IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 67

Civil Appeal No 196 of 2017 and Summonses Nos 39, 83 and 91 of 2018

Between

DOUGLAS FOO PEOW YONG

… *Appellant*

And

ERC PRIME II PTE LTD

… *Respondent*

Civil Appeal No 55 of 2018 and Summons No 86 of 2018

Between

YAP CHEW LOONG

… *Appellant*

And

(1) GRYPHON REAL ESTATE INVESTMENT CORPORATION PTE LTD
(2) TAN TEK SENG KELVIN (CHENG DECHENG KELVIN)
(3) KOH POH LENG (GAO BAOLING)

… *Respondents*

In the matter of Companies Winding Up No 143 of 2017

Between

DOUGLAS FOO PEOW YONG

… *Plaintiff*

And

ERC PRIME II PTE LTD

… *Defendant*

In the matter of Companies Winding Up No 146 of 2017

Between

YAP CHEW LOONG

… *Plaintiff*

And

(1) GRYPHON REAL ESTATE INVESTMENT CORPORATION PTE LTD
(2) TAN TEK SENG KELVIN (CHENG DECHENG KELVIN)
(3) KOH POH LENG (GAO BAOLING)

… *Defendants*

JUDGMENT

[Companies] — [Winding up] — [Directorial misfeasance]
[Companies] — [Winding up] — [Just and equitable] — [Loss of confidence]
[Companies] — [Winding up] — [Just and equitable] — [Loss of substratum]

Foo Peow Yong Douglas
v
ERC Prime II Pte Ltd
and another appeal and other matters

[2018] SGCA 67

Court of Appeal — Civil Appeals Nos 196 of 2017 and 55 of 2018 and Summonses No 39, 83, 86 and 91 of 2018
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
3 September 2018

22 October 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 There are two appeals before us. The first is Civil Appeal No 196 of 2017 ("CA 196"), brought by Douglas Foo Peow Yong ("Foo") against the decision of a Judge of the High Court ("the Judge") in Companies Winding Up No 143 of 2017 ("CWU 143") to refuse an application to wind up ERC Prime II Pte Ltd ("ERCP II"). Tan Tek Seng Kelvin ("Tan") and Ainon Binte Ismail ("Ainon") are non-parties in CA 196 who appeared below and before us to oppose the application to wind up ERCP II. The second appeal is Civil Appeal No 55 of 2018 ("CA 55"), which is brought by Yap Chew Loong ("Yap") against the decision of a Judicial Commissioner of the High Court ("the JC") to refuse an application in Companies Winding Up No 146 of 2017 ("CWU 146")

to wind up Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"). Tan and Koh Poh Leng ("Koh") are the second and third respondents respectively in CA 55.

2 These appeals raise a number of factual questions regarding the state of the companies concerned and the conduct of their management to date. Given the potential urgency of the matter, having regard to some concerns (including as to time bars) that we will touch on below, we have prepared our judgment on an expedited basis and have only dealt with the points necessary to dispose of the appeals.

Background

3 ERCP II and GREIC, the two companies that are the subject of these appeals, are investment holding companies set up by Ong Siew Kwee ("Andy Ong") and his associates pursuant to two joint ventures that he entered into with Foo sometime in 2009 or 2010. The first venture was the acquisition and development of what was known as the Big Hotel located at 200 Middle Road, Singapore; and the second was the acquisition and development of units in a mall known as Bugis Cube located at 470 North Bridge Road, Singapore. We will refer to these ventures as "the Big Hotel project" and "the Bugis Cube project" respectively.

ERCP II and the Big Hotel project

4 ERC Unicampus Pte Ltd ("ERCU") is a corporate vehicle that was incorporated for the purposes of acquiring and holding the Big Hotel project. Its shareholders include ERCP II, through which Foo made his investment in the project, and other special purpose vehicles ("SPVs") set up by Andy Ong

and his associates. ERCP II is the subject of CA 196, an appeal arising out of CWU 143.

5 ERCP II is an investment holding company incorporated in November 2010. Clause 3.2 of its shareholders' agreement dated 21 February 2011 states that its "principal business" is to invest in the project of acquiring, converting and managing the Big Hotel through ERCU. At the time of the application below, it held 32.24% of the shares in ERCU. Aside from these shares, ERCP II has no business of its own and no other valuable asset. The Big Hotel property has been sold and most of the investment returns distributed. ERCP II therefore only has the following assets at present:

(a) a claim to a share of a security deposit of $3.75m that was returned by the purchaser of the Big Hotel property to ERCU and is presently held by ERCU ("the Security Deposit"), and

(b) a potential claim to a share of $33.45m held in escrow by Rajah & Tann Singapore LLP ("R&T") ("the Escrow Sum") as solicitors for ERCP II, pending the determination of Originating Summons No 1004 of 2017 ("OS 1004") brought against ERCU by Griffin Real Estate Investment Holdings Pte Ltd ("GREIH") for the Escrow Sum to be paid to it. The Escrow Sum is currently held by R&T pursuant to a settlement agreement dated 3 December 2016 between the parties in Originating Summons No 924 of 2015 ("OS 924"), which included ERCP II and ERCU. We will elaborate on GREIH and these related actions later (see [16] and [26]–[27]).

6 According to Foo, ERCP II also has some interest in a $5m retention sum held by Dentons Rodyk & Davidson LLP, the law firm that acted as the

solicitors for the purchasers of the Big Hotel property from ERCU ("the Retention Sum"). The context of this sum is not entirely clear but, in any case, this is not a material point for the purposes of this appeal.

7 According to information provided by counsel for Foo, ERCP II's board composition since its incorporation is as follows:

Approximate Dates	**Directors of ERCP II**
30 November 2010 to 14 December 2010	Andy Ong Ong HB
14 December 2010 to 15 December 2010	Andy Ong Ong HB Ho Yew Kong ("Ho")
15 December 2010 to 12 July 2013	Ho
12 July 2013 to 24 October 2014	Ong HB
24 October 2014 to 13 April 2017	Andy Ong Ong HB
13 April 2017	Ong HB Stephen Tan Fei Wen ("Stephen Tan")

8 Based on the additional evidence sought to be adduced on appeal, which we will elaborate on below, it turns out that both Andy Ong and Ong HB have been disqualified from holding any directorship since 13 March 2017. Ong HB averred that he had only found out about his disqualification on or around 1 August 2018 and had since ceased to be involved in ERCP II's management. Thus, Stephen Tan in effect became ERCP II's sole director from that point. On 29 August 2018, which was a few days before the hearing of this appeal, Chia

Puay Khiang ("Chia") was appointed a co-director of ERCP II by a directors' resolution to which Stephen Tan was the sole signatory. The propriety of this appointment is disputed.

9 As for ERCP II's shareholders, they comprise several individual investors, as well as Foo, Tan, Ainon and ERC Holdings Pte Ltd ("ERC Holdings"):

(a) Foo held 19.8% of the total issued and paid up shares in ERCP II as of October 2017.

(b) ERC Holdings held around 9.24% of the shares in ERCP II as of July 2017. This is the ultimate holding company of several of Andy Ong's SPVs (collectively termed the "ERC Group"). It was incorporated on 13 May 1999 by Andy Ong, who was its majority shareholder (with a 91.85% shareholding) until 15 May 2017, which was shortly after the release of the judgment of the High Court in Suit Nos 122 and 1098 of 2013 (collectively, "the Suits"), which are suits to which he was party and which we refer to at [17] below. That judgment was adverse to Andy Ong, and after its release, he transferred all his shares in ERC Holdings to his sister, Ong Geok Yen ("Ong GY"). Andy Ong was also a director of ERC Holdings until 15 February 2016 when Ong GY took over. At the time of the hearing below, ERC Holdings' directors were Ong GY and Ong Geok Hong Lydia, who is another of Andy Ong's sisters. Apart from its shareholding in ERCP II, ERC Holdings also purportedly acquired shares in ERCU in October 2013 through the exercise of a share option, the legitimacy of which is presently disputed.

