Re Lee Tung Co (Pte) Ltd
[2007] SGHC 197

Case Number : CWU OS 55/2007

Decision Date : 22 November 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Jimmy Yim SC, Abraham Vergis and Clive Myint Soe (Drew & Napier LLC) for the plaintiff; Ang Cheng Hock, Tan Xeauwei and Jacqueline Lee (Allen & Gledhill) for Chow Kwok Chuen; Peter Cuthbert Low (instructed), Robert Yu, See Tow Soo Ling and Wong Shyen Sook (Colin Ng & Partners) for Chow Kwok Ching

Parties : —

Companies – Winding up – Application by non-minority shareholder to wind up company on just and equitable grounds – Whether there was management deadlock when company being run by senior management and turning in profit – Whether clean break desirable and justifying winding-up order – Whether difficulties in administering founder's and founder's wife's estates relevant in application for winding-up order

Companies – Winding up – Whether equitable considerations relating to winding up of quasi-partnerships applicable to family companies

Companies – Winding up – Whether just and equitable to order winding up of company – Section 254(1)(i) Companies Act (Cap 50, 2006 Rev Ed)

22 November 2007 Judgment reserved.

Judith Prakash J

Introduction

1 This application to wind up the defendant company, Lee Tung Company (Private) Limited ("Lee Tung"), was heard together with similar applications that had been filed by the same plaintiff in which he sought the winding up of two other companies, Associated Development Private Limited ("ADPL") (C.W.U. OS 56 of 2007) and Chow Cho Poon (Private) Limited ("CCPL") (C.W.U. OS 57 of 2007) (Lee Tung, ADPL and CCPL collectively "the companies"). Whilst, strictly, there are three separate and independent applications, the ground on which winding up is sought is the same in each case and the evidence that was presented was practically identical as well. The plaintiff seeks to have each of the companies wound up on the basis that it would be just and equitable for the court to make such an order. This judgment gives the reasons for my decision in each of the three cases.

Background

2 This is basically a family dispute. All three companies were set up by the plaintiff's father, Chow Cho Poon ("Mr Chow"), to hold the wealth that he had accumulated over the years. Now that Mr Chow and his wife, Grace Chow ("Mrs Chow"), are dead, their sons are running the companies and, in a sad but all too commonly encountered situation, have, despite the advantages of education and wealth, fallen out with each other, and may end up dismantling their father's legacy.

3 The plaintiff herein, Chow Kwok Chi ("Chi"), is the eldest son. The second son is Chow Kwok Chuen ("Chuen") and the youngest son is Chow Kwok Ching ("Ching"). Each of them is a director of

the companies and each holds shares in the companies both directly and through his interests in the estates of the parents. The eldest child of the family, a daughter, Mrs Betty Sheares ("Mrs Sheares"), is not a director of any of the companies. She has no direct shareholding but has an interest in the companies' shares through her interest in Mrs Chow's estate.

4 CCPL was incorporated in June 1962, Lee Tung in January 1969 and ADPL in July 1976. ADPL was incorporated to, among other things, hold and manage a property situated in Robinson Road. Mr Chow had named this property Chow House and had, prior to the incorporation of ADPL, held it in his own name. All the companies have their registered office at Chow House.

5 Currently, the three brothers are the only directors of the companies. The companies are basically in the business of renting out commercial properties and collecting rental income. The companies also generate dividend income from shares of publicly listed companies and interest income from fixed deposits in banks. Although major decisions and instructions as regards the management of the companies were the province of the directors, when Mr Chow was alive, the practice was that the day-to-day administration and operations of the companies were delegated to senior management staff. This remains the practice today: Lee Tung employs three persons who manage the day-to-day affairs of all three companies and ADPL and CCPL pay Lee Tung an annual management fee for the services of these three employees.

6 Mr Chow devoted most of his life to building up his fortune, acquiring real properties and incorporating the companies to hold the properties. He intended the companies to be family companies and he made special provision in the articles of association of each company in order to ensure that his wishes were achieved. In ADPL, the articles provided that Mr and Mrs Chow would be the governing directors and could not be removed from office by any director or shareholder. Further, every male descendent of Mr Chow in the male line who turned 21 years of age and notified ADPL of his desire to be appointed had to be appointed as a director of the company. In CCPL too, Mr Chow was the governing director who could not be removed and his adult male descendents in the male line were entitled to be appointed as directors of the company. In Lee Tung, Mr and Mrs Chow were the governing directors. Membership in that company was restricted to Mrs Chow, male descendents of Mr Chow in the male line and Mr Chow's lawful daughter. It can be discerned that, all in all, Mr Chow was a very traditional man.

7 While Mr Chow was alive, he and Mrs Chow ran the companies and, in the later years, Ching was also a director. Although the family home was in Singapore and the boys had at least part of their education here, none of them made his home in Singapore in their adulthood. Chi and Ching became doctors and specialised in ophthalmology whilst Chuen became an architect. All of them chose to live in Hong Kong and carry on their respective practices in that city.

8 Mr Chow died in August 1997. Under his will, Mrs Chow and Dennis Lee Kim Yew ("Dennis Lee") were appointed executors and trustees and his estate was bequeathed to his wife and three sons. His daughter was given a token legacy. Mrs Chow then ensured that Chi and Chuen also became directors of the three companies. When Mrs Chow herself died in December 2002, Dennis Lee appointed the three brothers to act jointly with him as executors and trustees of Mr Chow's estate. Some months later, Dennis Lee discharged himself from that position.

