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

**[2023] SGHC 276**

Companies Winding Up No 50 of 2022

In the matter of Section S 125(1)(i)
of the Insolvency, Restructuring and
Dissolution Act 2018

And

In the matter of Sin Joo Huat
Hardware Pte Ltd

Between

Tan Yew Huat

… *Plaintiff*

And

Sin Joo Huat Hardware Pte Ltd

… *Defendant*

Originating Application No 74 of 2022

Between

Tan Joo See

… *Claimant*

And

Tan Yew Huat

… *Defendant*

# GROUNDS OF DECISION

[Companies — Winding up — Majority sought winding up order on just and equitable grounds — Whether there was unfairness when majority could have voluntarily wound up the company]
[Contract — Mistake — Mistake of fact]

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# Tan Yew Huat
# v
# Sin Joo Huat Hardware Pte Ltd and another matter

**[2023] SGHC 276**

General Division of the High Court — Companies Winding Up No 50 of 2022 and Originating Application No 74 of 2022
Aedit Abdullah J
25 August 2022, 13 April 2023

4 October 2023

**Aedit Abdullah J:**

1 These are my full grounds in respect of two applications which are the subject of appeals. The first application, HC/CWU 50/2022 ("CWU 50"), was Mr Tan Yew Huat's ("TYH") application primarily for a winding up order to be made against Sin Joo Huat Hardware Pte Ltd ("the Company") on the ground that it was just and equitable to do so under s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). The second application, HC/OA 74/2022 ("OA 74") was Ms Tan Joo See's ("TJS") application primarily for:

(a) an order directing TYH to procure and obtain the members/shareholders resolution of the Company approving the transfer of a property ("the Property") to TJS, freed of the trust in favour of the Company;

(b) an order of specific performance by TYH to execute and deliver an instrument of transfer (in such form and manner satisfactory to TJS) of all of TYH's legal and/or beneficial interest in the Property to TJS; and

(c) alternatively, damages to be assessed.

2 In brief, these applications broadly raised the issues of: (a) whether the court should generally grant a winding up order under the just and equitable ground in s 125(1)(*i*) of the IRDA if the applicant is able to exit the company without the court's intervention; and (b) whether there was an agreement between TYH and TJS that would have entitled TJS to be the absolute owner of the Property. Having considered the parties' arguments and the evidence, I dismissed both applications.

## Background

### *The Company*

3 The Company was incorporated in Singapore in 1987,[1] for the wholesale of general hardware and the retail sale of spare parts and accessories for motor vehicles.[2] At the time of its incorporation, TYH and TJS, who are siblings, were appointed as the only directors of the Company[3] and each held one share of the two paid up and issued ordinary shares, out of a total share capital of $2.[4]

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1 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 5.

2 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 7.

3 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 9.

4 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 10.

4 In the years after incorporation, the issued share capital and the number of directors of the Company increased. This arrangement was implemented on the instructions of their late father Mr Tan Mooi Siong ("the late Mr Tan") who, though neither a director nor shareholder, made all the decisions relating to the Company's affairs.[5] One Mdm Goh Geak Luan ("Mdm Goh"), who was TYH and TJS's late mother, and their two sisters ("the other siblings") became shareholders and directors of the Company.[6] After Mdm Goh passed away, TYH, TJS, and the other siblings became the directors and shareholders of the Company. At the time of the applications, the Company had a share capital of $200,000 comprising 200,000 paid up and issued shares. TYH held 33.7%, TJS held 22.1%, and the other siblings each held 22.1% of the total shares.[7]

5 Around January 2007, TJS left the family business of the Company[8] and thereafter did not participate in the Company and the family business, though she continued to retain her shareholding and directorship in the Company.[9] Sometime in 2014 or 2015, the Company's main business in heavy machinery and vehicles came to a stop because of a dispute with TJS over the Property.[10]

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5 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 15.

6 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 13.

7 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 18.

8 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 54.

9 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 55.

10 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 61.

***The dispute over the Property***

6 The Property, a private landed residence, was purchased in 1991 when the late Mr Tan decided to invest the Company's surplus money.[11] The Property was registered in the names of TYH and TJS as tenants-in-common in equal shares.[12] TYH and TJS in turn held the Property on trust for the Company on the instructions of the late Mr Tan.[13] Similarly, in 1997, the late Mr Tan instructed that the Company purchase another private landed residential property ("the Other Property"), which is registered in the joint names of TYH and TJS as tenants-in-common and held by them on trust for the Company;[14] the Other Property did not figure much in the dispute here.