(c) Tan and Ainon are shareholders and collectively hold around 3.96% of ERCP II's issued shares as at July 2017. As noted above (at [1]), they oppose the winding up of ERCP II.

10 There was nothing to suggest that the relevant parties' shareholdings had materially changed by the time the appeal was heard before us.

11 We turn to the sequence of relevant events relating to the Big Hotel project.

12 On 14 October 2010, ERC Holdings obtained an option to purchase the Big Hotel property, which was exercised by ERCU on 3 November 2010. The total purchase price of the property was $103m.

13 By October 2013, almost three years after this, a total of five SPVs, including ERCP II, had been set up for unrelated individual investors to participate in the Big Hotel project. A shareholders' agreement was entered into in respect of each SPV. However, Andy Ong continued to make the principal commercial and management decisions for the project and, for this purpose, he used another of his vehicles, a company known as Gryphon Estate Management Pte Ltd ("GEM"). The payment of management fees by ERCU to GEM is one of the issues in dispute.

14 On 17 November 2015, the Big Hotel property was sold for $203m. Prior approval for the sale was obtained from ERCU's shareholders at an extraordinary general meeting ("EGM") of the company that was held two months earlier on 17 September 2015.

15 In 2016 and early 2017, a large part of the investment returns from the Big Hotel project was distributed to the various shareholders of ERCU and, in turn, by them to their respective shareholders. At the time of the hearing below, the proceeds had been distributed to the shareholders of ERCP II, and ERCP II's only remaining interest was its proportional share of the Security Deposit, the Escrow Sum, and possibly the Retention Sum (see [5] above).

GREIC and the Bugis Cube project

16 In respect of the Bugis Cube project, GREIH is the corporate vehicle through which the investment was to be made and held. For present purposes, it suffices to note that save for a period between May 2012 and April 2017, GREIH has had two shareholders: Sakae Holdings Ltd ("Sakae"), which held 24.69% of its issued share capital, and GREIC, which held the remaining 75.31%. These two shareholders represent (in a loose sense of the term) Foo's and Andy Ong's interests in the venture respectively.

17 GREIH has been the subject of extensive litigation before our courts. On 7 April 2017, the High Court issued its judgment in respect of the Suits in *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73 ("*Sakae (HC)*") in which it found, amongst other things, that Andy Ong and Ong HB, as directors of GREIH at the material time, had engaged in oppressive conduct towards Sakae, which was the minority shareholder in GREIH. Consequently, GREIH was ordered to be wound up (see *Sakae (HC)* at [293]). We upheld this aspect of the High Court's decision on 29 June 2018: see *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Sakae (CA)*"). GREIH is therefore now in the control of court-appointed liquidators. The relevance to the present appeals of certain

adverse findings made against Andy Ong and Ong HB in *Sakae (HC)* and *Sakae (CA)* is contested.

18 The focus of CA 55 is, however, on GREIC. This is an investment holding company incorporated by Andy Ong in November 2009. Its sole asset is its 75.31% shareholding in GREIH. GREIC's memorandum of association ("MOA") (as amended by special resolutions passed in 2010) lists seven objects, the first of which is to own the Bugis Cube project through GREIH for investment purposes for a minimum duration of 10 years commencing from the date of ownership, and the sixth of which is to distribute the sale proceeds from GREIC's assets to its shareholders. Clause 2.3 of a shareholders' agreement dated 31 August 2010 signed by the shareholders of GREIC, including Yap, also stated that the "principal business" of GREIC was to invest in the Bugis Cube project through GREIH.

19 As for GREIC's board composition, the following may be gleaned from what was before us:

Approximate Dates	**Directors of GREIC**
9 November 2009 to 17 January 2011	Andy Ong Ong HB
17 January 2011 to 5 March 2015	Ho
5 March 2015 to 14 March 2017	Andy Ong Ong HB Stephen Tan Chua Wei Tat ("Chua")
14 March 2017 to	Andy Ong

13 April 2017	Ong HB Stephen Tan
13 April 2017	Ong HB Stephen Tan

20 As we mentioned above (see [8]), it transpired that Andy Ong and Ong HB had been disqualified from holding any directorship since 13 March 2017. According to Ong HB, he first learnt of this disqualification sometime on or about 1 August 2018 and had thereafter ceased to be involved in GREIC's management. Thus, just as with ERCP II, Stephen Tan effectively became GREIC's sole director and, by a directors' resolution to which he was the sole signatory, he purported to appoint Chia as a co-director on 29 August 2018.

21 GREIC's shareholders comprised several unrelated individual investors as well as SPVs incorporated by Andy Ong and his associates. They include the following:

(a) Yap is a shareholder of GREIC and held around 3.19% of its issued share capital (400,000 out of a total of 12,555,000 issued shares) in September 2017 when CWU 146 was filed. Based on Yap's affidavits filed in CWU 146, as at 2 October 2017, 28 out of 45 shareholders holding 58.5% of GREIC's issued share capital supported his winding up application.

(b) Tan and Koh are also shareholders of GREIC and they oppose Yap's winding up application. As at September 2017, they collectively held around 3.19% of GREIC's issued share capital. They claim to be unrelated to the directors of GREIC.

(c) It appears that Andy Ong has some interest in GREIC, through ERC Holdings, which is one of the ultimate indirect holding companies of GREIC. Details regarding the management and shareholders in ERC Holdings have been set out at [9(b)] above. ERC Holdings held around 0.8% of GREIC's issued share capital as at September 2017.

22 Again, there was nothing to suggest that the parties' shareholdings in GREIC had materially changed by the time of this appeal.

23 As for the relevant events pertaining to the Bugis Cube project, on 3 September 2010, Sakae, GREIC and GREIH entered into a joint venture agreement that governed their investment in the Bugis Cube project. Pursuant to this agreement, GREIH purchased the Bugis Cube property for around $46m in March 2010. As was the case with the Big Hotel project, the plan was to develop and thereafter sell the Bugis Cube property for investment returns.

24 About two years later, between June and October 2012, GREIH sold all the units in the first to fifth floors of the six-storey Bugis Cube property and received a total of $142.8m from the sale. According to Yap, GREIC's share of the investment returns was between $41m and $89m. However, GREIH has not yet distributed to its shareholders the proceeds from the partial sale of Bugis Cube, although the reasons for the delay are disputed. At the time of the hearing before us, the sixth floor of units in Bugis Cube, apparently valued at around $15m, remained unsold by GREIH.

Related matters

25 There are several related matters concerning the Big Hotel and Bugis Cube projects, of which two are directly relevant to the present appeals.

26 OS 924 is a claim by Yap and some other investors against ERCU for, amongst other things, sale proceeds from the Big Hotel project to be held in escrow pending shareholder approval for its distribution. On 8 November 2016, the High Court dismissed the application. Based on its oral grounds, which are not sealed, the court decided as it did on the basis that the applicants, as shareholders of ERCP II and not of ERCU, did not have the requisite standing to sue. In so concluding, the court examined and rejected the applicants' argument that the corporate veil between ERCP II and ERCU should be pierced because the corporate structure was a mere façade designed to defeat the applicants' rights and to frustrate the enforcement of their shareholder rights:

> In the present case, I was not satisfied that there was any such concealment or evasion, or any other wrongdoing such that the corporate structure should be disregarded. The evidence adduced did not support the [applicants'] contentions at all: I could not conclude that any fraud, deceit, concealment or evasion occurred. Among other things, the testimony and other evidence from the [applicants] did not establish, in the light of the other evidence in the case, including the documents, that that the [applicants'] witnesses were the victims of deceit or fraud, or that the corporate structure was erected to hide wrongful transactions, or that there was any other actionable wrong.

OS 924 was eventually settled after the decision of the High Court was issued, with a portion of the sale proceeds returned to the shareholders, and some monies remaining in the hands of ERCU held on escrow by R&T (see [5(b)] above).

27 OS 1004 is GREIH's claim against ERCU in respect of the Escrow Sum. ERCP II is *not* a party to OS 1004. In Originating Summons No 471 of 2017, GREIH also obtained an injunction restraining ERCU from dealing with the Escrow Sum pending full disposal of OS 1004, which was still pending as at the hearing of this appeal.

