around the same time as the HMA. This disagreement became a source of great bitterness between the plaintiffs and Chesham and Mr Pua and Mr Kwee in particular. By the time of the Applications in April 2016, neither the JVA nor the RPMAs had been signed. The plaintiffs accused Chesham of using the RPMAs to hold them to ransom over the signing of the JVA, while Chesham accused the plaintiffs of reneging on the agreement to sign the two documents concurrently.

18 Other grievances also arose over the past few years. Since the RPMAs were never executed, PSRM remained unpaid for the retail leasing services which it provided to the Capitol Project mall, which has been operating since March 2015. At the same time, Mr Pua refused to countersign payments for various expenses incurred by CHM and Patina towards the opening of the Capitol Project hotel, despite having previously approved the hotel's pre-opening budget in November 2014. Chesham claimed that the hotel was unable to open as a result of this refusal. The relationship between Mr Pua and Mr Kwee also grew increasingly acrimonious and they had not been on speaking terms for more than a year at the time of the Applications, as a result of which the Capitol Project's Management Committee had lost direction. The Management Committee apparently had difficulty deciding even such basic questions as the colour scheme for the Capitol Project's façade. The hotel has yet to open even though it received its Temporary Occupation Permit on 13 October 2015 and it continues to undergo rectification works. It is fair to say that the progress of the Capitol Project has been severely stunted and its economic potential compromised as a result of the impasse and acrimony between Mr Pua and Mr Kwee. The Capitol Project has fallen into economic slumber as a result.

The plaintiffs' and Chesham's cases

19 The plaintiffs submitted that the defendants should be wound up on the "just and equitable" ground pursuant to s 254(1)(*i*) of the Act. According to the plaintiffs, the Capitol Project had been founded on a quasi-partnership based on mutual trust and confidence between the Original Shareholders. This relationship of mutual trust and confidence had broken down because of the disputes between the plaintiffs and Chesham. As a result of the loss of mutual trust and confidence, the plaintiffs and Chesham were no longer able to work together to manage the Capitol Project and this had led to deadlock. The two elements of loss of trust and confidence and deadlock made it "just and equitable" to wind up the defendants.

20 The plaintiffs also submitted that it would be "just and equitable" to order a buy-out under s 254(2A) of the Act instead of a winding up. The Capitol Project remained a viable venture and a winding up would have undesirable consequences on the defendants' creditors and employees. The plaintiffs took pains to emphasise that, in the event that a buy-out order was made, I should order the plaintiffs to buy Chesham out (rather than *vice versa*). Their reasons were that Chesham was primarily at fault in causing the loss of trust and confidence and would focus its attention on the hotel and retail spaces instead of advancing the best interests of the Capitol Project as a whole.

21 In the alternative, the plaintiffs submitted that I might order the shareholders to submit sealed bids for the other's shares in the defendant companies under s 257(1) of the Act.

22 As stated earlier, Chesham opposed the Applications. It submitted that the plaintiffs were responsible for causing the deadlock, and were therefore not entitled to seek relief on the just and equitable ground for winding up. In this regard, Chesham cited *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*") at [31], in which the Court of Appeal stated that s 254(1)(*i*) of the Act "does [not] apply to a case where the loss of trust and confidence in the other members is self-induced".

23 More importantly, Chesham took the view that the plaintiffs ought to have invoked Article 22 of the defendants' articles of association (all three of which were on the same terms). Article 22(A) states:

> (A) Every Member who desires to transfer any share or shares (hereinafter called "the vendor") shall give to the Company notice in writing of such desire (hereinafter called "the transfer notice"). Subject as hereinafter mentioned, a transfer notice shall constitute the Company the vendor's agent for the sale of the share or shares specified therein (hereinafter called "the said shares") in one or more lots at the discretion of the Directors to the Members other than the vendor at a price to be agreed upon by the vendor and the Directors or, in case of difference, at the price, which the Auditor of the Company for the time being shall, by writing under his hand, certify to be in his opinion the fair value thereof as between a willing seller and a willing buyer, 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 and accordingly the Arbitration Act, Cap. 10 shall not apply. A transfer notice shall not be revocable except with the sanction of the Directors.

24 Chesham submitted that where an exit mechanism such as Article 22 was available, the applicant would be unable to establish the unfairness required for the court to exercise its "just and equitable" jurisdiction, citing *Ting Shwu Ping (Administrator of the estate of Chng Koon Seng, deceased) v*

Scanone Pte Ltd and another appeal [2017] 1 SLR 95 ("*Ting Shwu Ping*") at [75]. Unsurprisingly, Chesham placed heavy reliance on *Ting Shwu Ping*.

25 The plaintiffs attempted to distinguish *Ting Shwu Ping* from the present case on the following bases:

(a) Mdm Ting wished to leave the company (and hence the question of who should buy who out did not arise), whereas the plaintiffs wished to remain engaged in the Capitol Project;

(b) Mdm Ting had no legitimate expectation of being involved in the management and operation of the company, whereas the plaintiffs not only had a legitimate expectation of being involved but that was also the very basis of their association with Chesham; and

(c) another shareholder had proposed to purchase Mdm Ting's shares in Autopack and Scanone, whereas there was no evidence that Chesham wished to purchase the plaintiffs' shares in the defendants.

26 Moreover, Article 22 was allegedly not relevant in the Applications because:

(a) the unfairness in the present case was not such as could be cured by the plaintiffs exiting the Capitol Project;

(b) Article 22 only applied to persons who *desired* to transfer their shares, but the plaintiffs did not desire to do so;

(c) the plaintiffs had a legitimate expectation of having their shares valued in some other way than that provided in Article 22; and

(d) there had been bad faith or impropriety in Chesham's conduct (referring to *Ting Shwu Ping* at [107(c)]).

Relationship between the shareholders

27 In my view, the facts suggested that the relationship between the Original Shareholders was akin to a quasi-partnership built on the bedrock of mutual trust and confidence, and the expertise that each stakeholder brought to the table. A quasi-partnership typically has one or more of the following characteristics:

(a) an association formed or continued on the basis of a personal relationship involving mutual confidence;

(b) an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business; and

(c) a restriction upon the transfer of the members' interests 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 (*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*") at 379; *Lim Ah Sia v Tiong Tuang Yeong and others* [2014] 4 SLR 140 at [65]).

28 While the Original Shareholders were all corporate entities, it was in reality Mr Pua, Mr Kwee and Mdm Widjaja who stood behind virtually all of their interactions and decisions. Mr Kwee had invited Mr Pua and Mdm Widjaja to join him in bidding for the Capitol Project because he was personally acquainted with them and also sought their individual expertise in the management of real estate. Their dealings testify to the trust and confidence which they reposed in one another. This was made crystal clear by

the failure of the Original Shareholders to document the specific terms of their relationship in a shareholders' agreement or JVA despite the scale and complexity, and perhaps risk, of the investment. Instead, they were content, at least at the outset, to have their working relationship proceed on the basis of unwritten mutual agreements. Illustrative of this, and the specific skill set each brought to the table, was the common understanding that responsibility for the Capitol Project would be cleaved and carved out between the Original Shareholders such that Mr Pua would take charge of the retail component, Mr Kwee would take charge of the hotel/theatre component and Mdm Widjaja would take charge of the residential component. Each of them was thus to have a role in the management of the Capitol Project, and for good reason. The nomination of PSRM and Patina, no doubt thanks in part to Mr Pua's connection with PSRM and Mr Kwee's connection with Patina, was effected without any formal written agreement. It was also agreed between the Original Shareholders that they were all to hold shares and interests in the Capitol Project's various companies, and no single shareholder was to own or exercise control over any part of the Capitol Project independently. Mr Pua and Mr Kwee both emphasised that they took a long-term view of their participation in the Capitol Project.-

29 The Capitol Project advanced strongly for several years despite the absence of a shareholders' agreement or JVA. It managed to obtain an aggregate of $612m in loan funding, and the hotel, theatre and residential components had all achieved their respective Temporary Occupation Permits by the date of the Applications. As mentioned, the retail mall has been functioning since March 2015. This stands testament to the relationship of trust and confidence amongst the Original Shareholders.