7 The dispute over the Property that led to a stop in the Company's main business (see [5] above) arose in January 2014, when TJS called a meeting between the shareholders and directors of the Company which was attended by TYH, TJS, and the other siblings.[15] During the meeting, it emerged that TJS sought the full legal and beneficial ownership of the Property in exchange for the sale of her shares to TYH.[16] No agreement or conclusion was reached at the meeting.[17]

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11 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at paras 30 and 32.

12 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 35.

13 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at paras 34 and 36.

14 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at paras 37–41.

15 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 69.

16 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 70.

17 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 71.

8 Thereafter, between July 2014 and July 2019, TYH and TJS negotiated through their solicitors.[18] Metropolitan Law Corporation ("MLC" or "TYH's solicitors") acted for TYH, while BT Tan & Co ("BTT" or "TJS's solicitors") acted for TJS. The key document was a letter from TYH's solicitors dated 29 December 2014 ("the December 2014 Letter"), which stated:[19]

> We have been instructed that our respective clients have reached a settlement of all corporate and family interest as follows which they propose encompassing in a Deed of Settlement:-
>
> **1. <u>Transfer of [the Property] to Tan Joo See</u>**
>
> Our client Tan Yew Huat will transfer his entire legal and beneficial interest in [the Property] to your client Miss Tan Joo See free from encumbrances. Your client will be released of any duties and obligations arising out of and in respect of any Trusts previously declared by your client in favour of the Company and/or SJH with respect to this property. Your client will bear all costs incurred in effecting this transfer including all stamp fees/ buyer additional stamp fees etc arising out of or in respect of the said Transfer.
>
> …
>
> Please note that the above offer for settlement, shall not be binding upon our clients unless it is unconditionally accepted by your client without any qualification whatsoever. In this respect, we hope that all parties would allow good sense, logic and reason to prevail to allow for an amicable and lasting resolution of all outstanding issues[.]

TYH and TJS disputed the legal significance of this letter and whether the terms are binding.

9 After the December 2014 Letter, TYH and TJS continued to correspond through their solicitors dealing with various matters including the valuation of

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18 Tan Yew Huat's affidavit in HC/CWU 50/2022 dated 25 February 2022 at para 77.

19 Plaintiff's Bundle of Documents ("PBOD") at pp 137–141.

the Property[20] and the passing of the necessary shareholder resolutions.[21] These discussions yielded no conclusion.

10 On 25 February 2022, TYH made a winding up application pursuant to s 125(1)(*i*) of the IRDA on the ground that it was just and equitable to do so. On 27 April 2022, about two months after CWU 50 was filed, TJS took out OA 74 against TYH for the Property to be vested absolutely in her name.

## Parties' arguments

### *General positions*

11 TYH argued that it was just and equitable to wind up the Company because:[22]

(a) the Company had lost its substratum;

(b) there was an irretrievable breakdown in the relationship of mutual trust and confidence between TYH and the other siblings on one faction of the Company, and on the other faction, TJS; and

(c) TYH and the other siblings were unable to exit the Company at fair value and were locked in the Company by TJS; and

(d) there was no abuse of process.

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20 PBOD at p 150.

21 PBOD at p 164.

22 Tan Yew Huat's Written Submissions dated 19 August 2022 ("TYH's WS") at para 5.

12 In opposition to CWU 50, TJS submitted that:[23]

(a) CWU 50 was brought by TYH in bad faith and was an abuse of the process of the court; and

(b) it was unjust, inequitable and unfair to permit TYH to wind up the Company as he did not come to court with clean hands.

13 On the other hand, TJS did not dispute that the Company had lost its substratum but submitted that she should not be faulted or blamed for the state of affairs. Instead, she submitted that TYH should be blamed for the Company's poor performance.[24] Additionally, TJS contended that CWU 50 was an abuse of process as it was brought by TYH to cover up his breach of a settlement agreement allegedly reached between TYH and TJS and contained in the December 2014 Letter ("the Alleged Settlement Agreement").[25] TJS further submitted that TYH and TJS had performed part of the Alleged Settlement Agreement, which supported the existence of the said agreement.[26]

***Further submissions***

14 Subsequently, on 26 September 2022, I invited further submissions addressing the issues of:

(a) whether the cases on just and equitable winding up show that either of the following factors goes to a basis for the court to decline to exercise its powers to wind up:

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23 Tan Joo See's Written Submissions dated 23 August 2022 ("TJS's WS") at para 5.