The decisions below

28 In CWU 143, Foo argued that ERCP II should be wound up under s 254(1)(*f*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") because its directors, specifically Andy Ong and Ong HB, had acted in the affairs of the company in their own interests rather than in the interests of the shareholders as a whole. He further asserted that because of his justifiable lack of confidence in their management of ERCP II, and alternatively, the fact that ERCP II had lost its substratum given the completed sale of the Big Hotel property, it was just and equitable for ERCP II to be wound up pursuant to s 254(1)(*i*) of the Act. ERCP II disputed the allegations of wrongdoing and argued that there was no basis for it to be wound up at this stage. Tan and Ainon also opposed the winding up application and expressed confidence in ERCP II's management.

29 The Judge dismissed the winding up application on 16 November 2017: see *Douglas Foo Peow Yong v ERC Prime II Pte Ltd* [2017] SGHC 299. In brief, he did so for the following main reasons:

(a) ERCP II had not lost its substratum because the dispute over the Escrow Sum had not yet been resolved. The object of investing in the Big Hotel project "must include the recovery and distribution of the returns from that investment" (at [17]).

(b) It was unnecessary to make any findings on the specific allegations of misconduct raised against Andy Ong and Ong HB because, amongst other things, a substantial portion of sale proceeds from the Big Hotel project had already been distributed by ERCU to its shareholders, including ERCP II, and in turn by ERCP II to its shareholders, including Foo (at [21]–[22]).

(c) In any event, the court should exercise its discretion not to wind up ERCP II because, amongst other things, there was no pressing reason to do so at this stage rather than after the resolution of the dispute with GREIH over the Escrow Sum in OS 1004 (at [25]). This was especially so because winding up ERCP II at this time could "complicate" ERCU's defence in OS 1004, which was being handled by Andy Ong and Ong HB (at [26]). Furthermore, liquidation of the company would cause unnecessary expenses to be incurred (at [27]).

30 As for CWU 146, Yap argued that GREIC should be wound up, relying solely on the just and equitable ground under s 245(1)(*i*) of the Act. He based his case, first, on the ground that GREIC had lost its substratum given that a majority of the units held by GREIH in Bugis Cube had been sold; and second, on the ground of misconduct by GREIC's directors leading to a justifiable loss of confidence in the management of the company. GREIC opposed the application on the basis that the requirements under s 254(1)(*i*) of the Act were not satisfied. Tan and Koh also took the position that they had confidence in the directors and the management of GREIC and wished the company to continue its operations.

31 The JC issued brief oral grounds on 28 February 2018, similarly dismissing the winding up application in respect of GREIC. His key findings were as follows:

(a) GREIC had not lost its substratum. Although the act of distributing the funds in question was merely an ancillary rather than an essential element of its substratum, there nevertheless remained two more activities in which GREIC had at least a "role in monitoring", which were:

(i) the completion of the sale of the Bugis Cube property, in particular of the remaining floor of units; and

(ii) the distribution of the relevant share of the sale proceeds from GREIH to GREIC.

(b) There was insufficient evidence of wrongdoing or fraud on the parts of GREIC's directors such as would justify winding up the company on the just and equitable ground. Although the findings of wrongdoings in *Sakae (HC)* in respect of GREIH were more relevant to the winding up of GREIC than they were to the winding up of ERCP II, they were not determinative. Furthermore, because GREIC's role was largely passive, being merely to receive distributions from GREIH, any wrongdoing could easily be detected and investigated even at a later stage. GREIC had also made further disclosures on the court's direction such that Yap had sufficient insight into its finances to pursue any perceived wrongdoings by other means.

32 It bears mentioning that both the Judge's and the JC's decisions in CWU 143 and CWU 146 respectively were delivered after the issuance of *Sakae (HC)*, but prior to the issuance of our decision on appeal in *Sakae (CA)*.

Arguments on appeal

33 In CA 196, Foo's position remains that ERCP II should be wound up and that private liquidators should be appointed. He relies on both ss 254(1)(*f*) and 254(1)(*i*) of the Act and makes the following main arguments:

(a) The Judge erred in conflating ERCP II's main and ancillary objects. For an investment company such as ERCP II, "the substratum of the company is lost once the ability of that company to invest has

ended, even if there are remaining monies left for the company to distribute". It was said that this justified winding up under s 254(1)(*i*) of the Act.

(b) The Judge should have made a finding on the specific allegations of misconduct against Andy Ong and Ong HB that had been levelled against them. Had he done so, he would have found that a winding up order pursuant to ss 254(1)(*f*) and/or 254(1)(*i*) of the Act was called for and appropriate.

(c) Where the statutory grounds for winding up have been made out, the court should be slow to refuse winding up on discretionary grounds, save in exceptional circumstances, such as where such a decision is justified in the public interest. In this case, the discretion not to wind up the company should not be exercised because, amongst other things, irremediable prejudice would be caused if ERCP II was left instead to be voluntarily wound up only after the resolution of the dispute over the Escrow Sum.

34 ERCP II, Tan and Ainon take the contrary position that the Judge was correct to dismiss CWU 143 for the following reasons:

(a) It is not just and equitable for ERCP II to be wound up under s 254(1)(*i*) of the Act at this stage because the recovery and distribution of investment returns from the Big Hotel project is not yet complete. It follows that the company has not lost its substratum.

(b) Section 254(1)(*f*) is not satisfied because the alleged misconduct of ERCP II's directors relate to ERCU which is a distinct entity from ERCP II. Hence, such alleged misconduct, even if true, would not

constitute acting "in the affairs of the company" as required by that provision. Further, there is no risk of misappropriation by the directors of ERCP II since a large part of the returns from the Big Hotel project has already been distributed by ERCU to its shareholders, including ERCP II, which has in turn distributed its share of the proceeds to its shareholders, including Foo.

(c) In any event, the Judge rightly refrained from exercising its discretion to order a winding up of ERCP II. Winding up is a draconian remedy of last resort. In this case, it would not expedite the distribution of any proceeds to the shareholders and the appointment of liquidators at this stage would be costly and unnecessary. Furthermore, there are other avenues for the company's aggrieved shareholders to seek recourse. In any case, the application is an abuse of process and an attempt to re-litigate issues that have been conclusively decided in OS 924.

35 Notably, however, ERCP II accepts that the company *should* be wound up at a later stage, presumably voluntarily, *after* the resolution of OS 1004 and the final distribution of the investment returns from the Big Hotel project.

36 In CA 55, Yap relies solely on the court's just and equitable jurisdiction to wind up a company under s 254(1)(*i*) of the Act. He makes the following key arguments in favour of winding up GREIC:

(a) The purpose for the incorporation of GREIC has been fulfilled and any remaining activity can be performed by liquidators. There is no possibility of the Bugis Cube project being resurrected. The substratum

of the company has therefore been lost and winding up under s 254(1)(*i*) of the Act is justified.

(b) There have been serious and persistent fraud and/or breaches of duty by the directors in the context of GREIH which are likely to recur. In this regard, specific allegations are raised against GREIC's directors, and the findings in *Sakae (HC)* and *Sakae (CA)* of misconduct by Andy Ong and Ong HB are also relied on. Yap has therefore justifiably lost confidence in the management of GREIC and this affords a ground for winding up under s 254(1)(*i*) of the Act.

(c) No factor militated against a winding up order, especially given that a majority of GREIC's shareholders in both number and share value have expressed support for the application, and there are no alternative remedies realistically available to Yap. Any additional cost associated with a compulsory liquidation is outweighed by the gravity of the directors' misconduct and the fact that GREIC is expected to receive substantial returns from GREIH for the Bugis Cube project.

37 GREIC, Tan and Koh take the position that the JC's refusal to wind up GREIC should be upheld for the following main reasons:

(a) There is no basis to wind up GREIC under s 254(1)(*i*) of the Act, given that:

(i) GREIC has not lost its substratum "because it has neither completely sold Bugis Cube, nor recovered and distributed the sale proceeds".

