IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 11

Civil Appeal No 51 of 2017

Between

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

… *Appellants*

And

Capitol Investment Holdings
Pte Ltd

… *Respondent*

In the Matter of HC/Companies Winding Up
Originating Summons No 72 of 2016

In the matter of
Sections 254(1)(*i*) and 254(2A)
of the Companies Act (Cap 50)

and

In the matter of
Capitol Investment Holdings Pte Ltd

Between

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

… *Plaintiffs*

And

Capitol Investment Holdings

Pte Ltd

… Defendant

Civil Appeal No 52 of 2017

Between

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

… Appellants

And

Capitol Hotel Management Pte Ltd

… Respondent

In the Matter of HC/Companies Winding Up Originating Summons No 73 of 2016

In the matter of
Sections 254(1)(*i*) and 254(2A)
of the Companies Act (Cap 50)

and

In the matter of
Capitol Hotel Management Pte Ltd

Between

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

… Plaintiffs

And

Capitol Hotel Management

Pte Ltd

… Defendant

Civil Appeal No 53 of 2017

Between

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

… Appellants

And

Capitol Retail Management
Pte Ltd

… Respondent

In the Matter of HC/Companies Winding Up
Originating Summons No 74 of 2016

In the matter of
Sections 254(1)(*i*) and 254(2A)
of the Companies Act (Cap 50)

and

In the matter of
Capitol Retail Management Pte Ltd

Between

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

… Plaintiffs

And

Capitol Retail Management
Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Companies] — [Winding up]

[Insolvency law] — [Winding up] — [Grounds for petition]

Perennial (Capitol) Pte Ltd and another
v
Capitol Investment Holdings Pte Ltd and other appeals

[2018] SGCA 11

Court of Appeal — Civil Appeals Nos 51–53 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
13 November 2017

26 February 2018

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

Introduction

1 These appeals concerned winding-up applications commenced against three separate companies by two disaffected and related shareholders on the "just and equitable ground" which is a well utilised ground for attempting to liquidate a company where the shareholders of the company concerned stand in a quasi-partnership relationship to each other. In the alternative, the shareholders sought an order that they be bought out by the opposing shareholder in each of the companies. The applications were dismissed at first instance after a full hearing. The disaffected shareholders appealed, seeking to persuade us to take a different view from the judge. On the facts and the law we

were not able to do so and, accordingly, dismissed the appeals at the end of the hearing.

2 The appeals raised issues which were closely related to those which this court recently considered in *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*"). The novel question that arose in this case was whether the principles established in *Ting Shwu Ping* are applicable in the context of a deadlock between equal shareholders of a company sought to be wound up, particularly where neither party desires to sell its shares to the other. Driving the dispute, however, was a tussle over the control of the parcel of land at the corner of North Bridge Road and Stamford Road on which for decades the iconic Capitol Theatre stood.

3 We now give our full grounds for dismissing the appeals.

The background

4 The appellants before us, and the applicants below, were Perennial (Capitol) Pte Ltd ("Perennial") and New Capitol Pte Ltd ("New Capitol"). The appellants sought to wind up three companies, Capitol Investment Holdings Pte Ltd ("CIH"), Capitol Hotel Management Pte Ltd ("CHM") and Capitol Retail Management Pte Ltd ("CRM") (collectively, "the respondent companies") on the "just and equitable ground" under s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed). The appellants were two of the three shareholders in each of the respondent companies, the third being Chesham Properties Pte Ltd ("Chesham").

5 The facts underlying this dispute were covered in detail by the High Court Judge ("the Judge") who heard the applications in his grounds of decision: see *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other matters* [2017] SGHC 84 (at [3]–[18] ("the GD"). What follows is an account of the key facts.

The incorporation of the respondent companies

6 In April 2010, the Urban Redevelopment Authority ("URA") launched a tender for a lease of a parcel of land located at the junction of North Bridge Road and Stamford Road. This parcel included the land on which the Capitol Theatre stood. While it was run-down and neglected, some of its former glory and fame still clung to the building, and the tender gave developers in Singapore an opportunity to acquire and capitalise on a landmark site.

7 One such developer was Mr Kwee Liong Seen ("Mr Kwee"). He invited Mr Pua Seck Guan ("Mr Pua") and Mdm Sukmawati Widjaja ("Mdm Widjaja") to join him in collectively bidding for the lease. It was envisioned that the land would be developed into an integrated development project comprising a theatre, a hotel and a retail mall ("the Capitol Project") which would include the restoration and refurbishment of the Capitol Theatre and the other conserved buildings adjacent to it. Mr Pua and Mdm Widjaja responded with enthusiasm and the parties decided to incorporate special purpose vehicles to hold their respective interests in the joint venture. To that end, Mr Kwee incorporated Chesham on 14 May 2010, Mdm Widjaja incorporated Top Property Investment Pte Ltd ("Top Property") on 8 June 2010, and Mr Pua incorporated the first appellant, Perennial, on 16 August 2010, as a wholly owned subsidiary of

Perennial Singapore Investment Holdings Ltd, which is in turn a wholly owned subsidiary of Perennial Real Estate Holdings Ltd ("PRE Holdings"). Mr Pua is the Chief Executive Officer and one of the directors of PRE Holdings. Chesham, Top Property and Perennial are, hereafter, collectively referred to as "the Original Shareholders".

8 On 16 August 2010, the Original Shareholders incorporated nine companies ("the Nine Companies"), which included the three respondent companies, to hold various components and assets of the Capitol Project. The Original Shareholders each appointed one director to the board of directors of each of the Nine Companies. Perennial appointed Mr Pua while Chesham appointed Mr Kwee.

9 The articles of association of each of the respondent companies contains the following clause ("Art 22"):

> 22.(A) Every Member who desires to transfer any share or shares (hereinafter called "the vendor") shall give to the Company notice in writing of such desire (hereinafter called "the transfer notice"). Subject as hereinafter mentioned, a transfer notice shall constitute the Company the vendor's agent for the sale of the share or shares specified therein (hereinafter called "the said shares") in one or more lots at the discretion of the Directors to the Members other than the vendor at a price to be agreed upon by the vendor and the Directors or, in case of difference, at the price, which the Auditor of the Company for the time being shall, by writing under his hand, certify to be in his opinion the fair value thereof as between a willing seller and a willing buyer, and such sum shall be deemed to be the fair value, and in so certifying the Auditor shall be considered to be acting as an expert and not as an arbitrator and accordingly the Arbitration Act, Cap. 10 shall not apply. A transfer notice shall not be revocable except with the sanction of the Directors.

10 On 18 August 2010, two bids were submitted through the Nine Companies to the URA. On 27 October 2010, one of these proposals won the tender. The shares in the respondent companies were subsequently distributed between Perennial, Chesham and Top Property in the respective proportions of 40%, 30% and 30%.