24 TJS's WS at paras 33–34.

25 TJS's WS at para 6.

26 TJS's WS at para 16.

(i) the availability of alternative mechanisms, including voluntary winding up, or

(ii) that the applicants are in the majority; and

(b) how the answer to the first question would affect the present winding up application.

15 TYH submitted that:

(a) the availability of alternative remedies does not preclude the possibility of a successful winding up under s 125(1)(*i*) of the IRDA, relying on the Court of Appeal decision of *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 ("*Ting Shwu Ping*") which had answered this question in the context of an application made under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act 2006");[27]

(b) furthermore, the fact that TYH and the other siblings owned the majority of shares in the Company did not preclude the court from making a winding up order. In this regard, TYH argued that the question was whether there was unfairness in keeping TYH and the other siblings in the Company.[28] It was also argued that the words "just and equitable" in s 125(1)(*i*) of the IRDA are words of the widest significance, and do not limit the jurisdiction of the court to any case;[29] and

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27 Tan Yew Huat's Further Written Submissions dated 21 October 2022 ("TYH's FWS") at para 4.

28 TYH's FWS at para 19.

29 TYH's FWS at para 21.

(c) applied to the present facts, the unfairness which warranted a winding up was the breakdown of the relationship of mutual trust and confidence, the locking of TYH and the other siblings in the Company when it had lost its substratum, and their inability to exit the Company because of TJS.[30] This was an exceptional case where a shareholder holding less than 25% of the shareholding could hold the majority to ransom because TJS held the keys to two of the Company's main assets, which were namely the Property and the Other Property (see [6] above). As such, TJS could disrupt, and had disrupted, the administration of the Company.[31] Given TJS's adversarial stance, she might mount a claim for minority oppression in respect of the actions of the majority. Leaving aside the issue of whether any such claim would be meritorious, it would be a waste of costs, time, and resources for the parties to be engaged in prolonged litigation.[32]

16 In response, TJS's submission was that:

(a) the availability of alternative remedies is a basis for the court to decline making a winding up order,[33] as s 125(3) of the IRDA provides that instead of making an order for the winding up of a company, the court may, if it is of the opinion that it is just and equitable to do so, make an order for the interests in shares of one or more members to be purchased by the company, or by one or more other members, on terms to the satisfaction of the court;

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30 TYH's FWS at para 43.

31 TYH's FWS at para 45.

32 TYH's FWS at para 46.

33 Tan Joo See's Further Written Submissions dated 23 November 2022 ("TJS's FWS") at para 7.

(b) a voluntary winding up was another available mechanism/remedy and a factor in favour of the court declining to make a winding up order. In this regard, it was argued that TYH and his two other sisters, holding 77.9% of the shares, could have easily passed the relevant resolution to wind up the Company on a voluntary basis and did not need to invoke the coercive powers of the court to do so;[34] and

(c) TYH was abusing the process of the court to achieve his collateral agenda of wriggling out of the Alleged Settlement Agreement reached with TJS. In the premises, since the voluntary winding up procedure was an alternative available mechanism, the court should decline to exercise its power to wind up the Company.[35]

**There was no unfairness justifying a winding up order under s 125(1)(*i*) of the IRDA**

17 Having considered the parties' arguments, I declined to make a winding up order in relation to the Company. The starting point for such applications is s 125(1)(*i*) of the IRDA, which provides:

> **Circumstances in which company may be wound up by court**
>
> **125.**—(1) The Court may order the winding up of a company if —
>
> …
>
> (*i*) the Court is of the opinion that it is just and equitable that the company be wound up;

As s 125(1)(*i*) of the IRDA was adopted in identical terms from the now-repealed s 254(1)(*i*) of the Companies Act 2006, I am of the view that the

34 TJS's FWS at para 8.

35 TJS's FWS at para 9.

principles which governed the latter provision continue to apply to s 125(1)(*i*) of the IRDA. Indeed, there is no indication that the drafters of the IRDA intended otherwise (see *Report of the Insolvency Law Review Committee: Final Report* (Chair: Lee Eng Beng SC) (2013)).

18 Turning to the applicable principles, there are two distinct stages for a court to consider in determining whether to make a winding up order under s 125(1)(*i*) of the IRDA. First, the applicant must establish that it is "just and equitable that the company be wound up", which is the basis for invoking the court's power to make a winding up order. Second, at the relief stage, supposing this ground is established, the court retains a residual discretion to consider whether, in the light of all relevant factors, including the utility and effect of a winding up order and the overall fairness and justice of the case, the company concerned should be wound up (see the Court of Appeal decision of *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*") at [82]).

