IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 88

Companies Winding Up No 163 of 2017

Between

Kathryn Ma Wai Fong

… *Plaintiff*

And

Trillion Investment Pte Ltd

… *Defendant*

Companies Winding Up No 164 of 2017

Between

Kathryn Ma Wai Fong

… *Plaintiff*

And

Double Ace Trading Company Pte Ltd

… *Defendant*

Companies Winding Up No 165 of 2017

Between

Kathryn Ma Wai Fong

… *Plaintiff*

And

Faxlink Trading Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Valerie Thean J:

Introduction

1 The plaintiff, Ms Kathryn Ma Wai Fong, is a shareholder of the three defendant companies ("the Companies"). She acquired the shares in these Companies in 2014 after the passing of her husband, in her capacity as the executrix of his estate. Arising from her unhappiness with the other shareholders, she applied to wind up each of the Companies pursuant to s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). These applications were resisted by the contributories of the Companies.

2 On 22 February 2018, after considering the affidavits and parties' arguments, I was of the view that it would not be just and equitable to wind up the Companies. I therefore dismissed all three applications. Ms Ma has now appealed and I furnish the grounds of my decision.

Facts

The business group

3 The late Datuk Wong Tuong Kwong ("Datuk Wong") was a highly-successful businessman. He incorporated WTK Realty Sdn Bhd ("WTK Realty") in Malaysia in August 1981. This became the flagship company of a business group (the "WTK Group") which comprises companies in Singapore, Malaysia, Liberia, the British Virgin Islands and Papua New Guinea. The Companies are part of this group.[1]

4 Datuk Wong had three sons (collectively, the "Wong brothers"): Wong Kie Yik ("WKY"), who co-founded WTK Realty with Datuk Wong;[2] Wong Kie Nai ("WKN"), Ms Ma's late husband; and Wong Kie Chie ("WKC"), who has lived in Sydney since 1984.[3]

5 Datuk Wong suffered a stroke in the 1990s and passed away in 2004 at the age of 85.[4] After Datuk Wong's health deteriorated, WKN, who was based in Sibu, became the Managing Director of WTK Realty and managed the Companies. Around March 2011, he discovered he was ill with cancer and left Sibu to receive treatment in Sydney.[5]

6 WKN passed away in Sydney around 11 March 2013. Ms Ma became the executrix of his estate pursuant to his will, and obtained grants of probate in several jurisdictions.[6] She became a shareholder of each of the Companies in

1 Ms Ma's first affidavit in CWU 163 of 2017 dated 12 July 2017 at paras 13–14.

2 WKY's first affidavit in CWU 163 of 2017 dated 30 August at para 25.

3 WKY's first affidavit in CWU 163 of 2017 dated 30 August at para 12; 17.

4 Ms Ma's first affidavit in CWU 163 of 2017 dated 12 July 2017 at para 17; 21.

5 WKY's first affidavit in CWU 163 of 2017 dated 30 August 2017 at para 26(a).

her capacity as executrix of WKN's estate.[7] Under WKN's will dated 9 November 2012, the shares of the Companies that WKN held were bequeathed to CIMB Commerce Trustee Berhad to be held on trust for the benefit of Ms Ma, their children Neil and Mimi Wong, and the beneficiaries of various trusts. Ms Ma and Neil and Mimi Wong have resided in Sydney since 2003.[8]

7 After WKN's death, Ms Ma and the rest of the extended Wong family have engaged in litigation across multiple jurisdictions. According to WKY, a total of 69 legal proceedings have been filed by parties in Malaysia, the British Virgin Islands and Singapore as at 30 August 2017.[9]

The Companies

8 The three Companies which are the subject matter of the three applications are Singapore companies.

9 Trillion Investment Pte Ltd ("Trillion") was incorporated in Singapore in 1979.[10] The original subscribers of Trillion were not members or relatives of the Wong family. The company was acquired by WKY and his wife in 1982 as an investment holding company for the purpose of property investment. It was not purchased to carry on any business.[11] Presently, Trillion has an issued share

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6 Ms Ma's first affidavit in CWU 163 of 2017 dated 12 July 2017 at para 23.