30 Sadly, by the time of the Applications, the relationship between Mr Pua and Mr Kwee and by extension the plaintiffs and Chesham had deteriorated to the point where they could no longer see eye to eye. I was satisfied that there was, as a result, a deadlock in the management of the defendant companies and a breakdown in the mutual trust and confidence that had previously subsisted between Mr Pua and Mr Kwee. The loss of mutual trust and confidence straitjacketed the progress of the Capitol Project, as was evident from the dispute regarding the JVA and in particular the RPMAs (which remained unsigned) and from the Capitol Project hotel's inability to commence operations (see [17] and [18] above).

31 I noted that Chesham did not dispute the plaintiffs' position that there had been a breakdown of trust and confidence between the shareholders, precipitating a deadlock. It was quite clear that the Capitol Project could not move forward as a result. The ensuing deadlock if unresolved would have precipitated an unfairness in that the warring parties would have been compelled to remain tied to a relationship which was unhealthy and quite evidently unable to function. However, such unfairness might be negated if the parties in fact had the means to exit the relationship: *Ting Shwu Ping* at [75(a)] and [107(a)]. In this regard, Article 22 was of critical importance to the Applications. I was therefore compelled to determine whether it provided an effective exit mechanism enabling the plaintiffs to escape the unfairness that would otherwise have ensued from a deadlocked relationship. This was the central issue before me.

Principles set out in Ting Shwu Ping

32 The Court of Appeal's recent decision in *Ting Shwu Ping* examined the relevance of an exit mechanism in a company's articles to an application under

s 254(1)(*i*), and the interaction between the "just and equitable" jurisdiction and the newly introduced "buy-out" option in s 254(2A) of the Act. A journey through *Ting Shwu Ping* was thus vital to a proper appreciation of the central issue that was before me. It should be noted that the Applications were filed before the judgment in *Ting Shwu Ping* was released. Despite my invitation to the plaintiffs at a Pre-Trial Conference on 23 December 2016 to consider its impact on the Applications, the plaintiffs decided to pursue their originally plotted course albeit with a subtle but significant shift in emphasis (see [51] below).

33 In *Ting Shwu Ping* at [36], the Court of Appeal affirmed *Evenstar* and noted that unfairness was the foundation of the jurisdiction under s 254(1)(*i*). The court stated unequivocally that the introduction of s 254(2A) did not change this: *Ting Shwu Ping* at [42]. Rather, s 254(2A) allowed the court the additional option of ordering a buy-out where the company was still a viable proposition: *Ting Shwu Ping* at [38] and [79]. The rationale behind s 254(2A) was that it was not sensible to liquidate a profitable business simply because the shareholders were deadlocked. That much was clear from the parliamentary deliberations: see, *eg*, *Ting Shwu Ping* at [43]. The key question for the court in analysing an application under s 254(2A) was "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 buyout": *Ting Shwu Ping* at [79]. In other words, an applicant would *first* have to satisfy the court that there was a basis for making a winding-up order. Only if he was able to do this would the court then go on to consider whether it would be more equitable to allow a buy-out than to order a winding up. Section 254(2A) was only an ancillary option, to be used where it was just and equitable to keep a straightjacketed but otherwise viable business alive.

The primary application was still one for winding up: *Ting Shwu Ping* at [42]. As will become apparent later, the plaintiffs skirted this overarching jurisdictional consideration.

34 The existence of an exit mechanism was of central importance to the question of whether there was sufficient cause to justify a winding up: *Ting Shwu Ping* at [76]. In this regard, *Ting Shwu Ping* adopted the principles embodied in three unfair prejudice cases (the equivalent of applications under s 216 here) decided by Hoffman J (as he then was). I summarise them as follows:

> (a) In *Re a Company (No 007623 of 1984)* [1986] BCLC 362 ("*Re a Company (No 007623 of 1984)*") (cited in *Ting Shwu Ping* at [68]), the petitioner argued that he had been unfairly prejudiced by exclusion from the company and by a proposed rights issue which, given his reluctance and inability to take up his allocation, would have the effect of reducing his interest in the company from 25% to 0.125%. Hoffmann J found that the company's articles provided a solution to the problem by entitling the petitioner to sell his shares to the other shareholders at a price to be certified by the auditor, or if no purchasing member was found, to any third party at any price. Hoffmann J took the view that the petitioner could only complain of unfairly prejudicial conduct if the majority was unwilling to pay the certified price but nonetheless insisted on a rights issue or refused to pay dividend or pension. Since the petitioner had not invoked the articles and the auditors had not been asked to certify a fair price, Hoffmann J did not find that the conduct of the majority had been unfair.

(b) In *Re a Company (No 004377 of 1986)* [1987] 1 WLR 102 ("*Re a Company (No 004377 of 1986)*") (cited in *Ting Shwu Ping* at [70]), the petitioner was removed as managing director of the company and excluded from participation in its management. Article 9 of the articles of association deemed the petitioner to have given a transfer notice in respect of all his shares in the company following his termination, and the transfer notice constituted the company the vendor's agent for the sale of his shares to other members at a price to be agreed upon by the vendor and directors or, in case of difference, at the price which the auditor of the company certified to be the fair value. The petitioner argued that his exclusion constituted unfairly prejudicial conduct because he had become a shareholder on the understanding that he would participate in the management of the company and be employed on a long-term basis. Hoffmann J took the view that the articles of association had made provision in advance for what was to happen in the event of a breakdown in relations, and the petitioner would not ordinarily be entitled to complain of unfair conduct if he had made no attempt to use the machinery for exit provided in the articles.

(c) In *Re a Company (No 006834 of 1988) ex parte Kremer* [1989] BCLC 365 ("*Re a Company (No 006834 of 1988)*") (cited in *Ting Shwu Ping* at [71]), the relationship between the petitioner and the other shareholder proved to be a failure. The other shareholder offered to purchase the petitioner's shares at their open market value to be determined by an independent valuer jointly appointed by the parties. The petitioner sought instead an order to buy the other shareholder out, or be bought out. Hoffmann J took the view (at 368b) that this was an "ordinary case of breakdown of confidence", and that in such circumstances "fairness require[d] that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out". However, Hoffmann J found that any unfairness would "disappear" if the minority shareholder were offered a fair price for his shares. In this regard, article 7 of the company's articles contained a common form pre-emption provision providing for the sale of shares between members at a price to be agreed between the transferor and the directors or, failing agreement, at a price fixed by the auditors as the fair value of the shares. It was held that, under such circumstances, the presentation of the oppression petition would ordinarily constitute an abuse of process.