***The applicable law***

19 In relation to the first stage, it is trite that the foundation of the court's power to order a winding up on the just and equitable ground is the notion of unfairness. However, while the words "just and equitable" are "words of the widest significance", this broad phraseology does not give the court free rein to simply exercise its power in an unprincipled manner (see *Perennial* at [40]). It is therefore important to pay heed to the specific kind of unfairness that the just and equitable ground is meant to address.

20 Three points underlie how unfairness operates in the context of s 125(1)(*i*) of the IRDA. The first, as Lord Wilberforce recognised in the House of Lords decision of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360

("*Ebrahimi*") at 379, is that individuals in a company may have legitimate expectations as between themselves that are not necessarily submerged within the company structure. These legitimate expectations arise from the circumstances of the parties' relationship and any understanding or expectations between them, and it is important to determine the true extent and content of the commercial agreement between the parties (see the High Court decisions of *Deniyal bin Kamis v Mapo Engineering Pte Ltd and others* [2023] SGHC 183 ("*Deniyal*") at [90]; and *Lian Hwee Choo Phebe and another v Maxz Universal Development Group Pte Ltd and others and another suit* [2010] SGHC 268 at [61]).

21 Second, the departure from such legitimate expectations may, in some circumstances, warrant the intervention of equitable considerations to suspend the usual operation of legal rights. In the words of Lord Wilberforce, these are considerations "of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way" (see *Ebrahimi* at 379). Whether a case falls into such circumstances depends on various non-exhaustive factors, including whether there was: (a) an association formed or continued on the basis of a personal relationship, involving mutual confidence; (b) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; and (c) a restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. Again, it is important to emphasise that these are non-exhaustive factors that are not intended to constrain the analysis or delimit the circumstances in which equitable considerations may intervene (see the Court

of Appeal decision of *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") at [17]; and *Deniyal* at [90]).

22 Third, it is the breach of such legitimate expectations, alongside the inability of the applicant to exit the company despite the breach, that grounds a finding of unfairness. As the Court of Appeal observed in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827, the unfairness which justified the making of a winding up order on the just and equitable ground arose because the appellant's legitimate expectation that his shares would be bought out was breached, and that the effect of the breach was to *trap the appellant in the company* (at [42]).

23 It follows therefore that, even where the applicant belongs to a faction of the company which owns, or has control of, a majority of the shareholding, unfairness may still be established if the applicant is not able to the exit the company without the court's intervention. On this point, the Court of Appeal decision of *Chow Kwok Chuen*, where the court ordered a winding up of the family companies involved, is instructive. In that case, there was actual deadlock because the relationship of the three brothers who managed the companies as directors had deteriorated to the point where no two of them would be in agreement about the companies' operations. While the odd number of three directors might suggest that the board should in theory be able to arrive at decisions by majority, this was a case of a three-way impasse in the companies' management, and the management of the companies was at a stalemate. In view of the brothers' equal contributions to the impasse, the court held that it would be unfair in the circumstances to allow the appellant, who held at least 25% of the issued shares in three companies and who was able to block any proposal for the voluntary winding up of the companies, to effectively freeze the assets of his other siblings who were in the majority. Therefore, the court held that

winding up was the only solution. This decision shows that even if the applicant for the winding up order belongs to a faction of the company which constitutes the majority in the company, he may still be prevented from exiting the company, resulting in unfairness that would justify the making of a winding up order.

24 Conversely, having a mechanism for exit generally negates the unfairness required to justify winding up on the just and equitable ground (see *Perennial* at [49]–[51]), unless the exit mechanism in question is arbitrary, artificial, or contrary to the legitimate expectations of the parties (see *Perennial* at [67]). For instance, if the applicant is able to avail himself of a voluntary winding up of the company in question, this may negate the unfairness required for the purposes of s 125(1)(*i*). This point was alluded to by the Court of Appeal in *Chow Kwok Chuen*, where the court made repeated references to the fact that the majority shareholders were not able to effect a voluntary winding up as they did not command at least 75% of the total shares of each company (at [2], [45], [47] and [48]). This suggests that if it is shown that the applicant could have put the company into a voluntary winding up, the court would generally require her to do so instead of seeking a winding up order under s 125(1)(*i*).

