IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 110

Civil Appeal No 59 of 2020

Between

Siva Kumar s/o Avadiar

… *Appellant*

And

(1) Quek Leng Chuang
(2) Traazil Leon
(3) Environmental Solutions (Asia) Pte Ltd

… *Respondents*

In the matter of Originating Summons No 83 of 2020

Between

Siva Kumar s/o Avadiar

… *Plaintiff*

And

(1) Quek Leng Chuang
(2) Traazil Leon
(3) Environmental Solutions (Asia) Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Inherent powers] — [Consent orders]

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v
Quek Leng Chuang and others

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21 September 2020

5 November 2020

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 When parties enter into a consent order for one shareholder to buy out the other on a valuation to be decided by an agreed independent valuer in settlement of a minority oppression action, either or both parties may not be entirely satisfied with the ensuing valuation. That is a risk which is inherent in any agreed independent valuation. After all, the valuer is required to be independent and by definition, such a valuer will not serve the interest of any particular party.

2 It is not unexpected for a shareholder who is dissatisfied with the valuation of the independent valuer to employ all available means with the benefit of hindsight to extricate himself from the consent order despite the fact that it was freely entered into with the benefit of legal advice.

3 This was precisely what happened in the dispute before us. CA/CA 59/2020 was the appellant's appeal against the decision of Audrey Lim J ("the Judge") on 6 March 2020 to dismiss HC/OS 83/2020 ("OS 83"). OS 83 was an application by the appellant to set aside a consent order ("the Consent Order") which was made by the High Court ("the Court") on 24 May 2019. The Consent Order provided for the 1st and 2nd respondents to purchase the appellant's shares in the Company at a price to be determined by an independent valuer.

4 Having carefully considered the parties' submissions, it was apparent to us that the appeal was wholly without basis and we dismissed the appeal. We observed that this was an entirely opportunistic attempt by the appellant to rely on a misreading of our decision in *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 ("*Liew Kit Fah*") to get out of a bad bargain as the independent valuation of his shares was unsatisfactory to him. We now provide our detailed grounds for dismissing the appeal.

Background facts

The parties

5 The 3rd respondent, Environmental Solutions (Asia) Pte Ltd ("the Company") was founded by the appellant, Mr Siva Kumar, the 1st respondent, Mr Quek Leng Chuang and Mr James Traazil. The Company was incorporated on 8 May 1999. Shortly after the first meeting in or around July 1999 where the business plans were discussed , Mr James Traazil passed away. As a result, the appellant and the 1st respondent started the business of the Company on their own.

6 The appellant presently holds 992,500 shares (49.625%) in the Company. The appellant was a director of the Company from 22 November 1999 to 27 May 2019. The 1st respondent holds 992,500 shares (49.625%) in the Company and is presently its sole director. The 2nd respondent, Mr Traazil Leon, who is the son of the late Mr James Traazil, holds the balance 15,000 shares (0.75%) in the Company, and became a shareholder of the Company on 18 January 2019, after the said shares were transferred to him from the estate of Mr James Traazil.

Breakdown in relations

7 Sometime in January 2018, the relationship between the appellant and the 1st respondent began to deteriorate over various business disagreements.

8 On 29 January 2019, the appellant was served a notice of an Extraordinary General Meeting ("EGM") to be held on 18 February 2019 to remove him as director of the Company and to appoint the 2nd respondent as director in the appellant's stead. As a result, the appellant commenced HC/S 168/2019 ("Suit 168") on 7 February 2019 against the respondents for minority oppression, amongst others. In Suit 168, the appellant sought the following reliefs:

(a) a declaration to remain as a director of the Company for as long as he was a shareholder of the Company;

(b) an injunction to restrain the 1st respondent, the 2nd respondent and the Company from removing him as a director of the Company, affecting his right to equal representation on the board of directors, or interfering with his rights and performance of his duties as a director;

(c) an order for him or the Company to buy out the shares of the 1st and 2nd respondents at fair value, in cash or in kind, or as determined by the court; or alternatively, for the 1st and 2nd respondents or the Company to buy his shares at fair value, in cash or in kind, or as determined by the court; and

(d) damages to be assessed.

9 On 7 February 2019, the appellant also filed HC/SUM 621/2019 ("SUM 621") to restrain the 1st respondent, 2nd respondent and the Company from proceeding with the EGM on 18 February 2019. On 26 April 2019, the appellant was served with a notice of an EGM to be held on 11 May 2019 for the proposed appointment of one Tay Eng Hean to be appointed as a director of the Company. On 7 May 2019, the appellant filed HC/SUM 2360/2019 ("SUM 2360") to restrain the 1st respondent, 2nd respondent and the Company from proceeding with the proposed EGM on 11 May 2019.

10 On 9 May 2019, the appellant obtained various court orders including an interim injunction restraining any EGMs of the Company to appoint a new director of the Company, pending the resolution of SUM 2360 and SUM 621 which were both adjourned to be heard on 24 May 2019.

The Consent Order and the related events

11 On 24 May 2019, the parties reached a settlement in Suit 168 and by consent, applied to the High Court to record the Consent Order which was duly granted of which its essential terms are reproduced below:

> 1. The 1st and 2nd [respondents] shall, jointly and severally, purchase, or cause to be purchased, [the appellant's] 992,500 shares in [the Company] on the following terms:

(1) The price of [the appellant's] Shares shall be determined by an independent valuer ("Valuer") who is to be appointed by agreement between [the appellant, the 1st respondent and the 2nd respondent] within 21 days from the date of this Order of Court, failing which, the Valuer shall be appointed by this Honourable Court within 35 days from the date of this Order of Court, or as such other time as this Honourable Court determines.