7 Ms Ma's first affidavit in CWU 163 of 2017 dated 12 July 2017 at para 4.

8 WKY's first affidavit in CWU 163 of 2017 dated 30 August 2017 at para 12; not disputed in Plaintiff's second affidavit in CWU 163 of 2017 dated 6 September 2017 at para 12.

9 WKY's first affidavit in CWU 163 of 2017 dated 30 August 2017 at para 13(e).

10 Ms Ma's first affidavit in CWU 163 of 2017 dated 12 July 2017 at para 8.

11 Contributories' written submissions dated 14 February 2018 at para 8(4); Mr Tan's affidavit dated 12 October 2017 at para 13.

capital of $150,000, divided into 150,000 shares of $1 each. Ms Ma, WKY and WKC each hold 50,000 shares.[12] The current directors are WKY and Mr Ong Kim Siong ("Mr Ong").[13]

10 Double Ace Trading Company Pte Ltd ("Double Ace") was incorporated in 1972[14] by Datuk Wong and his brother-in-law for the purpose of trading in spare parts used by the WTK Group and subsequently dealing with the trade and sale of timber by the WTK Group to customers.[15] It has an issued share capital of $50,000, divided into 50,000 ordinary shares of $1 each. Ms Ma holds 19,500 shares, WKY holds 19,998 shares, WKY's son holds two shares, WTK's nephew holds 10,000 shares and the estate of Datuk Wong's brother-in-law holds 500 shares.[16] The directors are WKY and Mr Ong.[17]

11 Faxlink Trading Pte Ltd ("Faxlink"), was incorporated in 1989.[18] Shortly thereafter, it was acquired by WKN and WKY. They had no specific business in mind for Faxlink and purchased it as a shell company which could be used to carry on business if and when the need arose.[19] It has an issued share capital of

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12 Ms Ma's written submissions dated 14 February 2018 at para 22; Contributories' written submissions dated 14 February 2018 at para 8(10).

13 Ms Ma's written submissions dated 14 February 2018 at para 22(d); Contributories' written submissions dated 14 February 2018 at para 8(11).

14 Ms Ma's affidavit filed for CWU 164 of 2017, dated 12 July 2017 at para 8.; Contributories' written submissions dated 14 February 2018 at para 8(10).

15 Contributories' written submissions dated 14 February 2018 at para 8(3).

16 Ms Ma's written submissions dated 14 February 2018 at para 23(c); Contributories' written submissions dated 14 February 2018 at para 8(10).

17 Ms Ma's written submissions dated 14 February 2018 at para 23(d); Contributories' written submissions dated 14 February 2018 at para 8(11).

18 Ms Ma's affidavit filed in CWU 165 of 2017, dated 12 July 2017 at para 8.; Contributories' written submissions dated 14 February 2018 at para 8(5).

19 Contributories' written submissions dated 14 February 2018 at para 8(5).

$2, divided into two ordinary shares of $1 each. Ms Ma and WKY each hold one share.[20] The directors are WKY and one Tan Hang Song.[21]

Legal context and issues arising

12 Ms Ma's applications were brought under s 254(1)(*i*) of the Companies Act, which provides:

> **Circumstances in which company may be wound up by Court**
>
> **254.**—(1) The Court may order the winding up if —
>
> …
>
> (*i*) the Court is of opinion that it is just and equitable that the company be wound up;

13 It was common ground between parties that unfairness forms the foundation of the Court's exercise of its jurisdiction; a company may not be wound up "just because a minority shareholder feels aggrieved or wishes to exit at will": see *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*") at [31].