25 For completeness, I did not find TYH's reliance on the Court of Appeal's statements in *Ting Shwu Ping* to be relevant in the present case. The Court of Appeal noted:

> 51 ***If a shareholder has recourse to a share buy-out remedy under s 216 of the Act, should the decision to present a winding-up petition instead (for the purpose of obtaining a s 254(2A) remedy) be considered an abuse of process?*** *Prima facie*, based on existing authorities, the answer should be "no".
>
> 52 … a court hearing a s 254(1)(*i*) application would not be precluded from ordering winding up simply

> because a s 216 remedy would otherwise be available because there is no statutory requirement that a petitioner must first have pursued available alternative remedies. …
>
> 56 ***The question that arises is whether, in view of that concern, the court should hold that s 254(2A) is available only in the situation where the shareholder has no other recourse to a buy-out remedy.*** To so hold contemplates finding an abuse of process where a shareholder brings a winding-up petition for the purpose of obtaining a s 254(2A) remedy even though he has alternative statutory recourse under s 216. However, this court in *Evenstar* ([36] *supra*) and the High Court in *Tang Choon Keng* have held that the availability of alternative remedies does not preclude the possibility of a successful winding up petition; from this, it must follow that the mere fact of available alternative remedies does not render a winding up petition an abuse of process. It is possible to argue, however, that the introduction of s 254(2A) changes the analysis somewhat.
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> [emphasis in original omitted; emphasis added in bold italics]

Relying on these statements, TYH submitted that the availability of alternative remedies did not preclude the possibility of a successful winding up application, as there is no statutory requirement that an applicant must have first pursued alternative remedies. As such, it was said that the availability of alternative mechanisms such as a voluntary winding up did not prevent the court from ordering the winding up of the Company where the test for the grant of such an order was met.[36]

26 However, TYH's reliance on *Ting Shwu Ping* was misconceived. Read in context, the Court of Appeal was addressing the issue of whether it is an abuse of process for a shareholder to present a winding up application for the purposes of obtaining a share buy-out remedy under s 254(2A) of the Companies Act 2006 (presently s 125(3) of the IRDA) when he already has recourse to a share buy-out remedy under s 216 of the same Act (see *Ting Shwu Ping* at [51]). This

[36] TYH's FWS at paras 4–8.

was completely different from the issue engaged in the present application, which concerned whether TYH could demonstrate unfairness justifying the winding up of the company under s 125(1)(*i*) of the IRDA if he was able to exit the company without the court's intervention.

***TYH did not face unfairness as he could have availed himself of a voluntary winding up to exit the Company***

27 I found therefore that there was no unfairness to TYH that would justify a winding up order under s 125(1)(*i*) as he could have put the Company in voluntary winding up. He, acting with the other siblings, are majority shareholders who could have put the Company into voluntary winding up. There was therefore nothing preventing TYH and his two other sisters from exiting the Company. In this regard, TYH broadly raised two objections, to which I now turn.

28 First, TYH argued that a voluntary winding up would not be practical or viable because the Company was unable to sell the Property and the Other Property held on trust for the Company without TJS's agreement or cooperation as TJS was the registered legal co-owner of the properties (see [6] above).[37] However, it was incumbent on the Company, as the beneficial owner of the properties, to pursue legal recourse against TJS. Such legal recourse might be to compel TJS to sell the properties in her capacity as a trustee, or for the properties to be absolutely vested in the Company pursuant to the rule in *Saunders v Vautier* (1841) 4 Beav 115. Indeed, if TYH sought the winding up of the Company, it was unclear why it would be unfair to require TYH and the Company to avail themselves of the legal rights and mechanisms which are

37 TYH's FWS at para 30.

available to them, instead of attempting to circumvent the whole process by relying on the court's just and equitable jurisdiction.

29 As Lord Wilberforce stressed in *Ebrahimi* at 379, "the 'just and equitable' provision does not … entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it". In other words, the court's power to make a winding up order under s 125(1)(*i*) is one which is only appropriately exercised in situations where it would be unfair to insist on the strict exercise of legal rights and mechanisms. It follows that, if there is no unfairness occasioned to the applicant, equitable considerations should not supersede the ordinary application of those legal rights and mechanisms. In the present case, TYH had not shown how requiring him to cause the Company to pursue legal recourse against TJS with the aim of selling the properties before a voluntary winding up would be unfair to him. Accordingly, it was inappropriate to exercise the just and equitable jurisdiction of the court to make a winding up order. It was not even evident why a compulsory winding up by the court, as opposed to a voluntary winding up, would better achieve the goal of selling the properties.