9 After Mr Chow's death, the companies marked time. They carried out their usual businesses of leasing out properties which they owned. No steps were, however, taken to dispose of any properties or to acquire new ones or to use the moneys of the companies to make any other type of investment. No substantial business decision was made, either by Mrs Chow or the three brothers, in respect of the companies over the past ten years apart from the decision in 2004 (arrived at after much

difficulty) that ADPL should refurbish the toilets and other common areas of Chow House. No other changes were made either to the companies or to the assets managed by them.

10 The companies are substantial ones. No detailed valuation has been carried out but in January 2005, a firm of valuers provided a "desk-top" valuation of the immovable assets owned by each of them. In total, it was estimated that CCPL's properties were worth $11.1m whilst Lee Tung's properties were worth $17.3m and ADPL's Chow House was worth $30.5m. At the same time, the family home at 35 Ridout Road which belonged to the estate of Mrs Chow was valued at $20m. It is common knowledge that since January 2005, real property values in Singapore have risen considerably and therefore today the three companies are worth significantly more than they were two years ago.

11 The shares in the companies are held by members of the Chow family. Some years before she died, Mrs Chow executed a deed of trust whereby she gave each of her sons 30% of her assets and her daughter 10% of her assets. These assets included her shares in the companies. In the breakdown that follows therefore, although I refer to Mrs Chow's shares, it should be borne in mind that the beneficial owners of those shares are actually her sons and daughter in the percentages mentioned. The shareholdings in the various companies, according to Chi, are:

LEE TUNG

Shareholder	No. of Shares	%
Estate of Mr Chow	1,230	45.56
Mrs Chow	1,149	42.56
Chi	247	9.14
Chuen	67	2.48
Ching	7	0.26

ADPL

Shareholder	No. of Shares	%
Estate of Mr Chow	1,500,001	33.33
Mrs Chow	750,001	16.67
Chi	750,000	16.67
Chuen	750,000	16.67
Ching	750,000	16.67

CCPL

Shareholder	No. of Shares	%
Estate of Mr Chow	7,287	29.74
Mrs Chow	84	0.34
Chi	5,712	23.31
Chuen	6,202	25.31
Ching	5,215	21.29

It is also important to know that at the time of Mr Chow's death, he owed substantial debts to the three companies. These debts increased thereafter because of death duties and other payments made on behalf of his estate. The exact amounts owing are in dispute. On book value, however, Mr Chow's estate now owes ADPL about $6.1m, Lee Tung about $10.7m and CCPL about $17.2m.

Litigation since 2002

12 It is collectively acknowledged in these proceedings that the three brothers do not get on well. The relationship between Ching and each of his elder brothers is especially bad. Although Chi and Chuen had been able to work together for some years in the running of the companies, their relationship has soured as they now take different approaches as to how the problems of the companies and the estate of their father are to be dealt with. The three applications presently before me are not the only proceedings in which the brothers have been involved on opposite sides.

13 The estate of Mr Chow has not been able to pay off its debts to the three companies because its principal assets comprise its shares in those same companies. Those shares are not liquid assets and yet they have to be realised in order for the debts to be settled. On the other hand, the estate has to discharge its liabilities to the three companies before it can call in and realise its assets for distribution. This is a conundrum which requires co-operation from all parties to resolve. This has not been forthcoming. After Mrs Chow died and the brothers became the sole trustees of the estate of Mr Chow, they made no progress at all in administering it. In June 2004, Ching applied to court (OS 729 of 2004) for an independent party to be appointed to administer the estate in place of all the three brothers.

14 By an order of court dated 5 October 2005, VK Rajah J appointed Mr Gerald Loong Sie Kong ("Mr Loong"), a certified public accountant, as the independent administrator of the estate of Mr Chow. He took over the administration of the estate from the three brothers and was given the mandate to call in and distribute the assets of the estate in accordance with Mr Chow's will, after discharging all the estate's liabilities.

15 In November 2005, the companies purported to exercise their respective liens over Mr Chow's shares in the companies for the purpose of satisfying the debts which his estate owed the companies. This action was authorised by Chi and Chuen. It was opposed by Ching. The exercise of the liens involved a sale of the shares. Some two months later, on the application of Mr Loong, the court ordered that the three brothers be restrained from dealing with or selling Mr Chow's shares in the

companies "whether for the purported purpose of enforcing any liens on shares or otherwise until final directions" from the court.

16 In February 2006, Mr Loong produced a report in which he stated that the main issue facing him as administrator of Mr Chow's estate was how to settle the alleged debts of the estate to the companies. This had to be done in order to facilitate the administration and finalisation of the estate. He then put forward several options which he thought might be available to deal with the problem. These were:

(a) that the companies waive the alleged debts;

(b) that the companies be liquidated;

(c) that the companies declare dividends in order to fund the estate's payment of the debts;

(d) that the estate's shares in the companies be sold;

(e) that the companies enforce their respective liens on the estate shares; and

(f) that the debt be assigned to the beneficiaries in the proportions to which they were entitled to the shares under the will of Mr Chow.

None of the options has been implemented basically because of disagreement among the brothers.

