IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 18

Civil Appeal No 44 of 2018

Between

Kathryn Ma Wai Fong

… *Appellant*

And

(1) Trillion Investment Pte Ltd
(2) Datuk Wong Kie Yik
(3) Wong Kie Chie

… *Respondents*

Civil Appeal No 45 of 2018

Between

Kathryn Ma Wai Fong

… *Appellant*

And

(1) Double Ace Trading Company (Private) Limited
(2) Datuk Wong Kie Yik
(3) Patrick Wong Haw Yeong

… *Respondents*

GROUNDS OF DECISION

[Companies] — [Winding Up] — [Just and Equitable Grounds]

Ma Wai Fong Kathryn
v
Trillion Investment Pte Ltd and others and another appeal

[2019] SGCA 18

Court of Appeal — Civil Appeal No 44 of 2018 and Civil Appeal No 45 of 2018
Judith Prakash JA, Steven Chong JA and Quentin Loh J
29 January 2019

20 March 2019

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 These grounds of decision relate to three connected appeals and three connected companies belonging, in the main, to three brothers. The appellant herein is the widow of one of the brothers and the executrix of his estate. After her husband's death, the relationship between the appellant and her brothers-in-law broke down and she subsequently filed applications to have the three companies wound up on the "just and equitable ground". After hearing the parties, we allowed one appeal and dismissed another. No decision was made in the third appeal as the parties accepted at the hearing that the company concerned should be wound up as it had never conducted any business and it served no purpose to keep it going. Accordingly, a consent order to that effect

was made.

2 The two cases on which we reached a decision were Civil Appeal No 44 of 2018 ("CA 44") and Civil Appeal No 45 of 2018 ("CA 45"). They involved Trillion Investment Pte Ltd ("Trillion") (the subject of CA 44) and Double Ace Trading Company (Private) Limited ("Double Ace") (the subject of CA 45). The original winding up applications were made by Madam Kathryn Ma Wai Fong (the "Appellant") who also applied for the third company, Faxlink Trading Pte Ltd ("Faxlink"), to be wound up. The three applications were heard by the same Judge ("the Judge") who, as mentioned earlier, eventually dismissed all of them. After hearing the appeals against these decisions, we dismissed the appeal in respect of Trillion but allowed that in respect of Double Ace and ordered that the latter company be wound up as we considered it would be just and equitable to do so.

Background

3 The Appellant's late husband was Wong Kie Nie ("WKN"), a Malaysian businessman and one of the three sons of the late Datuk Wong Tuong Kwong ("Datuk Wong"). The other two sons are Wong Kie Yik ("WKY") who was the second respondent in both CA 44 and CA 45, and Wong Kie Chie ("WKC") who was the third respondent in CA 44.

4 WKN was a shareholder and director of Trillion, Double Ace and Faxlink (collectively "the Companies"). He ran all the Companies until March 2011 when he fell ill with cancer. WKN passed away on 11 March 2013.

The business empire

5 The Companies originally formed the Singapore section of the business

empire of Datuk Wong who was a highly successful Malaysian businessman. His empire covered a wide array of businesses including timber logging and harvesting, land development, trading, manufacturing, oil palm plantations, oil milling, the hotel business and travel services. WTK Realty Sdn Bhd was the flagship company of the group which comprised over 50 companies operating in jurisdictions like Australia, Liberia, the British Virgin Islands, Papua New Guinea and Singapore.

6 Datuk Wong managed all his companies, including Trillion and Double Ace, from their respective inceptions till about 1990 when he suffered a stroke. WKN then took over Datuk Wong's position and managed the business empire until he himself fell ill in 2011.

Trillion and Double Ace

7 Trillion was incorporated in Singapore in 1979 and was brought into Datuk Wong's group by WKY in 1982. The purpose of the acquisition was to operate Trillion as an investment holding company which invested in real estate. Around 1984, Trillion purchased the office unit known as 3 Shenton Way, #20-08, Shenton House, Singapore (the "Trillion unit"). The purchase price was approximately $1.139 million. Ever since acquiring it, Trillion has been renting the Trillion unit to Double Ace for $5,000 a month. From the accounts, however, it appeared that Double Ace had not paid the rent and the same was reflected in Trillion's accounts as a debt due.