30 Second, TYH also contended that the passing of a special resolution for the voluntary winding up of the Company was not the end of the matter.[38] He argued that TJS was taking an adversarial stance and would, amongst other things, challenge the voluntary winding up or allege minority oppression.[39] However, there was nothing to substantiate that contention and it was, at best, speculative. Moreover, even if it were proven that TJS would oppose the voluntary winding up or allege minority oppression, TYH had not shown why

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38 TYH's FWS at para 11.

39 TYH's FWS at paras 12–14.

this would effectively stop the voluntary winding up in its tracks and thereby result in unfairness. Furthermore, while TYH had pointed to the eight-year impasse and the correspondence between the parties' solicitors in support of his assertion that a voluntary winding up would not be practical or viable,[40] no attempt at voluntary winding up had been made and, indeed, the said correspondence revealed that the possibility of a voluntary winding up was not even tabled to begin with.[41] In the absence of any other supporting evidence for TYH's assertion, it was therefore premature to conclude that a voluntary winding up would not be practical or viable.

31 For these reasons, I was unpersuaded that a voluntary winding up would not be a fair means for TYH and the other siblings to exit the Company, in the sense of being arbitrary, artificial, or contrary to the legitimate expectations of the parties (see [24] above). I therefore did not grant a winding up order as sought for by TYH and dismissed CWU 50 in its entirety. For completeness, my finding that there was an alternative exit mechanism for TYH and the other siblings, in the form of a voluntary winding up, made it unnecessary to decide if the Company had lost its substratum, if there was an irretrievable breakdown in the relationship of mutual trust and confidence between the shareholders of the Company, and if CWU 50 should be dismissed for abuse of process. It was also unnecessary to move on to the second stage of the *Ting Shwu Ping* framework to consider if an order other than that for a winding up of the Company should be made.

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40 Tan Yew Huat's Reply Submissions dated 2 December 2022 at para 10.

41 Plaintiff's Bundle of Documents in CWU 50 ("PBOD") at pp 129–172.

**TJS was not entitled to the absolute transfer of the Property to her name pursuant to the Alleged Settlement Agreement**

32 I turn now to TJS's application in OA 74, in which she sought specific performance for the transfer of the Property so that it would vest absolutely in her on the basis of the Alleged Settlement Agreement. While I found that TYH did make an offer containing the terms of the Alleged Settlement Agreement which TJS accepted, I was ultimately of the view that the Alleged Settlement Agreement should be declared void for common mistake at common law.

***TYH made an offer containing the terms of the Alleged Settlement Agreement which was accepted by TJS***

33 I first accepted, as a preliminary starting point, that there was an offer and acceptance between TYH and TJS. In this regard, it is helpful to set out the relevant terms of the Alleged Settlement Agreement, which was allegedly contained in the December 2014 Letter and sent by MLC (*ie*, TYH's solicitors) to BTT (*ie*, TJS's solicitors), with TYH and TJS copied:[42]

> We have been instructed that our respective clients have reached a settlement of all corporate and family interest as follows which they propose encompassing in a Deed of Settlement:-
>
> **1. <u>Transfer of [the Property] to Tan Joo See</u>**
>
> Our client Tan Yew Huat will transfer his entire legal and beneficial interest in [the Property] to your client Miss Tan Joo See free from encumbrances. Your client will be released of any duties and obligations arising out of and in respect of any Trusts previously declared by your client in favour of the Company and/or SJH with respect to this property. Your client will bear all costs incurred in effecting this transfer including all stamp fees/ buyer additional stamp fees etc arising out of or in respect of the said Transfer.
>
> …

[42] PBOD at pp 137–141.