17 Mr Loong recommended that the sixth option be the one adopted. That option requires the debts to be assigned to the beneficiaries of Mr Chow's estate in proportion to their respective entitlements under his will. The companies would thereafter be able to declare dividends so that those dividends could be used to repay the debts. The sixth option therefore requires that all three brothers voluntarily accept the assignment of the estate's debts and procure the declaration of dividends by the companies. This requirement was not met as Chuen rejected it. In August 2006, Mr Loong applied to court for an order that the sixth option be adopted as the most practicable option to resolve the disputes between the parties in relation to Mr Chow's estate. The application was not heard as it was adjourned for the brothers to consider an amicable settlement. Since then, there has been no further progress on settling the estate. Whilst I have not heard arguments on the merits of the application, it appears to me, on the face of it, that the court would have no power to impose an obligation on any of the brothers to accept an assignment of the estate's debts.

18 Since Mrs Chow's death, the day-to-day running of the companies has been in the hands of Lee Tung's three employees. These persons act on instructions from the directors which means, in effect, that for the most part they have acted on instructions from Chi and Chuen who were usually in agreement about what needed to be done. Ching often had different views but he was in the minority. During the four years after 2002, the companies remained profitable and viable but Ching became increasingly vocal about his unhappiness with his elder brothers and what he claimed to be oppressive acts by them against him as a fellow director and shareholder of the companies.

19 I should, briefly, mention the situation that exists in relation to Mrs Chow's estate. In September 2000, Mrs Chow executed a deed of trust and a deed of family arrangement. By the deed of trust, she declared herself trustee of all her assets (including those inherited from Mr Chow) for the benefit of her four children. The three brothers were appointed as trustees and were, under the terms of the deed, obliged to distribute all assets covered by the deed amongst the beneficiaries upon Mrs Chow's death. Mrs Chow died in December 2002. So far, no distribution has taken place. Further,

although the three brothers were also appointed the trustees of Mrs Chow's will, they have not yet applied for probate of the will. So far, two sets of proceedings have been commenced by Mrs Sheares against her brothers in respect of their obligations under the deed of trust and under the will. Therefore, little progress, if any at all, has been made in administering Mrs Chow's estate. Mrs Chow's shareholdings in the companies are sizeable and require administration.

20 On 28 January 2005, Ching commenced Suits 70 to 72 of 2005 ("the oppression suits") against Chi and Chuen for oppression. One suit was commenced in respect of each company. In the oppression suits, the main relief asked for by Ching was that the court order the compulsory winding up of each of the companies.

21 On 24 January 2007, Chuen filed three sets of originating summonses, one in respect of each company (OS 145 – 147 of 2007), in which he asked for leave to commence an action in the name of and on behalf of each of the companies against the estate of Mr Chow to recover the amount recorded in the books of that company as being owed by the estate to the company ("the derivative actions"). Some three months later, the three applications to wind up the companies were filed by Chi. By then, the scheduled hearing of the oppression suits was only a few months away.

22 When I heard the winding up applications, therefore, there were three sets of proceedings before the court in respect of each of the companies. One set, the oppression suits, had been started by Ching; the second set, the derivative actions, had been started by Chuen and the third set, the winding up applications had been started by Chi. It can be seen that each of the brothers had his own idea as to what was the proper way to proceed and at that time, none of them agreed on the other's course of action. Since then, all three sets of proceedings have been heard before me. The taking of evidence in all proceedings has been completed. Oral evidence was only given in the oppression suits. In the other two sets of proceedings, evidence was given entirely by affidavits. I should state that I have given Chuen leave in the derivative actions to commence an action in the name of each of the companies to recover the debts owed to it by the estate and that at the hearing Chi withdrew his earlier opposition to the proposal and, instead, supported the applications.

Grounds of the application

23 In his submissions, Chi was careful to state that he accepted Chuen's argument that the companies were investment holding companies that were, and continued to be, able to carry on their basic business of collecting rental profitably despite the disagreements amongst the three brothers. Nevertheless, he asserted that the companies ought to be wound up on the just and equitable ground. In his affidavit, Chi gave the following five reasons for the winding up:

(a) the whole object and purpose for the establishment of the companies, *i.e.*, to benefit Mrs Chow and the three sons, had been departed from. Instead, the companies had become the source of discord and family strife and as a consequence, at least two pieces of litigation had taken place in Singapore alone;

(b) the companies had no potential to grow in their business or to diversify as the management was, increasingly, becoming deadlocked due to the three-way fight amongst the brothers;

(c) the brothers could not see eye-to-eye on most issues and there was a considerable level of distrust and animosity amongst them. It would thus be better for them to achieve a clean break from each other by winding up the companies so that each could go his own way;

(d) winding up the companies would resolve the most contentious issue of the subjective

valuation of the companies and their real properties; and

(e) winding up the companies would also remove the stumbling block preventing the administration and finalisation of Mr Chow's estate.

24 In his closing submissions, the main reasons supporting the winding up application were reformulated as follows:

(a) as Mr Chow's estate consists mainly of shares in the companies which are not readily realisable, the winding up of the companies will enable the long overdue debts of the estate to the companies to be dealt with and thus allow the estate to be administered; and

(b) the three brothers can no longer work together in running the companies or in dealing with the affairs of the family. In addition, for so long as the companies exist, and the late parents' estates remain un-administered, the three brothers cannot avoid having to deal with one another and this state of affairs has resulted in numerous disputes and law suits between them.