8 As at 9 June 2017, Trillion had an issued share capital of $150,000 divided into 150,000 shares of $1 each. WKY, the Appellant (as executrix of WKN's estate) and WKC are recorded as the registered shareholders, each holding 50,000 shares in Trillion.

9 Double Ace was incorporated on 15 May 1972 by Datuk Wong and his brother-in-law, Mr Lau Hieng King, who were the initial subscribers in equal shares. Double Ace was set up for the purpose of trading in spare parts to supply other companies in the group. Subsequently, Double Ace also acted as an agent for some of these other companies and generated healthy revenues for the services it rendered.

10 As for Double Ace's shareholding, sometime after 24 April 1973 WKY became a shareholder and later WKN became a shareholder as well as a director. Presently, Double Ace has an issued share capital of $50,000 divided into 50,000 ordinary shares of $1 each. The Appellant (as executrix of WKN's estate) holds 19,500 shares, WKY holds 19,998 shares, WKY's son holds two shares while the remaining 10,500 shares belong to other members of Datuk Wong's family.

11 In the late 1970s, Double Ace purchased the office unit known as 3 Shenton Way, #20-07, Shenton House, Singapore (the "Double Ace unit") for approximately $71,000. Double Ace did not use these premises as its office but instead rented them out for approximately $2,500 per month. As mentioned, Double Ace is the tenant of the Trillion unit and uses the same as its office address. According to Ong Kim Siong ("Mr Ong"), a director of Double Ace, at about the time the proceedings commenced, its liability to Trillion for unpaid rental was in the vicinity of $890,169.44. As we understood the position, no rental had been paid by Double Ace thereafter and therefore the liability had increased.

12 Prior to the death of WKN, the Appellant was not a shareholder of Trillion or Double Ace and was never involved in the management of these two companies.

The dispute below

13 Since WKN's passing, the Appellant and the rest of Datuk Wong's family have been embroiled in litigation across multiple jurisdictions. According to WKY, as at 30 August 2017, a total of 69 legal proceedings had been filed by the parties in Malaysia, the British Virgin Islands and Singapore.

14 In August 2017, the Appellant filed the originating summonses HC/OS 163, 164 and 165 of 2017 to wind up Trillion, Double Ace and Faxlink respectively under s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act"). The Appellant gave three grounds for her contention that the Companies should be wound up under the section.

15 First, the Appellant alleged that the relationship of trust and confidence shared between WKN, WKY and WKC ("the Wong Brothers") in the running of the Companies extended to the members of their respective families. This relationship of trust and confidence had irretrievably broken down after WKN's passing as evidenced by the Appellant's exclusion from participation in the management of the Companies despite her request to be made a director of the Companies.

16 Second, the Appellant alleged that there had been mismanagement on the part of the directors and/or employees of the Companies. The Appellant contended that the directors and/or employees of the Companies were "obscuring their financial misappropriations". As such, the Appellant argued that a private liquidator should be appointed to investigate the Companies' affairs.

17 Finally, she alleged that there had been a loss of substratum of the Companies. In particular, the Companies had abandoned the businesses which

each was set up and/or acquired to do.

18 In reply, the Respondents (being WKY, WKC, WKY's son and the respective companies) denied all the allegations made by the Appellant in the three winding up applications. First, the Respondents argued that the relationship of mutual trust and confidence in the running of the Companies had only been amongst the Wong Brothers. When WKN passed away, this relationship ended. Second, there was no mismanagement of the Companies such that a winding up on just and equitable grounds was warranted. Finally, there was no loss of substratum in respect of any of the Companies save for Faxlink. In any event, the Respondents submitted that the Articles of Association (the "Articles") of Double Ace and Faxlink contained an exit mechanism which the Appellant should utilise before filing a winding up application. WKY and WKC also argued that the court should order that the Appellant's shares in the Companies be bought out instead of ordering the winding up the Companies.

The decision below

19 The Judge dismissed the appellant's application to wind up the Companies on the grounds given in *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and other matters* [2018] SGHC 88. The Judge's decision is summarised below.