(2) The Valuer shall be at liberty to determine and adopt the appropriate standards, and methods of valuation.

…

(4) The Valuer shall within 6 weeks from being appointed, or such other extended period as may be allowed by the Court (if not agreed by the parties), fix the value of the [appellant]'s Shares ("Value"), as at 7 February 2019.

…

2. Within 8 weeks of the final determination of the Value:

(1) [The 1st respondent and/or the 2nd respondent] and/or their nominee shall pay to [the appellant] the Value.

(2) [The appellant] shall sign a share transfer form to transfer [the appellant]'s Shares to [the 1st respondent and/or the 2nd respondent] and/or their nominee, as the case may be, and deposit it with the solicitors for [the 1st respondent and/or the 2nd respondent]. …

…

4. Within 3 days of this Order of Court, [the appellant] shall:

(1) File a Notice of Discontinuance as against [the Company].

(2) Resign from his appointment as a director of [the Company].

…

6. Save as provided in this Order of Court, [the appellant] withdraws all of his allegations against [the 1st and 2nd respondents], as stated in his Statement of Claim and Reply and Defence to Counterclaim, and all affidavits that were filed by [the appellant] in this action … and all other claims in his Statement of Claim against [the 1st and 2nd respondents] …

> 7. Save as provided in this Order of Court above, [the 1st and 2nd respondents] withdraw all their allegations against [the appellant] as stated in their Defence and Counterclaim …

12 The appellant resigned as a director of the Company on 27 May 2019. Thereafter, the parties took steps to perform their obligations pursuant to the Consent Order:

(a) On 15 August 2019, they *jointly appointed* Nexia TS Pte Ltd ("Nexia") as the Valuer and agreed to the terms of engagement of Nexia and its scope of work.

(b) They provided the documents as requested by Nexia.

(c) Thereafter, the parties made three sets of submissions to Nexia on 6 September 2019, 29 October 2019 and 25 November 2019 respectively in respect of the valuation. Both parties therefore had ample opportunities to address Nexia on the application of the lack of marketability discount before Nexia's final valuation report ("Final Report") was issued.

(d) Upon Nexia's review of each set of submissions, Nexia provided the parties with two draft reports before issuing the Final Report.

(i) On 10 October 2019, Nexia issued its first draft valuation report, valuing the appellant's shares at US$703,000. The appellant took issue with Nexia's application of a 25% discount for lack of marketability to the valuation of the appellant's shares.

(ii) On 11 November 2019, Nexia issued the second draft report, valuing the appellant's share of US$487,000 with the

application of a 25% discount for lack of marketability to the valuation of the appellant's shares.

(iii) On 4 December 2019, Nexia issued the Final Report valuing the appellant's shares at US$395,000 on the premise that the 25% discount for lack of marketability was applicable. This was derived from a gross valuation of approximately US$526,000. It is apparent that Nexia was consistently of the view that the discount for lack of marketability would apply in *all* of its valuation reports.

13 We note that there were some differences in the valuation of the appellant's shares by Nexia in its three reports. The first and second draft valuation reports differed because the first draft valuation report adopted the Guideline Public Company Method, while the second draft valuation report adopted the Discounted Cash Flow Method. Nexia took the view in the second draft valuation report that the Discounted Cash Flow Method was the most appropriate because (a) the shares of the Company were valued on a going concern premise; (b) there was sufficient reliable historical and projected financial data made available for the evaluation of share value based on the Discounted Cash Flow Method; and (c) in line with the going concern premise, it was unlikely that market participants would consider the net asset value. The Final Report also adopted the Discounted Cash Flow Method, but differed from the second draft valuation report because of differences in the Indicative Enterprise Values and the Indicative Equity Values. In any case, nothing material turns on the differences in Nexia's valuation reports and the changes in Nexia's valuations in its three reports were not the focus of the parties' dispute.

14 The obligation pursuant to paragraph 2 of the Consent Order which provided for the payment by the 1st and 2nd respondents and the transfer of the appellant's shares to the respondents/their nominees within eight weeks of the final determination of the value of the appellant's shares remained unperformed by the parties.

15 On 1 November 2019, the appellant commenced HC/SUM 5501/2019 ("SUM 5501") in Suit 168, seeking an order against the application of the lack of marketability discount in valuing his shares. At the hearing of SUM 5501 on 13 January 2020 before the Judge, the appellant made known his intention to set aside the Consent Order. SUM 5501 was therefore adjourned and the Judge directed that it should only be dealt with after the determination of the appellant's application to set aside the Consent Order.

16 On 20 January 2020, the appellant filed OS 83 to set aside the Consent Order and for Suit 168 to proceed to trial.

Decision below in OS 83

17 On 6 March 2020, the Judge dismissed OS 83 and observed that the appellant was in truth trying to get out of what had turned out to be a bad bargain for his shares, after having had sight of the report of Nexia (who was also jointly appointed by the parties) (Grounds of Decision ("GD") at [14]). The Judge found that the Consent Order should not be set aside following *Liew Kit Fah* ([4] *supra*) for the following reasons.