35 Having surveyed the three foregoing cases, the Court of Appeal stated that the following principles should apply to situations where a winding-up application was brought in the face of an exit mechanism provided in the company's articles, or the joint venture or shareholders' agreements.

36 First, even where the facts supported a *prima facie* finding of unfairness, the court must first ask itself whether the unfairness might be negated by an option for the applicant to exit from its interests in the company at fair value. This two-stage enquiry was encapsulated in *Ting Shwu Ping* at [107(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. …
>
> [emphasis added]

37 As observed in the above passage, the unfairness really lay in requiring the disaffected shareholder to maintain his investment in the company where there was a deadlock or unfair treatment. However, where the articles of association or shareholders' agreement allowed for an exit, such unfairness would arguably be resolved. The exit mechanism was the shareholders' agreed mechanism for unravelling the deadlock and resolving the unfairness. The disenchanted shareholder should abide by the terms of the agreement and not attempt to circumvent the same by applying for winding up. As stated in *Ting Shwu Ping* at [78], there were "clearly concerns relating to minority shareholders abusing s 254(2A) which the courts must be, and are, alive to". An order under s 254(2A) might appear more attractive to a shareholder than the exit mechanism, and the court must guard against any attempt to substitute the parties' agreed exit provision with a court-ordered buy-out under s 254(2A). This required the courts to closely examine an applicant's claim that there existed an unfairness that could not be resolved by utilising the agreed exit mechanism. If there were no compelling reasons for not utilising the exit mechanism, it might very well be that the applicant was seeking the assistance of the court, not to resolve the unfairness engendered by the deadlock through a winding-up order, but instead to exit at will by obtaining an order under s 254(2A). That would be an abuse of the process of the court.

38 Second, it followed from the foregoing discussion that if an exit mechanism did exist and would resolve the unfairness, that mechanism should generally be adopted (*Ting Shwu Ping* at [107(b)]), unless:

(a) the disaffected shareholder had a legitimate expectation that he was entitled to have his shares valued in some way other than that provided in the articles;

(b) there was relevant bad faith or plain impropriety in the respondents' conduct (*eg*, conduct which had affected the value of the shares); or

(c) the articles provided for an arbitrary or artificial method of valuation: *Ting Shwu Ping* at [107(c)].

39 Third, unfairness was unlikely to be established on the facts in the absence of any attempt on the applicant's part to invoke the agreed exit mechanism: *Ting Shwu Ping* at [107(d)]. A provision that the auditors would fix a "fair value" for the shares was "generally a fair provision": *Ting Shwu Ping* at [107(e)].

Application to the present case

40 Applying the foregoing analysis to the present case, the correct starting point was the identification of the "unfairness" that was alleged to exist on the facts. It is trite that in situations of deadlock, the unfairness which justifies a "just and equitable" winding up consists in the applicant being 'locked' into an association which is no longer capable of functioning as intended. This is clear from *Evenstar* at [36] (approved in *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") at [44]):

> The most obvious example of this would be cases involving a deadlock between equal shareholders; whilst it may be difficult to attribute oppressive or unfairly discriminatory conduct on either party in such cases, the courts have, nevertheless, been ready to grant winding-up orders pursuant

> to their "just and equitable" jurisdiction: see *eg, In re Yenidje Tobacco Company, Limited* [1916] 2 Ch 426 at 430. 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]

41 Thus, in *Chow Kwok Chuen* the Court of Appeal found that it was just and equitable to wind up the companies because the relationship between the three co-directors had deteriorated to the point where no two of them were in agreement about the companies' operations, causing a deadlock. There was "total mistrust among the directors" (at [22]) and the appellant, who held just in excess of 25% of the company, effectively locked the others in by relying on the default rule that at least 75% shareholding was required for voluntary winding up. The Court of Appeal stated at [45]:

> … 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. …

42 It may be noted that the same analysis applies to loss of substratum cases. This is evident from *Evenstar* at [31] (citing *O'Neill v Phillips* [1999] 1 WLR 1092 at 1101–1102):

> I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, *making it unfair that one shareholder should insist*

> *upon the continuance of the association.* … The unfairness may arise not from what the parties have positively agreed but *from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: non haec foedera veni.* …
>
> [emphasis added]

43 Finally, the same principle was neatly reiterated in *Ting Shwu Ping* at [107(a)]:

> … 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.

44 As noted in these cases, the unfairness in a situation of deadlock arises principally because of the inability to exit an obviously untenable relationship. It is the inability to exit, and not the deadlock *per se*, that creates the requisite unfairness for the purpose of s 254(1)(*i*). This then makes it "just and equitable" for the court to break the deadlock by allowing an exit through the making of a winding-up order. Accordingly, by applying to wind up the company, the applicant is evidently asserting that it is just and equitable to resolve the unfairness caused by being wedded to a deadlocked relationship by the court making a winding-up order. It is axiomatic therefore that where there exists a mechanism to exit from a deadlock, the unfairness that undergirds the exercise of the court's jurisdiction and discretion under s 254(1)(*i*) to make a winding-up order might be said to not arise. This seems correct not just as a matter of principle but also common sense.

45 Accordingly, in the present case, I had difficulty seeing how it could be said that the plaintiffs were locked into the Capitol Project and wedded to a dysfunctional relationship with Chesham. Taken at face value, the buy-out

mechanism provided in Article 22 would have offered a panacea to their predicament. Article 22 would have resolved the deadlock by allowing the plaintiffs to exit at fair value for their shares. The question that therefore naturally arose was: why did the plaintiffs not avail themselves of Article 22 and instead resort to applying for the court to wind up the defendants? Apart from Article 22 being a ready solution, it was far less draconian than a winding-up order. It did not seem sensible to wind up a viable company, which the defendants were. It was after all common ground that the Capitol Project was perfectly viable. As noted in *Ting Shwu Ping* at [54], such an application has "unfair and costly consequences" for viable businesses. The question assumed an even sharper focus when the plaintiffs persisted in pursuing the Applications notwithstanding the clear guidance provided by *Ting Shwu Ping*. The answer became clear in the course of oral submissions. I will touch on this later (see [51] to [53] below).

46 Returning to the analysis, I do not go so far as to say that the "unfairness" in *every* situation necessarily lies in the disaffected shareholder being forced to remain in the relationship. In this regard I note that *Ting Shwu Ping* only stated the principle as applicable "[i]n many cases", not all (see [43] above). It might be that in a case with a different factual complexion, the "unfairness" complained of could be of a different nature and not curable by an ability to exit. If, for example, the disaffected shareholder complained of being unfairly excluded from management, it might be argued that the ability to exit the company via an exit mechanism in the company's articles would not cure, but rather exacerbate, such exclusion. However, neither the facts of this case nor the plaintiffs' papers disclosed any unfair exclusion. There was hence nothing enabling me to conclude that there existed any unfairness which was not curable by the plaintiffs' exit from the Capital Project.

The fact that the plaintiffs did not wish to sell

47 The plaintiffs submitted that the reasoning in *Ting Shwu Ping* (*ie*, that the existence of an exit mechanism in the company's articles negated the unfairness) only applied where the applicant wished to sell his shares and exit the company. The plaintiffs further submitted that Article 22 only covered situations where the shareholder "*desires*" to sell his shares, and referred to *Lyle & Scott v Scott's Trustees* [1959] 1 AC 763 ("*Lyle & Scott*") for its analysis of the analogous phrase "desirous of transferring". As the plaintiffs did not wish to sell and instead wanted to buy out Chesham's interest, Article 22 was not appropriate and did not negate the unfairness.