20 First, on the Appellant's argument that there had been a breakdown of mutual trust and confidence between the Appellant and the other shareholders of the Companies, the Judge found that although the Companies were run on the basis of mutual trust and confidence amongst the Wong Brothers, this relationship did not extend to the Appellant as executrix of WKN's estate.

21 Secondly, on the Appellant's contention that there had been mismanagement of the Companies on the part of the Companies' directors and/or employees, the Judge found that there was no ground to suspect any lack of probity on the part of the directors of the Companies. The facts raised by the Appellant were mere suspicions.

22 Finally, as for the Appellant's contention that there had been a loss of substratum of the Companies, the Judge found that the Appellant did not have any standing to raise this argument. On the facts, the Judge found that it could not be said that the Appellant's participation in the Companies was predicated on the assumption that the Companies would be conducting any specific business. As for Faxlink, although it was a dormant company, as the Judge had already found that the Appellant had no basis to insist on participating in the management of the Companies, the demise of Faxlink should be left to the managers of Faxlink.

23 Accordingly, the Judge held that there was no injustice or unfairness which warranted the winding up of the Companies under s 254(1)(*i*) of the Act.

Issues that arose in these appeals

24 Section 254(1)(*i*) of the Act provides:

> **Circumstances in which company may be wound up by Court**
>
> **254.** – (1) The Court may order the winding up if –
>
> …
>
> (*i*) the Court is of the opinion that it is just and equitable that the company be wound up; …

25 We agreed with the Judge that unfairness forms the foundation of the Court's jurisdiction under s 254(1)(*i*) and that a company may not be wound up

"just because a minority shareholder feels aggrieved or wishes to exit at will" (see *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*") at [31]).

26 As the parties managed to reach a consent order in respect of CA 43, we did not need to consider the parties' submissions raised at this appeal. Therefore, in these grounds of decision, we will only give the reasons for our decisions in CA 44 and CA 45. In these two appeals, the following issues arose for our determination:

(a) whether the relationship of mutual trust and confidence between the Wong Brothers which formed the basis of the management of Trillion (in CA 44) and Double Ace (in CA 45) extended to the Appellant when WKN died;

(b) whether the Appellant had proved that there was a lack of probity in the management of Trillion and Double Ace by its directors and/or employees such that it would be just and equitable for the court to wind up these companies under s 254(1)(*i*) of the Act;

(c) whether the Appellant, as executrix of WKN's estate, was entitled to assert a loss of substratum in relation to Trillion and Double Ace as a ground to wind up those companies under s 254(1)(*i*) and whether there was in fact a loss of substratum of Trillion and/or Double Ace;

(d) if there were just and equitable grounds on which to wind up Trillion and Double Ace, the effect on the Appellant's case of the exit mechanism present in Double Ace's Articles; and

(e) whether it would be appropriate for the court to make an order under s 254(2A) of the Act for the Appellant's shares in Trillion and Double Ace to be bought out by the other shareholders of those companies.

27 We address each of these issues in turn.

Issue 1: whether the relationship of mutual trust and confidence between the Wong Brothers extended to the Appellant upon WKN's death

The law

28 It is well-established that the court can wind up a company where there is a breakdown in the relationship of mutual trust and confidence between the members of that company. The predicate to this is that there exists a relationship of mutual trust and confidence between the shareholders which formed the basis of the company's management. Whether there is such a relationship of mutual trust and confidence between the shareholders of the company is a question of fact.

29 If the court finds that there is a such a relationship of mutual trust and confidence between the shareholders and that that relationship formed the basis of managing the company, the court will term such a company a "quasi-partnership" (see *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 [85] – [90]).

30 When a "partner" in a quasi-partnership dies, the privileges and rights given to him by virtue of that relationship would end simultaneously. Rights under a quasi-partnership are generally not transmissible and would not

continue to bind the remaining quasi-partners vis-à-vis the deceased partner or his estate. However, where there is any express provision in a company's articles of association that enables the heirs of a deceased quasi-partner to enjoy the same rights and benefits as the deceased, the relationship of mutual trust and confidence will exist between the heirs and the other quasi-partners ([96] of *Ting Shwu Ping*).

