HCMP 868/2019 1
[2025] HKCFI 2052 2

IN THE HIGH COURT OF THE 3
HONG KONG SPECIAL ADMINISTRATIVE REGION 4
COURT OF FIRST INSTANCE 5
MISCELLANEOUS PROCEEDINGS NO 868 OF 2019 6

IN THE MATTER OF Sound Global Limited 7 8

and 9

IN THE MATTER OF Section 214 of the Securities and Futures Ordinance (Cap. 571) 10 11 12

BETWEEN 13

SECURITIES AND FUTURES COMMISSION Petitioner 14

and 15

SOUND GLOBAL LTD. (桑德國際有限公司) 1st Respondent 16
WEN YIBO (文一波) 2nd Respondent 17
ZHANG JINGZHI (張景志) 3rd Respondent 18
WANG KAI (王凱) 4th Respondent 19
ZHANG XIQUAN (張希泉) 5th Respondent 20

Before: Hon Linda Chan J in Court 21

Dates of Hearing: 9 and 10 April 2025 22

Date of Judgment: 15 May 2025 23

J U D G M E N T [1]

1. On 30 September 2022 this Court handed down the judgment [2022] HKCFI 3025 ("**Judgment**")[1] and ordered, *inter alia*, that Mr Wen shall make an offer to purchase the shares held by the other members of the Company ("**Minority Members**") at the price to be determined by the court ("**Buy-Out Offer**")[2].

2. Apart from the issue of price ("**Price Issue**"), which is hotly contested, there is a further issue regarding the identity of the administrator to be appointed for the purpose of administering the Buy-Out Offer ("**Administrator Issue**").

3. For the purpose of determining the Price Issue:

(1) The SFC adduces 2 opinions prepared by its expert, Mr Lung Hak Kau ("**Mr Lung**"), on 23 May 2024 ("**Lung 1st**") and 7 November 2024 ("**Lung 2nd**").

(2) Mr Wen adduces an opinion made by his expert, Ms Leung Churk Yin Jeanny ("**Ms Leung**") on 16 September 2024 ("**Leung 1st**").

A. FACTUAL BACKGROUND

4. The relevant factual background has been set out in §§20 to 40 of the Judgment. The following facts are relevant to the Price Issue.

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1 Unless otherwise stated, the abbreviations used in the Judgment are adopted

2 Judgment §119(2).

5. The Company through its subsidiaries in the Mainland carries on business in turnkey water and wastewater treatment.[3] Its shares have since 30 September 2010 been listed on the SEHK. The Company's shares were also listed on the Singapore Stock Exchange from 6 October 2006 to 27 January 2014[4].

6. The Company published its 2012 AFS and 2013 AFS on 22 March 2013 and 11 April 2014 respectively, both of which had been audited by Deloitte. In the 2013 AFS, the Company represented to its shareholders and the public that as at 31 December 2013, the Group had capital/reserves of RMB 3.07 billion and bank balances/cash of RMB 3.53 billion[5].

7. On 4 and 16 February 2015, the Emerson Reports were published, which suggested that the revenues of 2 subsidiaries within the Group had been inflated by RMB 1.38 billion; the true cash/bank balances of the Group was only 1/3 of the amount reported; and its true profit was ¼ of the amount reported[6]. In response, the Company issued clarification announcements on 13, 17 and 24 February 2015.

8. On 10 March 2015, Deloitte discovered the 2015 Cash Discrepancy of around RMB 2 billion in the Group's bank balances[7].

9. On 16 March 2015, the SFC issued a notice under s.183 of the SFO requiring the Company to produce bank statements and

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3 Judgment §22
4 Judgment §20
5 Judgment §§27-30
6 Judgment §31
7 Judgment §34

information relating to the Group's bank balances/cash as at 31 December 2012 and 31 December 2013[8].

10. On 23 June 2015, the Company announced that PKF had been engaged by the independent review committee to review the 2015 Cash Discrepancy[9].

11. On 31 August 2015, the Company further announced that RSM had conducted forensic investigations into the 2015 Cash Discrepancy. In its report dated 20 November 2015, RSM stated that PKF's findings were consistent with the Company's explanation that the 2015 Cash Discrepancy was due to the earnest money paid through SGC as its agent for the Proposed Acquisitions[10].

12. In light of RSM's findings, the SEHK did not pursue the matter further, and trading in the Company's shares resumed on 25 January 2016[11].

13. On 13 April 2016, the SFC exercised its power under rule 8(1) of the Securities and Futures (Stock Market Listing) Rules to suspend trading in the Company's shares ("**Suspension**") which has never resumed.[12]

14. On 13 September 2022, the Company was delisted from the SEHK.

15. In the Judgment, this Court found, *inter alia*, that:

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[8] Judgment §33

[9] Judgment §36

[10] Judgment §37

[11] Judgment §38

[12] Judgment §21

(1) The cash/bank balances reported in the 2012 AFS and 2013 AFS had been inflated by RMB 2.18 billion and RMB 2.72 billion respectively, which represented 82% and 89% of the net assets of the Group as at 31 December 2012 and 2013[13].

(2) Mr Wen had knowledge of and was involved in causing, directing and orchestrating (a) the fraudulent inflation and falsification in the Subsidiaries' bank balances for the financial years of 2011, 2012 and 2013 (i.e. Falsification Scheme), and (b) the fabrication of falsified bank statements and bank balance confirmations to support the inflated and fictitious bank balances (i.e. Fabrication Scheme)[14].