11 It should be noted that under Conditions 52 and 57.1 of the URA Conditions of Tender, the URA had the right to re-enter and resume possession of the site and dispose of it as though the tender had never been submitted, without compensation to the lessee, if the lessee were to be placed in liquidation before the issuance of the certificate of statutory completion for the Capitol Project. As of the date of the filing of the applications, no certificate of statutory completion had been issued.

12 In March 2012, Top Property decided to leave the Capitol Project. Following a series of negotiations, Chesham purchased two-thirds of Top Property's shares. The remaining shares were purchased by New Capitol, another wholly owned subsidiary of Perennial Singapore Investment Holdings Pte Ltd. Thus, after Top Property's departure from the Capitol Project, the appellants collectively held 50% of the shares in each of the respondent companies, while Chesham held the other 50%.

Mounting disagreements amongst the shareholders

13 Shortly after winning the tender, the Original Shareholders met to discuss how they would take the Capitol Project forward. They agreed, *inter alia*, to execute a joint venture ("JV") agreement to order their relationships, interests and rights. Numerous drafts of a proposed JV agreement were

circulated amongst the Original Shareholders between November 2010 and March 2011, but in the event no agreement was ever signed.

14 In the meantime, in December 2010, the Original Shareholders had agreed on the following allocation of responsibilities in relation to the Capitol Project: Perennial would be in charge of developing the retail component, Chesham would be responsible for developing the hotel and theatre components, while Top Property would be responsible for developing the residential component. This allocation of responsibilities reflected the respective expertise of Mr Pua, Mr Kwee and Mdm Widjaja: Mr Pua had experience in retail management. Mr Kwee had experience in developing luxury hotels and Mdm Widjaja had experience in developing and marketing luxury residential projects. The Original Shareholders also agreed on the following:

(a) Perennial (Singapore) Retail Management Pte Ltd ("PSRM") would be engaged to develop and operate the retail components of the Capitol Project. This engagement was to be effected through management agreements called the Retail Property Management Agreements ("RPM Agreements"). PSRM was to execute RPM Agreements with CRM and CHM. The RPM Agreement between PSRM and CRM would cover the retail units to be located in a building to be newly constructed while the RPM Agreement between PSRM and CHM would cover the retail units to be located within the conservation buildings of the Capitol Project.

(b) Patina Hotels & Resorts Pte Ltd ("Patina") would be engaged to develop and operate the retail and hotel components of the Capitol

Project. This engagement was to be effected through a management agreement called the Hotel Management Agreement ("HM Agreement"). Patina was to execute the HM Agreement and a licence agreement with CHM for the purpose of managing and operating the hotel.

15 According to the appellants, there was an understanding that the RPM Agreements would be executed at around the same time as the HM Agreement. Chesham, however, denied that there was any such understanding.

16 The HM Agreement had to be signed with some urgency because it was thought desirable to market the residential units as having access to the concierge services and amenities of the hotel. The HM Agreement was executed on 29 April 2013. Subsequently, in September 2013, the appellants provided Chesham with several drafts of the two RPM Agreements. However, despite many discussions, the appellants and Chesham were unable to agree on the terms of the RPM Agreements and neither was signed.

17 Discussions regarding the terms of the JV agreement began again in May 2014, after Mr Pua informed Mr Kwee that the appellants intended to transfer their shares in the respondent companies to their parent company, PRE Holdings. Mr Kwee was concerned that this would result in a change in the appellants' management, and sought to formalise the terms of the shareholders' relationship in the JV agreement. Chesham sent a draft JV agreement to Mr Pua on 28 May 2014, and negotiations concerning its terms ensued.

18 Between July 2014 and August 2014, Chesham and the appellants also began to negotiate the timing of the execution of the JV agreement and the RPM Agreements. Chesham wanted the RPM Agreements to be executed contemporaneously with the JV agreement. The appellants, however, considered that the RPM Agreements were more urgent and, on 29 August 2014, they requested that the RPM Agreements be finalised before discussions on the JV agreement were resumed. The final outcome of these discussions is a matter in dispute. Chesham claimed that the understanding reached was that the RPM Agreements would be *finalised* before the JV agreement, but the RPM Agreements and the JV agreement would all be *signed* at the same time. Chesham termed this the "October 2014 Agreement". The appellants, however, denied that there was ever any such agreement for all three documents to be signed at the same time.

19 By 13 March 2015, one of the RPM Agreements was ready for execution. The parties continued to negotiate the terms of the other RPM Agreement and the JV agreement but were still unable to agree on the terms of the latter.

20 In April 2015, Mr Pua requested that the RPM Agreements be signed. Mr Kwee refused to sign the RPM Agreements until the JV agreement was finalised, citing the October 2014 Agreement. The appellants denied that there was such an agreement and took Chesham's delay in executing the RPM Agreements as a violation of the alleged prior understanding that the RPM Agreements would be executed at the same time as the HM Agreements (see [15] above). The impasse continued and nothing further was signed.

21 This disagreement became a source of great bitterness between the appellants and Chesham, and between Mr Pua and Mr Kwee. Numerous issues stemmed from the impasse. Since the RPM Agreements were never executed, PSRM remained unpaid for the retail leasing services which it provided in respect of the Capitol Project. Mr Pua refused to countersign payments for various expenses incurred by CHM and Patina relating to the opening of the hotel. Chesham claimed that as a result of this refusal, the hotel could not open despite having received its Temporary Occupation Permit on 13 October 2015. The discord between the appellants and Chesham severely stunted the Capitol Project and its economic potential (at [18] of the GD).

22 On 13 April 2016, the appellants filed winding-up applications in respect of the three respondent companies under s 254(1)(*i*) of the Companies Act. In the alternative, they also sought orders under s 254(2A), either for Chesham to buy out the appellants' interests in the respondent companies, or for the appellants to buy out Chesham's interests in the respondent companies.

Decision below

23 The Judge declined to wind up the respondent companies or to order a buy-out. In his view, such an outcome "followed from a straightforward application of the principles in *Ting Shwu Ping*" (at [86] of the GD).

24 As the Judge noted at [36] of the GD, this court in *Ting Shwu Ping* held that even if the winding-up application disclosed a *prima facie* case of unfairness, the court must still consider whether the unfairness would be negated by the presence of an option for the applicant to be bought out of the company at fair value (*Ting Shwu Ping* at [107(a)]). If there was a mechanism

for the applicant to be bought out in the articles of association or a shareholders' agreement, that mechanism should generally be adopted unless one of the following exceptions applied (at [38] of the GD, citing *Ting Shwu Ping* at [107(b)]:

> (a) the disaffected shareholder had a legitimate expectation that he was entitled to have his shares valued in some other way;
>
> (b) there was relevant bad faith or impropriety in the respondents' conduct which had affected the value of the shares; or
>
> (c) the articles provided an arbitrary or artificial method of valuation.