31 The principles set out above are well established and we saw no reason to depart from them in this case.

Analysis

32 In that light, we agreed with the Judge that although there was a relationship of mutual trust and confidence amongst all the Wong Brothers in the management of Trillion and Double Ace (*ie,* Trillion and Double Ace were quasi-partnerships *vis-a-vis* the Wong Brothers), that relationship in so far as WKN was concerned ended with his death and did not transmit to the Appellant and WKN's estate. The Judge was correct to find on the facts that there was nothing in the Articles of Trillion and Double Ace which enabled the Appellant or WKN's estate to enjoy the same rights and benefits as WKN had nor was there any other documentary evidence of such an arrangement. This was further reinforced by the fact that neither the Appellant nor her children had ever been shareholders of Trillion and Double Ace and none of them had ever been involved in the management of these two companies.

33 The Appellant argued, both below and before us, that Trillion and Double Ace were family companies set up by the Wong Brothers and were part of Datuk Wong's business empire. As such, the court should find that the

relationship of mutual trust and confidence extended beyond just the Wong Brothers and to the members of their respective families.

34 We could not accept the Appellant's argument. It is not the law that when members of a family set up a company together, this automatically gives rise to a quasi-partnership or an entity akin to one and that a relationship of mutual trust and confidence is enjoyed by every member of the family in relation to the management of the company regardless of each person's involvement in the management or lack thereof. Any person asserting the existence of such a relationship must lead evidence to show that such was the intention and understanding of the founding members of the company. In this case, no evidence was adduced by the Appellant which showed that WKN and his brothers intended and understood that if any of them died, his heirs would enjoy the same rights and benefits as the deceased member had. Nor was there any evidence that it had been the intention of Datuk Wong that his sons' spouses and children should take their respective deceased husband's/father's place in the Companies in such a situation.

35 The Appellant relied upon a number of Malaysian court decisions where the court concerned ordered the winding-up of some of the Malaysian companies in Datuk Wong's group to show that there had been an irretrievable breakdown in the relationship between the Appellant and her children on the one side and WKY, WKC and their family members on the other. In particular, the Appellant relied upon the Malaysian courts' findings that the companies ordered to be wound up in Malaysia were "part and parcel of [Datuk Wong's] Family Company and/or part of the WTK Group of Companies" and that "there has been an irretrievable breakdown in the relationship between the respective shareholders/directors of the Respondent companies and that given the circumstances, it would be just and equitable to wind up the companies".

36 On this, we agreed with the Judge that the Malaysian courts' findings were irrelevant in this case. The findings of the Malaysian courts in relation to the Malaysian companies in those cases turned on their specific facts. Any contention made by the Appellant relating to Trillion and Double Ace had to be independently established and proved by the Appellant.

37 Therefore, we rejected the Appellant's arguments and agreed with the Judge that the relationship of mutual trust and confidence shared between the Wong Brothers in the management of Trillion and Double Ace did not transmit to the Appellant and WKN's estate upon WKN's demise. Thus, there was no basis for the Appellant to seek to wind up Trillion and Double Ace on this ground.

Issue 2: Whether there was a lack of probity in the management of Trillion and Double Ace

The law

38 It is well-established that the court can wind up a company under s 254(1)(*i*) of the Act where it is found that the company's business has been carried on in a fraudulent manner (*Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 at [18]). The shareholder who relies on this ground to wind up a company must prove a "lack of probity" in the directors' conduct and mere suspicion or assertion of impropriety will not pass muster (*Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 at [37]).

Analysis

Trillion

39 Starting with Trillion, the Appellant's main complaints in relation to the management of the company can be summarised briefly.

40 First, the directors of Trillion gave inconsistent explanations regarding Trillion's financial affairs. In particular, the directors gave inconsistent explanations as to the amount owed to WKY for the purchase of Trillion's property. It was unclear whether the sum was $942,065 or $624,283. The directors were also unclear about the amount owed to Trillion by Double Ace. In Trillion's financial statement dated 30 September 2016, it was recorded that the amount owing by a related party was $890,170 whereas in Double Ace's financial statement also dated 30 September 2016, it was recorded that Double Ace owed related parties $1,028,979.