(3) Regarding the 2015 Cash Discrepancy, Mr Wen gave false explanations to the other members of the board, the audit committee, Deloitte, PKF and RSM, the members of the Company, the SEHK and the SFC[15].

(4) The business and affairs of the Company were conducted by Mr Wen in an unfairly prejudicial manner within the meaning of s.214(1)(b), (c) and (d) of the SFO[16].

B. PRICE ISSUE

16. On the Price Issue:

(1) The SFC contends that the court should adopt HK$2.98 as the price of the Buy-Out Offer, which was the closing price

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13 Judgment §§46-55
14 Judgment §§56-71
15 Judgment §§81-90
16 Judgment §100

of the Company's shares on the last trading date on 12 April 2016 ("**LTD**"). On top of that, there should be interest at 1% above the prime lending rate from the LTD to the date of payment, to reflect the fact that the Minority Members have been kept out of pocket for the period.

(2) Mr Wen contends that the price should be valued as at the date of the Judgment (30 September 2022), alternatively, the date of the petition (14 June 2019) or the date of the amended petition (13 September 2019), with downward adjustments to account for the market factor since the LTD ("**Market Factor**") and the "distressed discount to address the heightened risks and uncertainties resulting from [the Company's] financial issues, suspension and subsequent delisting"[17] ("**Distress Factor**"). As regards interest, if the price is valued as at the date of the Judgment, no interest should be awarded as the Minority Members have not been kept out of pocket.

17. The order requiring Mr Wen to make the Buy-Out Offer was made under s.214(2)(e) of the SFO[18], which provides that the court may "make any other order it considers appropriate, whether for regulating the conduct of the business or affairs of the corporation in future, or for the purchase of the shares of any members of the corporation by other members of the corporation or by the corporation (and, in the case of a purchase by the corporation, for

[17] Leung 1st §§19-20
[18] Judgment §§106-117

the reduction accordingly of the corporation's capital), or otherwise."

B1. Applicable principles

18. It is common ground that given the similarity in wordings between s.214(2)(e) of the SFO and the provision for "unfair prejudice" under s.725 of the Companies Ordinance (Cap. 622)[19], the court should apply the principles governing valuation of a company in the context of "unfair prejudice" petition when determining the Price Issue.

19. The overriding consideration is fairness as between the parties. This was described by Kwan VP in *Li Guozhu v New Century Iatrical Inv. Management Limited* [2020] 3 HKLRD 464, §§29-30:

> "29. In valuing a company for the purposes of ascertaining the price to be paid for shares to be acquired by one party from another ordered in a petition based on unfair prejudice, the overriding consideration is fairness as between the parties. Which of the various approaches to valuation of a shareholding should be adopted is to be determined by what fairness in a particular case requires (*Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [146]). Which approach should be adopted as appropriate depends on all the circumstances, and the choice must be fair to both parties (*CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108 at [38]).
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> 30. The statutory framework of the remedies for unfair prejudice confers on the court a wide discretion to do what is considered fair and equitable between the parties in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company."

20. Mr Jenkin Suen SC [20], counsel for the SFC, submits that:

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19 Replacing s.168A of the former Companies Ordinance (Cap. 32)
20 Leading Ms Sheena Wong

(1) The overriding requirement of fairness applies to all aspects of valuation, including the date of valuation, the basis upon which the valuation is made,[21] and the choice of valuation methodology, assumptions and directions.[22] The court has a wide discretion which must be exercised to achieve, so far as possible, fairness as between the parties in all the circumstances of the case (*Re Elgindata* [1991] BCLC 959 at 1006c-d, 1007e, per Warner J).

(2) The court takes into account all the circumstances, including (a) when arriving at a fair value, it is necessary to assume that a notional sale would take place between the participants since the purpose of valuation is to achieve fairness as between the parties; and (b) the history of the events in the litigation (*Re Luk Fai Holdings* §101).

(3) To achieve fairness, valuation can be conducted on the footing that the conduct complained of had *not* occurred (*Re Sparkle Consultants (HK) Limited* (CA) §33; *In re London School of Electronics* [1986] Ch 211 at 224E-F, per Nourse J;[23] *Re Tai Lap Investment Co Ltd* [1999] 1 HKLRD 384 at 400I-J, 401E, per Le Pichon J (as she then was). This may require valuation to be done on a date prior to presentation of the petition (*Re Golden Bright Limited,* HCMP 6472/2001, 27 February 2004, §66, per Kwan J (as she then was)).[24]

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21 *Re Sparkle Consultants (HK) Limited* [2002] 3 HKLRD 62 (CA), §33, per Rogers VP

22 *Re Luk Fai Holdings Company Limited* [2023] HKCFI 2268, §100

23 Citing *In re O.C. (Transport) Services Ltd* [1984] BCLC 251 at 258

24 Before the diversion of substantial business from the company which was found to be unfairly prejudicial to the interests of the petitioner.

(4) The court also takes into account any difficulties in formulating or implementing a particular valuation method. For example, in *Re Cumana Ltd* [1986] BCLC 430 at 444i-445a[25], in rejecting the inclusion of an "escape clause" in the valuation, the court was satisfied that the difficulties in formulating and implementing such a clause would make that proposal "impracticable and unsatisfactory". Similarly, in *Re Elgindata*, the court declined to adopt a valuation method on the basis that it did not afford a workable formula for valuation in the circumstances of the case even though it expressed a sound principle (1006d-e).