14 In each case, Ms Ma brought an Originating Summons to wind up the Companies and did not seek to cross-examine any witnesses. She was of the view that the documents were sufficient to establish her case, which may be analysed in three broad strands. The first, and main, set of contentions may be termed the "family company arguments": that there was a relationship of trust and confidence between the Wong brothers which extended to WKN's family as well as WKY's and WKC's families.[22] Ms Ma contended that the breakdown

[20] Ms Ma's written submissions dated 14 February 2018 at para 24(c); Contributories' written submissions dated 14 February 2018 at para 8(10).

[21] Ms Ma's written submissions dated 14 February 2018 at para 24(d); Contributories' written submissions dated 14 February 2018 at para 8(11).

in the relationship between these two factions would make it unfair to "trap" her in the Companies.[23] Related to this was "an expectation and/or common understanding on the part of the [Wong brothers] and their immediate families (i.e. each Brother's spouse and issue) that each of the Brother's immediate families would be entitled to participate in the conduct of the … Companies' business".[24] Her exclusion from participating in the management of these Companies, despite her request, was thus argued to be unfair.

15 The second strand was that of mismanagement. She contended that the directors and/or employees of the Companies were "obscuring their financial misappropriations". Highlighting various transactions which she said were highly suspicious, she contended that a liquidator should also be appointed to investigate the Companies' affairs.[25]

16 The final plank of her case was the loss of substratum of the Companies, because the Companies had "abandoned the business that the corporators have agreed among themselves that [the Companies] should do, whatever the objects clauses may provide".[26]

17 The contributories denied these claims. They contended that the Companies were run on the basis of mutual trust and confidence *between the Wong brothers only*. Ms Ma was not relevant in this context because she was not involved, at any time, in the management of the Companies and therefore there had no basis for any expectation to participate in management.[27] All

22 Ms Ma's written submissions dated 14 February 2018 at para 47.

23 Ms Ma's written submissions dated 14 February 2018 at para 59.

24 Ms Ma's written submissions dated 14 February 2018 at para 138.

25 Ms Ma's written submissions dated 14 February 2018 at paras 77–116.

26 Ms Ma's written submissions dated 14 February 2018 at para 141.

allegations of mismanagement were denied. And the contributories contended that there was no loss of substratum save for Faxlink. For Faxlink, the contributories had no objections to winding it up if Ms Ma would agree to the appointment of the Official Receiver ("OR") as liquidator;[28] Ms Ma, however, objected and requested, in view of her contentions as to mismanagement, that a private liquidator be appointed.[29]

18 In addition, the contributories pointed out that the Articles of Association of both Double Ace and Faxlink contain exit mechanisms. Even where unfairness has been established, *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*") mandated that the Court must consider whether the presence of an option for Ms Ma to be bought out at fair value would negate any such unfairness. For Trillion, although the articles did not contain an exit mechanism, WKY offered to purchase Ms Ma's shares at fair value; and the contributories argued this made it unreasonable for Ms Ma to apply for a winding up.[30]

19 In the alternative, in the event that the conditions for winding up were satisfied, the contributories asked that the Court, instead of ordering a winding up, exercise its discretion to order that Ms Ma's shares be bought out under the new s 254(2A) of the Companies Act,[31] which provides:

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27 Contributories' written submission dated 14 February 2018 at paras 52–59.

28 Contributories' written submission dated 14 February 2018 at paras 121–127; 182–184.

29 Ms Ma's written submissions dated 14 February 2018 at para 216.

30 Contributories' written submission dated 14 February 2018 at paras 128–138.

31 Contributories' written submission dated 14 February 2018 at paras 139–154.

> On an application for winding up on the ground specified in subsection (1)(*f*) or (*i*), instead of making an order for the winding up, 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 one or more other members on terms to the satisfaction of the Court.

20 Summing up the above, these were the issues in dispute:

(a) Was the requisite unfairness established, such that it was just and equitable for the Court to intervene? This required consideration of the family company arguments, the mismanagement contentions and the loss of substratum argument.

(b) If unfairness was established, could any such unfairness be nullified by the presence of exit mechanisms in the Articles of Association of Double Ace and Faxlink or, in the case of Trillion, WKY's offer to purchase Ms Ma's shares at fair value?