41 Second, the directors of Trillion were unable to explain a letter dated 22 July 2015 ("July 2015 Letter") which was sent by Trillion's and Double Ace's lawyer to the Appellant stating that the directors of Trillion and Double Ace intended to strike off those companies from the Register of Companies. The Appellant argued that that conduct of the directors of Trillion and Double Ace was "compelling evidence [that] the directors and employees [of Trillion] are obscuring their financial misappropriations".

42 Third, the Appellant relied on the fact that one of Trillion's directors, Tiang Teng Hoong Richard ("Mr Tiang"), was under investigation by the Commercial Affairs Department ("CAD"). This, the Appellant argued, cast serious doubt on the veracity of Mr Tiang's statements regarding the company's finances.

43 Finally, the Appellant argued that she had been unfairly denied access to information relating to Trillion's business and affairs. Given the inconsistent information and explanations provided by Trillion's directors regarding Trillion's financial affairs, the Appellant contended that she should be made a director and be granted access to all the information of the company. The Appellant also argued that this was only proper given the fact that WKN was a director of the Trillion before his demise. As the executrix of WKN's estate, the Appellant had stepped into WKN's shoes and so should have the same access to the documents and information which WKN had when he was alive.

44 Upon analysis, we agreed with the Judge that the Appellant had not proven on the evidence that there was any lack of probity on the part of the other directors of Trillion in the management of Trillion's affairs.

45 First, as mentioned at [32] above, there was no mention in either Trillion's Articles or WKN's will that the Appellant as executrix of WKN's estate would be entitled to step into the shoes of WKN upon WKN's demise and thus assume a management position in Trillion. Thus, the Appellant's expectation to be made a director of Trillion and have access to all the documents and information relating to Trillion's affairs was ill-founded. As a shareholder of Trillion in her capacity as the executrix of WKN's estate, the Appellant was only entitled to the information that a shareholder was entitled to and, on this, it was not disputed that she had received all the information she needed as a shareholder.

46 Second, and flowing from the above, it was not open to the Appellant to complain about Trillion's liabilities – in particular, the amount owed by Trillion to a director for the purchase of the Trillion unit ($942,065) and the amount owed by Trillion to sundry creditors ($642,283). As far as Trillion was

concerned, these liabilities were historical in the sense that they had been in Trillion's financial statements since 2009 and had then been signed off by WKN himself in 2009 and 2010. There was no evidence before the court that WKN took issue with these debts when he was managing Trillion as he had done solely up to March 2011. Being only the executrix of WKN's estate with no role to play in the management of Trillion (see above at [45]), the Appellant could not take a position contrary to that adopted by WKN regarding these liabilities. Therefore, the existence of these liabilities did not point to any lack of probity on the part of WKY and/or the directors of Trillion.

47 Third, although the circumstances under which the July 2015 Letter was sent were not clear, we nonetheless agreed with the Judge that this letter alone did not evince any improper motives on the part of WKY or any of Trillion's or Double Ace's directors. We also noted that the Appellant did not seek to cross-examine WKY or any of the other directors of the Companies on the intention behind the July 2015 Letter. Therefore, although the Appellant found the July 2015 Letter to be suspicious, this was insufficient to show a lack of probity on the part of Trillion's and Double Ace's directors in the management of Trillion's and Double Ace's affairs.

48 Fourth, in relation to the Appellant's concern that the amount owing to Trillion as reflected in Trillion's financial statement dated 30 September 2016 was different from the amount Double Ace owed to other related parties as reflected in Double Ace's financial statement dated 30 September 2016, we considered that the Appellant's concerns were misplaced. In examining whether there has been a lack of probity on the part of Trillion's shareholders and directors, the court would only be concerned with Trillion's affairs and whether they were properly handled. On this, we note that the amount owing to Trillion by Double Ace for the rental of the Trillion unit had been in Trillion's financial

statements since 2009. It continued to increase year on year culminating in $890,170 in 2016. The Judge found, and we agreed, that this sum was due to the rental income payable by Double Ace which Trillion had not collected and which continued to accrue. Given that this was a situation that had started on WKN's watch and been permitted by him for years, we agreed with the Judge that it could not evidence a lack of probity on the part of the current management.

49 Finally, we did not place any weight on the Appellant's reliance on the fact that Mr Tiang was under investigation by the CAD. We noted that Mr Tiang was *not* being investigated for any impropriety in relation to Trillion or Double Ace.