25 The Judge emphasised that in situations of deadlock between shareholders, the unfairness would arise not from the deadlock *per se*, but specifically from the *inability to exit* an untenable relationship (at [40]–[41] of the GD, citing *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") at [44]). The Judge thus considered it "axiomatic" that where there existed a mechanism for exiting from the deadlock, "the unfairness that undergirds the exercise of the court's jurisdiction and discretion under s 254(1)(*i*) to make a winding-up order might be said not to arise" (at [44] of the GD).

26 On the facts, the Judge found that the relationship between the Original Shareholders was "akin to a quasi-partnership built on the bedrock of mutual trust and confidence" (at [27] of the GD). He was also satisfied that there had been a breakdown of trust and confidence between the shareholders

precipitating a deadlock. If such a deadlock remained unresolved, it would have "precipitated an unfairness" in that the parties would have to remain tied to a dysfunctional relationship (at [31] of the GD). However, applying *Ting Shwu Ping*, the appellants could not be said to be locked into the Capitol Project or stuck in a dysfunctional relationship with Chesham. The buy-out mechanism in Art 22 allowed the appellants to exit at a fair value for their shares and "offered a panacea to their predicament" (at [45] of the GD).

27 The Judge also rejected the appellants' argument that *Ting Shwu Ping* only applied in situations where the applicant (for a winding-up order) desired to sell his shares and exit the company. He held that if the appellants did *not* desire to exit the respondent companies, then they could not apply for winding up under s 254(1)(*i*) at all. Since a winding-up application "must be premised on the applicant's desire to extricate itself from the unfairness it alleges by securing a winding-up order"; a winding-up applicant could not "call upon the court to extricate it from a deadlock while insisting at the same time that its preference to remain in the company renders an agreed exit provision inapplicable" (at [54] of the GD). If the appellants would have been content with a winding-up order, they ought to have been equally content to be bought out, and this was "exactly what they had agreed to in the shape of Article 22" (at [75] of the GD).

28 The Judge concluded that the appellants had actually applied for winding up in the hope that they could avail themselves of a buy-out order against Chesham under s 254(2A) of the Companies Act. Liquidation was not their "true objective". Rather, the appellants were seeking to "circumvent

Article 22 by compelling resolution of the impasse on their terms" (at [55] of the GD).

29 Finally, the Judge rejected the appellants' arguments that they were entitled not to invoke Art 22. The appellants had no "legitimate expectation" that their shares would be valued by a method different from that provided for in Art 22 (at [78]–[83] of the GD). There had also been no bad faith or impropriety on Chesham's part and even if such bad faith or impropriety had existed, it had not affected the value of the shares in the respondent companies (at [84] of the GD).

The parties' cases on appeal

30 The respondent companies did not appear in either the proceedings below or in the appeals because they were under the control of deadlocked shareholders and directors, and could not have taken any position in the matter. The party resisting the winding up was Chesham and this was in substance a dispute between the appellants and Chesham.

The appellants' case

31 The appellants argued that the Judge erred in dismissing the winding-up application on the basis of the principles in *Ting Shwu Ping*. While *Ting Shwu Ping* had held that the existence of an exit mechanism in the articles of association would generally preclude an applicant from seeking a winding up on the just and equitable ground, the appellants submitted that this rule should be confined to cases where it was plain and obvious that one particular party should leave the company. But in a situation of deadlocked equal shareholders

neither of whom wished to leave, it was not obvious who should leave. Further, the unfairness engendered by the deadlock would not be negated simply by an option to exit by selling one's shares, because that would be precisely what the applicant ***did not*** wish to do.

32 In this regard, the appellants argued that the present case was distinguishable from *Ting Shwu Ping*. In *Ting Shwu Ping*, the eponymous applicant, Mdm Ting, was effectively the owner of half the issued shares of two companies. She wished to sell all these shares and had no intention of participating in the management of the companies. The parties were agreed that Mdm Ting had to be bought out but had not been able to agree on the price or valuation method.

33 In contrast, the appellants contended, they and Chesham were deadlocked, equal shareholders, and it was not obvious who should leave the respondent companies. The mere fact that the appellants could try to sell their shares if they wished to exit did not negate the unfairness. Article 22 did not resolve the unfairness because (a) the appropriate solution to the unfairness in this case was not necessarily for the appellants to sell their shares, especially since they did not wish to; and (b) Art 22 was not a "deadlock breaking clause" which could resolve the deadlock between the shareholders. There was also no evidence to suggest that Art 22 was specifically intended to resolve any problems or deadlock between the shareholders of the respondent companies.

34 The appellants further argued that even if it were held that Art 22 provided a solution to the "unfairness" in this case, they had justifiable reasons for not resorting to Art 22. In particular, the appellants raised the concern that

if they had invoked Art 22, there was a risk that Chesham would buy just one share (out of each of the respondent companies' ten shares), which would "leave the appellants in a 40% minority position". In their written submissions, the appellants also raised other risks that might arise if they had invoked Art 22, including the risk that subjecting the shares to third party valuation would depreciate the value of their shares.

Chesham's case

35 Chesham argued that the Judge was correct to find that the existence of Art 22 precluded the appellants from seeking to wind up the respondent companies on the just and equitable ground, in line with the decision in *Ting Shwu Ping*.

36 In responding to the appellants' argument that *Ting Shwu Ping* was only applicable in cases where it was plain and obvious that a particular party should leave the company, Mr Davinder Singh, counsel for Chesham, contended that the appellant's position conflated the questions of jurisdiction and remedy. Mr Singh, submitted that the inquiry of who should exit the company would only arise *after* the court found that it had jurisdiction in the matter, and such jurisdiction would only exist where a deadlock had given rise to unfairness, which was the basis of the court's jurisdiction to wind up companies on the just and equitable ground. However, in situations of deadlock, "unfairness" was found only if parties were *unable to exit*, and not merely *unable to agree*. Where an exit mechanism existed in the articles of association, it could not be said that any party was unable to exit, and therefore no unfairness could arise. That being

so, the court did not need to consider "who is to stay and who is to go", because the appellants had not even crossed the jurisdiction hurdle.

37 Chesham also argued that the parties should be required to abide by Art 22 because it made provision in advance for what was to happen if there was a breakdown in relations, and negated any unfairness to the exiting shareholder because it entitled him to obtain fair value for his shares. Mr Singh emphasised that the appellants' *unwillingness* to sell their shares was irrelevant, because it was the *availability* of Art 22 that negated the unfairness.

Issues before the court

38 The central issue in these appeals was whether the appellants were entitled to rely on the just and equitable ground provided by s 254(1)(*i*) of the Companies Act notwithstanding the existence of Art 22 because the appellants and Chesham were equal shareholders in the respondent companies. During the hearing before us, this was the issue that the parties focused on. Ancillary issues such as the identification of the party who caused the deadlock and whether the court had the power to order a sealed bid process fell by the wayside. Chesham's argument that the winding-up applications were an abuse of process was also related to the first-mentioned issue. In this regard, we observed in *Ting Shwu Ping* (at [77]) that:

> … 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. Therefore, on the hearing of any application to wind up a company on the just and equitable ground, matters must be determined in the round. …

39 In other words, we did not think that the abuse of process argument could be separated in any case from whether the applicant there was entitled to obtain a winding-up remedy. In this context, it may be helpful if we set out the relevant principles relating to the just and equitable ground under s 254(2)(*i*) of the Companies Act.