25 The applications have been opposed most strongly by Chuen. Ching also opposed them, primarily, because he considered that if the companies were to be wound up, it should be because of the oppressive conduct that (he alleged) Chi and Chuen had been guilty of in relation to him. He did not accept that there was sufficient evidence to justify the making of winding up orders on the just and equitable ground. He also considered that the applications were motivated by a desire to avoid the hearing of the oppression suits. Other submissions were made by Ching but these were similar to the arguments put forward by Chuen and I will consider these points together. I should note at this stage that Mrs Sheares filed an affidavit in the proceedings in which she supported the applications.

26 Attempting to rebut Chi's grounds for winding up, Chuen submitted:

(a) that Chi has not brought his case within any of the established categories under s 254(1)(i) of the Companies Act (Cap 50, 2005 Rev Ed) as listed in *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) at 705-716;

(b) nor has Chi shown that it would otherwise be just and equitable for the companies to be wound up;

(c) many of Chi's grounds for winding up do not have any direct bearing upon the management of the companies;

(d) Chi has not alleged any loss of confidence or lack of probity in Chuen's conduct as regards the running of the companies;

(e) Chi cannot invoke the court's just and equitable jurisdiction because he has not come to court with clean hands.

27 Specifically against each of the five grounds put forward by Chi, Chuen argued that:

(a) the object and purpose of the companies was investment holding and that had not been departed from. The companies were also not the source of discord and strife because the relationship among the brothers, especially between Chi and Chuen on the one hand and Ching on the other, was strained even before the deaths of their parents. Chuen also asserted that winding up the companies would be against Mr Chow's intention, as reflected in various provisions

in the Articles of Association, that the companies be a legacy of his hard work and achievements;

(b) Chi had exaggerated the extent of deadlock in the companies. Chuen asserted that despite the poor relationship amongst the brothers, the companies have remained profitable because they are uncomplicated self-running enterprises and moreover, any ordinary resolution can be passed so long as two of the three brothers vote in favour of them. Chuen argued further that in fact, Chi could not rely on any alleged deadlock or irretrievable breakdown in management to wind up the companies as Chi had not asserted that the companies are quasi-partnerships;

(c) on Chi's desire to achieve a clean break, winding up is not at all the fastest and easiest road to a clean break. Instead, Chi should just offer his shares for sale to the remaining members. In any case, the desire for a clean break is not a basis for winding up under s 254(1)(i);

(d) valuation would always involve a degree of subjectivity and this issue would plague the winding up process as much as it would a buy-out; and

(e) Mr Chow's estate could be administered without winding up the companies in that the estate's shares in the companies could be sold pursuant to an exercise by the companies of their liens over the shares.

28 Examining the various grounds relied on by Chi, I think that the issue of valuation was correctly dropped from his final submissions. As Chuen pointed out, the valuation argument was a neutral one. Whether the court ordered a winding up or a buy-out of Chi's shares, there would inevitably be arguments between the brothers as to the correct method for ascertaining the value of the shares and the matter would have to be submitted to expert evaluation. This ground need not detain me further.

29 The other ground which does not merit detailed consideration as a basis for a winding up order in this case is that related to the purpose and object of the companies. The traditional view is, as expressed in *Re Goodwealth Trading Pte Ltd* [1990] SLR 1239 ("*Goodwealth*"), that a company's substratum would be the main object which it was formed to achieve and if its main object could no longer be carried on, then the substratum of the company would have gone and any member may petition for a winding up order on the just and equitable ground (*per* Yong Pung How CJ at 1249). In this case, the parties agreed that the main object of the companies was to function as holding companies in respect of the assets acquired by Mr Chow. They further agreed that that object had not been departed from. Thus, following the traditional view strictly, I would not be able to hold that the substratum of any of the companies has gone or been abandoned and would not be able to justify a winding up order on that basis. No good reason has been put before me in this case which would justify a departure from the traditional view. Chi argued that because the object of setting up the companies was also to benefit Mrs Chow and the children of the family, the companies should be wound up since they were now causing the members agony, but this argument does not seem well founded to me. It is not the companies that are causing the brothers agony – it is the brothers' attitudes towards each other and their different interpretations of the wishes of their parents that have caused them to be in conflict. In any case, the object of a company is usually discerned from a perusal of its memorandum and articles and there is nothing in any of these documents, as far as the companies are concerned, that indicates that they were intended to benefit the Chow family in any manner other than the strictly material.

30 The other contention relating to the object of the companies was that put forward by Chuen, *i.e.*, that Mr Chow wanted CCPL and Chow House to continue to exist in order to perpetuate his legacy. There is insufficient evidence to establish this contention. As Chi pointed out, such intentions

on the part of Mr Chow are not evident from his will, the memorandum and articles of association of the companies or from any resolutions passed by the companies. The provisions in the articles of association granting pre-emption rights to existing members and management rights to adult male descendents show that the companies were intended to be kept within the family as long as they existed but do not establish that the companies were to continue indefinitely as a memorial to Mr Chow. If Mr Chow had wanted to achieve such an object, there were ways he could have done so. He did not use any of them. There are also express provisions in the articles of association of the companies in relation to how they may be wound up and these are inconsistent with the assertions made by Chuen that the companies were to be a permanent memorial to Mr Chow.

31 This leaves three main issues to be considered. These are:

(a) whether there is a deadlock or other difficulty in the management of the companies that justifies the making of a winding up order;

(b) whether a clean break is necessary and, if so, whether winding up the companies is the best way to achieve it; and

(c) whether the difficulties encountered in administering the estates of Mr and Mrs Chow would be relevant considerations in relation to the present application and, if so, whether a winding up order is necessary to resolve the situation.