(ii) There is no allegation of fraud or mismanagement "*vis-à-vis* the conduct of GREIC's affairs justifying the draconian

remedy of winding up of GREIC". The findings in *Sakae (HC)* and *Sakae (CA)* against Andy Ong and Ong HB relate to their conduct in relation to GREIH, and should not be relied upon in relation to GREIC which is a distinct entity.

(b) In any event, the JC rightly refrained from exercising his discretion to wind up GREIC. Winding up is not necessary at this stage as it will cause unnecessary costs to be incurred and deplete the proceeds from the partial sale of the Bugis Cube project. Further, if GREIC is wound up, it would not be able to safeguard its interest in the Bugis Cube project due to a lack of funding pending distribution of the sale proceeds by GREIH. The proposed liquidators for GREIC might also be unduly influenced by Sakae and/or Foo.

Applications to admit additional evidence in the appeals

38 Before we turn to the substantive issues, there are four applications before us for leave to admit additional evidence in the appeals. Insofar as they relate to matters that occurred *before* the trial or hearing below, it is trite that they are only admissible if they satisfy the three conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"), namely, non-availability, materiality and apparent credibility. However, for evidence of matters that occurred *after* the trial or hearing below, the test is more lenient and the two requirements are that the evidence must at least be potentially relevant to the issues in the appeal, and at least be seemingly credible (*BNX v BOE and another appeal* [2018] 2 SLR 215 ("*BNX*") at [99] and [100]).

39 In Court of Appeal Summons No 39 of 2018 ("SUM 39") filed in CA 196, ERCP II sought leave to adduce: (a) eight affidavits filed by Ong HB and other persons in related applications supposedly to give us the "full context"

of the Escrow Sum and to show Foo's motive for attempting to liquidate ERCP II; and (b) evidence as to the status and/or outcome of OS 1004. We dismiss this application in its entirety. Six of the eight affidavits pre-date the hearing of CWU 143 and therefore fail the requirement of non-availability. In this regard, Foo's motive in filing CWU 143, the supposed difficulty of defending OS 1004 if ERCP II was wound up, and the context of the Escrow Sum, are all issues that were argued before and considered by the Judge, and so evidence relating to these issues could and should have been adduced below. As for evidence regarding the status and/or outcome of OS 1004, we agree with Foo that the application is premature as OS 1004 is still pending disposal in the High Court.

40 In Court of Appeal Summonses No 83 and 91 of 2018 ("SUM 83" and "SUM 91" respectively) filed in CA 196, Foo seeks leave to admit evidence which may be classified into five categories as follows:

(a) Evidence relating to Ong HB's disqualification from holding any directorship since 13 March 2017.

(b) A certificate of conviction showing that Ong HB had pleaded guilty to and was convicted in the State Courts of 12 offences under the Act on 13 March 2017, and was sentenced to an aggregate fine of $14,000.

(c) The land register search result dated 31 July 2018 from the Singapore Land Authority in respect of a property at Simei that had previously been registered in Ong HB's name.

(d) Evidence relating to criminal charges brought against Andy Ong, Ong HB, Ho, Chua and Wijesekera Mahin Chandika ("Mahin") on

3 August 2018 for offences including criminal breach of trust and cheating involving a total of more than $20m.

(e) Evidence relating to High Court Summons No 3590 of 2018 ("SUM 3590") filed in one of the Suits.

41 We dismiss both summonses in their entirety.

(a) In relation to items (a) and (b), we were prepared to waive strict compliance with the non-availability requirement on the basis that the Accounting and Corporate Regulatory Authority ("ACRA") only started to publicly publish the disqualification status of directors with effect from 24 July 2018, and that this should be considered an exceptional circumstance warranting the waiver of the non-availability requirement (see *BNX* at [80]). However, in our judgment, the potential materiality of the items is not established. Insofar as item (a) is concerned, unless Foo could, on the basis of the evidence before this court, show that Ong HB had *knowingly* acted as a director despite his disqualification from acting as such, the mere fact of disqualification bears no perceptible relevance to the issues concerning ERCP II's substratum, loss of confidence in the management of the company, or directorial misfeasance. As for item (b), there is insufficient detail provided in relation to the antecedents. While the charge numbers and sentences imposed can be gleaned from the certificate sought to be adduced, it is not apparent what the charging provisions and the precise subject matter of the charges are.

(b) In relation to item (d), although these charges were filed after the hearing before the Judge, they bear little relevance to CA 196 because they generally relate to the conduct of Andy Ong, Ong HB, and their

associates in relation to GREIH and the Bugis Cube project. CA 196, however, concerns ERCP II and the Big Hotel project, which is a distinct joint venture. In addition, charges in relation to Chua and Mahin are all the more irrelevant as these individuals have no apparent role in CA 196.

(c) In relation to item (c), Foo's stated purpose is to show that Ong HB had recently sold a property that he owned, which allegedly suggests that he is in need of money. According to Foo, this "heightens the risks that [Ong HB] may use those monies distributed by ERCU to [ERCP II] for purposes other than the rightful distribution to shareholders". As for item (e), Foo's stated purpose is to show that the High Court had in SUM 3590 granted a freezing injunction against Ong HB in respect of assets up to $10m, on the basis of a real risk of dissipation of assets by him. Foo argues that this "suggest[s] an increased risk that [Ong HB] may divert, dissipate, or misappropriate funds which flow into [ERCP II]." In our judgment, both sets of evidence lack materiality because they relate to arguments that are highly speculative.

42 In Court of Appeal Summons No 86 of 2018 ("SUM 86") filed in CA 55, Yap seeks leave to adduce an affidavit with exhibits relating to: (a) the disqualification of Andy Ong and Ong HB from holding any directorship since 13 March 2017; and (b) criminal charges brought against Andy Ong and Ong HB on or around 3 August 2018. We allow SUM 86 only insofar as item (b) is concerned. We decline to admit item (a) for the same reasons as we stated at [41(a)] above. In respect of item (b), the charges were brought *after* the hearing before the JC, and are both apparently credible and at least potentially relevant to CA 55 since they relate to the conduct of Andy Ong and Ong HB in

relation to GREIH and the related companies involved in the Bugis Cube project (which includes GREIC), as well as their management of proceeds from the partial sale of the Bugis Cube property, in which GREIC has an interest.

43 On the eve of the appeal hearing, Ong HB and Chia filed affidavits in SUM 86 and SUM 91 stating that (a) Chia had been appointed as a director of ERCP II and GREIC in the place of Ong HB; and (b) Chia was also being appointed the sole bank signatory for the two companies in place of Andy Ong and Ong HB. On this basis, it is argued that the conduct of Andy Ong and Ong HB, and in particular the criminal charges brought against them in August 2018, are no longer relevant to the appeals. We do not agree. In our judgment, the potential relevance of the criminal charges brought against Andy Ong and Ong HB which we discussed above at [42] is not affected by the new information regarding Chia, because the mere fact that a new director or bank signatory has been appointed does not necessarily render the conduct of the previous directors irrelevant in an analysis under ss 254(1)(*f*) or 254(1)(*i*) of the Act. That said, we are of the view that the affidavits filed relating to Chia's recent appointment and role in ERCP II and GREIC are, in substance, additional evidence sought to be admitted in the appeals by the respective companies. In that regard, while neither company filed formal applications, we consider it appropriate to extend a degree of indulgence and to regard these affidavits as the subject of oral applications to admit additional evidence in the appeals, given the temporal proximity between the appointment of Chia and the appeal hearing, as well as the grave consequences that may follow a winding up application. To this end, we allow the oral applications in both appeals as the affidavits as to Chia's recent appointment and role are seemingly credible and at least potentially relevant to both appeals.