Applicable legal principles

The just and equitable jurisdiction

40 The notion of unfairness is the foundation of the court's jurisdiction under s 254(1)(*i*) of the Companies Act. The words "just and equitable" are "words of the widest significance, and do not limit the jurisdiction of the Court to any case" (*Chow Kwok Chuen* at [14]). This broad phraseology, however, does not give the court *carte blanche* – 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 (*Chow Kwok Chuen* at [19]).

41 At [74] of *Ting Shwu Ping*, we endorsed the approach taken by the House of Lords to the just and equitable winding-up jurisdiction in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*") – *ie*, it is a jurisdiction permitting the court to superimpose equitable considerations on the exercise of legal rights. This comment was made with reference to the following oft-cited passage in *Ebrahimi* (at 379D–G):

> … It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between

> one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. *The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.*
>
> [emphasis added]

42 The first and second elements identified in the passage above were, indisputably, present in the facts of the appeals before us. The parties' relationship was a quasi-partnership built on trust and confidence (see [26] above). There was also an agreement that all of the shareholders would participate in the management and conduct of the business (see [14] above). The third element – restriction upon the transfer of the members' interest in the company – was directly relevant to the enquiry before this court. In *Ebrahimi*, one factor that the House of Lords took into consideration was the fact that the petitioner had *no ability to dispose of his interest without the consent of the other shareholder* who had removed him from his directorship and excluded him from the management of the business (at 380F–381E). The analysis of Lord Wilberforce in *Ebrahimi* lends itself better to cases involving loss of a

substratum of shared understanding and confidence. The present, however, is better characterised as a deadlock case (see [20]–[22] and [26] above).

Unfairness in situations of deadlock

43 The concept of deadlock has been discussed in a number of local cases. Almost invariably, reference has been made to the decision of the English Court of Appeal in *In re Yenidje Tobacco Company, Ltd* [1916] 2 Ch 426 ("*Yenidje Tobacco*"). In *Yenidje Tobacco*, two tobacco manufacturers formed a private limited company to amalgamate their businesses. They were the only shareholders and held the shares in the limited company equally. Differences arose and their relationship became so acrimonious that neither of them would speak to the other, communication having to be conveyed between them through the secretary. One of them even commenced an action against the other for fraud in connection with the agreement to amalgamate. In spite of that, the company continued to carry on its business and made large profits. In these circumstances, a petition was presented to wind up the company on the ground of a complete deadlock and that it was just and equitable to do so. The English Court of Appeal ordered the company to be wound up.

44 In *Chua Kien How v Goodwealth Trading Pte Ltd and another* [1992] 1 SLR(R) 870, the Court of Appeal held that the principle to be drawn from *Yenidje Tobacco* could be expressed as follows: "if the only two directors of a company cannot agree with each other, and neither can overrule the other, there is a deadlock, which, if it occurs in a partnership [or a quasi-partnership], justifies the court in winding up the partnership" (at[25]). In the subsequent decision of *Chow Kwok Chuen*, the Court of Appeal at [21] also referred to the

concept of deadlock, adding that "true or absolute deadlock" (in the sense of equal shareholding) would not be required so long as there was deadlock in a practical or general sense. Similarly, in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*"), the Court of Appeal recognised that "[c]ases involving management deadlock or loss of mutual trust and confidence … can be re-characterised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder" (at [31]).

45 A close examination of the cases reveals that the Judge was right in finding at [40]–[44] of the GD, that in situations of deadlock between the shareholders of a company, unfairness stems from the shareholders' ***inability to exit*** rather than the deadlock *per se*. As Professor Pearlie Koh explained in Hans Tjio, Pearlie Koh & Lee Pey Woon, *Corporate Law* (Academy Publishing, 2015) at paras 11.103–11.104:

> 11.103 The court [in *Evenstar*] gave as an example of a situation to which section 254(1)(*i*) but not section 216 applies, a situation involving deadlock between *equal* shareholders. Even in situations short of equality, a "practical" deadlock can occur where there has been a breakdown in the relationship between the shareholders such that they are quite incapable of working together for the common good of the company … A similar analysis may be applied to the loss of substratum cases, where the company's primary object can no longer be achieved. In such cases, independently of any fault on the part of the parties, a winding-up order is often justified.
>
> 11.104 In such "fault-neutral" cases, the "unfairness" justifying the court's intervention does not lie in oppression or wrongful conduct in the management of the company or the conduct of the company's affairs as required by section 216 of the Companies Act. ***Instead, any unfairness justifying a winding-up order lies in holding the parties to the association (if the order is not made) despite the deleterious state of the state of their relationship, or the loss of the substratum***. …

[original emphasis in italics; emphasis added in bold italics]

46 In *Evenstar*, the appellant was a minority shareholder in Evenstar Investments Pte Ltd ("Evenstar Investments") while his older brother, Mr Sim Yong Teng ("SYT"), held the rest of the issued share capital. SYT had assured the appellant that if the latter ever wanted to pull out of Evenstar Investments, SYT would buy him out. After relations soured between the brothers, SYT, having repeatedly refused to honour his promise, eventually offered an unreasonable price for the appellant's shares (*Evenstar* at [25]). The appellant applied to have Evenstar Investments wound up on the just and equitable ground. He claimed, *inter alia*, that the company had lost its substratum, and that it had become "impossible" for him to continue his partnership with his brother. The petition was dismissed.

47 On appeal, the appellant argued that Evenstar Investments should be wound up because, *inter alia*, the mutual trust and confidence that was necessary to carry the business as a partnership had broken down, and there was no practical alternative to a winding up that would allow him to take his stake out of Evenstar Investments at a fair price.

48 This court allowed the appeal and granted the winding-up order, although it chose to defer the winding up to allow the parties to reach a compromise. It should be noted that the court found that there had been *no breakdown of mutual trust and confidence* between the brothers. SYT had, however, breached his promise to let the appellant pull out of Evenstar Investments, which had resulted in the appellant being "trapped" in the company and placed at SYT's mercy. This ran contrary to the appellant's "legitimate expectation" that he would be bought out by SYT on reasonable

terms (*Evenstar* at [40]–[42]). SYT's breach of promise had *also* "put [] an end to the basis upon which the [brothers] entered into association with each other, making it unfair that one shareholder should *insist upon the continuance of the association*" [emphasis added] (*Evenstar* at [43], citing *O'Neill v Philips* [1999] 1 WLR 1092 at 1101).

