**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 109**

Company Winding Up Application No. 170 of 2017

Between

Poh Leong Soon

… *Plaintiff*

And

SL Hair & Beauty Slimming Centre Pte Ltd

… *Defendant*

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# GROUNDS OF DECISION

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[Companies] — [Winding Up]

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# v
# SL Hair & Beauty Slimming Centre Pte Ltd

**[2018] SGHC 109**

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15 and 28 November 2017

27 April 2018

**Hoo Sheau Peng J:**

## Introduction

1 The plaintiff, Poh Leong Soon ("Mr Poh"), and Naron Lim Newkiat ("Ms Lim") are the only two directors of the defendant, SL Hair & Beauty Slimming Centre Pte Ltd ("the Defendant"). They are also the only two shareholders, each holding 50% of the Defendant's shares.

2 By this application, Mr Poh sought to wind up the Defendant ("the winding up application"). Mr Poh relied on the ground under s 254(1)(*f*) of the Companies Act (Cap. 50, 2006 Rev Ed) ("Companies Act"), alleging that Ms Lim, as a director, had acted in the affairs of the Defendant in her own interests, or in a manner unfair to Mr Poh. Alternatively, Mr Poh relied on the ground under s 254(1)(*i*) of the Companies Act, claiming that it was just and equitable that the Defendant be wound up.[1] In response, the Defendant filed HC/SUM

4277/2017, seeking an order to strike out the winding up application on the ground that it was an abuse of process ("the striking out application").

3 Having considered the arguments of the parties, and the facts and circumstances of the case, I dismissed the winding up application. As such, I did not make any order on the striking out application. Mr Poh has appealed against my decision. I now furnish my reasons.

## Background

### *The parties*

4 The Defendant was incorporated on 8 November 2013. Prior to that, Ms Lim ran a sole proprietorship by the name of SL Hair & Beauty Slimming Centre. She started the sole proprietorship on 29 June 1996, and it lasted for about 17 years.[2] Upon its incorporation, the Defendant took over the business of the sole proprietorship, which mainly involves the provision of beauty services and the selling of associated beauty products. From sometime in early 2010, Mr Poh began doing work for Ms Lim.[3] For some time, they were also in a romantic relationship.[4]

### *Roles within the company*

5 At its incorporation, Mr Poh became the company secretary of the Defendant. He was involved in the general management and administration of the business. Also, he handled the general record keeping of the company, such as preparing the company's financial statement and accounts. Ms Lim, on the

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[1] Affidavit of Andrew J Hanam dated 14 September 2017, at [2].

[2] Ms Lim's 1st Affidavit dated 15 September 2017 ("Ms Lim's 1st Affidavit") at [7].

[3] Mr Poh's 1st Affidavit dated 23 August 2017 ("Mr Poh's 1st Affidavit) at [3].

[4] Mr Poh's 1st Affidavit at [3].

other hand, continued to run the Defendant's day-to-day operations, such as managing the three to five staff, allocating their work and actually providing services to the customers herself.[5] There was some disagreement between the parties concerning how much Ms Lim knew about the financial affairs of the Defendant. I discuss this dispute in more detail at [38] below.

***Acquisition of shares***

6 Initially, the paid up capital of the Defendant was $30,000, which was wholly paid for by Ms Lim. Nonetheless, Mr Poh was allotted 40% of the shareholding (being 12,000 shares), with Ms Lim holding the remaining 60% (being 18,000 shares).[6] On 13 February 2014, Ms Lim injected a further $20,000 of capital into the company, and the total number of shares increased to 50,000. However, the allotment of shares remained 40% to Mr Poh (being 20,000 shares) and 60% to Ms Lim (being 30,000 shares).[7] Then, on 8 May 2015, there was a transfer of 5,000 shares from Ms Lim to Mr Poh, such that each held 25,000 shares in the Defendant. Mr Poh paid a consideration of only $1 to Ms Lim for the 5,000 shares.[8] Parties disagreed as to *how* and *why* Mr Poh came to own these shares, and I discuss the dispute over the acquisition of shares at [31]. In any event, as it stands, Mr Poh and Ms Lim are equal shareholders.

***Use of funds***

7 From sometime in May 2010, Mr Poh was paid a salary for his work with the sole proprietorship, and later for the Defendant.[9] In addition, from

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5 Ms Lim's 1st Affidavit at [8].

6 Ms Lim's 1st Affidavit at [37].

7 Ms Lim's 1st Affidavit at [37].

8 Ms Lim's 1st Affidavit at [9] and [19].

9 Mr Poh's 1st Affidavit at [3].

sometime in 2014, some of Mr Poh's personal expenses, especially in relation to his Housing and Development Board flat at Block 119A Rivervale Drive #09-310 ("the HDB flat"), were being paid by the Defendant.[10] Initially, in his lawyer's letter dated 21 August 2017, Mr Poh denied this, and claimed that he paid for such expenses.[11] However, after Ms Lim produced certain financial records in her first affidavit filed in the winding up application,[12] Mr Poh asserted that such expenses were approved by Ms Lim.[13] Ms Lim admitted that she knew about the Defendant paying for Mr Poh's personal expenses.[14] However, she claimed that she did not realise the burden these expenses imposed on the company's finances until around mid-June 2017, as she was not involved in the financial aspects of the business.[15] The use of the company's funds for Mr Poh's personal benefit formed another area of dispute between the parties, and this is set out in more detail from [33] below.