The substantive appeals

44 We turn to the substantive issues on this basis. Both CA 196 and CA 55 concern applications by shareholders for a company to be wound up. They are entitled to do so pursuant to s 253(1)(*c*) of the Act since they fall within the definition of a "contributory" under s 4(1) of the Act. The general approach taken in relation to a winding up application initiated by a contributory is summarised as follows in Andrew R Keay, *McPherson's Law on Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) ("*McPherson on Liquidation*") at para 4-064:

> Unlike a creditor with an insolvent company, a contributory does not have the *prima facie* right to have a company wound up. *The court has an unfettered discretion as to whether it will make a winding up on the contributor's petition. In exercising its discretion the court will take into account the wishes of other members of the company* and if a majority of members, from the viewpoint of value of interest in the company, oppose winding up on a reasonable basis the court is likely to dismiss the petition. However, *this will not be the case if the court takes the view that either the company needs to be investigated by a liquidator or the majority of shareholders have been defrauding the minority*. … [emphasis added]

45 Section 254 of the Act in turn defines the circumstances under which the court may order the winding up of a company. The relevant parts read as follows:

> **Circumstances in which company may be wound up by Court**
>
> **254.**—(1) The Court may order the winding up if —
>
> …
>
> (*f*) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members;
>
> …

> (*i*) the Court is of opinion that it is just and equitable that the company be wound up;
>
> …

46 Further, s 254(2A) of the Act provides that on an application for winding up under ss 254(1)(*f*) or 254(1)(*i*), the court may, if it thinks it just and equitable to do so, make an order for the shares of one or more members to be bought out by the company or other members instead of granting a winding up order. This provision was introduced in 2015 to confer greater remedial flexibility on the court, but it did *not* affect the grounds or basis for invoking ss 254(1)(*f*) or 254(1)(*i*) of the Act (see *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*") at [77], citing *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 at [38(a)]). In the present appeals, none of the parties sought to rely on this provision. Nor are we of the view that a buy-out order is appropriate given the nature of the allegations and the fact that a significant number of shareholders in both companies are individuals unrelated either to the applicants or the allegedly misbehaving directors.

CA 196 – Winding up of ERCP II

47 We turn first to CA 196 and, specifically, Foo's submission that ERCP II should be wound up under s 254(1)(*i*) of the Act on the basis that there has been a justifiable loss of confidence on his part in the management of the company by its directors.

48 As a matter of law, it is undisputed that one situation in which the just and equitable ground contained in s 254(1)(*i*) of the Act is satisfied is "where minority members have been oppressed or treated unfairly by controlling

members and have justifiably lost confidence in the management of the company" (*Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 at [18]; *Walter Woon on Company Law* (Tan Cheng Han, gen ed) (Sweet & Maxwell Asia, Revised 3rd Ed, 2009) ("*Woon on Company*") at para 17.67). In determining whether this ground is made out, the starting point is the following passage from the judgment of the Judicial Committee of the Privy Council (on appeal from the West Indian Court of Appeal) in *Loch and Another v John Blackwood, Ltd* [1924] AC 783 at 788, which we affirmed in *Chong Choon Chai and another v Tan Gee Cheng and another* [1993] 2 SLR(R) 685 at [9]:

> … It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

49 Further, as a general rule, allegations made to ground a claim of loss of confidence must be *proved* before an order to wind up under s 254(1)(*i*) will be made; mere assertions premised on nothing more than suspicions of impropriety will not suffice (see *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 at [37]).

50 On the facts, Foo relies on four specific instances of alleged misconduct by Andy Ong and Ong HB to justify his loss of confidence in the management of ERCP II. Out of these four allegations, three relate to ERCU rather than ERCP II. Insofar as CA 196 is concerned, we do not think it is necessary for us to consider whether misconduct on the part of Andy Ong and Ong HB in their

capacity as directors of ERCU (and not ERCP II) could properly be considered in assessing whether there has been a justifiable loss of confidence in their management of ERCP II. This is because we find that at least one of the allegations relating to Ong HB's conduct in his capacity as a director of ERCP II has been established. This allegation concerns a share option purportedly granted by ERCU to ERC Holdings, the brief details of which are as follows:

(a) On 31 May 2011, ERCU purportedly issued a share option to ERC Holdings in respect of 11.94m shares. This was authorised by Andy Ong and Ong HB, who were the only two directors of ERCU at that time even though they were both concurrently directors of ERC Holdings, and Andy Ong was in fact a very substantial shareholder of ERC Holdings, holding 91.85% of its shares (see [9(b)] above).

(b) Subsequently, the share option agreement between ERCU and ERC Holdings was signed by Ong HB on behalf of ERCU, and by Andy Ong on behalf of ERC Holdings.

(c) On 1 October 2013, ERC Holdings purportedly exercised its share option and accordingly acquired 11.94m shares in ERCU (amounting to around 25.4% of ERCU's new share capital). This immediately diluted the interests of pre-existing shareholders in ERCU, including that of ERCP II. The share application was signed by Andy Ong in his capacity as a corporate representative of ERC Holdings.

(d) This share issuance was made, on ERCU's part, pursuant to a resolution passed at a EGM held on 1 October 2013 which conferred unfettered powers on ERCU's directors to "allot and issue such shares in [ERCU] at any time and to any persons on such terms and conditions

and with such rights or restrictions as they may in their absolute discretion deem fit …". Ong HB had called for the EGM by a notice dated 1 October 2013 (which was the same day as the EGM) in his capacity as a director of ERCU. He then chaired this EGM on behalf of ERCU, and voted in favour of the share issuance resolution *on behalf of ERCP II* and four other shareholders of ERCU. Ong HB also voted in favour of dispensing with the requirement of 14 days' notice for the EGM, again *on behalf of ERCP II* and four other shareholders of ERCU. Ho represented the sixth shareholder and voted in favour of the same resolutions. Ong HB and Ho were the only attendees at this EGM and together they purported to represent all of ERCU's shareholders.

(e) The shareholders of ERCP II were only informed of the share option and its exercise much later on or around 17 July 2014.

51 In our judgment, the events recounted above betrayed a serious and obvious lack of probity on the part of Ong HB in his conduct as a director of ERCP II, which was unfair, if not oppressive, to the shareholders of ERCP II, including Foo, who was a minority shareholder of the company. Indeed, insofar as the evidence before this court is concerned, there are several instances of conflict of interest and/or breach of fiduciary duty disclosed. Of particular relevance to ERCP II is the fact that Ong HB had voted *on behalf of ERCP II* in favour of the resolution conferring an unfettered discretion on ERCU's directors to issue new shares, which would necessarily and substantially dilute ERCP II's shareholding in ERCU, thereby prejudicing its interest. Pursuant to this resolution, a significant number of shares was in fact issued by ERCU to ERC Holdings. At the time he so voted, Ong HB was concurrently a director of ERCU *and* of ERC Holdings, and the latter stood to benefit from the resolutions being passed. Ong HB also voted for the resolution to dispense with the notice

requirement for the EGM. This meant that ERCU's share issuance to ERC Holdings was approved on the very day that Andy Ong had caused ERC Holdings to send a share application to ERCU purporting to exercise the share option that Ong HB and he had earlier caused ERCU to issue to ERC Holdings. Further, despite the apparent and immediate dilutive effect of the share option and issuance on the interests of ERCP II's shareholders, Ong HB did not see fit to disclose these events to these shareholders until around a year later. In our judgment, the gravity and audacity of Ong HB's misconduct give rise to a justifiable loss of confidence on the part of Foo in Ong HB's management of ERCP II. The fact that Ong HB was at times joined by Andy Ong on the board of ERCP II (see [7] above) does not assist ERCP II given Andy Ong's close complicity in the very misconduct that we find has been established against Ong HB.

52 We appreciate that Andy Ong and Ong HB are not parties to this appeal. Nevertheless, Ong HB had, in his capacity as a director of ERCP II, filed affidavits in CWU 143 seeking to explain that the share option and issuance were: (a) made in consideration of a loan extended by ERC Holdings to ERCU for the renovation of the Big Hotel property; (b) properly approved at ERCU's EGM; and (c) pursuant to a shared commercial understanding that management decisions would be taken by GEM. We are not persuaded by these explanations. There is little by way of objective evidence to support them and, even if the shares were issued for a legitimate purpose, informed shareholders' consent should have been obtained from ERCP II's shareholders in the light of the obvious conflicts of interest.