48 I had significant difficulties with the plaintiffs' submissions. Apart from a reading of Article 22 that was entirely self-serving, the submissions obfuscated the distinction between whether there was *jurisdiction* to order a just and equitable winding up of the company, and the appropriate *remedy* in the event that there were grounds for winding up. The plaintiffs were using the tail (*ie*, s 254(2A)) to wag the dog (*ie*, s 254(2)(*i*)). That the plaintiffs would rather buy Chesham out was completely beside the point. The submissions skirted the fact that the Applications were first and foremost not for buy-out orders but for orders to wind up the defendants: see *Ting Shwu Ping* at [42]. It must not be forgotten that the nub of the Applications was a plea by the plaintiffs to wind up the defendants in order to resolve the unfairness engendered by leaving the shareholders in a deadlocked relationship. If that deadlock could be resolved by a contractual solution, and the plaintiffs were truly ambivalent as to the manner in which that was resolved, the question naturally arose whether an application to wind up was necessary in the first place. If it was not, then there seemed no good reason for the court to exercise

its "just and equitable" jurisdiction to wind the defendants up under s 254(1)(*i*). *It would simply not be "just and equitable"*. That the plaintiffs did not wish to sell was therefore not relevant to the issue of jurisdiction.

49 *Lyle & Scott* (see [47] above) was likewise irrelevant. It did not arise in the context of a winding-up application but merely illustrated the meaning of a "desire" to transfer shares. The point here, however, was not that the plaintiffs positively "desired" to sell their shares, but that their ability to exit negated the unfairness which would otherwise have been grounds for winding up.

50 Indeed, the plaintiffs' reading of "desired" in Article 22 was entirely self-serving. Surely an applicant faced with unfairness arising from a deadlock would turn to an agreed exit mechanism to resolve the same. If that mechanism provided for a sale of the applicant's shares, it must follow that the applicant would "desire" to sell his shares. This was a point that Hoffman J considered in *Re a Company (No 006834 of 1988)* (see [56] and [57] below). In the present case, it appeared that the plaintiffs' "desire" had morphed from one to *sell* into one to *buy* simply because of the existence of s 254(2A). That seemed a submission of convenience rather than substance. This brings me conveniently to the subtle but significant shift on the plaintiffs' part that I alluded to earlier.

51 In their submissions dated 14 September 2016 in respect of Summonses Nos 3854 to 3856 of 2016, the plaintiffs had stated that they were "equally prepared to buy over the whole, or sell out, of the Capitol Project". This was supported by Mr Pua's first affidavit, which stated that the plaintiffs were "equally prepared" for "a liquidation, sale or a court-ordered buy-out". Mr Pua asserted that the "sole goal of the Perennial Entities [was] to resolve

the value-destroying deadlock which the Shareholders are currently trapped in", whether this was accomplished through liquidation or a buy-out. In the event that the companies were placed in liquidation and the liquidator decided to sell the Capitol Project, the plaintiffs would be "prepared to make a bid".

52 The plaintiffs' submissions in the Applications similarly reiterated that "while an order under section 254(2A) of the Act may be preferable […] if for whatever reason such an order cannot be made […] then the Perennial Entities accept that a winding-up order would have to be made". The plaintiffs expressly denied that the Applications were commenced for the "primary objective" of obtaining an order under s 254(2A). The plaintiffs further reiterated that they were "not seeking an 'exit strategy'" although they "may be prepared" to sell their shares to Chesham should the court so order. It was on this basis that the plaintiffs argued that they had no "desire" to sell their shares and Article 22 was therefore inapplicable. This profession of neutrality was vital to the plaintiffs' argument that Article 22 was irrelevant as they did not positively *want* to sell their shares to Chesham. They were simply ambivalent towards this option, which was one acceptable solution amongst many.

53 However, in oral submissions before me on 3 and 20 January 2017, it became quite clear that the plaintiffs' primary aim was to remain in the Capitol Project and buy Chesham out. Counsel for the plaintiffs unequivocally and candidly stated, in response to a question from me as to why Article 22 was not used in view of *Ting Shwu Ping*, that the plaintiffs would prefer to buy Chesham's shares and remain actively involved in the management of the Capitol Project. This shift showed up the inherent weakness in the plaintiffs' claim and perhaps the true motivation for the Applications. It showed that the

plaintiffs were not seeking to resolve the unfairness engendered by the deadlock *per se*; they were seeking to resolve the unfairness on their terms using the mechanism of s 254(2A). Would the plaintiffs have filed applications to wind up the defendants if Parliament had not enacted s 254(2A)? I was not convinced that they would have. Would they have used Article 22 then? I believed that there was a fair chance that they would have.

54 The plaintiffs' argument went against the grain of Article 22 and the reasoning in *Ting Shwu Ping*. The court's winding-up jurisdiction was not intended to be a means by which a disgruntled shareholder might oust another from its investment in the company. The bringing of a winding-up application must be premised on the applicant's desire to extricate itself from the unfairness it alleges by securing a winding-up order. If the plaintiffs were truly prepared to wind up the defendants, it seemed strange that they would not be agreeable to exiting through Article 22. An applicant for a winding-up order cannot call upon the court to extricate it from a deadlock while insisting at the same time that its preference to remain in the company renders an agreed exit provision inapplicable. There is an inherent circuitousness of logic in that argument. The applicant would not then be seeking to extricate itself but instead to remove the other shareholder from the company. *That is not what the "just and equitable" jurisdiction was designed for.*

55 The only sensible way to rationalise the plaintiffs' position was to see it in the context of s 254(2A) – the plaintiffs were reluctant to invoke Article 22 because they hoped to avail themselves of an order under s 254(2A) for Chesham to sell its shares. The liquidation was therefore not the true objective; the "just and equitable" jurisdiction was just a means to an end. This was clearly an attempt by the plaintiffs to circumvent Article 22 by compelling

resolution of the impasse on their terms, *ie*, an effort to precipitate an exit at will, which as *Ting Shwu Ping* recognised at [45] was impermissible. It must be reiterated that the presence of s 254(2A) does not improve the position of an applicant. It exists only to ameliorate the inflexibility of the relief under s 254 – previously confined to the making of a winding-up order only – by permitting the court to make buy-out orders in the case of viable businesses. However, there is no reason for the court to consider the remedial options under s 254(2A) when the parties have contractually agreed on the means of resolving an impasse. Cogent and compelling reasons must exist for the court to interfere with the contractual bargain.

56 It is also worth noting that the language of Article 22 was similar to the exit provisions in the three *Re a Company* cases cited at [34] above. All three cases contained provisions providing for an exiting member to offer his shares to the other members either at a price to be agreed or at a fair value, and allowing the member to sell his shares to third parties if the other shareholders did not wish to purchase his shares at fair value or at all. Article 22 bore the greatest resemblance to the exit provision in *Re a Company (No 006834 of 1988)* (see [34(c)] above), which stated:

> A member desiring to transfer shares otherwise than to a person who is already a member of the company shall give notice in writing of such intention to the directors of the company, giving particulars of the shares in question. The directors as agents for the member giving such notice may dispose of such shares or any of them to members of the company at a price to be agreed between the transferor and the directors or failing agreement at a price fixed by the auditors of the company as the fair value thereof.