21. Mr Anson Wong SC[26], counsel for Mr Wen, does not take issue with the above principles. He submits that where the company is a going concern, the valuation should be conducted as at the date of the buy-out order. Reliance is placed on the following authorities:

(1) In *Re London School of Electronics Limited* at 224A-B, Nourse J said:

> "If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. *Prima facie* an interest in a going concern ought to be valued at the date on which it is ordered to be purchased. But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all."

(2) In *Profinance Trust SA* [2002] BCC 356 §61, Robert Walker LJ (as he then was) stated the principle in this way:

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[25] In that case, the majority shareholder was ordered to purchase the minority shareholder's shares as at the date of the petition (rather than the date of the order, which was after the valuation of shares had declined).

[26] Leading Ms Tara Liao

"The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:

(i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant *(Meyer)*.

(ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (*OC Transport*, and to a lesser degree *London School of Electronics*). But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome *(DR Chemicals)*.

(iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct *(Cumana)*.

(iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out *(Elgindata)*.

(v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings *(O'Neill v Phillips)*."

(3) In *Profinance*, the court adopted the date of the buy-out order as the date of valuation as there was no evidence or circumstances which justify the departure from the general rule. In *Re Sparkle Consultants (HK) Limited*, HCMP 1538/2000, 24 April 2001, §§147-148, Yuen J (as she then was) came to a similar conclusion.

(4) In *Re Elgindata Limited*, Warner J adopted the date of the buy-out order for valuation (1991), even though the fortunes

of the company had declined considerably since 1987 (when they were at their peak), and since 1989 (when the petition was presented). Although the petitioner had established unfair prejudice, the decline in value was not attributable to the respondent's conduct (1004i-1005b). In those circumstances, "to fix a date for the value of the shares at or near the time when the company's fortunes were at their peak would be grossly unfair to [the respondent]." (1006f-g).

(5) More recently, in *Dinglis v Dinglis* [2019] EWHC 3327 (Ch), DHCJ Adam Johnson QC followed *Profinance* and held that "a petitioner is not entitled to a one-way bet", given that "a shareholder must normally take the rough with the smooth, as far as fluctuations in the value of the business are concerned" and "a minority shareholder whose shareholding has been subjected over time to fluctuations in value in the ordinary course of the company's business cannot pick and choose an exit date which is most advantageous to him" (§66).

(6) The remedy must be proportionate to the unfair prejudice found, and the exercise of the jurisdiction under the unfair prejudice provision[27] is not a punishment for bad behaviour (*Hawkes v Cuddy* [2008] BCC 390, §246, per Lewison J).

22. In my view, the principle governing the date of valuation of a company which is a going concern is clear:

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[27] Section 996 of the Companies Act 2006, equivalent to s.725 of the Companies Ordinance

(1) If the company's business has *not* been affected by the unfairly prejudicial conduct and it continues to carry on the business up to the date of the buy-out order, it would usually be fair for valuation to be conducted as at the date of the order. This is because any profit generated (or loss sustained) by the company in the meantime will be reflected in the valuation in one or 2 aspects. First, the profit (or loss) will be reflected in the balance sheet as an increase (or decrease) in the net assets if no dividend is declared and paid in the meantime. If dividend had been declared and paid, all shareholders including the petitioner would have received the same. Second, the earnings every year (whether increase or decrease) will be taken into account when assessing the price-earning multiple applicable to the company. Such valuation would necessarily have taken into account and reflected both the upside and downside of the business.

(2) If the business of the company has been adversely affected by the unfairly prejudicial conduct, and the adverse effect is one which can be ascertained and quantified, it would still be fair for valuation to be made as at the date of the order and adjustments would be made to the valuation. In making the adjustments, the court is in effect reversing the financial impact of the unfair prejudice.

(3) If, however, the unfair prejudice has adversely affected the business of the company and the effect is not one which can be ascertained or quantified, so that it is not possible to reverse the unfair prejudice by making adjustments to the

valuation, the court would either adopt the date which pre-dated the unfairly prejudicial conduct or the date of the petition. Very often, the reason for adopting the date of the petition is because that was the date when the petitioner decided to exit from the company.

(4) The many cases cited by counsel, properly understood, were instances where the court decided the appropriate date of valuation on the basis of the findings of unfair prejudice and the circumstances faced by the company in question.

B2. Date of Judgment inappropriate

23. Mr Wong's arguments that the court should adopt the date of the Judgment as the date of valuation do not assist the determination of the Price Issue.

(1) There is little utility in contending that the price should be valued as at the date of the Judgment or the date of the petition or amended petition when no reliable financial information of the Company made up to any of these dates has been made available by Mr Wen to the experts or the court.

(2) As pointed out by Mr Lung, although the Company belatedly published its AFS for the years 2014 to 2019, the auditors expressed disclaimers of opinion on all of them[28]. This means that no reliance can be placed on any of these AFS.

[28] Cheng 5th §§11-17

(3) The Company has not published any AFS for the financial years from 2020 onwards.

(4) Mr Wen has not offered to make available the books and records of the Company to the experts for the purpose of assessing the value of the Company and the shares. This is despite the fact that he has been in control of the Company and the Group.

(5) Without any financial information, it is impossible for the experts to conduct any meaningful valuation of the Company or the price for the purpose of the Buy-Out Offer, whether on the date of the Judgment or the alternative dates advocated by Mr Wong.

(6) Indeed, Ms Leung does not take issue with Mr Lung's opinion that no reliable valuation can be conducted. She only suggests that adjustments should be made to the price on the LTD to reflect the Market Factor and the Distress Factor[29].