(c) Even if the test for winding up were satisfied, would it be more equitable to order that the shares of Ms Ma be bought out under s 254(2A) of the Companies Act?

21 In my judgment, it was not just and equitable for the Court to intervene. In brief, the family company arguments, the loss of substratum argument and the mismanagement contentions were not made out on the balance of probabilities. Even if unfairness was made out, which it was not, there were exit mechanisms which Ms Ma ought to have invoked in respect of Double Ace and Faxlink. For Trillion, while there was no exit mechanism, she ought to have considered WKY's offer to purchase her shares at fair value. Therefore, the applications were dismissed. The last issue, which was whether an order under

s254(2A) of the Companies Act would be a more equitable remedy, fell away after consideration of the first two issues, as the basis for the Court's intervention was not established. I explain my reasons in detail below.

Whether it was just and equitable for the Court to intervene

22 In elaborating on the standard of unfairness required in such cases, the Court of Appeal in *Evenstar* cited at [29] with approval Lord Wilberforce's speech in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*") at 379–380, where his Lordship held that the superimposition of equitable considerations typically requires one of more of the following elements:

> (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

Lord Wilberforce observed that parallels can be drawn with the law of partnership, "which has developed the conceptions of probity, good faith and mutual confidence". Thus, references to "quasi-partnerships" can be found in cases where the Court's just and equitable jurisdiction was invoked.

23 The Court of Appeal in *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") held at [17] that the concept of "just and equitable" is "a dynamic one" which should not be circumscribed in scope by reference to case law, and identified at [18] the following situations which could also constitute sufficient factual bases to establish just and equitable causes:

> (a) where the main object of the company cannot be achieved or has been departed from;
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> (b) where the company's business has been carried on in a fraudulent manner;
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> (c) where the company is really no more than an incorporated partnership and members can no longer work in association with one another;
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> (d) where minority members have been oppressed or treated unfairly by controlling members and have justifiably lost confidence in the management of the company; and
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> (e) where the petitioner has been deliberately excluded from the management of the company in contravention of an understanding that he will be allowed to participate in managing the company.

24 Fundamental to the Court's exercise of its broad discretion, nevertheless, is caution, because the Court's order would allow the applicant to be released from his obligation to comply with the framework provided by a company's memorandum and articles: *Chow Kwok Chuen* at [19].

25 I turn to Ms Ma's contentions on the family company arguments, the mismanagement contentions, and the loss of substratum argument with this context in mind.

The family company arguments

Was there a quasi-partnership?

26 It was common ground that a quasi-partnership – "an association formed or continued on the basis of a personal relationship, involving mutual confidence" – may be wound up on the just and equitable ground if the relationship of trust and confidence between its shareholders has broken down: see *Ting Shwu Ping* at [85]; [91].

27 *Was there, however, a quasi-partnership?* It was not disputed that one existed between the three Wong brothers when WKN managed the Companies. *WKN ceased to do so from March 2011, nevertheless.* Crucially, Ms Ma has not participated in the management of these Companies from their inception.

28 The Court of Appeal's guidance in *Ting Shwu Ping* is particularly pertinent. In that case, Mdm Ting, in both her personal capacity and her capacity as executor of her late husband's ("Mr Chng") estate, applied to wind up the defendant companies, which had been started and run by Mr Chng and his partner, one Mr Chan. After Mr Chng's death, Mdm Ting and Mr Chan could not agree over the management of the companies, and she applied for them to be wound up on the just and equitable ground.