> Please note that the above *offer for settlement, shall not be binding upon our clients unless it is unconditionally accepted by your client* without any qualification whatsoever. In this respect, we hope that all parties would allow good sense, logic and reason to prevail to allow for an amicable and lasting resolution of all outstanding issues[.]
>
> [emphasis added]

It was therefore clear that the legal effect of the Alleged Settlement Agreement was an "offer for settlement" which was binding upon "unconditional accept[ance]". Indeed, TYH, who is opposing OA 74, did not dispute this.[43] Rather, his position was that TJS never accepted this offer.[44]

34 However, in my judgment, the terms of this offer were accepted by TJS in August 2015. Indeed, it appeared that even by August 2015, TYH and TJS had reached an in-principle settlement. In a letter dated 20 August 2015, TYH's solicitors stated that TYH gave them instructions that TJS was "prepared to unconditionally accept" the terms of Alleged Settlement Agreement.[45] I also accepted that TJS subsequently gave her formal acceptance by way of a phone call between TYH's and TJS's solicitors in August 2015, and that TJS took steps to perform the agreement by handing over the keys and possession of the Property. These events were referenced in a letter from TJS's solicitors dated 6 January 2016 stating:[46]

> We also refer to the telephone conversation in August 2015 wherein our Mr B.T. Tan spoke and confirmed to your Mr Devadas Naidu that our client had accepted the contents of your letters dated 29.12.2014 [*ie*, the Alleged Settlement

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43 TYH's WS at para 106.

44 TYH's WS at para 107.

45 PBOD at p 146.

46 PBOD at p 147. While the date printed on the letter is "6th January 2015", Tan Joo See's Affidavit dated 18 April 2022 clarifies at para 26 that the letter was wrongly dated and that it should have been dated 6 January 2016.

> Agreement] and requested your Mr Devadas Naidu to forward to us all the necessary Transfer Forms in relation to the relevant immovable properties and company shares for our clients' execution.
>
> Pending execution of the Transfer Forms your client had handed over to our client the keys to and possession of [the Property].

Accordingly, I was satisfied that TJS communicated her acceptance to TYH in August 2015, and thus, objectively construed, TYH and TJS both intended to conclude the Alleged Settlement Agreement.

35 This conclusion was further supported by the reply letter from TYH's solicitors dated 19 February 2016, which did not deny the aforesaid phone call, or that the Alleged Settlement Agreement had been concluded. Instead, all that the letter contained was a request for the "updated Transfer with the consideration amount for our further perusal".[47] Given that the issue of a settlement agreement was a key focus of the solicitors' correspondence, one would have expected TYH's solicitors to raise objections in the 19 February 2016 letter if there was no binding agreement concluded by then. That they did not protest against the assertion that the Alleged Settlement Agreement had been concluded was strongly probative of its truth.

36 Lastly, by the admission of TYH's own solicitors in its letter dated 16 July 2019, there was no doubt that the Alleged Settlement Agreement had been concluded. The letter stated at para 2 as follows:[48]

> To begin with, we reiterate that there is *already a binding agreement* between our respective clients regarding the above matters as evidenced by exchange of letters between our respective terms. The bundle of right [*sic*] and obligations

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47 PBOD at p 148.

48 PBOD at p 165.

> created under the Agreement, in our vie[w] forms the basis of the consideration for the transfers of the property as well as the shares. This is clearly reflected in the said letters exchanged between our respective firms. *As such, what remains to be completed is to give effect to and/or implement the terms of this Agreement.*
>
> [emphasis added]

I placed strong weight on the statement in the letter that there was a binding agreement between TYH and TJS. This statement was made by TYH's solicitors, who represented TYH in the negotiation process between TYH and TJS and who would be best apprised of the state of negotiations. Furthermore, there could be no doubt that TYH's solicitors appreciated the legal significance of their words, and indeed the references to a binding agreement concluded between TYH and TJS were unequivocal.

37 While TYH rightly pointed out there were remaining issues to be resolved, I did not think that this detracted from the finding that the Alleged Settlement Agreement had been concluded. As the Court of Appeal observed in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [52], it is not uncommon for parties to first agree on a set of essential terms which they may be bound by as a matter of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other detailed terms. I found this to be the case here. There might have been remaining issues relating to the valuation of properties[49] and the passing of the necessary shareholder resolutions,[50] but these related to how the Alleged Settlement Agreement was to be performed and did not indicate that the purported agreement was not concluded to begin with. As the letter from TYH's solicitors

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49 PBOD at p 150.

50 PBOD at p 164.

dated 16 July 2019 (see [36] above) stated, "what remain[ed] to be completed [was] to give effect to and/or implement the terms of the Agreement".[51]

38 In the premises, I found, as a starting point, that TYH made an offer with the terms contained in the December 2014 Letter, which was accepted by TJS in August 2015. This made it unnecessary to decide whether any part performance by TYH and TJS evidenced the existence of the Alleged Settlement Agreement. However, the question remained whether the Alleged Settlement was validly concluded.