49 Accordingly, in *Evenstar*, the "unfairness" which justified the court's exercise of its jurisdiction under s 254(1)(*i*) of the Companies Act arose from two points: First, that SYT had breached his promise to buy the appellant out and thereby unlawfully stymied the appellant's legitimate expectation; and secondly, that the *effect* of SYT's breach was to *trap* the appellant in the association with SYT (*Evenstar* at [42]). That unfairness can stem from the other shareholder being "trapped" or "locked in" is clear from the Court of Appeal's observation at [36]:

> … The most obvious example of this would be cases involving a deadlock between equal shareholders; whilst it may be difficult to attribute oppressive or unfairly discriminatory conduct on either party in such cases, the courts have, nevertheless, been ready to grant winding-up orders pursuant to their "just and equitable" jurisdiction": see *eg,* [*Yenidge Tobacco*] at 430. The inequity justifying a winding-up order in such situation does not lie in the oppressive or wrongful conduct of the other shareholder in the *management of the company or the conduct of its affairs*, but in the opposing shareholder's *insistence on locking the applicant shareholder in the company despite the stalemate they have reached concerning the conduct of the company's business.* [emphasis in original]

50 A similar idea was expressed in *Chow Kwok Chuen* which involved three brothers who were co-directors of three family companies set up by their late father. The youngest brother applied to wind up the companies on the basis that the directors had reached a stalemate on matters relating to the running of

the family companies. This court observed (at [31]) that "[i]n a situation like the present, *the unfairness comes in the sense that it would be unfair to insist that the siblings remain together* in the company instead of allowing them to go their separate ways" [emphasis added].

51 Thus, unfairness lies in the *inability to exit*, and not in the impasse between shareholders. For completeness, even in situations 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 (see, *eg*, *Re C & MB Holdings Ltd* [2017] 1 BCLC 269 at [60]; *Re Elgindata Ltd* [1991] BCLC 959 at 1005g). It therefore follows that in the usual case, having a *mechanism for exit* negates the unfairness required to justify winding up on the just and equitable ground. This brings us to *Ting Shwu Ping*.

Ting Shwu Ping

52 In *Ting Shwu Ping*, the issue was whether the buyout mechanism provided for in the company's articles meant that a 50% shareholder's application for winding-up on the just and equitable ground was an abuse of process. Applications were filed by Mdm Ting to wind up Autopack Pte Ltd ("Autopack") and Scanone Pte Ltd ("Scanone"). At the time of the applications, in effect the shares of both companies were held by Chan Key Siang ("Mr Chan") and Mdm Ting herself. The original shareholders had been Mr Chan, Mdm Ting's husband Mr Chng, and one Mr Yeo. In 1996, Mr Yeo's shares were acquired by Mr Chan and Mr Chng in equal proportions. This equal shareholding continued until Mr Chng's death in 2014.

53 At the time of Autopack's incorporation in September 1989, Mr Chan, Mr Chng and Mr Yeo entered into a Memorandum of Understanding ("MOU"). Clauses 9(b) and 10 of the MOU stipulated that if a partner decided to withdraw from Autopack, he could choose to sell all the shares that he and his spouse owned. The remaining two partners could thereafter decide to admit a new partner to take over the shares of the withdrawing partner, or, if they were unable to agree on the admission of a new partner, compel the withdrawing partner to offer his shares to the remaining partners. The articles of association of both Autopack and Scanone also stipulated that remaining members had a right of pre-emption if an existing shareholder wished to transfer his or her shares.

54 After Mr Chng died, Mdm Ting became the administratrix of his estate and interacted with Mr Chan on the basis that she would sell the shares to him. Mr Chan was willing to buy the shares but the parties could not arrive at a price. After several offers and counter-offers were made without agreement being reached, the amicable relationship between the parties became strained. Mr Chan removed Mdm Ting from her position as director of Autopack and Scanone. She thus ceased to play any part in the running of those companies. Not long thereafter, Mdm Ting applied to wind up Autopack and Scanone on the just and equitable ground. In the alternative, she wanted the court to order Mr Chan to buy her out. Mr Chan submitted that the applications were an abuse of process because Mdm Ting should not be allowed to circumvent the buy-out procedure in the articles by presenting winding-up applications.

55 In considering whether Mdm Ting's winding-up applications amounted to an abuse of process, this court discussed three decisions of Hoffmann J: *Re a Company (No 007623 of 1984)* [1986] BCLC 362, *Re a Company (No 004377*

of 1986) [1987] 1 WLR 102 and *Re a Company (No 006834 of 1988) ex parte Kremer* [1989] BCLC 365 ("*Re a Company (No 006834 of 1988)*"). Summing up what the cases stood for, the court concluded:

> 75 … Hoffmann J's approach is well established in England and has much to commend it. In the absence of any justifiable reason for not resorting to that mechanism, the existence of a shareholder exit mechanism in the company's articles can affect the exercise of the court's s 254(1)(*i*) (and s 216) jurisdiction in the following ways:
>
> > (a) it can negate any unfairness arising from shareholder disputes or exclusion – unfairness has to be assessed in light of the shareholder's ability to exit the "unfair situation" under the procedure provided for in the articles;
> >
> > (b) it may render the application an abuse of process because the existence of a viable alternative gives rise to the question whether the shareholder has a collateral purpose in bringing a winding-up petition for the same share buy-out remedy available; but
> >
> > (c) the court has a residual discretion to assess if the procedure laid down in the articles is itself unfair rendering it "just and equitable" to allow the shareholder to rely on the statutory exit mechanisms.
>
> 76 To sum up, while it cannot be said that the existence of a procedure for a share buy-out in a company's articles automatically, as a matter of law, bars winding-up applications, *it does have a significant impact on the court's analysis of whether "sufficient cause" has been demonstrated to justify a winding up* and on whether the application was in fact brought with a collateral purpose such as to amount to an abuse of process.
>
> …
>
> 107 Taking a step back, it is useful to reiterate the key points of Hoffmann J's reasoning in the three cases cited earlier:
>
> > …
> >
> > (c) If the company's articles provide a mechanism by which a shareholder may be bought out, and the other shareholders are willing to purchase the

> disaffected shareholder's shares under that mechanism, the mechanism in the articles should generally be adopted. This is unless (a) the disaffected shareholder has a legitimate expectation that he is entitled to have his shares valued in some way other than that provided in the articles; or (b) there is bad faith or plain impropriety in the respondents' conduct (*eg*, by conduct which has affected the value of the shares); or (c) the articles provide for some arbitrary or artificial method of valuation.
>
> (d) *If the applicant has not attempted to invoke the share buy-out mechanism in the company's articles and the auditors have not been asked to certify a fair price, unfairness is unlikely to be established on the facts.*
>
> (e) A provision that the auditors shall fix a "fair value" for the shares gives the auditors precisely the function the court would undertake in valuing the shares; it is hence generally a fair provision. In this regard, it is noted that the three cases cited involved a buy-out mechanism in the company's articles which was similar to that in the present case.
>
> (f) While it is true that it would be difficult to challenge an auditor's valuation, especially if the basis for arriving at the valuation is not disclosed, it must be remembered that (a) any wrongdoing on the auditor's part does not constitute unfair conduct on the part of the other shareholders; (b) the applicant is free to sue the auditors for negligence or set aside the valuation; (c) while the valuation has a rough and ready aspect to it, this is the trade-off for a far quicker and cheaper method for resolving disputes about share price; and (d) *the petitioner consented to this mechanism by buying into a company (or incorporating a company) with such a share buy-out mechanism in its articles and careful consideration must be given to whether the court is merely superimposing equitable considerations, or relieving the applicant from his bargain entirely.*
>
> [emphasis added]