29 Several observations made by the Court of Appeal are instructive. First, the death of a shareholder in a quasi-partnership does not automatically justify winding up the company (at [87] and [90]). Second, "[r]ights under a quasi-partnership are, generally, not transmissible and would not continue to bind the remaining quasi-partners after a partner's death", unless this was expressly provided for in the company's constitution (at [96]). The holding of the Hong Kong Court of First Instance in *Cheung Shu Chuen v Lee Der Industrial Co* [2009] HKCU 478 at [24] that "a quasi-partnership was a *personal* relationship that did not survive death [emphasis added]" was cited with approval at [93] and [96]. Third, in response to Mdm Ting's submission that "the absence of trust and confidence between the shareholders … removes the basis or substratum of the [c]ompanies such that there are just and equitable grounds for winding up", the Court held, at [100]:

> Likewise, Mdm Ting cannot rely on the fact that the trust and confidence between shareholders no longer exists. While trust and confidence formed the basis of the incorporation of the

> Companies there is no reason to hold that the absence of mutual trust and confidence among the present shareholders justifies a just and equitable winding up. Mutual trust and confidence existed between Chan and Chng – but should the court expect the same trust and confidence to exist between Chan and Mdm Ting, and, on the basis that it does not, wind up the Companies? *It is, in our view, irrelevant that presently there does not exist any mutual trust and confidence between Chan and Mdm Ting since such relationship, if it ever existed, had nothing to do with the incorporation and running of the Companies*. Neither Company was ever based on mutual trust and confidence between Chan and Mdm Ting.
>
> [emphasis added]

30 In my judgment, this analysis informs the approach that must be taken here. The relationship of trust and confidence existed only between the Wong brothers. It did not extend to Ms Ma's family. It is therefore irrelevant that there was no longer any trust and confidence between the extended families.

31 *Chow Kwok Chuen* and *Lin Choo Mee v Tat Leong Development (Pte) Ltd and Others and Other Matters* [2015] SGHC 99 ("*Lin Choo Mee*"), relied upon by Ms Ma, were of no assistance to her case. *Chow Kwok Chuen* involved three brothers who were co-directors of three family companies set up by their late father. In *Lin Choo Mee*, the plaintiff, who applied to wind up three family companies on the just and equitable ground, was similarly a director of the three defendant companies and was "always meant to have a management role" in them. Thus, these two cases involved plaintiffs who had been actively running the companies sought to be wound up.

32 In contrast, prior to WKN's death, aside from WKN, no member of his family had at any time been a shareholder of the Companies; neither had any member of WKN's family been involved in the management of the Companies.[32] Ms Ma and Neil and Mimi Wong had lived in Sydney from 2003.

When WKN left Sibu in 2011, he left the Companies in the charge of WKY and trusted others. His passing in 2013 gave no reason to change the status quo that he put in place before his departure in 2011. Indeed, WKN's 2012 will[33] made clear that there was no expectation on his or his brothers' part for WKN's family to assist with the Companies after his passing. Clauses 4d–f provide that the shares of the Companies, as part of his "worldwide assets", are bequeathed to CIMB Commerce Trustee Berhad to be held on trust for the benefit of Ms Ma, his children Neil and Mimi Wong, and the beneficiaries of various trusts. With this trust arrangement, the beneficiaries would obtain the value of any assets held by the Companies at the time the directors of such Companies considered appropriate. This provision in the will also wholly negated Ms Ma's allegations that the acrimonious relationship[34] between her and the brothers impeded her administration of WKN's estate: she need only transfer ownership of the shares to CIMB Commerce Trustee Berhad, as envisaged by WKN. In any event, as the Court of Appeal cautioned in *Chow Kwok Chuen* at [40], "[o]f course, only unfairness, not expediency, can provide a 'just and equitable' basis for winding up".

33 It is convenient for me to deal, at this juncture, with the Malaysian litigation relied upon by Ms Ma. Specifically, the Malaysian courts found that Faedah Mulia Sdn Bhd, WTK Realty Builder Sdn Bhd, Unibaru Sdn Bhd, WTK Enterprises Sdn Bhd and WTK Trading Sdn Bhd, were "part and parcel of the Wong Family Company and/or part of the WTK Group of Companies" and that "there has been an irretrievable breakdown in the relationship between the respective shareholders/directors of the Respondent companies and that given

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32 Ms Ma's written submissions dated 14 February 2018 at para 70.