57 Notably, the provision also spoke of a member "*desiring*" to transfer shares. However, Hoffmann J did not restrict his analysis to situations where the shareholder positively desired to divest himself of his shares. His point,

rather, was that the existence of such a provision enabled the petitioner to resolve the breakdown of relations in a fair manner (at 367e–f and 368b–c):

> The principle to be derived from the cases is that when it is 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 a petition under s 459 of the 1985 Act will ordinarily be an abuse of the process…
>
> …
>
> … This is an ordinary case of breakdown of confidence between the parties. In such circumstances, fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is offered a fair price for his shares. In such a case, s 459 was not intended to enable the court to preside over a protracted and expensive contest of virtue between the shareholders and to award the company to the winner.

The same principle applied in the present case.

58 I also doubted whether the plaintiffs truly desired a winding-up order given the severe repercussions that a winding up could precipitate. Under Conditions 52 and 57.1 of the URA Conditions of Tender, if CRM or CHM were to be placed in liquidation before the issuance of the certificate of statutory completion for the Capitol Project, the URA would have had the right to re-enter and resume possession of the site and dispose of it as if the tender had never been submitted, without compensation to the owners. This would have been disastrous for the shareholders, who had yet to see a proportionate return on their significant investment. It was difficult to imagine that the plaintiffs were prepared to chance that risk. Moreover, I did not see why the interest in the Capitol Project should be auctioned off by a liquidator,

potentially to a third party, when Article 22 entitled the plaintiffs to sell their shares at fair value and Chesham, who clearly had no desire to depart from the defendant companies, might well be willing to purchase the plaintiffs' interest at fair value pursuant to Article 22.

59 I pause to note that the plaintiffs also invited me to make an order under s 257(1) of the Act for both parties to make sealed bids for the other's shares, and for the shareholder who made the higher bid to buy the other's shares. I was not convinced that s 257(1) was intended to be used in this manner, particularly when s 254(2A) allowed the court to order a buy-out. The ambit of s 257(1) was comprehensively described in *Evenstar* at [47] and [48] as follows:

> Under s 257(1) of the CA, the court may "make any interim or other order that it thinks fit" on a winding-up application. As a general principle, s 257 must give the court the power to ensure that no avoidable injustice is done to the parties when ordering the winding up of a company under s 254(1)(i). The Canadian courts have held that the corresponding Canadian legislative provision does not enable the court to give "an entirely independent remedy that will operate outside a prospective winding-up": see Laskin JA in *Re RJ Jowsey Mining Co Ltd* [1969] 2 OR 549 at 551, but that it does enable the court to make "any order" in connection with the winding up. In *Re Hillcrest Housing Ltd* (1992) 94 DLR (4th) 165, Carruthers CJ held that the Canadian equivalent of s 257(1) of our CA confers a court hearing a winding-up application with the jurisdiction to make "an order in furtherance of or otherwise in connection with a … winding-up order" [emphasis added]. … We are of the view that s 257(1) should be similarly interpreted. On this basis, a court making a winding-up order under s 254(1)(*i*) may therefore give directions to the liquidator to temper the harshness and inequity that may otherwise result from, for example, his converting all the assets of the company to cash and distributing the proceeds when an *in specie* distribution would be more beneficial to the shareholders.
>
> Apart from directing how the winding up should be conducted, we are also of the view that the court's power under s 257(1)

> also allows it to defer the winding up until parties have been given adequate opportunity to reach a compromise.

60 In other words, s 257(1) enables the court to make orders *relating to* a winding up (and presumably, when an order is made under s 254(2A), relating to the buy-out). It does not, however, allow the court to order some other relief *in lieu of* a winding up or a buy-out. The plaintiffs cited two Canadian authorities, *Vallée v Pickard* [2007] OJ No 110 and *Mostyn v Schmiing* [2011] BCSC 275, in which sealed bids had been ordered. However, sealed bids had been ordered in those two cases under different legislative provisions which bear far less resemblance to s 257(1) than the provision discussed in the Canadian authorities cited in *Evenstar* at [47]. It would seem that in Singapore, an application for an order for sale by sealed bids ought to be made, if at all, pursuant to s 254(2A) itself ("on terms to the satisfaction of the Court") rather than s 257(1). However, I tentatively express some doubt whether s 254(2A) would permit an order of sealed bids, as its wording seems to envisage the court ordering the sale by an *identified* member of his or her shares to another *identified* member. It might also be argued that, at least in the vast majority of cases, the court should form its own conclusion as to which shareholders ought to sell and to buy from the viewpoint of justice and equitability, rather than leaving it to chance. But that is a question for determination in a future matter.

Ostensible ambiguity as to whether the plaintiffs or Chesham should leave

61 Nor was I convinced that this case was distinguishable from *Ting Shwu Ping* on the basis that it was obvious in *Ting Shwu Ping* that the applicant, being the minority, would sell, unlike the present case where the plaintiffs and Chesham were equal shareholders. This submission again conflated the issues

of jurisdiction and relief. It is at the former stage that the court undertakes an inquiry into whether there is unfairness, and if so, whether that unfairness is negated by any exit mechanism that has been agreed between the parties. The question of who should do the buying does not arise for consideration at that stage. Only after the court has satisfied itself that its jurisdiction has been properly invoked does it then consider whether it would be more equitable to allow a buy-out rather than make a winding-up order: *Ting Shwu Ping* at [79]. And it is only at that stage that the question of who should be ordered to be bought out arises.

Re a Company (No 003096 of 1987) (1988) BCC 80

62 Counsel for the plaintiffs cited the case of *Re a Company (No 003096 of 1987)* (1988) BCC 80 ("*Re a Company (No 003096 of 1987)*") in support of his argument that the question of who should be bought out was germane to the court's decision in a winding-up application. The facts of that case were similar to the present. Mr and Mrs S, and Mr and Mrs C were the four directors and equal shareholders of the company. However, the confidence between Mr C and Mr S had entirely broken down and a parting of ways seemed inevitable. Each wished to acquire the other's shares and they could not agree on what would be a fair value. Mr and Mrs S requisitioned an Extraordinary General Meeting of the company in order to remove Mr C from office as a director. Mr S held the chair at the meeting by rotation and used his casting vote to effect Mr C's removal.

63 Mr and Mrs C brought a petition to wind up the company under the UK Companies Act 1985 ("the UK Act") on the "just and equitable" ground. Mr and Mrs S then applied to strike out the petition, while Mr and Mrs C applied to amend the petition by claiming, as an alternative to a winding-up

order, the type of relief obtainable on a petition under s 459 of the UK Act, *viz*, an order requiring a sale of shares in the company. Section 459, which was equivalent to our s 216, stated:

> **459.**—(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
>
> …

64 Peter Gibson LJ first considered the striking out application. He found that on the facts there was no quasi-partnership, nor was there any special obligation on Mr and Mrs S' part in good faith or confidence that so long as the business continued Mr C should be entitled to management participation. On the contrary, Article 15 of the company's articles granted the other directors a right of pre-emption when a shareholder wished to exit. Article 15(H) in particular provided that when any member in the employment of the company ceased to be in such employment, the directors might require the member to serve a transfer notice, by which the company would be constituted his agent for the sale of the shares to any other member of the company at a price specified or to be fixed by the auditor. As such, "the Articles must be taken to govern the relationship of the parties, who thereby provided what was to happen if there were fundamental disagreements between them and one of them left" (at 86). Gibson LJ was thus of the view that the winding-up petition should be struck out.