***However, the Alleged Settlement Agreement was void for common mistake at common law***

39 In the circumstances, I declared the Alleged Settlement Agreement to be void on the basis of common mistake at common law. This was because the agreement rested on an incorrect premise that both parties shared when entering into the agreement. Of importance to this finding was cl 1 of the Alleged Settlement Agreement, which provided that TYH would transfer his "entire legal and beneficial interest" in the Property to TJS. It further provided that TJS would be "released [from] any duties and obligations arising out of and in respect of any Trusts previously declared by [TJS] … with respect to [the Property]".[52]

40 While cl 1 provided that TYH would transfer his "entire legal and beneficial interest" in the Property, TYH did not have any beneficial interest in the Property. Indeed, it will be recalled that TYH and TJS were the legal co-owners of the Property, and they held the Property on trust for the Company

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51 PBOD at p 165.

52 PBOD at p 138.

(see [6] above). The beneficial interest of the Property thus resided solely with the Company. Put simply, this term was incapable of being performed by TYH from the outset.

41 I now turn to the question of what the legal effect of such misapprehension was. In my judgment, the doctrine of common mistake at common law would apply here to render the Alleged Settlement Agreement void. The five elements that must be satisfied for this vitiating factor to apply are summarised in the Court of Appeal decision of *Olivine Capital Pte Ltd and another v Chia Chin Yan and another matter* [2014] 2 SLR 1371 ("*Olivine Capital*") at [66], citing the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 at [76]:

(a) there must be a common assumption as to the existence of a state of affairs;

(b) there must be no warranty by either party that that state of affairs exists;

(c) the non-existence of the state of affairs must not be attributable to the fault of either party;

(d) the non-existence of the state of affairs must render performance of the contract impossible; and

(e) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

Applying these principles, I found that the Alleged Settlement Agreement was void for common mistake at common law.

42 First, I was satisfied that cl 1 of the December 2014 Letter, which formed part of TYH's offer, reflected a mistaken assumption on TYH's part that he owned both the legal and beneficial interest of the Property. This mistaken assumption was shared by TJS when she accepted the offer as contained in the December 2014 Letter without qualification.

43 Second, I found that there was no warranty by either party that this state of affairs existed. While the December 2014 Letter originated from TYH's solicitors, I did not think that this should not be taken as a warranty from TYH that he owned any beneficial interest in the Property. Both TYH and TJS were co-owners of the Company holding the Property on trust for it, and being legally advised, they were both in as good a position to know that TYH did not own the beneficial interest of the Property. Therefore, it could not be said that TYH warranted to TJS that he owned any beneficial interest in the Property as TJS would have already known beforehand that this was not the case.

44 Third, it could not be said that it was the fault of either party that TYH was not a beneficial owner of the Property. The trusteeship arrangement came about as a result of the late Mr Tan's instructions, which TYH and TJS merely followed.

45 As regards the fourth and fifth elements, it was clear that TYH could not perform the Alleged Settlement Agreement as he had no beneficial interest to transfer: *nemo dat quod non habet* (that is, no one can give what they do not have). It was also apparent that the purported outcome of the Alleged Settlement Agreement, which was for TJS to be the absolute owner of the Property and, in

the words of cl 1, "released from any duties and obligations arising out of and in respect of any Trusts previously declared", was dependent on the mistaken assumption that TYH owned some beneficial interest in the Property that he could transfer to TJS. In other words, this assumption was vital to the performance of the Alleged Settlement Agreement.

46 As the five elements in *Olivine Capital* were made out, I found that the Alleged Settlement Agreement was void. It followed that specific performance of cl 1 could not be granted, and accordingly I dismissed OA 74 in its entirety.

**Conclusion**

47 Neither side of this dispute succeeded in their applications before me. Indeed, this was an unfortunate dispute involving members of a family, who have been unable to reconcile their differences for a long time. Normally, in such situations, I would have preferred to allow parties to have a clean break, but I am duty bound to apply the law in accordance with its intended purposes. I fear, however, with the dismissal of the applications, that the parties will continue to expend time and cost in pursuing their respective claims. It might be better for them to consider a resolution out of court, which would entail compromise on both sides.

Aedit Abdullah
Judge of the High Court

Kang Kok Boon, Favian (Jiang Guowen) (Adelphi Law Chambers LLC) for the plaintiff in HC/CWU 50/2022 and the defendant in HC/OA 74/2022;
Tan Bar Tien (B T Tan & Co) for the non-party in HC/CWU 50/2022 and the claimant in HC/OA 74/2022.

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