***Events leading to the proceedings***

8 Around mid-June 2017, Ms Lim claimed that she realised that the Defendant's bank accounts were almost depleted, and that the Defendant would run out of cash in one or two months.[16] This was puzzling to her, as there was no substantial decline in the business.[17] Every year, Mr Poh would be overseas

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10 Ms Lim's 1st Affidavit at [16].

11 Mr Poh's 1st Affidavit at Exhibit P-1

12 Ms Lim's 1st Affidavit at [11].

13 Poh Leong Soon's 2nd Affidavit dated 2 October 2017 ("Mr Poh's 2nd Affidavit") at [6].

14 Ms Lim's 1st Affidavit at [11].

15 Ms Lim's 1st Affidavit at [9] and [11].

16 Ms Lim's 1st Affidavit at [13] and [14].

17 Ms Lim's 1st Affidavit at [10].

for long periods of time.[18] As he was away at the time, Ms Lim decided to stop the payment of certain expenses which were for Mr Poh's personal benefit.[19]

9 Thereafter, Ms Lim obtained all the financial documents from the Defendant's corporate secretarial firm.[20] Upon going through the financial statements and management accounts, Ms Lim formed the view that the Defendant had paid for unnecessary and excessive expenses for Mr Poh.[21] Further, Ms Lim claimed that the Defendant had advanced several sums of money to Mr Poh.[22] Again, I shall set out more details of the dispute over the use of funds at [33] below.

10 Mr Poh returned to Singapore at the end of July 2017. Ms Lim handed him a letter from her lawyers, M/s Ignatius J & Associates, dated 23 June 2017.[23] Ms Lim had also packed all of Mr Poh's belongings, and asked him to leave the Defendant's business premises.[24]

11 On 1 August 2017, Mr Poh met with Ms Lim and her lawyer on a without prejudice basis.[25] At this without prejudice meeting, Mr Poh was informed that Ms Lim wanted Mr Poh removed as a director and for him to transfer all his shares in the Defendant to Ms Lim for no consideration. Mr Poh was also asked to repay the company a certain sum of money. Subsequently, Mr Poh realised

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18 Ms Lim's 1st Affidavit at [12].

19 Ms Lim's 1st Affidavit at [14].

20 Ms Lim's 1st Affidavit at [14].

21 Ms Lim's 1st Affidavit at [15].

22 Ms Lim's 1st Affidavit at [17].

23 Mr Poh's 1st Affidavit at Exhibit P-1.

24 Mr Poh's 1st Affidavit at [6].

25 Mr Poh's 1st Affidavit at [7]. See also Ms Lim's 1st Affidavit at [45].

that he had been removed as a signatory to one of the Defendant's bank accounts.[26]

12 In response, Mr Poh engaged M/s Andrew LLC to correspond with Ms Lim's lawyers. From 10 to 25 August 2017, two rounds of letters were exchanged between the lawyers. The contents of these letters are important, and I set them out here:

(a) In a letter dated 10 August 2017, Mr Poh's lawyer wrote, stating that "[d]ue to irreconcilable differences, [Mr Poh] proposes that [Ms Lim] purchase his shares in the [Defendant] for the sum of *$150,000* or at half the value of the [Defendant] with such valuation to be carried out by an accountant with such costs to be shared equally" [emphasis added]. More pertinently, Mr Poh's lawyer ended the letter by proposing that in the alternative, the Defendant could enter into a voluntary winding-up. Should the Defendant or Ms Lim not agree with any of the options, Mr Poh "*will have no choice but to apply to court for a winding up*" [emphasis added]. Mr Poh expected to hear from Ms Lim by 17 August 2017, which was a mere *seven* days away.[27]

(b) In her lawyer's letter dated 17 August 2017, Ms Lim disagreed with the proposal of the purchase of Mr Poh's shares for $150,000, highlighting that this sum was unreasonable because Mr Poh did not pay anything for his shares in the Defendant. Also, Mr Poh benefitted at the expense of the Defendant. Details of all of Mr Poh's personal expenses paid by the Defendant, and the advances which were given by the Defendant, were set out. Ms Lim then counter-proposed to Mr Poh to

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26 Mr Poh's 1st Affidavit at [7].