(a) The Judge disagreed with the appellant's reading of *Liew Kit Fah* that it stood for the proposition that without a finding of minority oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), the court could not order a buy-out of shares by a

majority shareholder from the minority shareholder, or *vice versa*. The Judge observed that this court in *Liew Kit Fah* did not hold that consent orders that were not made without a prior finding of minority oppression were void or invalid. Instead, it had held that such a consent order was in essence a freely negotiated transaction akin to one between a willing seller and a willing buyer: *Liew Kit Fah* at [35] and [50]. Implicit in this reasoning was that such consent orders were valid and enforceable. Both the majority and minority decisions in *Liew Kit Fah* upheld the consent order (GD at [5]).

(b) On the facts of Suit 168, the Consent Order did not provide for nor ask the court to determine the substantive issue of who should buy out whose shares in the company, unlike in *Liew Kit Fah*. The court in Suit 168 was not asked to determine any substantive issue, but merely to record a court settlement – the only matter that might require the court's determination from the terms of the Consent Order was to appoint a valuer if the parties could not mutually agree on one (GD at [6]).

(c) The Consent Order expressly provided that the appellant, the 1st respondent and the 2nd respondent were to withdraw all allegations against each other as made in their respective pleadings. This was an implicit disclaimer by the parties that they did not admit to any liability, including that for minority oppression. Thus, the Consent Order was not made under s 216(2) of the Companies Act, but was in essence a freely negotiated transaction akin to one between a willing seller and a willing buyer (GD at [6]).

18 The Judge rejected the appellant's submission that the court did not have the jurisdiction to grant a consent order which included a share buy-out clause where the suit concerned a minority oppression action, because the parties' respective claims and counterclaims had not been determined by the court. The Judge observed that if that were the case, no agreements or settlements could ever be recorded as a consent order for a share buy-out, where the claim was one of minority oppression, without the matter proceeding to trial and the court first determining the merits of the parties' substantive cause of action or claim (GD at [8]).

19 The Judge also rejected the appellant's submission that he would not have agreed to the Consent Order if he had known that, by entering into it, he would be deemed to have abandoned his claims for minority oppression, which correspondingly meant that the discount for lack of control and the lack of marketability discount "should be applied" to the valuation of his shares. The Judge did not find the appellant's alleged lack of intention to "abandon" its oppression claim as a sufficient ground to set aside the Consent Order as it was contradicted by the clear text of the Consent Order (GD at [9] and [10]).

20 Further, the Judge did not find any prejudice against the appellant if the Consent Order was upheld, given that the appellant had voluntarily entered into the Consent Order and was legally represented at all material times. Instead, prejudice could equally be caused to the 1st and 2nd respondents if the Consent Order was set aside (GD at [12]).

21 Finally, the Judge rejected the appellant's claim that the Consent Order should be set aside on the basis of a mutual mistake. The appellant claimed that he was under the mistaken impression, at the time of recording the Consent Order, that no discount would be applied to his shares. However, the appellant

did not state on affidavit that he was under the mistaken impression at the time the Consent Order was entered into that there would be no application of the lack of marketability discount. There was also no evidence to support such a claim of the appellant's mistaken impression (GD at [13]).

Parties' arguments on appeal

22 We turn now to briefly summarise the parties' arguments on appeal.

23 The appellant submitted that the Judge erred in her decision not to set aside the Consent Order because (a) the High Court did not have the *jurisdiction* to grant the Consent Order; (b) the Consent Order ought to have been set aside by virtue of mistake; and (c) it would be inequitable to enforce the Consent Order.

24 The appellant submitted that based on his interpretation of both the majority and minority decisions in *Liew Kit Fah* ([4] *supra*), without a finding of minority oppression under s 216 of the Companies Act, the court could not order a buy-out of shares by a majority shareholder from the minority shareholder, or vice versa. Thus, the appellant submitted that the High Court did not have the jurisdiction to grant the Consent Order.

25 The appellant further submitted that prior to *Liew Kit Fah*, no reported decision had suggested that (a) by entering into a consent order without first determining whether minority oppression had been made out, the minority shareholder would be deemed to have abandoned his claims for minority oppression; and (b) if so, the shareholders would be deemed to be willing buyers and willing sellers, and the usual discounts for lack of control and lack of marketability could apply. The Consent Order was entered into on 27 May 2019, before the decision in *Liew Kit Fah* was released on 27 November

2019. He argued that had he known about the above factors before the Consent Order was entered into, he would have proceeded with the trial for the court to make a finding of minority oppression by the 1st and 2nd respondents, and to thereafter procure his own valuation of his shares in the Company. This, he argued, justified the setting aside of the Consent Order by virtue of mistake.

26 On the other hand, the respondents argued that the Consent Order was not made under s 216(2) of the Companies Act, but was merely a recording of the parties' agreement to settle. Thus, *Liew Kit Fah* was irrelevant.

27 The respondents also submitted that the High Court had the requisite *jurisdiction* on the basis that the dispute was submitted to the High Court. The real question was whether the High Court had the *power* to grant the Consent Order.

28 The respondents further averred that the appellant's argument against mutually agreed buy-outs recorded in contractual consent orders militated against public interest.

Our decision

29 We dismissed the appellant's appeal and found his submissions to be wholly unmeritorious. As the appellant had purported to rely on our decision in *Liew Kit Fah* ([4] *supra*) to advance his case theory that the court had no jurisdiction to record a consent order arising from a claim for minority oppression, we take this opportunity to explain why such an argument was a complete misreading of our decision.

Relevance of Liew Kit Fah

30 We start by observing that the present facts are far removed and entirely distinguishable from the facts in *Liew Kit Fah*.