32 In considering these issues, I have to bear in mind that as Yong Pung How CJ observed in *Goodwealth* ([29] *supra*):

> There is now a practically unlimited range of circumstances within which a winding-up order can justifiably be made on [the ground that it is just and equitable to do so]. Judicial interpretation has added steadily to the categories of cases which may be brought under this ground, and it is inevitable that still more categories will be added by the courts in future. Among the most common cases have been those in which a director has been ousted from office, or where a deadlock has developed in the management of the company's affairs, or where directors have lost confidence in working with each other, or where the company's substratum has disappeared. Although, for convenience, it has been possible to separate the cases into different categories, a principle which has become increasingly accepted is that courts will not hesitate to provide relief and wind up a company, as they would a partnership, if it is clear that the parties involved will no longer be able to work together. (at pg 1245)

I have also to consider whether equitable principles demand that the state of affairs of the companies calls for court intervention in the form of a winding up order or whether some other form of relief would be more appropriate in the circumstances.

Deadlock in management?

33 As implied in the extract from the *Goodwealth* judgment that I cited above, most cases in which winding up has been ordered as a result of deadlock in the management of a company have involved companies that were quasi-partnerships. The companies here are not quasi-partnerships and Chi did not attempt to argue so. In the course of trial, however, his counsel argued that the ground was still applicable because the companies fall within the definition of "an association formed or continued on the basis of a personal arrangement, involving mutual confidence".

34 The phrase quoted above was used by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*

[1973] AC 360 (at 379) to describe one of the elements which the court would take into account when deciding whether to subject the exercise of legal rights to equitable considerations. It should be noted that although Lord Wilberforce went on to state that this element was often found where a pre-existing partnership had been converted into a limited company, that was only an example of the type of company that could fall within the definition. It was not an exclusive categorisation. To me, the more important words in the definition are "an association formed … on the basis of a personal arrangement". These words are capable of applying to a wide variety of cases and, in particular, to situations where companies are formed for the purposes of carrying on family businesses and holding family assets. It must be remembered that in the passage of his judgment from which I have quoted, Lord Wilberforce was at pains to make clear that the equitable considerations did not apply "where the association [was] a purely commercial one, of which it [could] safely be said that the basis of association [was] adequately and exhaustively laid down in the articles" (at 379). Whilst the companies may not be quasi-partnerships, as family companies, they share the characteristics of such associations in that they have very few members most of whom are also the directors, and the shares of the companies are closely held and not easily transferable to parties outside the magic circle. In addition, the directors in family companies hold their positions due to ties of blood and natural affection rather than due to business acumen or commercial considerations. In my judgment, if equitable considerations are to be applied to modify or restrain the exercise of legal rights, then the family company would, along with the quasi-partnership, be the paradigm case in which such considerations should be applied. I agree, therefore, with the proposition put forward by Chi that deadlock in the management of these companies would be a ground for winding them up.

35 In this case, the substance of the argument on deadlock pertains to a very practical consideration and it is essentially whether the relations between the brothers *inter se* have come to the point where they can no longer work together to run the companies properly. The question is therefore whether there is in fact such a degree of deadlock as to make winding up the only practicable solution.

36 Chuen accepted that the three brothers could not work together in the administration of Mr Chow's estate. That was the reason why the court had to appoint Mr Loong as the administrator of the estate. Chuen did not accept, however, that such disagreement meant that the business of the companies could not be carried on. The essential difference between acting as trustees and acting as directors, he pointed out, is that whereas trustees have to act unanimously, directors can act by a majority. His argument was that the companies' business had been effected through resolutions that had been passed by himself and Chi acting together. Thus, this was not the classic case of deadlock.

37 On the evidence, there is indeed no complete deadlock in the management of the companies. Resolutions have been passed, in the majority of cases because Chuen and Chi have been able to agree on the course of action to be taken. However, even though the articles of association of the companies provide for majority rule, the situation is an unhealthy one because Ching is consistently left out of management decisions by virtue of being outvoted. Whether this course of conduct by Chi and Chuen amounts to oppression has to be considered in the oppression suits rather than in this action but the situation does colour the way in which the companies are being run. Moreover, now that Chi and Chuen are also in opposition, it is difficult to see how the situation will get any better if the companies continue to operate. It should be noted that the two men are not only opposed on the issue of winding up, but also on other issues relating to the debts of the estates. It was for that reason that Chuen had to file the derivative actions.

38 Ching did not contend that there had been no breakdown in confidence or that the management was not deadlocked. He, however, opposed the granting of a winding up order on this

ground on the basis that s 254(1)(i) does not apply to a case where the loss of trust and confidence in other members is self-induced. See *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 ("*Evenstar*") and *Ng Eng Hiam v Ng Kee Wei* [1965] 31 MLJ 238 ("*Ng Eng Hiam*"). He also contended that Chi had not come to court with clean hands. Chi's main purpose, Ching alleged, was to forestall the oppression suits.

39 It is clear on the authorities that if Chi was the cause of the deadlock, then he should not be allowed to obtain a winding up order. It is only Ching who blames Chi for the deadlock and he has as many grievances with Chuen as he does with Chi. Chuen himself accepted Chi's assertion that "no one brother can be singled out as being the main cause or contributor to the strife and discord [among the brothers]. Each of [them] must bear part of the blame for [their] collective predicament". He went on to suggest, however, that Ching may have been right in his accusation that Chi had taken out the winding up applications in a bid to circumvent the need to defend himself against the oppression suits brought by Ching. That suggestion is not, in my judgment, supported by the evidence. By the time the winding up applications were filed, the oppression suits were far advanced and although Chi may have been motivated by a desire to render them redundant, there was no evidence that the basis of his desire was anything other than the wish to save time and costs for all parties and to obtain the result which he considered to be in the best interests of all. He was quite prepared to, and did indeed, defend himself vigorously in the oppression suits.