27 Mr Poh's 1st Affidavit at Exhibit P-1.

transfer all of his shares in the Defendant to Ms Lim for no consideration, and for him to repay a sum of $89,328 to the Defendant. This sum was the amount of a loan taken from DBS Bank for the HDB flat ("the DBS loan"), which the Defendant had allegedly helped to repay. This is described further at [33(a)] below. Ms Lim was prepared to waive all other claims for the monies used for Mr Poh's other personal expenses.[28]

(c) In a letter dated 21 August 2017, Mr Poh denied that the Defendant funded Mr Poh's personal expenses which were enumerated in the earlier letter. Mr Poh also explained that he earned his 50% share of the Defendant through his work and extensive contributions towards establishing the Defendant.[29] Mr Poh then gave Ms Lim an ultimatum stating that "unless [Ms Lim] agrees by 25 August 2017 to a valuation and to buy out [Mr Poh's] 50% share in the [Defendant], [Mr Poh will] commence legal action".[30] It was proposed that the valuation be carried out by an independent auditor, and Ms Lim was given *four* days to consider the matter.

(d) In a letter dated 25 August 2017, Ms Lim replied rejecting Mr Poh's share buy-out proposal and informed Mr Poh that the offer in the letter dated 17 August 2017 remained.[31]

13 On 28 August 2017, barely within one month of Ms Lim raising her concerns with Mr Poh, the winding up application was filed. On 15 September

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28 Mr Poh's 1st Affidavit at Exhibit P-1.

29 Mr Poh's 1st Affidavit at Exhibit P-1.

30 Mr Poh's 1st Affidavit at Exhibit P-1.

31 Ms Lim's 1st Affidavit at Tab 10.

2017, acting upon the direction of Ms Lim, the Defendant filed the striking out application. Thereafter, the matters were heard before me.

**The parties' cases**

14 As stated at [2], for the winding up application, Mr Poh relied on both the grounds in ss 254(1)(*f*) and (*i*) of the Companies Act. However, in his arguments, Mr Poh's counsel essentially relied on the latter ground – that it was just and equitable for the court to wind up the company.

15 Mr Poh's counsel submitted that at the heart of the "just and equitable jurisdiction" is "the notion of unfairness": *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*") at [31]. The company is like a quasi-partnership. Following the end of the romantic relationship in 2017, Ms Lim acted to shut Mr Poh out of the Defendant's affairs.[32] Given the actions taken by Ms Lim, there was a management deadlock, as well as a breakdown in the mutual trust and confidence between the parties. There was unfairness in the situation. Thus, the "just and equitable" jurisdiction should be invoked to wind up the company, and to allow the parties to part ways.[33]

16 Alternatively, should the court not be inclined to wind up the company, relying on s 254(2A) of the Companies Act, Mr Poh's counsel submitted that it was open to the court to order a purchase of Mr Poh's shares by Ms Lim, with the sum payable for the shares to be valued by an independent accountant.[34] At this juncture, I pause to observe that this relief was not included as a prayer in the winding up application.

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32 Plaintiff's written submissions at [23].

33 Plaintiff's written submissions at [23] to [26].

34 Plaintiff's written submissions at [27].

17 The Defendant opposed the winding up application. It was submitted that the winding up application was an abuse of process, and that in any event, the grounds within ss 254(1)(*f*) and (*i*) of the Companies Act were not made out.

18 It is well established that a winding up application can be struck out or dismissed on the basis "that it is an abuse of process if it is brought to harass the company or for a collateral purpose": *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 [47]. Mr Poh had brought the winding up application to harass the Defendant and Ms Lim into buying his shares at an unreasonable price of $150,000, despite him not paying for the shares, and to avoid answering for his misdeeds.[35] Further, the Defendant pointed out that the company is still a going concern, and the present dispute did not affect its business.[36] Mr Poh's motive for taking out this drastic measure should be questioned.

19 According to the Defendant, there was also no real evidence of a deadlock in its management. The dispute between the parties related only to the disposal and valuation of Mr Poh's shares.[37] After all, Ms Lim continued to run the business. In any event, even if there was any breakdown in the relationship between the Ms Lim and Mr Poh, it was induced by Mr Poh.[38] Ms Lim had merely put a stop to the unsustainable expenses being paid by the Defendant.[39] The romantic relationship broke down in 2013, and Ms Lim did not shut out Mr

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35 Defendant's written submissions at [10].

36 Defendant's written submissions at [10].

37 Defendant's written submissions at [52].

38 Defendant's written submissions at [64(c)].

39 Defendant's written submissions at [58].

Poh because of this reason. Instead, it was Mr Poh who became unhappy about Ms Lim's actions, and refused to negotiate with Ms Lim and the Defendant in good faith to resolve their differences. Instead, he chose to file this winding up application, so as to exit at will. Based on the facts and circumstances, the "just and equitable" ground was not made out. Similarly, the ground within s 254(1)(*f*) was not established.[40]

20 At the first hearing on 15 November 2017, I asked Mr Poh's counsel whether the Defendant's articles of association provided for an exit mechanism. In response to my query, Mr Poh's counsel replied that he had to check. It was the Defendant's counsel who pointed to articles 30 to 34 of the Defendant's articles of association ("the Articles"), which provided for such an exit mechanism. In light of this, I invited the parties to provide further submissions on the effect of the exit mechanism, and also pointed parties to the fact that on 13 November 2017, the Court of Appeal had upheld the High Court's decision in *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other matters* [2017] SGHC 84, which examined the issue of a buyout mechanism in the context of such an application.[41]

21 The parties filed further submissions on 20 November 2017. In the further written submissions for Mr Poh, it was submitted that by way of the letters exchanged with Ms Lim's lawyer, he had complied with the exit mechanism in substance, although not in form. The Defendant submitted otherwise, contending that the exit mechanism was not invoked by Mr Poh at all. This was a further reason, according to the Defendant's counsel, to dismiss the winding up application.