B3. Price on LTD should be adopted

24. Mr Suen submits that it is fair, just and appropriate to adopt the price of HK$2.98 on the LTD as the price of the Buy-Out Offer for the following reasons:

(1) The purpose of the Buy-Out Offer is to allow the Minority Members whose interests have been unfairly prejudiced by Mr Wen's misconduct to dispose of their shares at a fair

[29] Leung 1st §§19-20

price that reflects the market value of the shares without regard to any negative effect caused by the misconduct.

(2) The price of HK$2.98 is the clearest evidence and reflection of the open market's sentiment on the value of the Company's shares based on the information available in the market at the time,[30] *before* the Suspension on 13 April 2016 and the eventual delisting on 13 September 2022.

(3) The price on the LTD represented:

(a) the last time and opportunity when the Minority Members could have exited the Company, before the Suspension was imposed in the course of the SFC's investigations over the 2012 and 2013 Discrepancies, for which Mr Wen was wholly or partly responsible; and

(b) the closest available approximation to the market value of the Company's shares at a time when the 2012 and 2013 Discrepancies were not yet known to the market and hence not factored into the market price of the shares.

(4) There is no realistically workable or more suitable alternative price to be adopted. As a result of the misconduct and the Schemes, there is virtually no prospect of ascertaining the true financial state of the Company[31] at

[30] Lung 1st §§21, 32
[31] Judgment §113

the material times or conducting any meaningful valuation exercise given that:

(a) Mr Wen had allowed all senior employees involved in the fictitious bank balances to leave, without any record or contact details, and all financial records and bank documents of the Subsidiaries were allegedly "lost in a fire" on 25 November 2016[32].

(b) There were significant qualifications and limits on the reports prepared by PKF, RSM and Gaowen Law Firm back in 2015 to 2017.[33] The difficulties faced now, so many years after the event, could only have been amplified and the true status further obscured.

(c) The Company's AFS from 2014 to 2019 were unreliable and in any event outdated.

(d) It is simply not feasible or possible to value the fair or market value of the Company's shares on any dates.

25. I agree with the points made by Mr Suen which I consider to be well founded.

26. Mr Wong does not dispute the points summarized in §24(1) and (4) above. As regards the points in §24(2)-(3) above, Mr Wong contends that (1) the Minority Members could have elected to exit the Company through "off-market transactions" and the difficulties in selling their shares due to the Suspension was a risk which the Minority

[32] Judgment §§67-68
[33] Judgment §115

Members voluntarily assumed; and (2) before the Suspension, the "public investors had been fully aware of the allegations of inflated revenue raised by the Emerson Reports published in February 2015" as well as the 2015 Cash Discrepancy. Those investors chose to keep or even buy the shares of the Company and should have been taken as having voluntarily assumed the risk involved in doing so[34].

27. I have no hesitation in rejecting Mr Wong's contentions:

(1) The Suspension was imposed by the SFC after it had commenced investigations into the 2012 and 2013 Discrepancies for which Mr Wen was responsible (as I so find).

(2) There is *no* evidence to suggest that the Minority Members were aware of the 2012 and 2013 Discrepancies or the Schemes when they acquired the Company's shares before the LTD.

(3) While the Emerson Reports which contained allegations of inflated bank balances/cash, inflated revenue and inflated profits were published in February 2015, one cannot ignore the fact that the Company (under the control of Mr Wen) immediately denied the allegations by making the announcements on 13, 17 and 24 February 2015 (see §7 above). This was followed by the publication of the reports of PKF and RSM which, on their face, supported the denial put forward by the Company.

[34] Mr Wen's Skeleton §§25-27

(4) There is simply no basis in support of the contentions that the Minority Members have voluntarily assumed the risk of the Suspension.

(5) To the contrary, the Minority Members' expectation when they acquired the shares was that they could be traded on the SEHK, which is one of the unfair prejudice suffered by the Minority Members[35].

28. In my view, subject to the question of interest, the price on the LTD should be adopted as the price of the shares for the purpose of the Buy-Out Offer as it is the *only* objective evidence on the market price of the shares as at that date. Indeed, neither Mr Wen nor Ms Leung has put forward any other price which they contend is fair or appropriate in the circumstances of this case.

B4. Adjustments proposed by Ms Leung

29. As stated above, Ms Leung opines that the price of the shares should be adjusted by the Market Factor and the Distress Factor.

30. The Distress Factor can be disposed of shortly. The so-called distress was the direct result of Mr Wen's misconduct. The Buy-Out Offer was made to redress the prejudice suffered by the Minority Members as a result of such misconduct. I am unable to see any basis for the court to make any downward adjustment for the distress suffered by the Company and hence the Minority Members. At the hearing, Mr Wong rightly abandons the argument[36].

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[35] Judgment §114(3)
[36] Mr Wen's Skeleton §36

31. As regards the Market Factor, Mr Wong makes the following points:

(1) The Market Factor is unrelated to Mr Wen's conduct.

(2) Without the adjustment for the Market Factor, it would result in a disproportionate and unfair penalty to Mr Wen since "a shareholder must normally take the rough with the smooth, as far as fluctuations in the value of the business are concerned" *(Dinglis v Dinglis)*.

(3) To account for the Market Factor, Ms Leung analysed the price-to-earnings ("**P/E**") and price-to-book ("**P/B**") of various companies operating in the same industry and geographic region on the assumption that the Company remains a going concern[37].

(4) The comparables were selected on the basis that they were (a) listed on the Main Board of the SEHK from the LTD to the respective assessment dates[38], (b) principally engaged in water utilities sector, and (c) mainly operated in the Mainland, with 60% or more of its revenue derived from the Mainland in the relevant financial years[39].