40 What can however be seen from the way the brothers react to one another is that they are all determined to get their way, regardless of whether they have any evidence to support their allegations against the others. There is enough evidence in this case alone (not to mention the evidence in the oppression suits) to support a finding that all the brothers have contributed to the poor state of their relations with each other. In these circumstances, it would be wrong to deprive Chi of the remedy which he seeks simply because he was also one of the causes of the current state of affairs.

41 The court in *Ng Eng Hiam* ([38] *supra*), in dismissing the application for winding up, reasoned that even though the permanent directors of the relevant company were not on speaking terms, there was no suggestion that the business of the company could not be carried on efficiently and that there was a reasonable hope of reconciliation and co-operation between the directors. Yong Pung How CJ in *Goodwealth* ([29] *supra*), while accepting that the court had the discretion to refuse a petition brought by a petitioner whose own behaviour has caused a breakdown in relations, expressed doubt that *Ng Eng Hiam* would be followed now in the Singapore courts because it is unrealistic to expect parties whose animosity has reached the point of court proceedings, to reconcile their differences after messy and expensive litigation.

42 In the present case, it is not just a matter of the current proceedings before the Singapore courts. The Chow family has been involved in numerous suits during the ten years that have passed since the death of Mr Chow. Although not all the litigation pertains directly to the management of the company, it is beyond doubt that the three brothers cannot work together in any fruitful manner in basically all matters, despite Chuen's insistence that there is no real deadlock.

43 When the companies were set up, Mr Chow had the confidence that he and his wife, as the governing directors, would be able to manage the companies for the benefit of themselves and their families. After Mr Chow died, Mrs Chow was still able to direct the affairs of the companies and keep her sons in line. Since her death, however, the fractures in the family have translated into fractures in the companies and from all the suits that are before the courts, it is clear that each of the brothers takes a very different attitude to the manner in which the companies and the family fortunes should be dealt with. For the past few years, no progress has been made with settling the problems

caused by the debts that Mr Chow's estate owes the companies and nothing has been done to move the companies in any particular direction. None of the brothers has complete confidence in either of the others. In a situation such as this where the companies were in effect inherited as a family business (such that the brothers became co-directors because of the inheritance and not because they had a common business that they wanted to promote), while the existence of the companies cannot be said to be the sole cause of the breakdown in the relationships, it appears to me that the parties should not be forced to remain as co-directors. Their positions in the companies have exacerbated the extent of the disagreement amongst the brothers. It is not difficult to foresee that as long as the companies are in existence and the brothers hold the same positions, there will be serious squabbles. The companies will continue to be run by the senior management but will, essentially, be rudderless though they may continue to turn a profit. It is no longer possible for the directors to work together and that is a very strong argument in favour of ordering a winding up pursuant to the just and equitable jurisdiction of the court.

44 Chuen has argued that Chi cannot obtain a just and equitable winding up because there was no allegation by Chi that there was any lack of probity, good faith or other impropriety in the way Chuen has conducted himself in the running of the companies. But lack of probity is only one factor to consider, albeit a significant one, in deciding whether to order a winding up. What makes this factor less relevant in the present case is the fact that this petition is not the classic case of a winding up application being brought by a minority shareholder against the majority. This petition was commenced because Chi was of the opinion that a winding up would be in everyone's interest, not because his participation as a director was being side-stepped by the majority. None of the brothers can be considered the majority on the facts of this case. As such, the absence of a lack of probity should not factor in the current application.

45 Similarly, it is acknowledged that in a typical case where the just and equitable jurisdiction of the court is invoked, the lack of confidence must be grounded on the conduct of the directors in regard to the companies' business rather than in regard to their private lives or affairs. On the evidence, even though the brothers did not get on well before their parents died, and even though their animosity also extends to matters pertaining to Mr Chow's estate, the business of the companies can safely be said to be one of the main causes for the lack of confidence that each has in the others.

Clean break

46 The desire for a clean break is not an established ground for a winding up application. It is a concept found in matrimonial matters rather than in commercial ones. In a case like this, however, where the dispute may be considered as springing from domestic relations, it may have some place. Even so, it should be regarded not so much as a basis for making the order as a factor put forward to establish that any remedy short of winding up would be unlikely to resolve the issue before the court.

47 There is an exit strategy for any of the brothers who no longer wishes to have an interest in the companies or to be involved in their affairs. Under the articles of association, such brother, in this case, Chi, would be bound to offer his shares for sale to the other members of the companies. If no other member is willing to purchase the shares at a fair value, he would then be able to offer his shares to any person and at any price. The right of sale is restricted in that the shares cannot be transferred to non-members as long as there are members (in the case of Lee Tung) or any person approved by the directors as desirable to be admitted into membership (in the case of ADPL and CCPL) who are willing to purchase the same at a fair value. It also appears from the documents in the core bundle that all of the companies' articles contain provisions limiting the right of membership to Mr Chow's lawful daughter and his male descendents in the male line. I note, however, that it was

submitted at trial that such a provision currently exists only in the Articles of CCPL and not in the Articles of ADLP or Lee Tung.