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40 Defendant's written submissions at [56].

41 Notes of Evidence of hearing dated 15 November 2017.

**Decision**

22 To summarise, I did not find that the grounds within s 254(1)*(f)* and (*i*) of the Companies Act had been established. Even if I were to be inclined to accept Mr Poh's case that there was a management deadlock, or a breakdown of mutual trust and confidence, it was largely brought about by his actions. It appeared that the Defendant and Ms Lim had potential claims against Mr Poh. Further, Mr Poh had not made any genuine efforts to negotiate with Ms Lim on a buy-out, or to invoke the exit mechanism so as to leave the company. Instead, he proceeded with the winding up application to exit at will. Based on all the facts and circumstances, I did not find that the "just and equitable" ground was made out, or that Ms Lim acted in her own interests, or in any manner unfair to Mr Poh. More importantly, I also formed the view that the winding up application was a complete abuse of process by Mr Poh. It was brought for improper motives and for collateral purposes. There was no reason for Mr Poh to rush to resort to this drastic and harsh measure to wind up a going concern, barely a month after the disputes were raised by Ms Lim. This led me to dismiss the winding up application.

***The applicable legal principles***

23 I now set out my analysis, beginning with the law. In this regard, I should add that on 26 February 2018, the Court of Appeal released its grounds of decision in *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] SGCA 11 ("*Perennial*") and I rely on *Perennial* as it encapsulates the applicable legal principles.

24 Concerning the "just and equitable" jurisdiction under s 254(1)(*i*) of the Companies Act, it is well established that the "notion of unfairness" is its foundation: *Perennial* at [40]. As observed in *Evenstar* at [31]:

> Unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the "just and equitable" jurisdiction … has been successfully invoked can be re-characterised as cases of unfairness …

25 While it is a wide jurisdiction, it is a jurisdiction that has to be exercised with caution, "particularly where the making of such an order would have the effect of releasing the applicant from any obligation to comply with the scheme of things provided under the memorandum and articles of association": *Perennial* at [40]. In fact, any unfairness lies in the inability to exit a company. Even in situations of impasse "where the shareholder is being marginalised or shut out from management, or where there is a loss of trust and confidence, it is the notion of being locked into such a situation that is unfair": *Perennial* at [51]. Therefore, the question is whether there is an option for the applicant to exit from its interests in the company at fair value. Indeed, the presence of a buyout mechanism in the company's constitution would be a vital consideration. An applicant who had not even attempted to invoke the buyout mechanism would be unlikely to establish the "unfairness" necessary to invoke the court's just and equitable jurisdiction to wind up a company: *Perennial* at [56], referring to *Ting Shwu Ping* at [75], [76] and [107]. That said, there could be situations in which unfairness would be established notwithstanding the presence of a buyout mechanism. This included the situation where there is "a defect in the valuation mechanism – *ie*, it was arbitrary or artificial": *Perennial* at [56].

26 With that, I go to the alternative ground within s 254(1)(*f*) of the Companies Act. As observed by the High Court in *Re HL Sensecurity Pte Ltd (formerly known as HL Integral Systems Pte Ltd* [2006] SGHC 135 at [28], it is a rarely used provision, and has two constituent parts. The first part applies when the directors are shown to have preferred their own interest to the interests

of one, or more or perhaps some significant section of the members of the company so that the action of the directors may be open to challenge. As for the second part, it relates to the directors acting in any other manner "which appears to be unfair or unjust to other members". It is said that the words "unfair and unjust" refers to the commercial morality or integrity which the law sets out to uphold or sustain, having regard to the circumstances of the case.

27 Moving on, it is also well established that a winding up application can be struck out or dismissed on the basis "that it is an abuse of process if it is brought to harass the company or for a collateral purpose": *Ting Shwu Ping* at [47], see also *Evenstar* at [39]. In this regard, "the investigation of whether there is an abuse is often inextricably tied up with an investigation of the grounds presented and whether the applicant has acted reasonably or has been impelled by improper motives": *Perennial* at [38] and *Ting Shwu Ping* at [77]. Therefore, especially when hearing an application based on the "just and equitable" ground, matters are often determined in the round.

28 For completeness, I should add that the test for ordering a winding up under ss 254(1)(*f*) and (*i*) of the Companies Act has to be met before the remedy under s 254(2A) might be granted for the court to order a buy-out of the applicant's shares: see *Ting Shwu Ping* at [40] and [46].