56 To recapitulate, the position that this court set out in *Ting Shwu Ping* at [75[, [76] and [107] was that the presence of a buyout mechanism in the company's constitution would be a vital consideration when examining whether

it was just and equitable to order a winding up. In the usual case, an applicant who had not even attempted to invoke the share buy-out mechanism would be unlikely to establish the "unfairness" necessary to invoke the court's just and equitable jurisdiction to wind up a company. There were, however, atypical situations in which unfairness would be established notwithstanding the presence of the buy-out mechanism. These included situations where the disaffected shareholder legitimately did not expect to have his shares valued in the manner prescribed by the agreed mechanism, where the shareholders had conducted the company's affairs in bad faith or improperly, and where there was a defect in the valuation mechanism – *ie*, it was arbitrary or artificial (*Ting Shwu Ping* at [107(c)].

57 On the facts before it, this court found that the appropriate solution in *Ting Shwu Ping* was for Mdm Ting to be able to sell her shares at a fair price, and that a proper application of the buy-out mechanism in the companies' articles would resolve any unfairness that Mdm Ting complained of (at [108]).

58 Finally, in *Ting Shwu Ping*, this court also considered how the introduction of a buy-out remedy via the insertion of s 254(2A) into the Companies Act had affected the operation of s 254(1)(*i*). It was observed that s 254(2A) simply gave the court remedial flexibility in the form of an option of granting a buyout order when, in all of the circumstances, it would be more equitable to allow a buyout (at [79]) than to wind up the company concerned. Section 254(2A) did not change the grounds for invoking s 254(1)(*i*) of the Companies Act. Before it could order a buy-out remedy under s 254(2A), the court would still have to form the view that the requirements for winding up had been satisfied (at [46]).

Application to the facts

59 It was abundantly clear – and this was an observation made by the Judge too at [86] of his decision – that applying the principles in *Ting Shwu Ping* led to the conclusion that the just and equitable ground under s 254(1)(*i*) had not been made out on the present facts. That the shareholders of the respondent companies were mired in a deadlock was not disputed by Chesham. However, given that Art 22 allowed a shareholder to "exit" the respective companies, there was no situation of "lock-in" on which a finding of unfairness could be made.

60 Counsel for the appellants, Mr Thio Shen Yi, accepted the legal principles enunciated in *Ting Shwu Ping*. His submission was that those principles were not relevant to the facts of the present appeals. As referred to above at [32]–[33], the appellants' contention was that unlike in *Ting Shwu Ping* where the applicant desired to sell her shares and had no intention of participating in the management of the companies, the present case concerned a deadlock between equal shareholders neither of whom wished to leave and where it was not obvious who should go. Therefore, the unfairness could not be negated through the operation of the exit mechanism.

61 The appellants relied on four authorities to make this point: *Apcar v Aftab* [2003] BCC 510, *Asia Pacific Limited v ARC Capital LLC and Haida Investments Limited* [2015] (1) CILR 299 ("*Asia Pacific Limited*"), *Harborne Road Nominees Ltd v Karvaski and another* [2012] 2 BCLC 420 ("*Harborne Road Nominees Ltd*") and *Re a Company (No 003096 of 1987)* (1988) 4 BCC 80.

62 The first three cases essentially make the same point: that where there are equal shareholders, one of them should not be forced to accept an offer to be bought out or be stuck in an arrangement where the quasi-partnership had broken down. In *Harborne Road Nominees Ltd*, David Cooke J held at [27] that:

> … Ultimately, in a breakdown of relations between a majority and a minority shareholder the solution is likely to be that the minority shareholder must exit the company, or be offered the opportunity to do so on fair terms. In the case of equal shareholders however, particularly, if they are quasi-partners, there is a clear potential for injustice if one of them is able to seize de facto control of the company and effectively force the other either to accept his offer to buy or be forever excluded from the participation that he bargained for and cut out from any remedy in respect of what would be a continuing breach of the quasi-partnership arrangement originally made. Lord Hoffmann's remarks were not intended to have the effect of establishing a mechanism for seizure and exclusion.

In *Asia Pacific Limited*, John Chadwick P of the Cayman Islands Court of Appeal took the following view at [45]:

> … It seems to me impossible to say that a shareholder is necessarily acting unreasonably if he refuses an offer for the purchase of his 50% interest. Why should he not take the view that an equitable solution to the breakdown in the relationship of trust and confidence upon which the quasi-partnership was established would be for him to have the opportunity to purchase the other party's 50% share, or for the company to be sold to a third party, or for the company to be wound up? …

63 *Re a Company (No 003096 of 1987)* was also concerned with a petition by a shareholder with a 50% shareholding to wind up a company on just and equitable grounds. Mr Thio relied on the portion of the decision where Peter Gibson J held that the crucial question to be asked is which side should go, and whether it is "plain and obvious" that the petitioners should go (at 93). Mr Thio did not elaborate on Gibson J's decision but on a close reading of *Re a*

Company (No 003096 of 1987), it does not support the appellants' position. The details of that case were summarised by the Judge at [62]–[69] of the GD. In gist, the two petitioners, Mr and Mrs C, had fallen out with their fellow shareholders, Mr and Mrs S. Mr S had excluded Mr C from management by removing him as a director. Mr and Mrs C applied to wind up the company on the just and equitable ground, but subsequently sought to amend their petition to include a claim for relief pursuant to s 459 of the UK Companies Act 1985 (c 6) (which is equivalent to s 216 of our Companies Act). That provision required the petitioning shareholders to establish that there had been "unfairly prejudicial" conduct in the running of the company. Mr and Mrs S applied to strike out the winding-up petition.

64 Gibson J found that the winding-up petition should be struck out (at 86) because there was no quasi-partnership relationship between the parties, Mr C was not entitled to participate in the management and the articles must be taken to govern what was to happen if there were fundamental disagreements between the shareholders. He then, however, proceeded to consider whether the petition could be saved by amendments which would allow the petitioners to rely on s 459 of the UK Companies Act 1985 which dealt with remedies for oppression. He surveyed several authorities that indicated that exclusion of a shareholder from management did not amount to unfairly prejudicial conduct if it was obvious or reasonable that the excluded shareholder should exit the company. The question was thus whether, on an application of those authorities, it was obvious that Mr and Mrs C should exit the company. If so, then their claim for relief under s 459 was unsustainable and would be struck out. It was in *this* context that Gibson J stated that the crucial question was whether it was plain and obvious that the petitioners should exit the company. He concluded that it

was indeed clear that Mr and Mrs C should leave, adding that a fair offer had been made to them to acquire their shares and they had unreasonably refused that offer (at 93–94). Accordingly, their petition was struck out.