(5) Although Mr Lung suggests that Ms Leung's inclusion of some comparable which were listed after the LTD is inappropriate because *inter alia* they tend to have smaller market capitalisation and therefore lower P/E and P/B[40],

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37 Leung 1st §§34-35
38 That is, the 3 alternative dates of valuation contended by Mr Wong
39 Leung 1st §36
40 Lung 2nd §§21-24

however, even if one were to take the average P/E and P/B of only those comparables with similar market capitalisation as the Company, the adjusted share prices on the assessment dates would still be much lower than the price on the LTD[41].

32. According to Ms Leung, after making adjustments for the Market Factor, the adjusted price of the shares on the date of the Judgment would be HK$1.27 (if adjusted by the average P/E of the comparables) or HK$0.68 (if adjusted by the average P/B of the comparables).[42]

33. Mr Lung does not consider the adjustment for the Market Factor to be appropriate for the following reasons:

(1) The assumption that the P/E, P/B and the share price of the Company would change according to the change in the average P/E or P/B of the companies within the same industry is unjustified and does not accord with the reality. There are different reasons which affect the P/E and P/B of different companies, and market condition is just one of the many factors affecting a company's P/E or P/B.[43]

(2) Mr Lung illustrates the inappropriateness of using the average P/E and P/B to adjust the Company's share price in that between the LTD and the date of the petition, the P/E of one comparable increased by 32.7%, while the P/E of another comparable decreased by 72.9%. Similarly, the change in P/B of the comparable ranged from an increase of

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41 See Scenario 2 in the Table of Adjusted Valuation handed up by Mr Wong on 10 April 2025
42 Leung 1st §40; Mr Wong's Table Scenario 1.
43 Lung 2nd §14.

28.6% to a decrease by 62.0%. Such huge difference in performance between companies in the same industry shows that one cannot simply take the average P/E or P/B to reflect the market condition or development.[44]

(3) During cross-examination, Ms Leung accepts that a company's P/E and P/B are affected by the specific circumstances of the company. She emphasizes that by taking an average P/E and P/B of the comparables, she is seeking to ascertain the changes in the financial performance of all the comparables which, she opines, reflect the condition of the market.

34. While I can see the rationale in taking the average P/E or P/B of various comparables as an indication of any changes in the market condition faced by the Company, in the end, I do not think that the proposed adjustment for the Market Factor is appropriate. There are 2 reasons for this:

(1) The adjustment for Market Factor is premised on the assumption that the valuation should be conducted as at the date of the Judgment or any of the alternative dates advocated by Mr Wong, which I consider to be inappropriate.

(2) More importantly, Mr Wen chose not to make available to the experts or the court any books and records of the Company which, if produced, would show the actual financial state of the Company and its performance for the period when he contends that adjustment should be made for

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44 Lung 2nd §§15-17.

the Market Factor or the period from 2017 (i.e. after the books and records of the Subsidiaries had allegedly been destroyed in a fire). The court is left in the dark as to whether the Company's performance has in fact declined owing to the alleged deterioration of the market condition, still less to the extent of 44.11% to 77.29%. I do not think that it is open to Mr Wen, who has decided to withhold the relevant financial information from the court, to suggest that there should be a downward adjustment for the Market Factor to the price of the shares.

B5. Interest

35. Mr Suen submits that interest should be awarded on the price from the LTD to the date of payment to reflect the fact that the Minority Members have not been able to realise their shares and have been kept out of pocket of the proceeds. An award of interest would accord with the requirement of fairness and is amply justified on the facts of this case given the lapse of almost 9 years since the Suspension[45]. Reliance is placed on:

(1) *Re Tai Lap Investment Company Limited*, where Le Pichon J (as she then was) said (§59) that an order for payment of interest reflects "the fact that the shareholder has been kept out of the enjoyment of that value in the meantime", and has been described as "money compensation for the injury done" to the oppressed shareholder.[46]

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45 SFC Skeleton §§40-42

46 Quoting *Dynasty Party Ltd v Coombs* (1996) 138 ALR 64 at 85.

(2) *Re Power Hong Kong Limited* [2023] HKCFI 2539, §13, where Ng J said "Since the court has a wide discretion to do what is considered fair and equitable between the parties in all the circumstances of the case, the same overriding consideration as to fairness between the parties should apply not just in relation to the valuation of the Company, but to all aspects of a buy-out Order including the formula for the calculation and payment of interest on the purchase price. It is also trite that generally an award of interest is within the discretion of the Court".

(3) *Re Golden Bright Ltd* [2007] 1 HKC 89, §§36, 38, 39, 41, where Kwan J (as she then was) awarded interest on the purchase price from the date of valuation (prior to the date of the petition).

36. Mr Wong accepts that the interest element is to compensate the Minority Members for being kept out of the money in the meantime but submits that no interest should be added to the price of the Buy-Out Offer for the following reasons:

(1) If the date of valuation is the date of the Judgment, "it is doubtful whether the relevant shareholder can in any way be said to have been kept out of any money for any period prior to the buy-out order" (*Re Maxtop International Investment Ltd* [2014] 4 HKLRD 416, §8(2), *per* DHCJ Stewart Wong SC)[47].

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[47] Mr Wen's Skeleton §§45-47

(2) It is wrong in principle to award interest covering the period before the Judgment. Unlike a private company where there would be restrictions on a member's right to transfer shares[48], the Minority Members were not subject to any restriction and could have sold their shares through off-market transactions notwithstanding the Suspension.