***Grounds for winding up***

29 Essentially, Mr Poh's case was that by Ms Lim's actions as set out at [8] to [11] above, she had effectively shut him out from the affairs of the company, which was formed as a quasi-partnership. There was a management deadlock, and a loss of mutual trust and confidence. As such, it was argued that the Defendant should be wound up. Mr Poh's counsel, however, did not consider the *reasons* leading to the situation to be material. Thus, on the dispute over the

use of funds, should the Defendant have any valid claims against Mr Poh, these can be dealt with by the liquidator. As for the dispute over the acquisition of shares, should Ms Lim have any valid claim against Mr Poh, again, it was open to Ms Lim to commence legal proceedings against him.

30 Even if I were to accept Mr Poh's case that he had been shut out from the affairs of the company, and that there was a loss of mutual trust and confidence, it was important to examine *all* the relevant factors, including the reasons for the problems between the parties, in order to ascertain whether objectively, there was unfairness to him arising from the situation at the time. With that, I turn to deal with the areas of dispute, starting with the dispute over the acquisition of shares.

31 According to Ms Lim, she expected Mr Poh to pay for his shares, and had asked him for payment.[42] Further, she did not agree to the transfer of her 5,000 shares to him for $1.[43] While there was a signed directors' resolution dated 8 May 2015 to that effect, she believed that her signature was procured when she was busy at the shop, and that the purport of the document was not properly explained to her.[44] Mr Poh's position was that the 20,000 shares were given to him as a gift, in view of his extensive contributions to reviving the sole proprietorship from early 2010 to 2013, and later towards the Defendant. He had never been asked to pay for any of the shares. He denied that he deceived Ms Lim into transferring the 5,000 shares to him for the consideration of $1, and instead alleged that it was Ms Lim's idea to do so. At that time, they were still in a romantic relationship.[45]

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42 Ms Lim's 1st Affidavit at [31] and Ms Lim's 2nd Affidavit dated 19 October 2017 ("Ms Lim's 2nd Affidavit") at [9].

43 Ms Lim's 1st Affidavit at [31] and Ms Lim's 2nd Affidavit at [10].

44 Ms Lim's 1st Affidavit at [40].

32 It was evident that there were disagreements between the parties as to Mr Poh's entitlement and liability for the shares. While it was not for me to determine the dispute, two uncontested points emerged. First, I noted that conceivably, Ms Lim had a potential claim against Mr Poh for payment for the shares. Second, it was obvious that Mr Poh did not pay for his shares, save for perhaps the $1 which Ms Lim could not recall receiving.[46] The shares are of substantial value, as the Defendant is a viable company. In fact, Mr Poh had valued his 25,000 shares at $150,000. These were relevant factors for my consideration.

33 Moving on to the dispute over the use of funds, I set out some details. From as early as 2014 when Mr Poh acquired the HDB flat, the Defendant had been paying for certain expenses of the HDB flat. These included the following:

> (a) the servicing of the monthly instalments of the DBS loan, amounting to $89,328.00 (including interest amounting to $9,328.00 and a processing fee of $500). The sum that was disbursed by DBS to the Defendant was $79,500.00, which the Defendant then paid directly to the Mr Poh by way of a cheque.[47] Ms Lim explained that Mr Poh had represented to her that he needed a home office to work out of. She agreed to the taking up of this loan because she hoped to use the HDB flat to store some of the inventories of the Defendant's business. However, to this date, the Defendant had not been allowed to use the HDB flat as an office space;

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45 Mr Poh's 2nd Affidavit dated 2 October 2017 ("Mr Poh's 2nd Affidavit") at [3] and [4].

46 Ms Lim's 1st Affidavit at [40].

47 Ms Lim's 1st Affidavit at Tab 4.

(b) the maintenance costs of the HDB flat which included the Town Council conservancy charges ($61.50 per month), Singtel internet bills ($101.84 per month), HDB parking fees ($107.80 per month).[48] In total, the Defendant had paid a total sum of $9,800.00 by GIRO for these expenses to the benefit of Mr Poh; and

(c) the Defendant's cheque records also exhibited a total payout of $38,869.00 to the Plaintiff to renovate the HDB flat[49].

34 In addition, the Defendant also paid for these other expenses for Mr Poh's benefit:

(a) the monthly hire purchase instalments for a motor vehicle registered under the Defendant's name which amounted to $86,157. Ms Lim contended that this vehicle was used exclusively by Mr Poh and was left unused every time he was out of Singapore[50];

(b) the maintenance of the motor vehicle which included $200 per month for diesel costs, $1,500 per year for motor vehicle insurance, $240 for Viacom inspection and road tax charges of about $426 per year. During the most recent service session, the Defendant had paid $1,038.06[51];

(c) Mr Poh's dental and medical fees which amounted to $1,450 and $4,305.90 for the year ending 31 December 2016[52]; and

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48 Ms Lim's 1st Affidavit at Tab 2.