31 In *Liew Kit Fah*, the consent order stated that there was no admission of liability but the parties agreed to have the court determine whether the appellants were to purchase the respondents' shares in the company or *vice versa*. In that case, the judge at first instance was thus asked to determine the party who should be entitled to the buy-out. This court then found that the judge at first instance had erroneously treated the entire exercise relating to the buy-out issue as one that had engaged the court's powers under s 216(2)(*d*) of the Companies Act when that was clearly not the case (at [15], [18] and [20]).

32 However in the present case, the ambit of the Consent Order was quite different. Here, parties came to a settlement and appeared before the High Court to record the agreed terms of a settlement in a consent order. As the Judge correctly observed, the High Court did not make any substantive determination of any issue in Suit 168. Pursuant to paragraph 1(1) of the Consent Order, the residual role of the High Court was one of appointing the Valuer in the event that parties could not mutually agree on the appointment within 21 days of the date of the Consent Order. In fact, paragraph 1(1) of the Consent Order was eventually not invoked as the parties were able to agree on the joint appointment of Nexia as the independent Valuer.

33 We further note that when the parties entered into the Consent Order, it was clear that the parties intended to abandon all claims and counter-claims, including that of minority oppression, against each other.

(a) During the parties' negotiations for a settlement preceding the Consent Order, it was the appellant who suggested by way of a text message to the 1st respondent on 29 April 2019 at 10.57am:

> Can we just agree to get an independent valuer and pay the value of the shares. I resign , you run the company as you deem fit. *and we both move on amicably*? [emphasis added]

The appellant evidently had the intention to sell his shares to the 1st and 2nd respondents on the basis of an independent valuation and for parties to "move on amicably", which was entirely consistent with the terms of the Consent Order to withdraw all allegations against each other in their pleadings.

(b) At the hearing on 24 May 2019, the appellant tendered the draft Consent Order and informed the Judge that the parties "have come to *settlement*". After the Judge made some amendments to the draft Consent Order with the agreement of the parties, the Consent Order was granted by the Judge on 24 May 2019.

(c) The Consent Order *expressly* provided that both parties would withdraw their respective allegations in their pleadings against each other, acting as an implicit disclaimer by the parties that they did not admit to any liability, including any liability of minority oppression.

(d) Therefore, the withdrawal or abandonment of all allegations against each other including minority oppression was the *direct consequence* of the express terms of the Consent Order. It was disingenuous of the appellant to suggest that by entering into the Consent Order, he would be *deemed* to have abandoned his claims for minority oppression based on his flawed reading of *Liew Kit Fah*.

34 Thus, the present case simply involved a settlement agreement between the parties that was recorded as a consent order by the Court. Such a consent order was designed to allow the parties to enforce the order in the event of non-compliance without having to institute a fresh action: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 at [163(b)]. The commentary in *Singapore Court Practice* (LexisNexis Singapore, 2020) ("*Singapore Court Practice*") at para 42/1/6 provides further guidance, citing the pronouncement by Byrne J in *Wilding v Sanderson* [1897] 2 Ch 534 at 543, which in turn stated as follows:

> … [T]he advantage of embodying the terms of the settlement in a consent judgment or order is that *it may be automatically enforced in the event of non-compliance* (as in the case of any other judgment or order):
>
> > *A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of the court.* The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. *He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.*
>
> [emphasis added]

35 The appellant further submitted that *Liew Kit Fah* ([4] *supra*) established that if the parties opted to enter into a consent order without having the issue of minority oppression determined, they would be deemed to be willing buyers and willing sellers, and thus the discounts for lack of control and lack of marketability discount could apply. His argument was that had he known that the lack of marketability discount would apply in such a situation, he would

not have entered into the Consent Order and would have proceeded to trial to obtain a finding of minority oppression instead.

36 However, we observe that this was premised on an erroneous interpretation of *Liew Kit Fah*. In fact, we held to the contrary in *Liew Kit Fah* that unlike the minority discount for lack of control, the discount for lack of marketability is "industry specific" and should be left to "the expertise of the independent valuer to decide whether to apply the lack of marketability discount for the respondents' shares" (at [59]).

37 It appears to us that the *real unhappiness* of the appellant was with Nexia's final valuation of the appellant's shares itself, and not with the application of the lack of marketability discount *per se*. The difference between Nexia's final valuation of the appellant's shares at US$395,000 and the appellant's own estimation of the value of his shares at S$10m was over S$9m while the difference arising from the application of the lack of marketability discount only amounted to US$133,000. Thus, we found that it was entirely opportunistic for the appellant to have purportedly relied on an erroneous reading of *Liew Kit Fah* in order to get out of the valuation of his shares by the jointly appointed Valuer.

38 When parties agree to the joint appointment of an independent valuer, it would be within the parties' contemplation that the valuer may arrive at a valuation which is *different* from the way each of them may subjectively value their respective shares. However, in agreeing to a valuation by a jointly appointed independent valuer, the parties must be bound by the resultant valuation. It is apposite to bear in mind that such a valuation can cut both ways as it could be favourable or unfavourable to either party.

39 Further, it is clear to us that *Liew Kit Fah* ([4] *supra*) could not possibly have had any impact or influence on the Valuer's decision. The decision in *Liew Kit Fah* was only released on 27 November 2019. By then, Nexia had issued its first draft valuation report on 10 October 2019 which had applied a 25% lack of marketability discount to the valuation of the appellant's shares. In any event, the Valuer's decision to apply the discount for lack of marketability was entirely consistent with our observation in *Liew Kit Fah* at [59], as discussed above, that the application of such a discount is industry specific and should be left to the expertise of the independent valuer to decide.