65 We agreed with the Judge's conclusion at [69] of the GD that *Re a Company (No 003096 of 1987)* suggests that an unhappy shareholder cannot complain of unfairly prejudicial conduct on the basis of his exclusion from management, if it is obvious that he should exit the company. The case also supports the proposition that unfairness is not made out where a fair offer has been made to the unhappy shareholder to acquire his shares. It does *not* support the proposition that it is only where it is "plain and obvious" that a shareholder should exit the company that he may be required to invoke an exit mechanism in the articles before seeking a just and equitable winding up. With respect, Mr Thio's reliance on *Re a Company (No 003096 of 1987)* for that proposition was misplaced.

66 Leaving that aside, the appellants' argument was flawed in numerous respects. We make six points. First, the appellants' primary case was that it was not clear who should leave in an equal shareholding situation. This obviously meant that the "unfairness" that the appellants complained of was not the notion of unfairness that forms the basis of this court's just and equitable jurisdiction in a deadlock situation – *ie*, being locked in with no means of exit (see [45] above). The appellants could clearly have extricated themselves from the deadlock that the Capitol Project was plagued with. In fact, the appellants were not even complaining about the deadlock *per se*. Instead, it appeared that the unfairness that the appellants complained of was that they could only choose between leaving the Capitol Project or remaining in the unhealthy situation of

the shareholders being at an impasse, and that the effect of *Ting Shwu Ping* on a dilemma like theirs would be to freeze the shareholders in a staring match – the loser who blinked first would have to exit by relying on Art 22. The weakness in this submission was that if the appellants were willing to wind up the companies (bearing in mind that an order to buy out the other shareholders is a discretionary remedy that is not guaranteed in every circumstance), they were evincing a willingness to relinquish their respective shareholdings in the same and, logically, they should have been equally agreeable to an Art 22 exit as well. Indeed, this was a point that factored in the Judge's consideration (at [53]–[54] of the GD) and, as the Judge put it: the appellants would then not be seeking to extricate themselves but instead to remove the other shareholder from the respondent companies. This was not what the court's just and equitable jurisdiction was for.

67 Second, as Mr Thio correctly accepted, there was no discussion about a pre-emption clause like Art 22 in *Apcar v Aftab*, *Asia Pacific Limited* and *Harborne Road Nominees Ltd*. In our view, this was a crucial distinguishing factor. It eliminated the specific notion of unfairness we identified – *ie*, the inability to extricate oneself from a deadlock situation (see [45] above). We also considered the parties' unwillingness to rely on Art 22 to be immaterial. Where there is an exit mechanism within the articles, this mechanism essentially captures the terms on which the shareholders envision that a shareholder exit will take place. As we stressed in *Ting Shwu Ping* at [107(c)–(d)], where there is a mechanism in the company's articles, 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 or 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.

68 On a related note, the appellants also contended that Art 22 was not intended to be a deadlock resolution mechanism. This contention was based on two factors. First, the articles of association were not drafted with a view to catering for an equal shareholding situation as Top Property was still part of the Capitol Project when the articles were drafted. Second, the draft JV agreements exchanged between the parties contained separate provisions to deal with a potential deadlock, in addition to a pre-emption provision; this would not have been necessary if they had considered that a pre-emption provision alone would address this situation. We accepted that Art 22 does not expressly contemplate a situation of deadlock between the shareholders but nothing turned on that. In the cases cited at [55] above, pre-emption clauses in terms similar to Art 22 were regarded as mechanisms which the applicant should invoke before commencing an application for relief based on unfair prejudice. Indeed, in each of these cases, Hoffmann J described these exit mechanisms as "*common form*" pre-emption clauses (*Re a Company (No 007623 of 1984)* at 367; *Re a Company (No 004377 of 1986)* at 104; *Re a Company (No 006834 of 1988)* at 367). In all of these cases, the exit provisions in question did not positively *require* the exiting party to sell his shares to another shareholder. Instead, the common thread was that the exit provisions each set out mechanisms for the exiting party to sell his shares at *fair value* if a price could not be mutually agreed upon.

69 We acknowledge that in *Re a Company No 004377 of 1986*, Hoffmann J noted that "the articles have made provision in advance for what is to happen if there is a breakdown in relations" (at 109). However, this observation did not mean that an exit mechanism would only preclude a just and equitable winding up if it specifically contemplated and addressed a deadlock or a breakdown of relations. The applicability of *Ting Shwu Ping* is not dependent on the exit mechanism specifying which party should exit in the event of a deadlock, or on the exit mechanism specifically catering to the event of a deadlock. What is required is that the mechanism provides an "option for the [disaffected shareholder] to be bought out of the company at *fair value*" [emphasis added] (*Ting Shwu Ping* at [107(a)]) if he wishes to leave the company. The reason why such a mechanism generally precludes a just and equitable winding up is that if there is a ready and available means of ensuring that a party who wishes to exit is able to do so on fair terms, then there would be no basis for the court to order a winding-up on the ground of unfairness. The power to wind up a company cannot be used to relieve the parties from the bargain they entered into when they structured their relationship according to the articles of association (see *Re a Company (No 004377 of 1986)* at 111 and *Ting Shwu Ping* at [74]).

70 The third point we make relates to the appellants' contention that if the analysis in *Ting Shwu Ping* and the GD were taken to its logical conclusion, a winding application would fail not only where there was a contractually agreed on mechanism for exit, but also in all other cases where shareholders could *possibly* sell their shares to other shareholders or a third party and exit the company. On this submission, there was no difference between a case where the articles of association contained a pre-emption clause, and a case where there was no pre-emption clause, but a party in a deadlocked situation could have

made an *ad hoc* offer to sell his or her shares. Yet the party in the latter situation would not be precluded from obtaining a winding up simply because he had not made an offer to sell his shares at fair value. By the same reasoning, there was no reason why the mere presence of Art 22 should prevent a party from obtaining a winding up on the just and equitable ground merely because he had not tried to invoke Art 22.

71 In our view this submission overlooked a crucial difference between situations where the articles of association contain a pre-emption provision, and those where they do not. Without a mechanism like Art 22, the remaining party may insist on a low purchase price which the exiting party would be unlikely to agree to, perpetuating the deadlock situation. In contrast, with an exit mechanism like Art 22, the parties would be able to fall back on an agreed valuation method.

72 In any event, the position we have adopted with regard to cases where there are contractually-agreed mechanisms for exit is entirely consistent with the courts' approach in cases *without* such exit mechanisms. Regardless of whether there is a pre-emption clause, an applicant will likely be precluded from bringing a winding-up application if he has refused a reasonable offer to be bought out of the company at fair value. Thus, for example, in *In Re a Company (No 002567 of 1982)* [1983] 1 WLR 927, Vinelott J dismissed a winding-up petition because the applicant had refused an offer from the other two shareholders in the company to buy the applicant's shares at a fair price to be determined by an arbitrator or expert.