49 Ms Lim's 1st Affidavit at [16(b)].

50 Ms Lim's 1st Affidavit at Tab 6.

51 Ms Lim's 1st Affidavit at Tab 6.

52 Ms Lim's 1st Affidavit at Tab 7.

(d) Mr Poh's travel expenses. As Mr Poh often travelled to the United States of America three times a year, Ms Lim said that she only agreed to allow the Defendant to fund one trip in the year ending 31 December 2016.[53]

35 Ms Lim also furnished evidence showing some advances made to Mr Poh, which I shall not detail here.[54] Further, Ms Lim highlighted an unexplained transaction which showed the Defendant owing both Ms Lim and Mr Poh a total sum of $200,000.[55] Ms Lim claimed not to have any knowledge of this and that on the evidence, no director's resolution was furnished to explain this transaction. In the financial statement of 2016, it was reflected that this debt was written off.

36 As for her knowledge of the Defendant's financial affairs, Ms Lim explained that while she knew about the Defendant paying for Mr Poh's expenses, his demands had become unreasonable, and imposed an unsustainable burden on the Defendant.[56] Until end June 2017, she did not get access to the financial statements and management accounts of the company. Therefore, she only took action in June 2017, and this had nothing to do with the ending of their personal relationship.

37 Mr Poh did not deny that his personal expenses were paid by the Defendant. However, he claimed that these were paid with Ms Lim's approval. Also, he claimed that Ms Lim was fully aware of the financial situation of the

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53 Ms Lim's 1st Affidavit at [16].

54 Ms Lim's 1st Affidavit at [17].

55 Ms Lim's 1st Affidavit at [20].

56 Ms Lim's 1st Affidavit at [11].

company, and would have known about the balance within its bank accounts.[57] He denied any advances made by the Defendant to him.[58]

38 Of the two versions concerning Ms Lim's knowledge of the financial affairs of the Defendant, I was more convinced by Ms Lim's position that prior to June 2017, she was not fully aware of the Defendant's financial state. In fact, this was consistent with Mr Poh's admission that he was in charge of the administration and management of the Defendant.[59] Meanwhile, it appeared that Ms Lim, who set up the sole proprietorship, was really far more involved in the daily operations of the business. Such was the division of labour between the parties.

39 Turning to the dispute over the use of funds, once again, it was not for me to determine the substantive merits of the various allegations. However, two material points emerged. First, the Defendant might have a potential claim against Mr Poh for some, if not all of the payments. Second, the Defendant paid *substantial* sums for Mr Poh's expenses. These payments were in addition to the salary paid by the Defendant to Mr Poh. In contrast, it did not appear that Ms Lim took such sums from the Defendant. These two factors were relevant for my consideration.

40 Assessed holistically, the factual matrix was that the Defendant took over the business of a sole proprietorship belonging to Ms Lim. Apart from $1, Mr Poh did not pay for his shares in the Defendant. Undoubtedly, Mr Poh contributed towards the sole proprietorship, as well as the Defendant which

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57 Mr Poh's 2nd Affidavit at [6].

58 Mr Poh's 2nd Affidavit at [8].

59 Mr Poh's 2nd Affidavit at [5].

might have accounted for the shares being allocated to him. However, at all times, he was paid a salary, and the shares are fairly valuable.

41 Then, from 2014, the Defendant paid substantial sums for Mr Poh's personal benefit, especially towards the HDB flat. Thus, by end June 2017, the Defendant was somewhat in a financial strain. Specifically, as at end June 2017, there was only a sum of $9,534.89 left in the Defendant's OCBC bank account, and a sum of $381.14 in its DBS bank account. This was in contrast to the total sum of about $41,000 at the end of 31 December 2016 in these accounts.[60] In my view, there was basis for Ms Lim to take the remedial steps to stop the payment for his expenses, as Mr Poh was away. Admittedly, Mr Poh might be aggrieved by the extent of Ms Lim's measures, which seemed to have shut him out from the Defendant's affairs. However, those additional measures could not be said to be detrimental to the Defendant, and the Defendant continued its operations.

42 Even if there was a deadlock in the management, and or a breakdown of mutual trust and confidence between the shareholders, it seemed to me that the situation was substantially caused by Mr Poh's actions. Arising from the disputes over Mr Poh's actions, Ms Lim and the Defendant may well have legitimate claims against him, which remain unresolved. Meanwhile, the company is still a going concern, and Ms Lim continued to run the company on a daily basis. Given these facts and circumstances, I did not see how it could be argued that Ms Lim, as a director, had acted in her own interests, or in a manner unfair to Mr Poh. As for the "just and equitable" ground, I also did not see how it could be said to be made out, or that it could be relied on by Mr Poh.

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60 Ms Lim's 1st Affidavit at Tab 3.