40 For the above reasons, we reiterate that the majority and minority decisions in *Liew Kit Fah* did not assist the appellant's submission.

Whether the High Court had the jurisdiction or power to grant the Consent Order

41 We next turn to address the appellant's submission that the Consent Order should have been set aside because the High Court did not have the jurisdiction to grant a share buy-out order, without the High Court first being satisfied, or making a finding, that minority oppression under s 216(1) of the Companies Act had been established.

The distinction between "jurisdiction" and "power"

42 We start by making a preliminary observation that the terms "jurisdiction" and "power" have been commonly used interchangeably in various contexts. However, as we observed in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 ("*Re Nalpon*") at [29] and [32], a key distinction should be drawn between the two distinct and entirely different concepts. This court in *Re Nalpon* adopted the definitions proposed by Chan Sek Keong J (as he then

was) in *Muhd Munir v Noor Hidah and other applications* [1990] 2 SLR(R) 348 at [19] and made the following observations (at [29]–[31]):

> 29 *The terms "jurisdiction" and "powers" are commonly used interchangeably, sometimes to describe each other, in various contexts.* For example, an article "The Inherent Powers of the Court" [1997] SJLS 1 by Prof Jeffrey Pinsler notes at p 1 that the phrase "inherent powers" has commonly been referred to as "inherent jurisdiction". ...
>
> 30 Given that the two terms are so often used together and sometimes even used interchangeably, we find it opportune to first *clarify the conceptual difference between the "jurisdiction" of a court, and the "power" of a court*, before elaborating further on the "inherent jurisdiction" or "inherent powers" of a court.
>
> 31 At [10]–[12] above, we had adopted the definition of the word "jurisdiction" found in *Muhd Munir* ([13] *supra*). In stating this definition, Chan J was actually clarifying the difference between the "jurisdiction" and the "power" of a court. He had stated at [19] that:
>
> > ***The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute.*** ...
> >
> > *The distinction between jurisdiction and power is recognised in the [Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA")], ss 16 and 17 (which confer jurisdiction) and s 18 (which confers powers).* ...
>
> 32 To clarify, in relation to civil matters, ss 16 and 17 of the SCJA set out the circumstances in which the High Court is seized of jurisdiction (*ie*, the authority to hear the dispute brought before it). Section 16 provides for the general circumstances (in general, where there is proper service of the writ or any other originating process or when the defendant has submitted to the jurisdiction of the High Court), while s 17 provides for six specific circumstances where the High Court is seized of jurisdiction. In contrast, s 18 of the SCJA sets out what the High Court is empowered to order to give effect to its determination. Section 18(1) provides that the High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore, while s 18(2) refers to the First Schedule of the SCJA, which lists out certain specific powers.

> Some examples of the powers provided for in the First Schedule of the SCJA include the power to give prerogative orders, to stay proceedings, and to order a medical examination of parties. *Plainly, the jurisdiction of a Court and the powers of a Court are two distinct and entirely different concepts.*
>
> [emphasis in original omitted, emphasis added in italics and bold italics]

Furthermore, as described by this court in *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80 at [39], jurisdiction is a precondition of the lawful exercise of a particular power.

43 In the present appeal, the true issue concerned the *power* exercised by the High Court (*ie*, the High Court's capacity to give effect to its determination in granting the orders or reliefs sought by the successful party to the dispute), and not its *jurisdiction* (*ie*, the authority, however derived, to hear and determine a dispute that is brought before it).

44 It cannot be denied that the High Court was clearly seised of jurisdiction pursuant to s 16(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") to hear the dispute in Suit 168. The respondents were validly served with a writ of summons in Suit 168 in Singapore in the manner prescribed by the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

45 Thus, it was strictly incorrect for the appellant to argue that the High Court had no *jurisdiction* to grant the Consent Order. Counsel for the appellant, Mr Christopher Daniel, rightly conceded this point at the appeal hearing, and clarified that his submission was that the High Court did not have the *power* to grant the Consent Order, and not that it did not have the requisite *jurisdiction*. Indeed, the real issue of contention between the parties was whether the

High Court had the *power* to grant the Consent Order, without first making a finding of minority oppression under s 216(1) of the Companies Act.

Dissenting judgment in Liew Kit Fah

46 To support his argument that without a finding of minority oppression under s 216(1) of the Companies Act, the court does not have the power to order a buyout of shares by a majority shareholder from the minority shareholder, the appellant relied on the dissenting opinion of Belinda Ang Saw Ean J in *Liew Kit Fah* ([4] *supra*) where she observed in *obiter dicta* that the parties could not have conferred on the court the power to order a share buy-out (at [119]–[121], [125], [134]–[135]):

> 119 I have, until this point, been content to deal with the appeal on the premise that I accept the appellants' submission that the Consent Order was the basis of the court's power to make the Buy-out Order. For my part, however, I have some doubts as to the correctness of such a position. *Specifically, it seems to me that there is some difficulty with the view that the parties could have conferred on the court the power to make a share buy-out order solely by their consent.* As I noted, the point was not squarely argued before us. Future courts may therefore wish to explore the issue in greater detail, and I therefore only put forth some provisional observations on the matter here.
>
> 120 … By a process of elimination, it would seem, *the appellants contend that the source of the court's power to make the Buy-out Order therefore must have been the Consent Order.* No other argument from principle is advanced in support.
>
> 121 The appellants' submission seems, however, to *run contrary to the well-established principle that parties cannot confer jurisdiction upon the court. …*
>
> …
>
> 125 The upshot therefore is that it is not a good answer simply to point at a consent order and say that its terms was the source of the court's power to make the order sought to be enforced. The court can only make an order that is within the jurisdiction of the court to begin with; *powers cannot be conferred by virtue of the parties' consent alone.*
>
> …