33 Tab 1 of Contributories' combined bundle of documents ("CBOD").

34 Ms Ma's affidavit filed for CWU 163 of 2017, dated 12 July 2017 at para 62.5.

the circumstances, it would be just and equitable to wind up the companies".[35] The same findings were made in a similar action involving WTK Realty, Leasewell Leasing Sdn Bhd and Salwong Sdn Bhd, and the Malaysian courts ordered that those companies be wound up on the just and equitable ground.[36] She pointed out that WKY also applied in Malaysia for Arctic Star Sdn Bhd ("Arctic Star") to be wound up on the ground that there was a loss of mutual trust and confidence between WKY and Ms Ma's family.[37]

34 I rejected this argument on the basis that the findings of the Malaysian courts did not relate to the Companies at hand. I did not find persuasive the submission that the findings of the Malaysian courts were relevant as factual findings because of "the global nature" of the present proceedings.[38] The suits concerned Malaysian companies in the WTK Group and were dealt with under Malaysian law. Insofar as there were any factual findings, these were not relevant to the present action: see ss 42–45 of the Evidence Act (Cap 97, 1997 Rev Ed). Any contention regarding the Companies at hand must be independently established and proved by Ms Ma.

Effect of finding that there is no quasi-partnership

35 Absent a quasi-partnership, what expectations are reasonable on the part of Ms Ma? I deal with Ms Ma's complaints about not being made a director at her request in this perspective. In the light of my finding that there is no quasi-partnership between Ms Ma or her children and the other brothers in respect of

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35 Ms Ma's written submissions dated 14 February 2018 at paras 66–68; Plaintiff's 3rd affidavit filed for CWU 163 of 2017, dated 18 November 2017, at pp 694–695.

36 Ms Ma's written submissions dated 14 February 2018 at Annex A.

37 Ms Ma's written submissions dated 14 February 2018 at paras 71–75.

38 NE 22/02/2018 at pp 8–9.

the Companies, it would follow that she does not have a right to participate in their management; nor is it reasonable for her to ask to be made a director.

36 There remained her argument that the deep acrimony between the family factions within the extended family was sufficient. It is clear from *Ebrahimi* that, absent a quasi-partnership, familial acrimony is not a sufficient premise for the Court's intervention.

The mismanagement contentions

37 As highlighted by *Chow Kwok Chuen,* carrying on business in a fraudulent manner may found good ground for intervention. It was not disputed that shareholders who rely on this ground must prove a "lack of probity" in the directors' conduct: *Loch v John Blackwood, Limited* [1924] AC 783, applied in *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 ("*Summit*") at [37]. Mere suspicion or assertion of impropriety will not pass muster: *Summit* at [37].

38 What was disputed here was whether there was any lack of probity on the part of the directors of the Companies. Ms Ma made various contentions of mismanagement, which I detail below. For reasons which I explain, I was of the view that these contentions were unmeritorious.

General allegations

39 The first allegation concerns a letter dated 22 July 2015 which was sent by Pereira & Tan LLC to Ms Ma's solicitors. The letter states that Double Ace and Trillion "intend to take steps to be struck off".[39]

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[39] Plaintiff's bundle of documents ("PBOD") for CWU 164 of 2017 at p 179.

40 Ms Ma submitted that the circumstances under which this letter was sent were suspicious. Mr Richard Tan ("Mr Tan"), who had charge of the accounts of the Companies, contended that he had mistakenly instructed Pereira & Tan LLC to send the letter after overhearing a conversation between WKY and a third person. WKY clarified that he did not authorise Mr Tan to do so, which was confirmed by Mr Tan. Ms Ma did not believe this explanation, saying it was too "convenient" for Mr Tan to now claim that he could not recall details of the conversation which he overheard. Furthermore, she asserted that WKY must have been aware of this letter, as he was the company's managing director.[40]

41 In my view, although the circumstances under which the letter was sent are far from clear, Ms Ma had not established that Mr Tan or WKY had acted improperly. Ms Ma also did not seek to cross-examine WKY or Mr Tan on their motives. She simply thought that the letter was suspicious. That was not sufficient.