(3) It is also wrong in principle to award interest for the period before the presentation of the petition as the Minority Members voluntarily assumed the risk of the Suspension when they acquired the shares in the Company.

(4) As a matter of discretion, it would be unfair to Mr Wen to bear interest for the time taken by the SFC to prepare and present the petition.

37. In my judgment, it is fair and appropriate to award interest on the price of HK$2.98 for the period from the LTD to the date of payment, for the following reasons:

(1) The Minority Members have not been able to sell their shares through the SEHK for the entire period from the LTD to the date of payment. They should be compensated for the loss of the use of the value represented by the shares they held in the Company.

(2) It was open to Mr Wen to buy out the shares of the Minority Members without waiting for the SFC to complete its investigations or for the court to order him to make the Buy-

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48 Companies Ordinance (Cap. 622), ss.11-12

Out Offer. At trial, it was Mr Wen's own evidence that he had intended to privatise the Company by acquiring all the shares held by the Minority Members although he did not explain why he did not pursue that course any further.

(3) Mr Wen remains the majority shareholder and has control over the Company and the Group. Any profits made by the Company during the entire period from the LTD to the date of payment have *not* been distributed to the shareholders in the meantime. Upon completion of the Buy-Out Offer, Mr Wen will become the sole shareholder of the Company[49] and will be able to enjoy any profits generated by the Company to the exclusion of the Minority Members.

38. As for the rate of interest, Mr Suen submits that it should be 1% above prime lending rate, which was the rate awarded in *Re Power Hong Kong Limited* §24;[50] *Re Golden Bright Ltd* §§42-43, 45 (adopting *Wong Man Yin v Law Lam Wai* [2001] 3 HKLRD 720);[51] *Re New Century* §58[52]). Mr Wong submits that if interest is awarded, Mr Wen does not object to the rate proposed by the SFC[53].

39. The rate proposed by the SFC is fair and should be adopted.

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49 Assuming all the Minority Shareholders accept the Buy-Out Offer

50 Interest was awarded from the date of the buy-out order (§31).

51 Interest was awarded from the date of valuation to the date of the order for valuation, and at judgment rate thereafter.

52 Interest was awarded from the date of judgment until determination of the price.

53 Mr Wen's Skeleton §50

C. ADMINISTRATOR ISSUE

40. Mr Suen submits that it is necessary and desirable for independent professional administrator to be appointed by the court pursuant to s.214(2)(c) of the SFO[54] to assist and deal with the logistics involved in the execution of the Buy-Out Offer, in view of the following facts and matters:

(1) The substantial public interest at stake, and the fact that the SFC has identified over 3,300 Minority Members located in different jurisdictions, whose shares are held through 149 brokers/intermediaries.[55]

(2) The proposed appointees from JLA Asia Limited ("**JLA**") have professional expertise and track record in dealing with the type and extent of work required for the Buy-Out Offer.

(3) Tricor Investor Services Limited ("**Tricor**") proposed by Mr Wen does not have such track record. There is no assurance as to Tricor's ability to undertake such important tasks to the requisite standard within its preliminary fee quotation.

(4) The present case cannot be compared with general offers and privatisations in which the share registrar would normally handle. The implementation of the Buy-Out Offer involves the additional tasks or responsibilities of dealing with investors' queries as well as monitoring and reporting to the

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54 Which empowers the court to "appoint a receiver or manager of the whole or any part of the property or business of the corporation and may specify the powers and duties of the receiver or manager and fix his remuneration"

55 Cheng 5th §§21-24; Cheng 6th §15.

court. Tricor's preliminary fee quotation does not appear to take into account these additional tasks.

(5) As regards Ms Leung's suggestion that Tricor could work together with Mr Wen's legal adviser "in conjunction with SFC's oversight", it is unclear what and why input from Mr Wen's legal advisers is required in relation to the administration of the Buy-Out Offer.

(6) The share registrar usually reports back to the company, and in this case, it would be Mr Wen. If Tricor is to handle the Buy-Out Offer, investors would likely question why Mr Wen should be given control and management of the process.

(7) There is no suggestion that Mr Wen is unable to afford the fees of JLA, which would in any event be scrutinised and need to be reasonable.

41. Mr Wen does not oppose the appointment of administrator to handle the logistics and implementation of the Buy-Out Offer but opposes the appointment of JLA on the ground that its estimated fee in the amount of HK$3.2 to HK$3.5 million is excessive; and the same task can be undertaken by Tricor, the share registrar of the Company, at less than HK$1 million.

42. In my view, the concern raised by Mr Wen is reasonable. There is no proper basis to doubt the competence or experience of Tricor in handling the implementation of the Buy-Out Offer. Indeed, Tricor being the share registrar, is in a better position in administering the Buy-Out Offer as it has possession of all the necessary information regarding

the present location and contact details of the Minority Members. There is no reason why the court should appoint JLA at a considerably higher fee for administering the same task.

43. Upon hearing the observation of this Court, Mr Suen confirms that the SFC will not object to the appointment of Tricor as administrator for the purpose of the Buy-Out Offer provided that Tricor is impartial in undertaking such task.

D. DISPOSITION AND COSTS

44. For the reasons set out above, I hold that:

(1) Mr Wen shall make the Buy-Out Offer to the Minority Members at the price of HK$2.98 per share;

(2) Interest at 1% above the prime lending rate published by HSBC for the period from the LTD to the date of payment ("**Interest**") shall be added to the price of HK$2.98 per share; and

(3) Tricor is appointed as the administrator for the purpose of handling and administering the Buy-Out Offer.