> 134 Having closely examined the reasoning adopted in the *Hoban* and the *Abhilash* cases in the manner above, I have serious difficulty with concluding that they stand for the proposition that the court may derive its power to make a buy-out order solely from the parties' consent. The most recent views expressed by this court in *Turf Club* … – that the order in *Hoban* was not even a consent order – places even greater strain on the implicit reasoning in *Hoban* (and which was, by this token, misunderstood in *Abhilash (HC)*) that the court's jurisdiction to order the buy-out came from the consent of the parties. As it was only an "ordinary order of court", the question is even more starkly presented – under what jurisdiction did the court make this order in each case?
>
> 135 To conclude, it appears to me that the position in Singapore is not conclusively settled. In some future case therefore, it would be open to this court, and indeed necessary for this court, to determine a sound juridical basis for the exercise of its powers in making a buy-out order where parties have compromised on the issue of minority oppression. The approach advocated by the appellants, namely, that a consent order can be the source of the court's power is, as I have explained, [lacking in] both authority and principle. …
>
> [emphasis added]

47 In our judgment, the appellant's argument was plainly incorrect. While we did not have to deal with this point in reaching our decision to dismiss the appeal, we nevertheless provide our observations on this issue in order to clarify the position.

48 We agree with Ang J's proposition that the parties cannot by consent confer on the court a jurisdiction which the court otherwise lacks. This is a principle that is well-established and largely uncontroversial. We accept that if the court is asked to make an order outside its jurisdiction, it can properly decline to do so: *Foskett on Compromise* (David Foskett gen ed) (Sweet & Maxwell, 8th Ed, 2015) at paras 9-11 and 10-02.

49 The English Court of Appeal decision in *Hinde v Hinde and another* [1953] 1 WLR 175 ("*Hinde*") illustrates this principle. The case concerned a

consent order that stipulated for the husband to pay the wife maintenance until her remarriage. When the husband passed away, the wife sought continuous payment of her maintenance from the husband's estate as she had remained unmarried. As no further maintenance was forthcoming, the wife brought an action against the husband's estate claiming continuing payments of maintenance. The estate resisted the claim on the ground that the order was to be construed as limited to the period of the parties' joint lives, and therefore it ceased on the death of the husband. The court held that the parties could not by consent confer on the court a jurisdiction which it did not possess, and inasmuch as the jurisdiction of the court in respect of a wife's maintenance was by ss 190(1) and (2) of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49) (UK) ("Supreme Court of Judicature (Consolidation) Act 1925"), limited to a period of the joint lives, if the order was to be enforceable as an order of the Divorce Court it could only be for their joint lives (at 175). Morris LJ observed that (at 183):

> It follows that the *only jurisdiction which the court had to order the husband to pay £300 per annum to the wife was limited to the period of the joint lives*. Though parties may agree on amounts or may make agreements as to payments, *they cannot by consent confer on the court a jurisdiction which it does not possess*. Thus, in *Re Aylmer, ex p Bischoffsheim* Lord Esher MR in the course of his judgment, referred to the "well known rule" that "the consent of parties cannot give the court a jurisdiction which it does not otherwise possess."

50 On the facts of *Hinde*, the consent order was granted pursuant to a power *conferred by statute ie*, the Supreme Court of Judicature (Consolidation) Act 1925. It is imperative to bear in mind that it was the statute which *defined* the court's powers such that the maintenance was only payable for the parties' joint lives and thus the consent order had to be construed as consistent with the statute to be enforced as an order of the Divorce Court.

51 In the House of Lords decision in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 ("*Essex*"), the parties attempted to confer jurisdiction upon the Lands Tribunal by agreement to determine a preliminary issue as to whether the provisions of Part IV of the Town and Country Planning Act 1959 (c 53) ("Town and Country Planning Act 1959") enabled a purchase price notice to be served in respect of land part of which, being a church, was exempt from rates, had no rateable value and whether the purchase price notice as valid. The House of Lords held that the *only statutory jurisdiction* of the Lands Tribunal under Town and Country Planning Act 1959 was to determine an objection properly made and therefore in deciding on the validity of the purchase price notice which was not the subject of such an objection, the Lands Tribunal had no jurisdiction to do so. It was thus in that context that Lord Reid observed at 820–821 that "it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction". Again, just like in *Hinde*, the jurisdiction of the Lands Tribunal in *Essex* was similarly defined by statute *ie*, the Town and Country Planning Act 1959.

52 Here, the situation was entirely different from *Hinde* or *Essex*. The Consent Order was granted by the court pursuant to its *inherent power* to fulfil its function as a court of law and not pursuant to any statute which defined the circumstances for the granting of a buy-out order. In the present case, the High Court was already *seised of jurisdiction* (as explained above at [44]) and the jurisdiction of the High Court was in no way conferred by the consent of the parties. Instead, both parties sought the High Court to exercise its *power* to grant a consent order incorporating the terms of the parties' settlement agreement and the source of this power was from its *inherent power* to fulfil its function as a court of law (see below at [57]).