53 Before us, counsel for ERCP II further submitted that: (a) other shareholders had been given an opportunity to buy out ERC Holdings' shares in ERCP II but they chose not to do so; and (b) ERC Holdings has agreed for

the shares it obtained pursuant to the disputed share option to be converted into a loan. In our judgment, neither explanation addresses the impropriety of the share option and issuance, which is the threshold issue. In particular, they do not address the prejudice caused to ERCP II of having its interest in ERCU diluted by the share option and issuance.

54 Consequently, on the basis of the evidence before us, we are satisfied that there was a serious and obvious lack of probity on the part of Ong HB in dealing with the share option and issuance between ERCU and ERC Holdings in his capacity as a director of ERCP II, which suffices to justify Foo's loss of confidence in Ong HB's management of the company.

55 Having said that, we do not agree with Foo's reliance on the findings against Andy Ong and Ong HB in *Sakae (HC)* and *Sakae (CA)*, which we have briefly described at [17] above, to show that these two individuals must have used similarly unfair and oppressive methods of dealing in relation to the companies involved in the Big Hotel project, including ERCP II. We do not think that such reasoning, based *solely* on the alleged propensity of a director to act in a given way based on how he has acted in another situation, is appropriate in the context of CA 196, which involves a different set of companies and a different business venture as that implicated in the two judgments on which reliance is sought to be placed.

56 Turning to ERCP II's other arguments on the question of loss of confidence, ERCP II does not directly respond in the appeal to the specific allegations raised by Foo, but rather submits that the allegations have been determined and dismissed in OS 924, and are therefore *res judicata*. In our judgment, there is no merit to this argument. We have briefly summarised the oral grounds of the High Court above at [26]. First, as a matter of legal context,

the primary issue in OS 924 is materially different from that before us. There, the question was whether the corporate veil should be lifted on account, amongst other things, of the allegations of fraud and wrongdoing raised against Ong HB and others. In that context, the relevant yardstick was the doctrine of separate legal personalities. That involves a different inquiry from the present question of whether the alleged wrongdoings of ERCP II's directors justify a loss of confidence in their ability to manage the company such as to constitute a just and equitable ground for winding up. Second, and more specifically, the allegation as to the unauthorised share option and issuance between ERCU and ERC Holdings was apparently not an issue in dispute in OS 924. Instead, the applicants there appear to have relied on representations allegedly made to them by Andy Ong during various investment seminars conducted by him. Third, the High Court in OS 924 expressly noted that in that case, taking into account the need for a prompt resolution of the dispute, "[t]here was no opportunity to have broad cross-examination on all possible issues". In these circumstances, we are of the view that the doctrine of *res judicata* is simply not engaged.

57 The question that troubled us is whether the loss of confidence in Ong HB's conduct as ERCP II's director remains relevant given that Stephen Tan has taken over as the director of ERCP II, and is now joined by Chia. Having reviewed the evidence, we are satisfied that it is. There can be no question that Stephen Tan is closely associated with Ong HB and Andy Ong, and counsel for ERCP II did not attempt to deny this. As for Chia, documents that we were referred to by counsel for Foo and Yap show that she too has worked closely with Ong HB and Andy Ong in various capacities within the ERC Group from as early as 2010. Indeed, there is some suggestion that she is (or was) a cheque signatory for ERC Holdings, which is an entity inextricably implicated in our findings above on ERCU's share option and issuance (see [50]

above). Moreover, in her affidavit announcing that she had been appointed a co-director of ERCP II, Chia did not disclose or disclaim her association with any of these companies or with Ong HB, even though she and her advisors must have known that that would be a material area of concern in the present appeals. We find this omission deeply troubling. In the circumstances, the inference must be that she is an associate of Ong HB and/or Andy Ong.

58 Furthermore, the circumstances under which Stephen Tan purported to appoint Chia as a co-director of ERCP II buttress our finding that there is a justifiable loss of confidence in the present directors of ERCP II. In this regard, Stephen Tan, with full knowledge of the dispute concerning ERCP II and the nature and strength of the allegations made by Foo against the former directors, Ong HB and Andy Ong, purported to appoint Chia to the board of ERCP II even though she, like Stephen Tan himself, is known to be a close associate of the alleged wrongdoers. This decision was made unilaterally without notice to Foo (or apparently any other shareholder of ERCP II), pursuant to procedures which might even be in contravention of ERCP II's shareholders' agreement under which GEM has the right to nominate any new or replacement director, but which right may be overridden by shareholders holding more than 75% of ERCP II's issued share capital. Given the circumstances, the only appropriate conclusion is that Stephen Tan's own conduct in his capacity as a director of ERCP II lacks probity and justifies a loss of confidence in the current management of the company.

59 We turn to the issue of discretion. It is trite that the court retains a residual discretion to decline winding up even if the statutory grounds for winding up under s 254(1) of the Act have been made out (see *Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 at [33], cited in *Perennial* at [82]). Relevant considerations at this stage include the views of other stakeholders

including the non-petitioning shareholders, the existence of other procedures and remedies to protect the applicants' interests, and any abuse of process (see *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [19]; *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [59]; *Woon on Company Law* at para 17.50). Unless satisfied that the lower court had misdirected itself with regard to the principles in accordance with which its discretion had to be exercised, or considered matters that it ought not to have considered or failed to consider matters that it ought to have considered, or that the decision is plainly wrong, the lower court's decision as to the exercise of its discretion should not lightly be disturbed (*The Vishva Apurva* [1992] 1 SLR(R) 912 at [16]).

60 We have summarised the Judge's considerations in CWU 143 at [29(c)] above. To elaborate, the Judge's four reasons for exercising his discretion not to wind up ERCP II are as follows:

(a) First, there was no pressing reason to wind ERCP II up. ERCP II itself had no objections to being wound up *after* the dispute over the Escrow Sum was resolved, and even if it was wound up immediately, liquidation would not be completed until the resolution of that dispute. It also remained open to the liquidators (as and when they are appointed) to investigate any alleged wrongdoing by Andy Ong and Ong HB regardless of whether a winding up order was made (at [25]).

(b) Second, the winding up of ERCP II could unnecessarily complicate ERCU's defence against the claim for the Escrow Sum by GREIH's liquidators. The defence was being handled by Andy Ong and Ong HB. If Foo succeeded in winding up ERCP II, he would likely seek similar applications against other shareholders of ERCU, which would

"potentially lead to ERCU being controlled by liquidators of ERCU's SPV-shareholders", thereby complicating the defence (at [26]).

(c) Third, having liquidators handle the distribution of ERCP II's share in the Escrow Sum (if any) to its shareholders would "incur additional expenses unnecessarily" (at [27]).

(d) Fourth, not all shareholders were in favour of winding up ERCP II before the dispute over the Escrow Sum was resolved (at [28]).

61 We agree with the Judge insofar as he accepts that there remains a substantive role for the liquidators of ERCP II (as and when they are appointed) even though the Big Hotel project is already in its terminal stages. This role has both a prospective component – relating to the monitoring of ERCU's conduct of OS 1004 and the distribution of the Escrow Sum and other assets when received by ERCP II – and a retrospective aspect – relating to an investigation into the company's records and possible prosecution of past misconduct by its previous management. However, with respect, we are of the view that the Judge erred in exercising his discretion to decline to wind up ERCP II for the following reasons:

(a) First, in stating that there is no pressing reason for the immediate liquidation of ERCP II, the Judge omitted to consider the prejudice that such a delay in the independent investigation of ERCP II's past affairs might have on any potential claim against its previous management for breach of fiduciary duty and/or other causes of action, especially in the light of the possible operation of the time bar. In this regard, when we asked counsel for ERCP II, who also acted for Andy Ong and Ong HB in other related matters, whether his clients were prepared to undertake

that they would not rely on the time bar argument in the event that the issue arose, he was not able to confirm this.

(b) Second, while there is force in the Judge's concern that winding up ERCP II might affect ERCU's defence in OS 1004 against GREIH's claim for the Escrow Sum, we think this concern can be better addressed through other means including a closer supervision of the appointment of liquidators of ERCP II.