50 In light of the foregoing, we rejected the Appellant's contention that there was a lack of probity on the part of the directors of Trillion.

Double Ace

51 For Double Ace, the Appellant relied on five matters. First, she said that the directors of Double Ace could not explain for certain to whom the amount of $1,028,979, reflected in its financial statement dated 30 September 2016, was owed. The various versions were first, that it was rental owed to Trillion in respect of the Trillion unit and second that the amount of $138,809.55 out of the $1,028,979 was actually owed by Double Ace to a related company called Rayley Co Ltd.

52 Second, the directors of Double Ace were unable to explain the increase in Double Ace's revenue from $8,032 to $127,340 as reflected in its 2016 financial statement bearing in mind their assertion that active trading had ended a few years earlier.

53 Third, the debts of Double Ace had been altered without explanation. In Double Ace's financial statement dated 30 September 2015, it was stated that there was no amount owing to the directors and that the amount owing to related parties was $1,095,907. However, in 2016, the amount owing to directors ballooned to $100,000 and the amount owing to related parties was $995,907. The Appellant argued that WKY had carved out $100,000 as allegedly being owed to him personally and that this was suspicious.

54 Fourth, Double Ace's financial statement stated that the company had trade receivables amounting to $1,510,153 which were "past due … but not impaired". This was inconsistent with Mr Tiang's affidavit which stated that he considered it unlikely that this debt would be recoverable. As she had in the case of Trillion, the Appellant relied on the fact that Mr Tiang was under investigation by the CAD. This, the Appellant argued, cast serious doubts on Mr Tiang's statements regarding the company's finances.

55 Finally, the Appellant argued that the directors of Double Ace were unable to explain the July 2015 Letter which, as stated earlier, indicated an intention on the part of Double Ace's directors to strike off that company from the Register of Companies. This showed a lack of probity on the part of the directors in the management of the company.

56 On examination, we concluded, like the Judge, that these concerns raised by the Appellant were insufficient to prove that there was a lack of probity on the part of the directors of Double Ace.

57 First, in relation to the July 2015 Letter and the fact that Mr Tiang is under investigation by CAD, we repeat [47] and [49] above.

58 Second, in relation to the amount of $1,028,979 owed by Double Ace to related parties, as well as the amounts owed to a director, we note that the Appellant did not seek to cross-examine the directors of Double Ace on this amount but instead relied only on the affidavit evidence. On this, we considered that there was insufficient evidence to show any impropriety in relation to this debt. Although it was unclear from the face of the financial statements how the debt of over $1m arose and why $100,000 was now owing to a director, these discrepancies alone were insufficient to establish a lack of probity.

59 Finally, we noted that the Appellant had sought to rely on what she understood happened during the annual general meetings at which she was represented by her proxies. On this, we agreed with the Judge that the matters relied on were hearsay as none of the Appellant's proxies had filed any affidavit on what transpired at the annual general meetings.

60 Therefore, we were in agreement with the Judge that there was insufficient evidence to show a lack of probity on the part of the directors of Double Ace.

Issue 3: whether Trillion and Double Ace had suffered a loss of substratum

61 The Judge noted that where a company had lost its substratum, the unfairness "arises not from the loss of substratum *per se*, but from the majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree". She cited Lord Hoffman's decision in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1101H. The Judge then went further and stated that a shareholder of a company may rely on the loss of substratum ground to wind up a company on just and equitable grounds "if he had joined the company on the understanding that it would continue pursuing

certain goals". For this proposition, the Judge cited *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2012) at paragraph 17.59.

62 On the foregoing basis and in the light of the facts before her, the Judge found that the Appellant's participation in the Companies by her acquisition of shares therein was not predicated on the assumption that the Companies would be conducting any specific business. This was because such acquisition of shares had taken place in the context of the Appellant's position as the executrix of WKN's will. In this capacity, her task was only to transfer WKN's shares in the Companies to the trust company specified in WKN's will. The Judge therefore found that the Appellant had no basis to expect the Companies to be run in a particular way and so could not raise a loss of substratum as a ground for winding up the Companies.