73 Fourth, the appellants have drawn a false dichotomy between the options that they were presented with. In an equal-shareholding situation where the company's articles provide a pre-emption provision and shareholders are deadlocked, the disgruntled shareholder is not solely left with a choice between tolerating the deadlock and leaving the company by utilising the pre-emption provision and obtaining consideration representing the fair value of his shares. The appellants have therefore mischaracterised the situation – there is no "staring match" to speak of (see [66] above). The disgruntled shareholder may also offer to purchase the other half of the company's shareholding. If the price offered is attractive enough, the other shareholder(s) may be enticed into a sale. In such a situation, there is no "unfairness" that would make it "just and equitable" for a court to intervene and exercise its powers under the winding-up regime.

74 Fifth, having regard to the drastic consequences of ordering a winding up, it accords with sound policy for the court to decline winding up because the disaffected shareholder *has a contractually enforceable option* as to how he may exit on fair terms under the articles of association. This is in keeping with the idea that the just and equitable jurisdiction must be exercised judiciously, and with special regard for the "irreversible and drastic nature of a winding up as a court-ordered remedy" (*Chow Kwok Chuen* at [47]). As this court noted in *Ting Shwu Ping* at [54], even the mere commencement of a winding-up application may be detrimental to a company, especially one that is otherwise a going concern. The triggering of the advertising requirements of a winding-up application may lead to costly consequences. As noted in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [17] and [19], a winding-up application *implies* insolvency and presentation of one could damage the

company's creditworthiness or financial standing with other creditors or customers.

75 The respondent companies are, as the Judge noted, "perfectly viable" (at [45] of the GD). The Judge also noted at [58] of the GD that a winding up could precipitate "disastrous" results:

> … Under Conditions 52 and 57.1 of the URA Conditions of Tender, if CRM or CHM were to be placed in liquidation before the issuance of the certificate of statutory completion for the Capitol Project, the URA would have had the right to re-enter and resume possession of the site and dispose of it as if the tender had never been submitted, without compensation to the owners. This would have been disastrous for the shareholders, who had yet to see a proportionate return on their significant investment. …

76 The drastic consequences of a winding up are why courts have generally been reluctant to order a winding up where more moderate remedies are available as alternatives to a shareholder. Where a pre-emption provision is present in the company's constitution, then the disaffected shareholder not only has a more moderate course open to him – to sell his shares to the other shareholder – but also has a *contractually enforceable guarantee* that he will be able to do so at a fair value.

77 We should add that the remedial flexibility which the court has under s 254(2A) of the Companies Act to order a buy-out instead of a winding-up does not alter our analysis. While it is true that a buy-out order under s 254(2A) would avoid the drastic effect of a winding-up order, this does not mean that the courts should construe the notion of unfairness in a more generous manner, or that the just and equitable jurisdiction should be exercised more liberally.

We reiterate our observations in *Ting Shwu Ping* that s 254(2A) has not changed the grounds for invoking s 254(1)(*i*) (at [38(a)]). A buy-out order is not intended be a free-standing remedy; the court must be satisfied that there are grounds for a just and equitable winding up before it decides to order any remedy at all (at [46]).

78 Finally, we address Mr Singh's submission that the inquiry of who should exit the company would only arise *after* the court finds that it has jurisdiction in the matter. Where an exit mechanism existed in the articles of association, it could not be said that any party was unable to exit, no unfairness could arise, and the court would not need to consider "who is to stay and who is to go", because it simply had no jurisdiction to decide on the matter.

79 Mr Singh noted that the Judge had made a similar observation, by which he was presumably referring to the following passage at [61] of the GD:

> Nor was I convinced that this case was distinguishable from *Ting Shwu Ping* on the basis that it was obvious in *Ting Shwu Ping* that the applicant, being the minority, would sell, unlike the present case where the plaintiffs and Chesham were equal shareholders. *This submission again conflated the issues of jurisdiction and relief. It is at the former stage that the court undertakes an inquiry into whether there is unfairness, and if so, whether that unfairness is negated by any exit mechanism that has been agreed between the parties. The question of who should do the buying does not arise for consideration at that stage. Only after the court has satisfied itself that its jurisdiction has been properly invoked does it then consider whether it would be more equitable to allow a buy-out rather than make a winding-up order*: *Ting Shwu Ping* at [79]. And it is only at that stage that the question of who should be ordered to be bought out arises.
>
> [emphasis added]

80 This point was disputed by Mr Thio, who contended that the question of which party should leave was "not a jurisdictional point" but had been "part of the reasoning" as to whether unfairness was established.

81 As observed in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258, the word "jurisdiction" means different things depending on the context in which it is used. As noted in that case (at [31]), while "jurisdiction" refers to the authority to hear and determine a dispute that is brought before it, "power" refers to the court's capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute.

82 Bearing this distinction in mind, it would be helpful to make the following clarification. When the court speaks of its "just and equitable jurisdiction" to order a winding up under s 254(1)(*i*) of the Companies Act, it is referring to the court's *power* to order a winding up if it is "of opinion that it is just and equitable that the company be wound up" (the ground under s 254(1)(*i*)), and, supposing this ground is established, if the court also takes the view that winding up is the appropriate remedy. It bears repeating that there are two distinct stages. Even where the statutory *grounds* for winding up a company have been technically established, the court has a residual discretion to consider whether, in the light of all relevant factors, including the utility and effect of a winding-up order and the overall fairness and justice of the case, the company concerned should be wound up (*Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 at [33]). This is the "relief" stage that the Judge was referring to at [61] of the GD and also the stage where the appropriateness of a buy-out order under s 254(2A) is considered.

83 By "jurisdiction", Mr Singh and the Judge (at [61] of the GD) were not referring to the court's authority to hear and determine the winding-up application. Instead, they were referring to the statutory ground for invoking the court's *power* to order a winding up (*ie*, unfairness, in the context of s 254(1)(*i*)). It is only if this ground is established that the court proceeds to the "relief stage", where the issue of "who should leave" is considered. We agree. As we have discussed above, where such a pre-emption clause is found in the company's articles, unfairness is negated by the presence of an option for the disaffected shareholder to exit on fair terms (see [66]–[77] above), and it follows that the court does not need to proceed to the "relief" stage.

Conclusion

84 For the foregoing reasons, we did not think that the just and equitable ground for winding up provided by s 254(1)(*i*) of the Companies Act had been made out. The mere fact that the shareholders in this case were deadlocked and equal shareholders did not render the principles we set out in *Ting Shwu Ping* inapplicable. We therefore dismissed the appeals.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

Thio Shen Yi SC, Ngo Shuxiang Nicholas and Reshma Nair (TSMP Law Corporation) for the appellants;
the respondent unrepresented and absent;

Davinder Singh SC, Pardeep Singh Khosa and Chen Chi (Drew & Napier LLC) for the other party.