65 Gibson LJ then turned his mind to whether the amendments sought by the petitioners would salvage the petition. The thrust of the proposed amendments was that Mr and Mrs S had acted in a manner unfairly prejudicial

to the petitioners, including Mr S using his casting vote to exclude Mr C from the company by removing him from office. Gibson LJ was referred to passages from two of the three cases decided by Hoffmann J cited with approval in *Ting Shwu Ping*. The first was a passage from *Re a Company (No 007623 of 1984)* (see [34(a)] above), which concerned a petition under the predecessor of s 459 of the UK Act, at p 366 *per* Hoffmann J:

> There are many cases in which it becomes in practice impossible for two people to work together without obvious fault on either side. They may have come together with a confident expectation of being able to co-operate but found that insurmountable differences in personality made it impossible. In those circumstances the only solution is for them to part company. If one of them asks the other to leave the business, I cannot accept that the former must automatically be regarded as having acted in a manner unfairly prejudicial to the interests of the latter. *It must depend on whether it is reasonable that one should leave rather than the other* and, even more important, on the terms on which he is asked to go.
>
> [emphasis added]

66 The second was a passage from *Re a Company (No 004377 of 1986)* (see [34(b)] above), a petition under s 459 of the UK Act, at 109B–E *per* Hoffmann J:

> … [Counsel for the petitioners] says that this company was a corporate quasi-partnership and, therefore, the petitioner had a legitimate expectation that, unless he did something which plainly justified his exclusion, he would enjoy continued employment and participation in the management. In a sense that is true, because the parties no doubt went into the venture expecting to get on with each other. But if a cautious adviser had said to them, "What is to happen if you fall out?" I have no doubt that they would have said, "Then we shall have to part. One of us will have to buy the shares of the other, or the company will have to be wound up." Leaving aside for a moment the 1982 articles, I cannot accept that if there is an irretrievable breakdown in relations between members of a corporate quasi-partnership, the exclusion of one from management and employment is ipso facto unfairly prejudicial

> conduct which entitles him to petition under section 459. It must depend on *whether, if there is to be a parting, it is reasonable that he should leave rather than the other member or members* and on the terms he is offered for his shares or in compensation for his loss of employment.
>
> [emphasis added]

67 On the basis of those decisions (amongst others), Gibson LJ determined (at 93) that the "crucial question" in determining whether to allow the amendment application was "which of the two sides should go, and whether it [was] plain and obvious, even without a hearing of the petition, that the petitioners should go". If it was not obvious that it was the petitioners (rather than Mr and Mrs S) who should leave the company, then Mr and Mrs S' attempt to exclude them from the company might constitute unfairly prejudicial conduct and the striking out application must fail. On the facts, Gibson LJ concluded that it was plain and obvious that it was the petitioners who should leave the company and disallowed the amendment application.

68 Counsel for the plaintiffs relied on these passages to support his argument that the presence of an exit mechanism would only stand in the way of a winding-up application where it was clear that the applicant should be the one leaving the company. However, the context of these passages was crucial. The petitioners sought to establish that their exclusion from the company was unfairly prejudicial under s 459 of the UK Act with a view to obtaining the sale of shares. In this context, Hoffmann J's *dicta* (see [65] and [66] above), which Gibson LJ adopted, stood for the proposition that the exclusion of one shareholder from the company would not *ipso facto* constitute unfairly prejudicial conduct within the meaning of s 459 if it was plain and obvious that that shareholder should be the one to go. The question of which shareholder should leave the company was thus considered relevant to whether

unfairly prejudicial conduct could be made out under s 459. Unfair exclusion was not, however, alleged in the Applications, so the question of who should leave the company did not arise at the stage of jurisdiction to wind up. In fact the Applications did not concern s 216 at all. Insofar as they were applications for buy-out orders under s 254(2A), the plaintiffs had to first establish jurisdiction to wind up under s 254(1)(*i*), which I found to be absent.

69 In fact, *Re a Company (No 003096 of 1987)* supported rather than detracted from the analysis in *Ting Shwu Ping*. In striking out the winding-up petition, Gibson LJ referred to the three indicators of a quasi-partnership in *Ebrahimi* set out at [27] above and observed that the third element (*ie*, restrictions upon the transfer of shares) was found to be "inapplicable" as the petitioners were not "locked into the company". Moreover, far from there being an agreement or understanding that Mr C was entitled to continue as director so long as the business continued, Article 15 showed that Mr C and Mr S "did address themselves to what would happen if Mr C were to leave the company", and the "resolution" of problems between the directors was to be "by provisions in the Articles", from which there was no reason to depart. The authorities cited also recognised the principle that an application under s 459 of the UK Act would be inappropriate where the company's articles contained machinery enabling the applicant to resolve the unfairness: *Re a Company (No 007623 of 1984)* at 367e–h, *Re a Company (No 004377 of 1986)* at 110f–h. Gibson LJ thus concluded at 94:

> [E]ven if I were wrong in my view on the petition for winding up on the just and equitable ground, I would reach the conclusion that because it was plain and obvious that the petitioners must go *and because a fair offer has been made to the petitioners to acquire their shares and they have unreasonably refused that offer*, the petition is bound to fail, and the proposed amendments to obtain Section 459 relief are also bad.

[emphasis added]

70 Thus, having considered *Re a Company (No 003096 of 1987)*, I did not think that the Applications were exempted from the analysis in *Ting Shwu Ping* simply because it was ostensibly unclear whether it was the plaintiffs or Chesham who ought to leave.

No offer to purchase the plaintiffs' shares

71 It was also irrelevant that Chesham had made no offer to purchase the plaintiffs' shares, or that the plaintiffs doubted whether Chesham would in fact agree to purchase the plaintiffs' shares at a fair price. It was, however, relevant that the plaintiffs had filed the Applications under s 254(1)(*i*) without first attempting to avail themselves of Article 22. They had only done so because they harboured the hope of securing an order buying Chesham out under s 254(2A). This seemed to me to be quite clearly an improper attempt to invoke the jurisdiction under s 254(1)(*i*). Unless and until the exit mechanism was tested, the plaintiffs had no basis to complain of unfairness: *Ting Shwu Ping* at [107(d)], *Re a Company (No 007623 of 1984)* at 367e–f.

Objections to the invocation of Article 22

72 The plaintiffs made several other arguments to, in effect, attempt to persuade me that applying the analysis in *Ting Shwu Ping* to the Applications would be unwise or unjust. I will deal with the arguments briefly.