63 With respect, we could not accept that loss of substratum can only be relied upon by a non-founding shareholder if the shareholder has taken up shares on an assumption that the company will continue to run a particular business. The loss of substratum argument is much wider than that. A company's substratum is the main object which it was formed to achieve and when it is no longer able to carry on that object, *any* member may petition for a winding up order on the just and equitable ground (see *Re Goodwealth Trading Pte Ltd* [1990] 2 SLR(R) 691 at [25]). This is only fair because in situations where the main objective of the company can no longer be achieved through no fault on the part of the parties, the unfairness lies in holding the parties to the association despite the loss of substratum, and a winding up order under s 254(1)(*i*) is often justified (Hans Tjio, Pearlie Koh & Lee Pey Woon, *Corporate Law* (Academy Publishing, 2015) at paras 11.103 – 11.104 cited with approval in *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*") at [45]).

64 Another situation where the loss of substratum argument is available to an aggrieved shareholder is where the company is effectively dormant at the time of the application (contrary to what it was set up to do) and its finances are poor such that the company is no longer viable (*Ng Sing King and others v PSA International Pte Ltd and others* [2005] 2 SLR(R) 56 at [23] and [173]). In such a situation, it can be said that the company had stopped conducting the business it was set up to do and, given its poor financial state, there is no longer any reasonable prospect that the company will achieve its substratum.

65 In other words, the guiding principle to bear in mind when assessing whether to wind up a company on the basis that it has lost its substratum is to consider whether there is unfairness in keeping the aggrieved shareholder (whatever her reason for becoming a member of the company) locked into a company which is no longer carrying out and/or can no longer carry out the business it set out to do.

66 In that light, we examined whether either Trillion or Double Ace had lost its substratum as a matter of fact.

Analysis

Trillion

67 As mentioned at [7] above, Trillion was acquired to be an investment holding company. It carried out that precise objective in or about 1984 when it purchased the Trillion unit. From then on, its sole business had been to rent out the unit to Double Ace for $5,000 a month. This business model never changed. It can be assumed that WKN, while he was a director of Trillion, was in agreement with the other directors of Trillion that the Trillion unit should be Trillion's sole investment and income generator. Although Trillion did not

collect rent from Double Ace, the amount owing by Double Ace to Trillion was duly recorded in Trillion's financial statements and Double Ace continued to be held to be in debt to Trillion.

68 Furthermore, although we noted that there was a prospective (and hoped for) *en bloc* sale of Shenton House, the Trillion unit could continue to be rented out until the *en bloc* sale materialised. As such, we considered that it would be premature to conclude that *merely* because the only property Trillion invested in was the subject of a prospective *en bloc* sale that Trillion had lost its substratum. As long as Trillion continued to have ownership of the unit, it could continue to earn rental revenue, thus fulfilling its substratum which was to invest in real estate. Therefore, we agreed with the Judge that Trillion had not lost its substratum.

Double Ace

69 Double Ace, as mentioned at [9] above, was set up for the purpose of trading in spare parts used by Datuk Wong's businesses. Subsequently, Double Ace also acted as an agent for some of the companies in the group and it was paid agency fees for doing so. Sometime in the late 1970s, Double Ace acquired the Double Ace unit and earned income by renting it out (see above at [11]). Double Ace's business grew under both Datuk Wong's and WKN's management.

70 However, after WKN fell ill in 2011, no business was transacted through Double Ace according to Mr Ong, one of Double Ace's directors. This was further evidenced by the generally declining or stagnant revenue generated by Double Ace after 2012 which is shown in the table below:

Year	Revenue ($)	Operating Expenses ($)
2009	196,626	228,480
2010	435,695	223,222
2011	Not available	Not available
2012	265,596	222,753
2013	271,410	236,610
2014	16,000	245,448
2015	8,032	258,033
2016	127,340	245,481

71 As shown in the table, despite the reduction in revenue after 2011 and the alleged cessation of trading, the operating expenses of Double Ace continued to remain stable or even grow during the same period. As for the sudden increase in Double Ace's revenue in 2016, counsel for Double Ace suggested that it could be attributed to rental income received from the Double Ace unit. This, we agreed with the Judge, could not be correct because Mr Ong had also had given evidence that since August 2015, the unit had not been tenanted. Accordingly, it was unclear to us what the source of this revenue was.