53 More pertinently, we note that the proposition that the parties cannot by consent confer on the court a power which the court otherwise lacks can only gain traction in the present context *if* a share buy-out order can *only be made* via s 216(2)(*d*) of the Companies Act. When Ang J made this point in connection with the share buy-out order in *Liew Kit Fah* ([4] *supra*), her view was predicated on the assumption that a share buy-out could *only be made* under s 216(2)(*d*) of the Companies Act. We respectfully disagree with this premise. We can accept that in the event a court finds that minority oppression was not made out, it would lack the power to order a buy-out order under s 216(2)(*d*) of the Companies Act. In such a case, like *Hinde* and *Essex*, the court's power to grant a buy-out order as *defined under s 216(2) of the Companies Act* can only be granted upon a finding of minority oppression. However, that does not arise in the context of a consent order for one shareholder to buy out the other in a situation where the court is not required to make any finding of minority oppression or the lack thereof. In fact, the court is precisely requested by the parties *not* to make any finding in respect of minority oppression. In granting a consent order pursuant to a settlement between the parties, the court is clearly not purporting to grant any buy-out order under s 216(2)*(d)*. As the majority explained in *Liew Kit Fah*, when a share buy-out order is made by way of a consent order and *without a finding of minority oppression*, the court's power under s 216(2)(*d*) was *not engaged* and consequently *no buy-out order was made under s 216(2)(d)* (at [20]–[23]). Nevertheless, the consent order was upheld by both the majority and minority in *Liew Kit Fah*, although the majority and minority disagreed on the applicability of minority discounts (at [69] and [136]).

54 The whole purpose of a court granting a consent order pursuant to a settlement is to avoid the court having to make a finding of minority oppression

in the first place and to allow the parties to enforce the order in the event of non-compliance without having to institute a fresh action (see above at [34]). It would be counter intuitive to require the court to make a finding of minority oppression, when that is exactly what parties are seeking to avoid. In the absence of a settlement, the matter would then have to proceed to trial and if a case of minority oppression is made out, the court would then be empowered to make a buy-out order under s 216(2)(*d*) of the Companies Act.

The source of the court's power to grant a consent order

55 We now turn to examine the source of the court's power to grant a consent order, pursuant to the parties' settlement. We note that s 18(2) and the First Schedule of the SCJA, which sets out what the High Court is specifically empowered to order to give effect to its determination, does not expressly enumerate the court's power to grant consent orders. However, it is clear to us that the court must have the *inherent power* to grant consent orders, even where the consent order provides for one party to purchase the shares of the other, without a prior finding of minority oppression.

56 The courts have generally accepted that they possess the inherent power to fulfil their functions as courts of law: *Singapore Civil Procedure 2020* vol 1 (Chua Lee Meng gen ed) (Sweet & Maxwell, 10th Ed, 2020) at para 92/4/1. In the leading case of *Connelly v Director of Public Prosecutions* [1964] AC 1254, Lord Morris stated at 1301:

> … A court must enjoy such powers [which are inherent in its jurisdiction] in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process". …

Sir Jack Jacob, in his seminal article entitled "The Inherent Jurisdiction of the Court" (1970) Current Legal Problems 23 (described in *Wellmix Organics*

(International) Pte Ltd v Lau Yu Man [2006] 2 SLR(R) 117 at [83] as being "widely recognised as the leading discourse on the inherent powers of the court in the Commonwealth"), defined (at 51) the inherent jurisdiction of the court as:

> … being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

57 In endorsing this definition, this court in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 observed that the exercise of the inherent powers of the court, whether pursuant to O 92 r 4 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) (which is, in substance, identical to the O 92 r 4 of the ROC presently in force) or the common law, should not be circumscribed by rigid criteria or tests and that in each instance, the court must exercise it judiciously and the essential touchstone is one of "need" (at [27]). We observe that such a need for the court's inherent power to grant a consent order pursuant to the parties' settlement is clear and obvious. It is required in order for the court to fulfil its functions as a court of law and to do justice between the parties, when both parties apply to the court for a court order pursuant to terms of their settlement. As mentioned above, this allows the parties to enforce the order in the event of non-compliance without having to institute a fresh action.

58 We do not think there can be any dispute that it is common for courts to grant consent orders or judgments in order to give effect to the parties' settlement of disputes. Equally, there can be no doubt that the courts have the power to grant such consent orders pursuant to its inherent jurisdiction. The question raised by the minority decision in *Liew Kit Fah* ([4] *supra*) is that this general rule does not apply to a consent order for the buy-out of shares. With respect, we disagree. First, there can be no dispute that a settlement agreement

freely entered into for one shareholder to buy out the other is valid and binding. Second, there can be no denial that such a settlement agreement is capable of being strictly enforced in the event of a default. Third, there is no reason in principle why this conclusion should be any different if the same parties apply to court to record their settlement as a consent order for ease of enforcement. In our view, the court's inherent powers exist precisely "to do justice between the parties" and we cannot think of a more appropriate use of the court's inherent powers than to assist the parties to resolve their dispute amicably by granting the consent order at the express request of the parties.