73 First, the plaintiffs submitted that by applying Article 22 in this situation, I would be "indirectly enforc[ing]" Article 22 and "forc[ing]" the plaintiffs to sell their shares notwithstanding their readiness to purchase Chesham's shares. This objection approached the question of the court's

winding-up jurisdiction on the wrong footing. Nothing in the foregoing analysis could possibly be construed as "forcing" the plaintiffs to exit the company: they were obviously at liberty to do whatever they desired with their shares. But if an applicant for winding up calls upon the *court* to extricate him from a commercial relationship which he entered into of his own accord, then he must satisfy the legal requirements for the exercise of such jurisdiction. Where the applicant has other means of resolving the unfairness, that jurisdiction does not exist. As aptly expressed in *Talwerdi v Infonet Technology Corp* [2001] BCSC 1304, a British Columbia case cited to me by counsel for Chesham, at [47], "The principles in *Ebrahimi* attempt to provide relief to a shareholder who has *no legal means* of extracting his or her interest from the company, not to offer the most lucrative recovery possible." (emphasis added)

74 Second, the plaintiffs argued that this approach made it a "waiting game" between the shareholders to see who would outlast the other. Since the court would not exercise its winding-up jurisdiction in light of Article 22, the resolution of the deadlock became a matter of which shareholder would leave the Capitol Project first. I was of the view that the submission missed the point completely. It is not a case of who pulls the trigger first. It is instead about a disenchanted and disenfranchised shareholder appealing to the court's equitable jurisdiction to mitigate an unfair situation by ordering a winding up. Such a shareholder ought not to seek such an order when he can seamlessly exit through an exit provision that he has agreed to with minimal collateral damage to the business or the company. Seen from that perspective, it is the shareholder's need to exit rather than his desire to stay that s 254(1)(*i*) responds to.

75 It must be said that every party entering into a commercial relationship takes the risk that the relationship may sour or that the bargain may turn out to be a bad one. The court's jurisdiction under s 254(1)(*i*) exists to relieve a shareholder from the consequences of his decision by "subject[ing] the exercise of legal rights to equitable considerations" (*Ebrahimi* at 379D). Where that jurisdiction does not arise, there can be no reason for the court to intervene in the shareholders' interactions, which must be left to run their natural course. It might be disagreeable to the plaintiffs to have to choose between exiting the Capitol Project and remaining in a deadlocked relationship with Chesham, as they clearly preferred to buy out Chesham. But if the plaintiffs would have been content with a winding-up order, they ought to have been equally content to be bought out. And the latter is exactly what they had agreed to in the shape of Article 22.

76 Third, the plaintiffs argued that taking this analysis to its conclusion would mean that a winding-up application would fail, not only where there was an exit mechanism provided in the company's articles, but in *every* case where it was possible for the applicant to sell out of the company. However, whether it is "just and equitable" to wind up a company under s 254(1)(*i*) of the Act turns on the specific facts of each case, *viz*, whether the making of a winding-up order is necessary to mediate the unfairness which the applicant complains of. The court in each case would have to scrutinise such factors as the nature of the unfairness, the viability of selling out of the company and the fairness of the terms of sale.

Exceptional circumstances

77 I did not accept that this case fell within the exceptional circumstances suggested by Hoffmann J which justify a departure from the exit mechanism

provided in Article 22. The Court of Appeal in *Ting Shwu Ping* accepted his analysis and noted (at [109]) that these were "rather limited bases". The plaintiffs submitted both that they had a legitimate expectation that their shares would be valued in some way other than that provided in the articles, and that there had been bad faith or plain impropriety in Chesham's conduct. I was not persuaded by either of these arguments.

Legitimate expectation

78 It must be emphasised that the legitimate expectation referred to in *Ting Shwu Ping* at [107(c)] is an expectation *that the shares should be valued in a different way* than that provided in the articles. Article 22 provided for the share price to be agreed upon between the exiting shareholder and the other shareholders, failing which the auditor should determine a fair price. The mere fact that Top Property had left the Capitol Project without expressly invoking Article 22 could not, in my view, ground a legitimate expectation on the plaintiffs' part that their shares would be valued in some other way. Nor did the plaintiffs suggest what this "other way" might be. It must be noted that the plaintiffs did not suggest that the auditors would not arrive at a fair value if Article 22 were to be invoked. Article 22 bound the plaintiffs and Chesham. As noted earlier, *Ting Shwu Ping* had observed that such a provision would be deemed a fair one: see [39] above. There was therefore a lack of clarity as to the exact nature of the plaintiffs' complaint.

79 In Top Property's case, the Original Shareholders had eventually agreed, after negotiations, on the price and proportion in which the first plaintiff and Chesham would purchase Top Property's shares, such that there was no need to fall back on the alternative mechanism of having the auditor value the shares under Article 22. Top Property had initially offered to sell its

shares in the Capitol Project to the first plaintiff and Chesham at a price based on a land valuation of $400m. Based on Article 22(C), the sitting shareholders were entitled to purchase Top Property's shares *pro rata* based on the number of shares held. This would have given the first plaintiff a majority stake in the Capitol Project. However, that did not happen. According to the plaintiffs, Mr Kwee thought Top Property's asking price was too high and refused to accept a sale price based on a land valuation any higher than $350m. Mr Kwee admitted that he thought the price too high, but averred that he had not wanted to jeopardise his friendship with Mdm Widjaja by negotiating the price with her. Whatever the case, Mr Kwee left the negotiations to be conducted between Mr Pua and Mdm Widjaja, following which Top Property agreed to sell its stake in the Capitol Project to the first plaintiff and/or its nominee at a purchase price of $70m (based on a land valuation of approximately $383.3m).

80 As Chesham wanted to be equal shareholders with the first plaintiff in the Capitol Project, the first plaintiff agreed to allow Chesham to acquire more than its *pro rata* entitlement. Chesham hence purchased two-thirds of Top Property's shares and the second plaintiff, which had been incorporated by the first plaintiff for this purpose, purchased the remaining third. As a result, Chesham and the plaintiffs were equal shareholders in the Capitol Project following Top Property's exit.

81 The plaintiffs' submission conflated the *allocation of shares* with the *valuation of shares*. These are distinct concepts. Top Property's shares were allocated between Chesham and the plaintiffs in a 2:1 ratio, contrary to Article 22(C), because the plaintiffs had agreed to accommodate Chesham's desire for parity of interest. However, that had nothing to do with the *valuation of Top*

Property's shares, the price of which was agreed by negotiation. This was totally consistent with the machinery under Article 22, which expressly permitted the vendor and the directors to agree on the price. As such, the fact that Top Property's shares were not allocated *pro rata* could not have created a legitimate expectation on the plaintiffs' part that their own shares in the Capitol Project would be valued otherwise than in accordance with Article 22. It was similarly open to the plaintiffs to sell their shares under Article 22 at a price to be negotiated between the shareholders (as Top Property did) or, failing agreement, valued by the auditor. I reiterate that it was not clear what "other way" the plaintiffs could have expected to have their shares valued, and why the "way" spelt out in Article 22 was not the correct way; "short of contrary evidence, what is spelt out in the Articles is taken to be what the parties agreed to": *Ting Shwu Ping* at [111(b)]. There was a paucity of evidence that what was spelt out in Article 22 was not the correct way. The fact remained that Article 22 was available to the plaintiffs as a means of exiting the company at fair value, thereby breaking the deadlock with Chesham.

82 The plaintiffs also attempted to ground their purported legitimate expectation on the fact that the draft JVA prepared by Chesham in July 2014 ("the July 2014 draft JVA") proposed different methods of valuing each shareholder's shares in the event of a deadlock (Clause 5.6) or exercise of a right of pre-emption (Clause 6.3). However, the July 2014 draft JVA could not have grounded any legitimate expectation because it was only a draft document subject to parties' negotiations. Moreover, as the plaintiffs never agreed to the July 2014 draft JVA (and in fact deleted Clause 5.6 in their response), they could not have intended to accept it as binding. As such, the July 2014 draft JVA did not supersede Article 22, which the Original

Shareholders had agreed to and which continued to govern the shareholders' relationship while discussions regarding the draft JVA were underway.