42 A second area was access to documents. Ms Ma complained that she had been unfairly denied excess to information relating to the Companies' receivables, employee benefits, directors' remuneration, liabilities, management accounts, minutes of extra-ordinary general meetings and business affairs in general.[41]

43 It was not disputed that Ms Ma had been provided all the information which she was entitled to as a shareholder, including notices and minutes of the Companies' annual general meetings, and copies of the Companies' audited

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40 PBOD for CWU 164 of 2017 at p 9, S/No. 6.

41 Ms Ma's written submissions dated 14 February 2018 at paras 122–123.

financial statements. She pointed out that while WKN was alive, he had been a director of the Companies and had complete access to documents and information relating to the Companies. She should "be given the same documents and information that WKN would have been privy to as a director", because the Companies were still run as family companies, and she, as the executrix of WKN's estate, had "stepped into WKN's shoes".[42]

44 In the light of my findings on the family company arguments, this contention held no water. WKN's rights as a director did not transmit to her upon his death, nor was there any clause in the articles or memoranda of association that gave her a director's rights to information.

Company specific allegations

45 Ms Ma pointed out some inconsistencies in the evidence as to the amount of rent owed by Double Ace to Trillion.[43] This was because Mr Tan first stated at an annual general meeting that the sum owing was $1,028,979,[44] but later confirmed on oath that as reflected in Double Ace's accounts, the sum was $890,170.[45] In response, counsel for the contributories, Mr Palmer, explained that Double Ace also owed $138,809.55 to Rayley Co Ltd ("Rayley"), and the sum of $890,170 and $138,809.55 is $1,028,979.55.[46] The discrepancy was due to the omission of this particular debt.

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42 Ms Ma's written submissions dated 14 February 2018 at paras 125–126.

43 PBOD for CWU 164 of 2017 at pp 5-7, S/No. 2–3.

44 Mr Tan's affidavit for CWU 164 of 2017 dated 12 October 2017 at para 24.

45 Mr Tan's affidavit for CWU 163 of 2017 dated 12 October 2017 at para 16.

46 NE 22/02/2018 at pp 75–76.

46 In respect of Double Ace's debt of $138,809.55 owed to Rayley, I make a slight diversion to explain that Ms Ma complained that this debt did not appear in any of the financial statements, and took issue with Mr Tan's stated ignorance as to how the debt arose. As explained above, the sum of $138,809.55 is likely part of the larger debt of $1,028,979.55, which appears in the company's financial statements dated 30 September 2016.

47 Ms Ma also referred to the Trillion's financial statements, which indicated that the company's related-party debts increased from $995,907 in 2015 to $1,028,979 in 2016, a sum of $33,072. As stated above, the sum of $1,028,979 was supposedly rent owed by Double Ace to Trillion. Somewhat inconsistently, Mr Tan stated on affidavit that rent was $5,000 a month, or $60,000 a year. Ms Ma queries that if the sum of $1,028,979 was rent owed, the difference in the amount owing between 2015 and 2016 should be $60,000 and not $33,072. Accordingly, that sum could not have been rent owed to Trillion.[47] Mr Palmer accepted that he had no explanation for this discrepancy.[48] The point was raised by counsel for Ms Ma, Mr Seah, however, for the first time during the hearing. It stands to reason that if the point was an important one for Ms Ma, the query would have been posed earlier, and not at the final hour of the hearing where, clearly, accountants would not be at hand.

48 Ms Ma further alleged that Mr Tan and Mr Ong made statements at Double Ace's and Trillion's 2017 annual general meeting to the effect that these companies were going to be wound up. She contended that their subsequent denials that such statements were made were evidence that they were lying.[49]

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47 PBOD for CWU 164 of 2017 at pp 5–6, S/No. 2.