45. Upon considering the parties' respective contentions on the detailed terms on the implementation of the Buy-Out Offer and the timetable for Mr Wen to make available the funds required for the Buy-Out Offer, I make an order in the following terms:

(1) Pursuant to section 214(2)(e) of the SFO, Mr Wen shall make an offer ("**Buy-Out Offer**") to purchase the shares in

the Company held by all its members other than Mr Wen and the companies owned and/or controlled by him ("**Minority Members**") (i) at the price of HK$2.98 per share, and (ii) with interest at 1% above prime rate ("**Interest**") from the LTD until the date of payment. The price of HK$2.98 per share plus Interest from the LTD until the date of the Offer Document (as defined below) shall be the purchase price of the shares held by the Minority Members. The Interest from the date of the Offer Document to the date of payment shall be referred to as "**Further Interest**";

(2) Tricor Investor Services Limited be appointed as administrator ("**Administrator**") for the purpose of handling and administering the Buy-Out Offer subject to the terms of this Order and the terms set out in the Schedule hereto;

(3) The Administrator shall, within 14 days of this Order, provide to the SFC and Mr Wen its written consent to the appointment, failing which JLA shall be appointed as the Administrator in place of Tricor;

(4) Within 14 days of receipt of the Administrator's written consent to the appointment, Mr Wen shall pay to the Administrator an amount to be mutually agreed between Mr Wen and the Administrator as an advance payment towards the Administrator's fee; and

(5) The Buy-Out Offer shall be implemented in the following manner:

5.1. Mr Wen shall, within 14 days of the appointment of the Administrator:

(i) provide to the Administrator and the SFC a draft offer document and accompanying form of acceptance ("**Draft Offer Document**") containing the terms of the Buy-Out Offer, procedure for acceptance of the Buy-Out Offer, and all such information as may be necessary for the acceptance of the Buy-Out Offer; and

(ii) inform the Administrator of the number of shares in the Company held by him and the companies owned and/or controlled by him and provide supporting documentation to the satisfaction of the Administrator.

5.2. The SFC and the Administrator shall provide their comments on the Draft Offer Document within 14 days thereafter, and Mr Wen shall within 14 days thereafter finalise the Draft Document in the form as agreed by the SFC and the Administrator ("**Offer Document**");

5.3. The Administrator shall within 28 days of its appointment compute and notify the SFC and Mr Wen ("**Notification**") the amount of the funds ("**Funds**") required to be paid by Mr Wen for purchasing all the shares held by the Minority Members;

5.4. Mr Wen do:

(i) within 14 days after the Notification, pay 3% of the Funds to the Administrator;

(ii) within 60 days after the Notification, pay 22% of the Funds to the Administrator; and

(iii) within 120 days after the Notification, pay 50% of the Funds to the Administrator;

5.5. On behalf of Mr Wen, the Administrator shall, within 14 days after the Administrator's receipt of the Funds as referred to in paragraph 5.4(ii) above, make the Buy-Out Offer to each of the Minority Members, by:

(i) issuing to each of the Minority Members a letter together with the Offer Document by one or more of the following means:-

(a) in the case of those Minority Members having a last known address in Hong Kong, by prepaid surface mail posted to such address;

(b) in the case of those Minority Members having a last known address elsewhere, by prepaid airmail posted to such address;

(c) in the case of those Minority Members having an email address, by email delivered to such email address; and

(d) in the case of those Minority Members having mobile number(s), by WhatsApp delivered to such mobile number(s).

(ii) advertising, by a mode to be agreed with the SFC, a notice of the Buy-Out Offer once in Chinese and once in English in local newspapers, both by paper publication and by electronic publication;

(iii) setting out, in the steps mentioned in paragraphs 5.5(i) and (ii) above, the means of acceptance of the Buy-Out Offer and the First Offer Period (as defined below) within which the Buy-Out Offer shall be open for acceptance;

5.6. The Buy-Out Offer shall be open for acceptance for a period of 42 days ("**First Offer Period**") from the date on which the Offer Document is dispatched by the Administrator to the Minority Members;

5.7. The Administrator shall, within 7 days from the expiration of the First Offer Period compute and provide written notification to Mr Wen of (i) the amount of the funds ("**First Batch of Funds**") required to be paid (out of the Funds received by the Administrator as referred to in paragraph 5.4 above) to those Minority Members who have accepted the Buy-Out Offer ("**First Batch of Minority Members**") and (ii) the shortfall of the Funds (if any) required to meet

the payment obligation of the First Batch of Funds ("**Shortfall**") (collectively "**First Acceptance Notification**");

5.8. Mr Wen do, within 14 days of receiving the First Acceptance Notification, transfer the Shortfall (if any) to the Administrator;

5.9. The Administrator shall make payment to the First Batch of Minority Members no later than 28 days following the date of the First Acceptance Notification or the receipt of the Shortfall, whichever is later;

5.10. Following the First Acceptance Notification, the Administrator may inform the SFC and Mr Wen in writing of any required additional payment to be made by Mr Wen ("**Top-up Payment**"), and Mr Wen shall pay such amount to the Administrator within 14 days thereafter;

5.11. On behalf of Mr Wen, the Administrator shall handle and administer the Buy-Out Offer pursuant to the powers and duties set out in the Schedule hereto and in accordance with a protocol to be agreed between the SFC, Mr Wen and the Administrator in respect of the following matters:

(i) receiving and processing the acceptances of those Minority Members who have accepted the Buy-Out Offer;