83 In this regard, it appeared that Mr Pua had himself accepted that the defendants' respective constitutions would govern the relationship between the shareholders even after the departure of Top Property. When Mr Kwee revived discussion about the JVA on 28 May 2014, their previous discussions about the JVA having petered out in April 2011, Mr Pua professed surprise. He apparently found it "difficult to understand why [Mr Kwee] would suddenly propose a JVA when the Shareholders had been content to be governed by the respective companies' constitutions and operate without a JVA for the past three years". He stated moreover that a JVA was unnecessary "as the constitution of the [companies incorporated for the purpose of the Capitol Project] would continue to govern the joint enterprise". These statements were inconsistent with any purported legitimate expectation that Article 22 should not be given effect to.

Bad faith or impropriety

84 I did not find the plaintiffs' allegation of bad faith or plain impropriety in Chesham's conduct to be substantiated by the factual matrix. Even if such conduct existed, it must have "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": *Re a Company (No 006834 of 1988)* (see [34(c)] above) at 368g. In *Ting Shwu Ping,* for example, the Court of Appeal observed that there was "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" (at [114]). There was simply no evidence before me of such bad faith or impropriety on Chesham's part impacting share value.

Indeed, there would have been no reason for Chesham to deliberately reduce the value of the shares in the Capitol Project given that it had a stake equal to the plaintiffs. Chesham would have been shooting itself in the foot if it had, making such conduct unlikely.

85 In this regard, I should add that during the Pre-Trial Conference on 23 December 2016 (see [32] above), I had invited the plaintiffs and Chesham to address me on the need for filing further affidavits in light of *Ting Shwu Ping*. However, the plaintiffs and Chesham did not take up the invitation. This left me to determine the foregoing issues on the affidavit evidence already filed which, as I found, did not support the Applications.

Conclusion

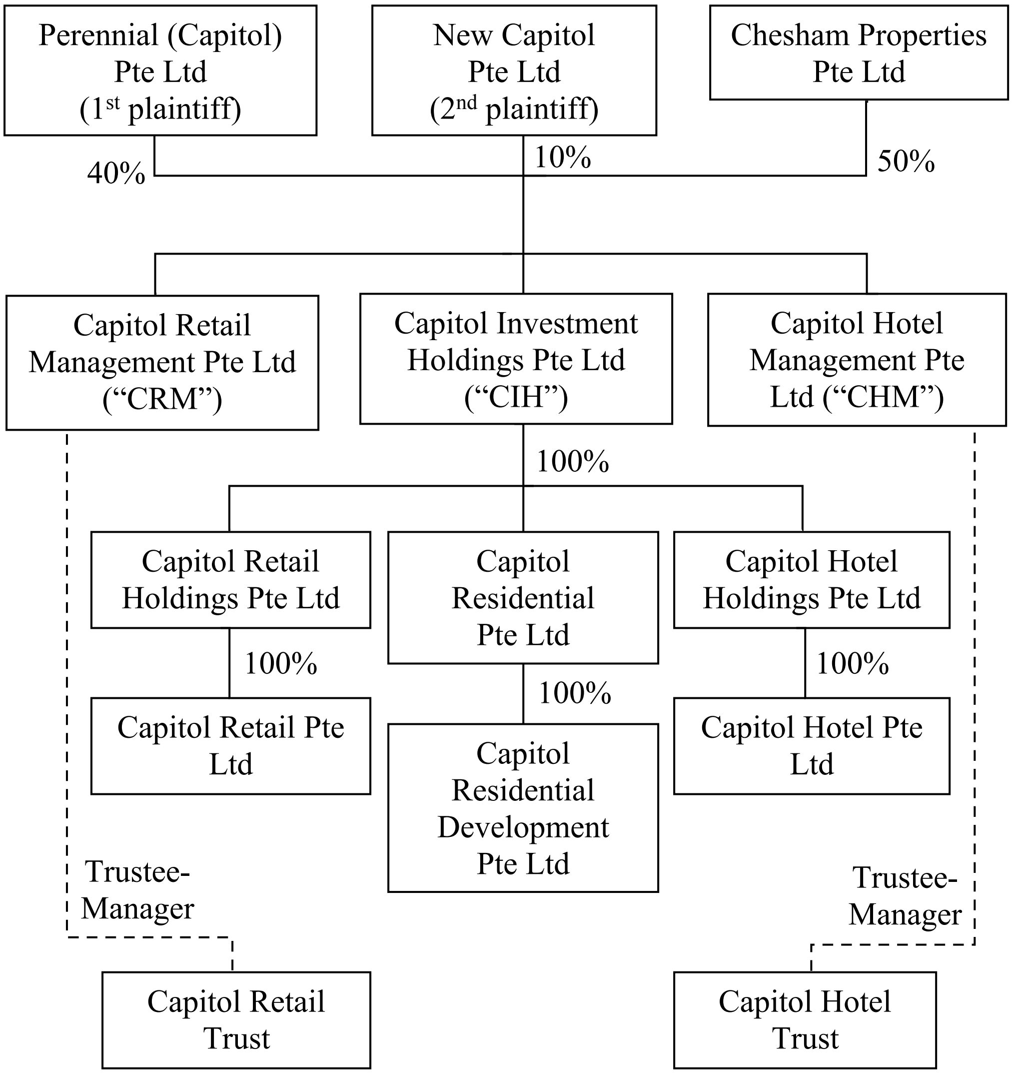
86 In the circumstances, I found that it would not be just and equitable to wind up the defendant companies or order a buy-out. This followed from a straightforward application of the principles in *Ting Shwu Ping*, by which I am bound. I therefore dismissed the Applications with costs to Chesham. I further took the opportunity to invite the plaintiffs to exercise the right of exit provided in Article 22. In the event that the plaintiffs did so and an exit did not materialise for reasons that were not attributable to the plaintiffs, I was of the view that the complexion of the case could be significantly altered (see *Ting Shwu Ping* at [108] and *Re a Company (No 007623 of 1984)* at 367e–f).

87 Finally, I would like to record my appreciation to counsel for the assistance which they rendered to the court.

Kannan Ramesh
Judge

Thio Shen Yi SC, Colin Liew, Reshma Nair and Nicholas Ngo
(TSMP Law Corporation) for the plaintiffs;
Defendants, unrepresented, absent;
Davinder Singh SC, Pardeep Singh Khosa and Chen Chi (Drew &
Napier LLC) for the other party.

Annex 1


Perennial (Capitol) Pte Ltd (1st plaintiff)
New Capitol Pte Ltd (2nd plaintiff)
Chesham Properties Pte Ltd
40%
10%
50%
Capitol Retail Management Pte Ltd ("CRM")
Capitol Investment Holdings Pte Ltd ("CIH")
Capitol Hotel Management Pte Ltd ("CHM")
100%
Capitol Retail Holdings Pte Ltd
Capitol Residential Pte Ltd
Capitol Hotel Holdings Pte Ltd
100%
100%
100%
Capitol Retail Pte Ltd
Capitol Residential Development Pte Ltd
Capitol Hotel Pte Ltd
Trustee-Manager
Trustee-Manager
Capitol Retail Trust
Capitol Hotel Trust