43 My view was fortified by the fact that I found that Mr Poh was not trapped in the impasse. By the correspondence exchanged between the lawyers, it seemed to me that parties understood that the valuation and the disposal of Mr Poh's shares stood in the way of them parting ways. Although Ms Lim appeared to be pressing for a transfer of his shares to her with no consideration, this was on the basis of resolving the claims she felt she had against him. Therefore, as Ms Lim's counsel put it, there were matters to be negotiated between the parties. However, Mr Poh did not address the disputes, and very quickly put to a close the negotiation process by lodging proceedings. I shall return to the exchange between the lawyers from [49] below. For now, I add that as the High Court observed in *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR (R) 46 ("*Summit*") at [27]–[35], where parties cannot reach an agreement as to the terms on which they are to sever their relationship, there is no basis to wind up the company under the "just and equitable" ground.

44 Further, Mr Poh had not *genuinely* sought to rely on the exit mechanism contained within the Articles. Again, any unfairness arising from the situation Mr Poh found himself in could also have been negated by the exit mechanism. At this point, I pause to reproduce the relevant articles of the Articles[61] which provided for the exit mechanism:

> 29. Shares may be freely transferred by a member or other person entitled to transfer to any existing member selected by the transferor …
>
> 30. Except where the transfer is made pursuant to *Article 34* hereof **the person proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called "the transfer notice") to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value**, and shall constitute the Company his agents for the sale of the share to any member of the Company or persons selected as

61 Ms Lim's 1st Affidavit at Tab 11.

> aforesaid, **at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles** …
>
> 31. **If the Company shall within three months after service of a sale notice find a member willing to purchase any share comprised therein (hereinafter described as a "purchasing member") and shall give notice thereof to the retiring member, the retiring member shall be bound upon the payment of the fair value to transfer the share to such purchasing member, who shall be bound to complete the purchase within seven days of the service of such last mentioned notice.** The Directors shall, with a view to find a purchasing member, offer any shares comprised in a sale notice to the persons then holding the remaining shares in the Company as nearly as may be in proportion to their holdings of shares in the Company, and shall limit a time within which such offer if not accepted will be deemed to be declined …
>
> 32. **In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party certify in writing the sum which in his opinion is the fair value**, and such sum shall be deemed to be the fair value, and in so certifying the auditor, shall be considered to be acting as an expert …
>
> …
>
> 34. **If the directors shall not, within the space of three months after service of a sale notice, find a purchasing member of all or any of the shares comprised therein** and give notice in manner aforesaid, or if through no default of the retiring member, the purchase of any shares in respect of which such last-mentioned notice shall be given shall not be completed within twenty-one days from the service of such notice **the retiring member shall, at any time within six months thereafter, be at liberty to sell and transfer the share comprised in his sale notice (or such of them as shall not have been sold to a purchasing member) to any person and at any price.**
>
> [Emphasis added in bold]

45 To summarise, the exit mechanism provided for notice to be given to the *Defendant* of Mr Poh's intention to transfer his shares, a timeframe of up to *three months* for the Defendant to find a member to buy the shares at a fair price, and that where a dispute arises in relation to the fair price, that the auditor shall

certify the fair price. Should no member be willing to buy Mr Poh's shares, he has six months to sell to any person at any price.

46 In the first place, Mr Poh was completely unaware of this exit mechanism.[62] This was conceded by Mr Poh's counsel at the hearing on 15 November 2017. Caught in the situation, Mr Poh's counsel submitted that based on the exchange of the lawyers' letters, Mr Poh had complied with the exit mechanism, in substance, if not in form. He argued that notice had been given to the Defendant, by way of the lawyer's letters dated 10 and 21 August 2017. Also, Mr Poh had suggested that a valuation be carried out by an accountant or an independent auditor, and that the share transfer price to be carried out based on this: see [12] above. It is pertinent to note that Mr Poh's counsel did not argue that the exit mechanism was defective.

47 I observed that the letters of 10 and 21 August 2017 were sent to Ms Lim's lawyers, and addressed to Ms Lim. These were not notices to the Defendant. In any event, on 10 August 2017, Mr Poh gave Ms Lim a mere seven days to reply to his proposal, and then in the 21 August 2017 letter, he gave her four more days to consider the matter. On the other hand, the exit mechanism provided that the Defendant is entitled to up to three months to act on such a notice of intention to sell. While Mr Poh's counsel argued that the timeframe of three months was unnecessary because Ms Lim was the only other member of the Defendant, and that notice to Ms Lim sufficed as notice to the Defendant, it remained the case that Ms Lim was deprived of having sufficient time to consider the matter, and that no formal notice was given to the Defendant, as a separate entity from Ms Lim. In fact, I reiterate my view that Mr Poh had hastily brought the negotiations process to a close. In my view, Mr Poh had not sought

[62] Defendant's further submissions at [20]. See also Minute Sheet of hearing on 15 November 2017, 2.30pm.

to go through the process provided for under the Articles, and I agreed with Ms Lim's counsel that this was a further basis to find that the "just and equitable" ground was simply not made out.