72 Nonetheless, what was plain was that after WKN fell ill in 2011, Double Ace had been dormant as was admitted by Mr Ong and as shown by the decline in Double Ace's revenue. Apart from attempting to rent out the Double Ace unit (which was not an object for which Double Ace had been set up), the directors of Double Ace were content to leave the company in its dormant state and to hope to gain a windfall if an *en bloc* sale of Shenton House could be achieved.

73 We were satisfied, therefore, that Double Ace lost its substratum sometime after WKN fell ill. In the circumstances, we found that there was a basis on which to wind up Double Ace on the just and equitable ground under s 254(1)(*i*).

Issues 4 and 5: alternatives to winding up

74 The Respondents argued that in the event the court found that just and equitable grounds to wind up either Double Ace or Trillion had been established, the Appellant could have recourse to the exit mechanism provided by the respective Articles to exit the company. The availability of this mechanism would, they said, negate any unfairness found in the case.

75 The Respondents further argued that the court should order the Respondent to buyout the Appellant's shares in Trillion and Double Ace under s 254(2A) of the Act instead of winding up these companies.

The law

76 In *Perennial* at [67], we held that where there is an exit mechanism within a company's articles of association, any unfairness found to have satisfied s 254(1)(*i*) of the Act can be negated:

> Where there is an exit mechanism within the company's articles [of association], and the other shareholders are willing to purchase the disaffected shareholder's shares, that mechanism should be adopted (or else, unfairness is unlikely to be established), unless there are extenuating circumstances including situations where the articles in question are arbitrary, artificial and do not capture the legitimate expectations of the parties when it comes to share valuation. We certainly did not think it appropriate that shareholders be allowed to march into the court with a winding-up application because they held the view that it was *unfair* for them to be bound to apply a contractual mechanism that they had agreed to when drafting their company's constitution.

[emphasis in italics in original]

77 As for an equitable buyout under s 254(2A) of the Act, before the court can consider whether to grant this order, the test for ordering a winding up under s 254(1)(*i*) must first be established (*Ting Shwu Ping* at [33] to [46]). This test had been established in the case of Double Ace but not with respect to Trillion.

78 We considered, therefore, whether the Appellant ought to utilise the Double Ace exit mechanism to negate the unfairness of being locked into a company that had lost its substratum and if the exit mechanism was unable to negate the unfairness, whether we should order the remaining shareholders of Double Ace to buy over the Appellant's shares in Double Ace under s 254(2A).

Analysis

79 Although the evidence was insufficient to support a finding of lack of probity on the part of the directors, we agreed that some aspects of Double Ace's financial affairs were unclear as seen from the inconsistent explanations of Double Ace's financial statements by WKY, Mr Ong and Mr Tiang (see above at [51] to [60]) and the other questions arising in relation to the accounts which were pointed out by the Appellant and which we recounted at [51] to [54] above. Accordingly, we considered that it was unlikely that a fair and proper valuation of Double Ace could be done without a thorough investigation into Double Ace's financial records and activities.

80 A liquidator with the appropriate powers under the Act could achieve this and would be, indisputably, a neutral party.

81 Therefore, we found that it was indeed just and equitable to wind up Double Ace and that the exit mechanism provided by the Articles did not negate the unfairness that had been established.

Conclusion

For the foregoing reasons, we dismissed the appeal in CA 44 but allowed the appeal in CA 45. We therefore ordered that Double Ace be wound up under s 254(1)(*i*) of the Act. We further ordered that the parties were to endeavour to agree on a private liquidator to be appointed to wind up Double Ace. In the event that the parties were unable to agree on the private liquidator to be appointed, the court would appoint the liquidator.

Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

Rethnam Chandra Mohan, Chia Xin Ran Alina and Stella Ng Yu Xin (Rajah & Tann Singapore LLP) for the appellant in Civil Appeals Nos 44 and 45 of 2018;
The first respondent in Civil Appeals Nos 44 and 45 2018 not represented; and
Palmer Michael Anthony, Reuben Tan Wei Jer and Amanda Chen (Quahe Woo & Palmer LLC) for the second and third respondents in Civil Appeals Nos 44 and 45 of 2018.

`