48 In any case, even if the provision has been deleted, it would be difficult to imagine any third party purchaser willing to buy any of the members' shares in the event that a winding up is not ordered, considering the current situation of the companies. Only a family member could possibly be interested in acquiring the companies. At the moment, however, there is only one offer on the table. Chuen has made an offer to buy Chi out of the companies. In his first affidavit (filed on 15 June 2007), Chuen averred that he had the necessary financial resources to buy out both Chi's and Ching's shares in the companies, but in a supplemental affidavit (filed on 6 July 2007), he clarified that his buy-out proposal extended only to Chi. He added that he was willing to buy Chi's shares at a fair value subject to the repayment of the debts owed by Mr Chow's estate to the companies. He extended this offer on the same basis to any shares attributed to Chi from their late parents' estates upon their administration. In the course of the hearing, Chuen's counsel clarified further that Chuen's alternative offer was to buy out the shares belonging to Mr Chow's estate if and when the lien is enforced. If that materialises, Chuen will not be able to buy out Chi's shares as well.

49 Chi has refused to accept the offer because the offer was a buy-out in stages, to be effective only as and when the parents' estates are successfully administered. He asserted that if that course is taken, the brothers would not be able to achieve a clean break and they may potentially be held to ransom by Chuen upon ceding control of the companies to him, without being paid in full and while the shares of Mr and Mrs Chow are still locked in the companies. Since Chuen does not have ready resources to buy out Chi and, more importantly, his resources are dependent upon another contentious issue in this case, namely the administration of Mr Chow's estate, his proposed solution does not merit much consideration.

50 Moreover, even if Chuen buys Chi out of the companies, this will not resolve all the difficulties in the companies as Ching will remain both a shareholder and a director. Chuen has confirmed that he has no resources to buy those shares. He has not offered any solution as to what can be done with regard to Ching's shares if the winding up order is not made. The evidence in the oppression actions shows that Ching and Chuen have not been able to co-operate and that Ching regards Chuen as a prime mover in what he regards as oppressive actions taken against him. If Chi is bought out and the only remaining directors are Chuen and Ching, the probability is that there will be a total deadlock. In that event, the court is likely to have to consider similar applications in the foreseeable future.

51 Looking at the actions of the parties over the years, the outlook for an amicable resolution of their various difficulties with one another appears bleak. It is hard to envisage the business of the companies being carried on normally without one or more of the directors having serious disagreements with the others every time a non-routine decision has to be made. What would happen then? Sooner or later the matter is likely to end up in court. The history of these parties over the past five years shows an increasing tendency to look to the court to resolve one party's disagreement with the others or to break the deadlock that has prevented any forward motion in respect of any particular matter. The court has an interest in discouraging unnecessary litigation. It should also be remembered that while the brothers are feuding, their sister's interest is being affected. She is not a direct shareholder but she has an interest in the companies as a beneficiary of her mother. If the companies remain in existence and remain under the stewardship of the three directors, it is highly unlikely that she will see any material benefit from such interest for a long time to come as they will not be able to agree on what has to be done to resolve issues such as this. In this situation, one can see that a clean break would benefit not only the brothers by allowing them to move on with their lives freed from the necessity of interacting with each other but would also assist in resolving issues related to the sister's interest and would, in all likelihood, reduce the prospect of

future litigation.

The administration of the estates

52 Chi submitted that in considering the applications, the court would be entitled to take into account the intertwined interests of the companies and the estate of Mr Chow. He argued that Mr Chow's estate had been locked up for ten years and that it would be inequitable to allow it to continue to fester in that condition. Chuen, on the other hand, reminded me that in these applications, the court was seised of jurisdiction only with respect to the winding up and not with respect to the administration of Mr Chow's estate. In response to this contention, Chi relied on the Canadian case of *Baxted v Warkentin Estate* [2006] M J. No. 376 ("the *Baxted* case") to demonstrate that the need to administer an estate of deceased person has been found to be a material factor for consideration when an application to wind up has been made.

53 In the *Baxted* case, the company in question was inherited by the children of the founder of the company. One of the five children was tasked by her father's will to manage and run the company for the benefit of all the siblings. She ran the company in much the same manner as her father had done before her and the estate and the company were treated as one and the same and the assets intermingled. The will of the father envisaged that the company might be sold or wound up within five years of his death but, 17 years thereafter, the company was still in existence and the other siblings wanted it wound up on the basis that it was hampering the effective administration of the father's estate and that they had been prevented from realising their inheritance for 17 years. In ordering that the company be wound up on the just and equitable ground, the court took into account the need to administer the estate for the benefit of the other four children. The winding up application was not viewed independently from the need to complete the administration of the estate because the beneficiaries of the estate were shareholders in the company and the operations of the estate and the company had been co-mingled. It should also be noted that it was found in that case that the manager of the company had unfairly disregarded the interests of the other shareholders in the corporation.

54 There are differences in the facts of this case from the facts in the *Baxted* case. Chi has not made an allegation that Chuen or Ching has unfairly disregarded his interests in the companies. No specific allegation was made about the co-mingling of the operations of the estate and the companies. It is clear, however, that the companies have been funding the obligations of the estate. The companies paid the estate duty levied on the estate of Mr Chow and have also advanced moneys for the maintenance of real properties owned by the estate. These advances form part of the loans to the estate that are recorded on the books of the companies.