***Abuse of process***

48 More importantly, based on the above, and my further discussion below, I found that the winding up application was, in fact, brought with an ulterior motive or for collateral purposes, namely, to pressure Ms Lim to purchase Mr Poh's shares for $150,000, without having to provide any answers to the various allegations raised by Ms Lim.

49 In his first letter to Ms Lim on 10 August 2017 after the meeting on 1 August 2017, Mr Poh merely cited "irreconcilable differences" between the parties. He did not deal specifically with any of the disputes. Instead, he demanded that Ms Lim buy out his shares in the Defendant for a hefty sum of $150,000, agree to a voluntary winding up, or he would "*apply to court for a winding up*". In her lawyer's letter of 17 August 2017, Ms Lim set out all her specific concerns, itemising the expenses for Mr Poh's benefit. She made a proposal for him to leave the company, and to repay a sum of money for the DBS loan only. In the response of 21 August 2017, Mr Poh denied that the Defendant made the payments of his expenses (a position from which he retracted subsequently). Again, his demand for a buy out of his shares in the Defendant (with *four* days for Ms Lim to decide) was coupled with the threat to "*commence legal action*".

50 From Mr Poh's conduct, I found that Mr Poh was focused on pressuring Ms Poh to buy his shares for valuable consideration. Mr Poh was not interested in resolving the root causes of the dispute with Ms Lim at all. Barely a month after Ms Lim raised her concerns, on 28 August 2017, Mr Poh filed the winding

up application. In fact, I noted that Mr Poh's supporting affidavit for the winding up application was affirmed on 23 August 2017. This meant that even *before* receiving Ms Lim's reply on 25 August 2017 (which was the stipulated deadline for Ms Lim's reply), Mr Poh had already made preparations to file his winding up application.

51 After the winding up application was filed, and Ms Lim had filed her first affidavit on behalf of the Defendant providing evidence of all the excessive financial personal benefit Mr Poh enjoyed at the Defendant's expense, Mr Poh merely replied that such expenses had been approved by Ms Lim. He did not attempt to account for them and insisted on his wish to wind up the Defendant.

52 As Ms Lim's counsel pointed out, even if there were to be a share buyout, it was reasonable for Ms Lim to wish to understand Mr Poh's position on the expenses and advances so that these can be taken into consideration in deciding on a fair price to Mr Poh. Indeed, some time would be required to establish a fair price, if any. However, Mr Poh had no interest to discuss the disputes, or to negotiate in good faith. I noted that even at the hearing, Mr Poh's counsel submitted that should the Defendant or Ms Lim have any valid claims against Mr Poh, they should take out separate legal proceedings. Again, this reflected Mr Poh's unreasonableness in insisting on proceeding with the winding up proceedings, regardless of the underlying disputes or the impact on the company. It was also telling that in the winding up application, Mr Poh did not pray for the relief under s 254(2A) of the Companies Act for the court to order a buy-out of his shares. Instead, this was only brought up in the course of the submissions by Mr Poh's counsel.

53 Mr Poh's application to wind up the Defendant became more suspect when it was clear that the Defendant is a going concern, and appears to be a

viable business. As the High Court stated in *Summit* at [7], where a company is a going concern, there is no reason to believe that an aggrieved minority shareholder would want to wind up the company if his real relief can be satisfied in other ways. As such, the court should look at the motive for doing so. I found that the consideration applied with even more force where Mr Poh was a 50% shareholder.

54 To sum up, in filing the winding up application, I found that Mr Poh intended to exert pressure on Ms Lim to buy him out, at a price which would ignore any disputes between the parties. Mr Poh intended to profit from the winding up as an equal shareholder, without consideration of the effect on the Defendant. In this regard, I also refer to the discussion above on the grounds of winding up, and rely on them in finding that this has been a complete abuse of process by Mr Poh.

***Further letters by parties***

55 Two days after I had dismissed this application, Mr Poh's counsel wrote to me, arguing, *inter alia,* that the exit mechanism was defective. In his letter, he did not even refer to s 28B of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). He also included fresh evidence. Unsurprisingly, the Defendant objected to the letter, and disputed that the exit mechanism was defective. Given that Mr Poh's counsel had failed to properly apply for leave of court to hear further arguments, and did not seek leave to adduce further evidence, I did not consider the contents of the letters.

**Conclusion**

56 In conclusion, I found that there was no basis to wind up the company under the grounds within ss 254(1)(*f*) and (*i*) of the Companies Act, and that

there has been an abuse of the process of the court. As the grounds for winding up had not been established, there was no basis for me to order a buy-out of Mr Poh's shares under s 254(2A) of the Companies Act. I therefore dismissed the winding up application. I ordered costs of $10,000 (inclusive of disbursements) to be paid by Mr Poh to the Defendant.

Hoo Sheau Peng
Judge

Andrew John Hanam (Andrew LLC) for the plaintiff;
Ignatius Joseph, Wong Jun Weng Andrew and Chong Xin Yi
(Ignatius J & Associates) for the defendant;
Beverly Wee for the Official Receiver.