59 Consistent with the existence of the inherent powers of the court to grant consent orders, O 42 r 1A(3) of the ROC provides that the court may record the consent judgment or order *without requiring the parties to appear before the court*:

> **Consent judgment or order (O. 42, r. 1A)**
>
> **1A.**—(1) In any cause or matter, the parties may inform the Registrar in writing that they wish to record a consent judgment or order without appearing before the Court.
>
> (2) For the purposes of paragraph (1), the parties must inform the Registrar of the terms of the consent judgment or order that they wish to record.
>
> (3) *The Court may record the consent judgment or order without requiring the parties to appear before the Court.*
>
> (4) Where the Court has recorded a consent judgment or order under paragraph (3), the Registrar must inform the parties of —
>
> (*a*) the recording of the consent judgment or order; and
>
> (*b*) the Judge or the Registrar who recorded the consent judgment or order.
>
> [emphasis added]

This must, *a fortiori*, mean that where parties do appear before the court, the court would similarly have the power to grant a consent judgment or order pursuant to the parties' settlement agreement. The granting of consent orders or judgments by a court remains an exercise of judicial power as the court is not obliged to grant consent orders at the behest of the parties. In *Singapore Court Practice* at para 42/1/6, it was opined that "[t]he court may refuse to record a consent order if it believes that there is no proper agreement between the parties or for some other reason which casts doubt on the legality of the arrangement", citing *Andy Tan Poh Weng v Jee Lee* [2013] SGHC 234 as an example.

60 For the above reasons, we held the view that the court had the inherent power to grant consent orders providing for one party to purchase the shares of the other, even without a prior finding of minority oppression. In such a case, as explained by the majority decision in *Liew Kit Fah*, the court's powers under s 216(2)(*d*) of the Companies Act are plainly not engaged in the first place. There would be no question of the court acting *ultra vires* in respect of s 216(2)(*d*) of the Companies Act in granting such consent orders.

Other arguments

61 We now turn to summarily deal with the remaining arguments put forth by the appellant, which, in our judgment, were plainly untenable.

62 The appellant submitted that the Consent Order ought to be set aside by virtue of a common mistake of law because (a) both parties mistakenly believed that the buyout of the shares was being made under s 216(2) of the Companies Act; and (b) that the High Court had the jurisdiction to do so. The appellant also submitted that prior to *Liew Kit Fah* ([4] *supra*), the cases suggested that no discount should be applied to the valuation of the minority's shares in a minority

oppression action. Following the issuance of the judgment in *Liew Kit Fah*, the appellant averred that there had been a common mistake in relation to the fundamental assumption when the Consent Order was entered into, thus rendering the performance of the Consent Order impossible.

63 A consent order can be set aside if there is fraud or other vitiating factors: *Ng Kiam Bee v Ng Bee Eng* [2013] 2 SLR 442 at [15]. The court's jurisdiction to interfere with consent judgments is, generally, a very limited one: *Chiang Shirley v Chiang Dong Pheng* [2017] 1 SLR 283 at [18]. In *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 at [18], this court held that "[a] consent judgment or consent order is binding and cannot be set aside save for exceptional reasons". These exceptional reasons included "grounds that would justify the setting aside of a contract" (*Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 at [27]) and "fraud" (*Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 at [11]). In *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017 at [17], the English Court of Appeal observed that "[a]s with any other contracts, compromises or consent orders may be vitiated by a common mistake of law".

64 However, we reject the appellant's submissions as there was simply no common mistake of law. There was no evidence that either party was of the mistaken belief that the share buy-out was made under s 216(2)(*d*) of the Companies Act. The appellant's intention to abandon his minority oppression claim was clearly evidenced by the *express* language of the Consent Order, where all parties agreed to abandon all allegations against each other in their pleadings. It is also unequivocal from the statutory language of s 216 of the Companies Act that the court may only order a buy-out of shares under s 216(2)(*d*) upon the court being satisfied that either s 216(1)(*a*) or s 216(1)(*b*) has been established. Without a finding of minority oppression, the court's

powers under s 216(2)(*d*) of the Companies Act could not have been invoked in the present case. It is self-evident that the court did not purport to grant the Consent Order under s 216(2)(*d*). As we explained earlier (at [32] above), in granting the Consent Order pursuant to a settlement agreement between the parties, the High Court's role was a limited one as it made no substantive determination of any issue in Suit 168.

65 Further, there was no common mistake as to the applicability of the lack of marketability discount. Had the parties truly held a contrary view on the applicability or non-applicability of the said discount, they would have expressly provided for it in the Consent Order. This alleged common mistake was thus an afterthought by the appellant and was his attempt to get out of a bad bargain after having sight of an unfavourable valuation report, despite having agreed to jointly appoint Nexia as an independent valuer. For the same reasons, we also rejected the appellant's submission that it would be inequitable to enforce the Consent Order.

66 Finally, we observed that SUM 5501, which was the appellant's application for an order against the application of the lack of marketability discount, had been adjourned by the Judge until the conclusion of the present proceedings to set aside the Consent Order. It appears to us that following our decision to dismiss this appeal, the Consent Order should be fully enforceable. However, as SUM 5501 was strictly not before us, it would not be in order for us to make any orders thereunder and it was for the appellant to decide whether he wished to withdraw the application. We invited the appellant to consider withdrawing SUM 5501 but if he wished to proceed with it notwithstanding our decision to dismiss the appeal, he may face adverse costs consequences, should the Judge decide to dismiss SUM 5501.

Conclusion

67 For all of the above reasons, we dismissed the appeal and awarded the 1st and 2nd respondents total costs of $35,000, which included disbursements and costs for the summons for the appellant's application for extension of time (CA/SUM 73/2020). The usual consequential orders applied.

Steven Chong Judge of Appeal	Chao Hick Tin Senior Judge	Woo Bih Li Judge

Christopher Anand s/o Daniel, Ganga d/o Avadiar and Yeo Yi Ling Eileen (Advocatus Law LLP) for the appellant;
Srinivasan s/o V Namasivayam and Janna Wong Qian Ern (Heng, Leong & Srinivasan LLC) for the respondents.