55 Chuen submitted that the *Baxted* case could be distinguished on its facts because the respondent in that case was running the family company as her fiefdom, excluding everyone else from its management. While it is true that in the present case, all three brothers are directors of the companies and this petition is not grounded upon exclusion from management, the fact remains that agreement cannot be reached to effect the administration of Mr Chow's estate and for all beneficiaries to realise their inheritance. With all three brothers holding different views as to how the estate is to be administered, the consequence is the same – the estate stays stagnant and no one can benefit from the inheritance he or she is entitled to.

56 Bearing in mind that the estate of Mr Chow has been unadministered for the past ten years and that no progress was made even after Mr Loong was appointed by the court to administer the estate because the brothers could not agree on any of the solutions proffered by him, it is not realistic to leave out the consideration of the stalemate in the administration of Mr Chow's estate in determining

this application. Chuen argued that the estate could be administered in other ways. If that was so, it would have been administered in those other ways much earlier. Earlier attempts by Chuen and Chi to resolve the issue of the debts were stymied by Ching and the state of distrust among the brothers is such that it is highly likely that any action taken by any one of them would be opposed by one or both of the others. The fact that five years after Mrs Chow's death and two years after Mr Loong's appointment, no progress has been made in settling the estate demonstrates the brothers' inability to subordinate their differences with one another in the interests of the estate and the companies. This is a highly unusual situation and whilst the facts may not be as extreme as in the *Baxted* case, I consider that the administration of the estate is a relevant factor to consider in relation to the winding up application. It is a major argument in favour of a winding up order that such order would allow the administration of the estate of Mr Chow to be completed expediently and that putting the companies into liquidation would ensure that they come under the direction of an independent third party who will make decisions based on rational grounds of what would be in the best interests of the companies and the shareholders as a whole, and whose decisions would not be coloured by emotions developed over years of family dispute.

The overall perspective

57 It was stated in *Evenstar* ([38] *supra*) that "[a]s a general principle, s 257 [powers of court on hearing winding up applications] must give the court the power to ensure that no avoidable injustice is done to the parties when ordering the winding up of a company under s 254(1)(i)" (at 852). The companies are viable and profitable, although most of the profits are generated from passive income which does not require work from the directors. That is not a decisive factor, however, in a winding up application on just and equitable grounds. As established as long ago as 1916, viable and profitable companies can be wound up under s 254(1)(i): see *Re Yenidje Tobacco Company Limited* [1916] 2 Ch 426. At the heart of the doctrine is the notion of unfairness: see *Evenstar* at para 31, p 845. Unfairness in the present case is certainly not of the usual breed. This is not a typical winding up application brought by a minority against the majority: unfairness here has to be gleaned from the consequence of the winding up application not being granted – whether it is fair to allow the companies to continue functioning at a completely meaningless and operational level, or whether it is "fairer" to order a winding up and allow the parties to go their own way.

58 In my view, little injustice, if any, would be caused to Chuen or Ching if a winding up is ordered. If Chuen would like to continue Mr Chow's legacy, he could always set up another company in memory of his father. As for Ching, he wants the companies wound up, but on his ground only. The oppression suits have been heard and, if he is found to have been oppressed, whilst further winding up orders may not be made, his position may nevertheless be vindicated by an award of costs. Attendant problems pursuant to a winding up order as highlighted by Chuen, such as difficulties as regards the existing tenants of Chow House and the extensive costs and time required for the process, are standard consequences of any winding up order. Chi himself has acknowledged that he is fully aware of the lengthy process. But at the very least, the end will be in sight and parties will know exactly where they are headed. Moreover, the companies are essentially holding companies whose "operations" will not be very badly affected when wound up.

59 In addition, there are provisions for winding up in the articles of association of all the companies. Although this is not conclusive, it at least shows that winding up is a solution not completely opposed to the intentions of Mr Chow.

60 Given the litigation history and the complex nature of the relationships among the brothers, it does not make sense for this court to stand aside and allow the situation to deteriorate further. In *Goodwealth* ([29] *supra*), the court held that since the relationship between the parties had

deteriorated to an extent where it would no longer be possible for them to participate in any form of business enterprise, to deny the winding up application would only bring on a marathon of litigation. The court went on to say (at 1248) that "[i]n such circumstances, the court cannot stand aside, much less remain in an ivory tower, and comfort itself by saying that the minority party can always bring an action later for oppression, if need be … To do so would be to risk bringing the court into disrepute". With respect, I fully endorse that view and find it most apt in relation to the cases before me.

61 In this case, the oppression action has already been brought. And it is not difficult to extrapolate from there that should winding up not be ordered, a barrage of various other suits pertaining to many more issues which will continue to plague the companies will follow. All this stems from the undeniable fact that the brothers cannot work together regardless of what matter it is that they are faced with. In family companies such as the present where there are only a few members and directors holding completely divergent objectives and where it is not feasible for members to exit at will simply by selling their shares to any willing purchaser, a winding up order is inevitable even if it is admittedly not the perfect solution.

Conclusion

62 For the reasons given above, I make the following orders:

(a) that Lee Tung Company (Private) Limited be wound up; and

(b) that Tam Chee Chong be appointed the liquidator of the company.

I note that the plaintiff has asked for the costs of his application to be taxed and paid out of the assets of the company. I am not sure whether that is the correct order to make in this case since the persons who opposed the winding up application were Ching and Chuen and the company itself took no part in the case. I will therefore hear the parties on costs.

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