(c) As for the third reason given by the Judge regarding unnecessary expense, this was also the main objection raised by ERCP II on appeal. But the concern is unwarranted or at least overstated, since liquidators' fees and investigative costs would most likely have to be incurred in any event even if the company is wound up only after the complete distribution of the investment returns, which was the position urged by ERCP II upon us. Indeed, given the slow-moving present state of affairs, immediate liquidation might conduce to a faster resolution of the company's affairs and the parties' differences.

(d) Fourthly, while the opposing views of Tan and Ainon ought to be given some weight, we do not consider them overriding given the seriousness of the misconduct and the lack of probity that have been found, and the fact that Foo has a significantly greater shareholding in ERCP II (see [9] above). These are factors which the Judge omitted to consider.

62 For these reasons, we are satisfied and hold that ERCP II ought to be wound up.

63 Apart from loss of confidence, there are two other grounds relied upon by Foo which we will only briefly mention. The first is that ERCP II has lost its substratum given the near-conclusion of the Big Hotel project, and therefore should be wound up on just and equitable grounds under s 254(1)(*i*) of the Act. We do not base our decision on this ground. The loss of substratum ground is usually invoked where the company's original purpose is *frustrated or no longer practicable*. In a situation where the substratum has been *fulfilled*, it appears to us, at least provisionally, that the better course is for the company to be wound up voluntarily rather than compulsorily by order of court. In any event, we agree with the Judge's reasoning that, insofar as ERCP II is concerned, given the nature of the investment and cl 3.2 of the shareholders' agreement (see [5] above), the substratum of the company must include the recovery and distribution of investment returns from the Big Hotel project, which to date remain uncompleted (see [15] above). The second ground relied upon is s 254(1)(*f*) of the Act. However, as we mentioned above (at [50]), several of Foo's allegations against Ong HB and Andy Ong related to ERCU instead of ERCP II. Although it is arguable that Ong HB failed or omitted to disclose certain material facts to ERCP II or to take active steps *qua* director of ERCP II to stop or report misconduct at the ERCU level, it is not clear that this would fit within the statutory phrase "acted in the affairs of the company". In any event, in the light of our findings above, there is no need to rely on either of these grounds.

CA 55 – Winding up of GREIC

64 Turning next to CA 55, which concerns GREIC, we are similarly of the view that there has been a justifiable loss of confidence on Yap's part in the management of the company by its directors. In this regard, although Yap raised four specific allegations against the directors of GREIC in his written case, he

focused primarily on two of them in his oral submissions. We agree that there is sufficient basis for finding that both of these allegations justify a loss of confidence of Yap in the management of GREIC.

65 The first allegation relates to loans of around $1.12m borrowed in the period from 2014 to 2017 by GREIC from ERC Holdings purportedly for the payment of Ho's legal costs incurred in connection with the disputes in *Sakae (HC)* and *Sakae (CA)*. These loans came to light only during the proceedings in CWU 146 when Ong HB disclosed the statements for GREIC's bank account from its time of incorporation. This was done at the JC's invitation, on pain of possible adverse inferences being drawn if such disclosures were not made. GREIC does not dispute the fact that the loans were in fact taken out.

66 Based on the evidence before us, there are at least two distinct acts of misconduct in relation to these loans. First, the loans were taken out contrary to cl 11(vi) of GREIC's shareholders' agreement, under which GREIC is only permitted to borrow "(other than by way of bank overdraft not exceeding S$10,000,000 at any one time)" with the prior written approval of shareholders holding at least 75% of the company's issued shares. No shareholder approval, however, was in fact obtained in relation to these loans from ERC Holdings. GREIC provided no substantive explanation for this, save to say that it is open for Yap to take other steps to pursue any perceived wrongdoing without winding up GREIC, including to sue for a breach of the shareholders' agreement. We do not consider this to be a satisfactory response.

67 Second, we agree with Yap that there was no apparent basis for GREIC to have paid for Ho's legal costs. GREIC's explanations for why it had done so were that: (a) Ho was GREIC's corporate representative on GREIH's board;

and (b) it was in GREIC's interest to assist Ho in his defence of the suit, since GREIC was named a jointly and severally liable co-defendant in the same suit. We are not persuaded. In *Sakae (HC)* at [41]–[42], the High Court found that Ho was acting as Andy Ong's and *not* GREIC's representative. Further, it is not believable that GREIC paid Ho's legal costs on account of their shared interests as co-defendants because, by that logic, GREIC would have paid the legal costs of all parties named as its co-defendants in the suit. There is also no evidence that Ho had said that he would not defend the suit unless GREIC paid for his legal costs. Indeed, curiously, there is no evidence that GREIC had borrowed any funds for the payments of its *own* legal costs in the suit.

68 Two points are notable in relation to these loans. First, the result of GREIC taking out the loans is that it incurred significant liabilities to ERC Holdings of which its shareholders neither knew nor approved. As it does not appear that Ho would make any repayment of the disbursements, these liabilities effectively dilute the shareholders' financial interest in GREIC as any proceeds obtained from GREIH would first have to be used to repay ERC Holdings before a distribution to GREIC's shareholders can be made. Second, although it is not entirely clear who on GREIC's board had approved each loan, these particulars are not critical since all of the relevant persons, including Ong HB, Andy Ong, and Stephen Tan, had served as directors of GREIC at some point in the period from 2014 to 2017 during which the loans were taken out. Indeed, Ho, who benefited from these loans, had himself served as a director of GREIC from January 2011 to March 2015.

69 The second allegation is that GREIC's directors have caused GREIC to refrain from collecting on a debt of $370,000 due from GREIH to GREIC. In fact, GREIC has not even filed a proof of debt in respect of this claim in GREIH's liquidation. This is clearly prejudicial to the interests of GREIC's

shareholders, including Yap, and favours the interests of other shareholders of GREIH. GREIC does not dispute the existence or quantum of the debt owed by GREIH. Before us, its counsel provided two explanations as to why it did not take any action: first, the entitlement to the debt was not so clear-cut, and second, the management of GREIC did not wish to generate additional work for the liquidators of GREIH pending the resolution of *Sakae (CA)*. In our judgment, neither explanation can stand up to scrutiny. The first explanation is an afterthought that had not been relied on until the hearing of this appeal. Indeed, it contradicts Ong HB's affidavit dated 22 November 2017, in which he acknowledged without qualification that $370,000 was payable by GREIH to GREIC but explained that GREIC had not received the sum "because [Foo] had refused to authorise any payments out of GREIH's accounts since then". Even if we take the reference to Foo's non-cooperation at face value, the explanation is no longer relevant since GREIH is presently under the management of its liquidators. The second explanation is similarly unconvincing. There is nothing particularly difficult about reviewing an uncontentious proof of debt, and in any case it is not credible that the directors of GREIC had prioritised protecting the welfare of GREIH's liquidators over discharging their own directorial duties.

70 Apart from the two specific allegations, we also agree with Yap's submission that the adverse findings against Ong HB in *Sakae (HC)* and *Sakae (CA)* should be recognised as one reason for the loss of confidence in the directors of GREIC, even though the two judgments related, strictly speaking, to GREIH. In *Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 ("*Kingsley*"), the sole director of each of the companies in a corporate group was the subject of investigations by the Australian securities commission, which had applied to wind up several companies in that group. The Supreme Court of Victoria found evidence

showing a justifiable lack of confidence by the shareholders in the management of one company, and, on that basis, found a justifiable lack of confidence in another company of that group which had a "sufficient nexus" with the first company. The court reasoned as follows, referring to the first company as "Finance" and the other company as "Properties":