(ii) setting the timing and time limits for procedures under the Buy-Out Offer;

(iii) taking such steps as may be necessary or reasonable to follow up with the Minority Members who have not accepted the Buy-Out Offer by the First Offer Period;

(iv) distributing to each of the Minority Members who have duly accepted the Buy-Out Offer:

(a) the payments for the purchase of shares of the Minority Members; and

(b) any Further Interest;

(6) There be a long-stop date ("**Long-Stop Date**"), being 6 months from the expiration of the First Offer Period, after which the Buy-Out Offer will lapse, unless otherwise agreed in writing between the SFC and Mr Wen or as ordered by the Court;

(7) If any Minority Members who have responded to the Administrator and accepted the Buy-Out Offer after the expiration of the First Offer Period but before the Long-Stop Date (collectively "**Second Batch of Minority Members**"), the following terms shall apply:

7.1. The Administrator shall, within 7 days after the Long-Stop Date, compute and provide written notification to Mr Wen of the amount of the funds ("**Second Batch of Funds**") required to be paid by Mr Wen to the

Second Batch of Minority Members and the shortfall of the Funds (if any) required to meet the payment obligation of the Second Batch of the Funds ("**Further Shortfall**") (collectively "**Second Acceptance Notification**");

7.2. Mr Wen do, within 28 days of receiving the Second Acceptance Notification, transfer the Further Shortfall (if any) to the Administrator;

7.3. The Administrator shall make payment to the Second Batch of Minority Members no later than 28 days following the date of the Second Acceptance Notification or the receipt of the Further Shortfall, whichever is later;

(8) Within 28 days after completing the Buy-Out Offer, the Administrator shall return to Mr Wen any surplus balance from the Funds and the Top-up Payment (if any) remaining in its possession, after deducting all the applicable fees, costs and expenses of the Administrator;

(9) The time stipulated in this order continues to run during summer vacation; and

(10) Liberty to apply.

46. As for costs, I make a costs order *nisi* that the costs of and occasioned by the determination of the Price Issue and the Administrator Issue be paid by Mr Wen to the SFC, to be taxed if not agreed, with certificate for 2 counsel.

(Linda Chan) 1
Judge of the Court of First Instance 2
High Court 3

Mr Jenkin Suen SC leading Ms Sheena Wong, instructed by Securities 4
and Futures Commission, for the Petitioner 5

Mr Anson Wong SC leading Ms Tara Liao, instructed by DLA Piper 6
Hong Kong, for the 2nd Respondent 7

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SCHEDULE

(1) The Administrator shall be appointed for *inter alia* the following purposes:

(a) to assist with and implement the Buy-Out Offer;

(b) to receive, hold and administer the funds transferred from Mr Wen (including the Funds and any Top-up Payment);

(c) to determine the amounts to be paid and make payments to each Minority Member who accepts the Buy-Out Offer;

(d) to assist in the transfer of the shares from the Minority Members (who accept the Buy-Out Offer) to Mr Wen;

(e) to perform all duties incidental to and necessary for the implementation of the Buy-Out Offer.

(2) The Administrator shall have, *inter alia*, the following powers and duties:

(a) to request the Company, brokers, market intermediaries, CCASS and/or the share registrar to provide all information on the Minority Members as may be required for carrying out the Buy-Out Offer, and to compile a list setting out the identities, shareholding and contact details of each of the Minority Members;

(b) to take all necessary steps (including corresponding with any person, advertising and making announcements as the Administrator deem fit) in communicating the Buy-Out Offer to the Minority Members;

(c) to receive, hold and administer the funds transferred from Mr Wen (including the Funds and any Top-up Payment) for the purpose of purchasing the shares held by the Minority Members and paying any Further Interest due to them;

(d) to hold the Funds and any Top-up Payment (or any part thereof), when received by the Administrator, in a designated client account or accounts of the Administrator at a bank, such account(s) to be interest bearing pending payment;

(e) to transmit payments out of the Funds and any Top-up Payment, to the Minority Members who accept the Buy-Out Offer in such manner as may be determined by the Administrator;

(f) to take all necessary steps to transfer the shares of the Minority Members who accept the Buy-Out Offer to Mr Wen (or such other persons or entities as nominated by him);

(g) to carry out their functions and duties expeditiously and use all reasonable efforts to conclude the Buy-Out Offer as soon as reasonably practicable;

(h) to keep proper accounts of all payments received and made pursuant to the Buy-Out Offer and report to the SFC, the Company and Mr Wen of the progress of the Buy-Out Offer upon (i) communication of the Buy-Out Offer to the Minority Members; (ii) receipt of response from the Minority Members in relation to the Buy-Out Offer; and (iii) conclusion of the Buy-Out Offer;

(i) with the consent of Mr Wen or leave of the Court, to appoint agents to do any business(es) which the Administrator is unable to do itself in the discharge and exercise of its powers;

(j) with the consent of Mr Wen or leave of the Court, to appoint solicitors (whose fees will be subject to taxation if not agreed) to advise on any points of law arising in the course of the Buy-Out Offer, subject to the right of the SFC, the Company and Mr Wen to be heard in respect of such points of law; and

(k) to do all other things incidental to the exercise of the foregoing powers.

(3) The SFC, the Company and Mr Wen shall provide all reasonable assistance to the Administrator in the performance of the exercise of its powers and duties.

(4) Mr Wen shall pay the fees, costs and expenses of the Administrator, to be taxed if not agreed.

(5) The SFC, Mr Wen and the Administrator shall be at liberty to apply for the purpose of carrying out the terms of this Order.