> 99 I am satisfied that Properties was an integral member of the … Group and cannot be regarded on the evidence as a stand-alone company unaffected by the conduct and management of the affairs of the group.
>
> 100 More particularly, in my opinion, *there was a sufficient nexus, indeed a very close one, between Properties and the following serious and fundamental deficiencies in the conduct and management of the affairs of Finance* during the period when Properties was used as a vehicle for, or a tool in, the implementation of the first project:
>
> - Finance raised money from the public without the required prospectus or other disclosure document;
> - redeemable preference shares were issued by Finance without notifying [the securities commission], without proper disclosure to investors of the nature and structure of the first project or the terms of the share issue or the existence of Properties;
> - the absence of financial records clearly explaining the affairs of Finance, including the costs of the first project, the transactions with Properties and the calculation and distribution of profits;
> - the 'confusion' as to whether Finance paid investors by way of franked dividend or by way of interest (and the tax consequences thereof for Finance and for investors).
>
> 101 I am therefore further satisfied that there is a justifiable lack of confidence in the conduct and management of the affairs of Properties by reason of the matters relating to Finance set out above.
>
> [emphasis added]

71 On the facts before us, we are satisfied that there is a sufficient nexus between GREIC and the serious and fundamental deficiencies identified in *Sakae (HC)* and *Sakae (CA)* in relation to the conduct of Andy Ong and Ong HB

in their capacity as directors of GREIH. Three factors stand out in this regard. First, GREIC is a shareholder in GREIH and is invested in the same venture, that is, the Bugis Cube project. Indeed, GREIC is a special purpose vehicle set up for the primary purpose of holding shares in GREIH, and these shares in GREIH are the sole asset of GREIC (see [18] above). Any financial misconduct affecting the economic interest of GREIH would therefore necessarily impact the economic interest of GREIC. Second, for significant periods of time, GREIC and GREIH also shared the same set of management personnel in Andy Ong, Ong HB and Ho (see [17] and [19] above). Third, as we mentioned above (at [17]), in *Sakae (HC)*, the High Court found Andy Ong and Ong HB to be liable for the oppression of Sakae, and in *Sakae (CA)*, we affirmed this finding. The specific acts of oppression comprised several transactions entered into by Andy Ong and Ong HB on behalf of GREIH which were found to be fraudulent and entered into by them with full knowledge that the transactions were false (see, for instance, *Sakae (CA)* at [126] and [198]). By any measure, these were damning findings that went beyond GREIH's internal affairs and directly affected GREIC's economic interest. Taking these factors holistically into consideration, we accept that the findings in the two judgments contributed to a justifiable loss of confidence by Yap in the management of GREIC even though the conduct discussed in the judgments technically relate to GREIH. The nexus between GREIC and the judgments in the context of CA 55 is far more proximate than that in CA 196 between ERCP II and the same two judgments (see [55] above).

72 For analogous reasons, we also regard as relevant the fact that criminal charges have been brought against Andy Ong and Ong HB in August 2018 in relation to their conduct *vis-à-vis* GREIH. The fact that these charges do not directly relate to GREIC does not preclude their relevance. They appear to be

based on findings in *Sakae (HC)* and *Sakae (CA)*, and allege variously against Andy Ong and Ong HB, amongst other things, criminal breach of trust by dishonest misappropriation of sums belonging to GREIH, cheating GREIH thereby inducing it to deliver shares to ERC Holdings, forgery and fabrication of evidence such as a lease agreement between GREIH and another company, and money laundering of sums belonging to GREIH obtained in breach of trust. Given the relationship between GREIC and GREIH, the fact that Andy Ong and Ong HB were for substantial periods directors of both GREIC and GREIH, and the nature and content of the charges, we are of the view that the highly proximate nexus between GREIC and these charges brought against Andy Ong and Ong HB renders it impossible for any shareholder in GREIC to turn a blind eye to such alleged criminal wrongdoing, even if GREIC and GREIH are strictly speaking distinct entities. Insofar as GREIC argues that a charge is not the same as a conviction and that the presumption of innocence should apply, we see some force in the submission, but we do not think that this necessarily precludes a consideration of the fact that the charges have been brought. The relevant inquiry here is whether the charges could reasonably lead or contribute to a *loss of confidence* in the management of a company by persons who are the subject of the charges, and not whether the charges in themselves establish directorial misfeasance by these persons. Taken in that context, the charges brought against Andy Ong and Ong HB in August 2018 are relevant to the question of loss of confidence when assessed in conjunction with the surrounding facts, including the findings in *Sakae (HC)* and *Sakae (CA)* (albeit that those are based on the civil standard of proof). And, in our judgment, these charges in fact contributed to a justifiable loss of confidence in the management of GREIC by Andy Ong, Ong HB, and their associates.

73 For the same reasons in those given above (see [57]), the purported appointment of Chia as a co-director of GREIC together with Stephen Tan does not cure or ameliorate such loss of confidence. Indeed, we take a similar view that Stephen Tan's conduct as a director of GREIC in purporting to appoint Chia as a co-director serves as a further reason for a justifiable loss of confidence in *his* management of GREIC. It is notable that, as with ERCP II, the purported appointment of Chia appears contrary to GREIC's shareholders' agreement, under which the appointment of new and replacement directors should be done pursuant to nominations by a management company that is now in liquidation. No evidence of any such nomination was brought to the attention of this court.

74 In its defence, GREIC appears to rely on the High Court decisions in OS 924, CWU 143 and CWU 146 as evidence that the courts hearing those matters have unanimously found "no evidence of fraud or serious misconduct" on the part of Andy Ong and Ong HB. In our view, this submission is wholly misguided. Save for CWU 146, which is the decision leading to *this* appeal, the other two decisions relate to companies not involved in the Bugis Cube project. In any event, we have explained why OS 924 does not engage the doctrine of *res judicata* (see [56] above), and CWU 143 is the subject of the appeal in CA 196, which we have allowed.

75 Finally, on the issue of discretion, for similar reasons to those stated in relation to ERCP II (at [59]–[61] above), we consider that there is no reason to decline an order for the winding up of GREIC. In fact, two points lean strongly in favour of a winding up order. First, more than half of the shareholders of GREIC in number and in shareholding appear to support the winding up application in CWU 146, even if they may not have participated in the appeal. Each of them wrote on their voting slips at an EGM conducted by GREIC on 3 August 2017 that they "want GREIC to be wound up by the Court in

[CWU 146]" and that the directors of GREIC "should protect company interest [*sic*] and not to oppose the [application]". In the light of the substantial support for Yap's application, the opposition of Tan and Koh carries less weight. Secondly, in *Sakae (CA)*, we upheld the High Court's decision to wind up GREIH largely on the basis of misdeeds by Andy Ong and Ong HB in relation to that company. In that context, and in the light of GREIC's own submission that "it is imperative that GREIC remains in a position to supervise GREIH's liquidation", we do not consider it proper that the same individuals whose conduct *vis-à-vis* GREIH is being scrutinised be allowed to influence the liquidators of GREIH through their proxies appointed as directors of GREIC who are supposedly meant to "supervise" GREIH's liquidation. With respect, the JC omitted to consider either of these points, although in fairness, only *Sakae (HC)* had been decided at the time of the hearing before him.

Conclusion

76 For these reasons, we make the following orders:

(a) CA 196 is allowed.

(b) CA 55 is allowed.

(c) SUM 39 is dismissed.

(d) SUM 83 is dismissed.

(e) SUM 91 is dismissed.

(f) SUM 86 is allowed only insofar as it relates to criminal charges brought against Andy Ong and Ong HB on or around 3 August 2018.

(g) GREIC and ERCP II's oral applications to admit the affidavits filed by their representatives in relation to Chia's appointment and role in the companies are allowed.

77 The parties are to file and serve submissions (not exceeding 10 pages each) within 30 days of the date of this judgment if they are unable to agree on the issues relating to the appointment and/or remuneration of liquidators for ERCP II and/or GREIC. Whether or not such an agreement is reached, the current boards of directors are, within 14 days of the date of this judgment, to cause ERCP II and GREIC respectively to inform all their creditors and shareholders of our decision in these appeals and to invite them to submit their views, if any, regarding the appointment or remuneration of the liquidators for each of these companies. Any creditor or shareholder who wishes to state his position should do so by way of a letter addressed to this court within 35 days of the date of this judgment.

78 Further, unless the parties come to an agreement on costs, they are also to furnish submissions (not exceeding 10 pages each) to this court on the costs of these appeals and the applications within 30 days of the date of this judgment.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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