48 NE 22/02/2018 at p 100.

49 PBOD for CWU 164 of 2017 at p 10, S/No. 7; PBOD for CWU 163 of 2017 at p 9,

There was no basis for her to make this allegation: her proxies did not even file affidavits to provide an alternative version of events.

49 The other contentions in relation to Double Ace and my views on the same are as follows:

(a) Ms Ma found it suspicious that Double Ace owed WKY $180,000, which he explained was to cover its operating costs.[50] During the hearing, Mr Palmer directed me, by way of example, to the 2013 accounts of the company, which indicate that expense on employee benefits and other operating expenses add up to approximately $180,000.[51] Mr Palmer further emphasised that there was no evidence that Ms Ma or her proxies had taken issue with the financial statements of the Companies at its annual general meetings.[52] Her belated complaint was therefore an afterthought.[53] In reply, Mr Seah, submitted that the financial statements do not indicate that the expenses were owed to WKY. Furthermore, as Ms Ma was a minority shareholder of Double Ace, there would be no point in objecting to the financial statements at the general meetings.[54]

I was not persuaded that the circumstances around the alleged loan were suspicious. It is not unusual for directors to advance loans to their companies, especially where the company in question, like Double Ace,

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S/No. 5.

50 PBOD for CWU 164 of 2017 at p 4, S/No. 1.

51 PBOD for CWU 164 of 2017 at p 66; NE 22/02/2018 at p 69.

52 NE 22/02/2018 at pp 71–72.

53 NE 22/02/2018 at p 73.

54 NE 22/02/2018 at pp 117–118.

holds family assets. The quantum of the loan is also reasonable, taking into account the expenses of the company as reflected in the financial statements, which Ms Ma did not object to at the annual general meetings. Even if the statements would have been approved over her objections, I nevertheless find it strange that Ms Ma had done absolutely nothing to record her disapproval or reserve her rights, given the seriousness of her allegations.

(b) Ms Ma also highlighted that the company's 2015 financial statements state that the company owed $1,095,907 to related parties, but none to directors. However, its 2016 financial statements state that it owed $100,000 to a director, and $995,907 to related parties. Ms Ma concluded from this that WKY had "carved out" the sum of $100,000 for himself.[55] Mr Palmer pointed out at the hearing that this allegation was not made in the affidavits and that the contributories had no opportunity to explain.[56]

In my judgment, the evidence in this regard is too ambiguous. In the absence of queries having been raised properly with WKY or the company's accountant, I was unable to find that WKY had acted improperly in stating that $100,000 of the company's debt was owed to him.

(c) Ms Ma took issue with the sudden increase in Double Ace's revenue from $8,032 in 2015 to $127,340 in 2016. She highlighted that although Mr Tan and Mr Ong had suggested that the increase was due to receivables paid by a company called "Hallaway" for use of its

55 PBOD for CWU 164 of 2017 at p 11, S/No. 8.

56 NE 22/02/2018 at p 85.

facilities and premises, this could not be correct because according to WKY, the property which Double Ace owned had had no tenants since August 2015.[57]

It was important to put this allegation in perspective: it related to an increase in income, not a loss, and the only issue – if any - was a purported failure to identify the source of the income.[58] Again, I was unable to find that this, without more, showed any want of probity on the part the company's officers.

(d) Ms Ma further accused Mr Tan of making "flippant and baseless" statements regarding a debt of $1,510,153 owed to the company by related offshore companies. According to her, Mr Tan "should have checked with WKY whether the debts were recoverable, rather than 'assuming' [them to be]".[59] Mr Palmer pointed out in response that there was no allegation that there was anything wrong with the company's accounts. Rather, the complaint was that Mr Tan should have known better rather than to assume.

In my view, although Mr Tan could have been more careful, there is nothing here which suggests lack of probity on his part. Nor did Ms Ma suggest that Mr Tan's action had prejudiced any party.

50 Ms Ma's allegations in relating to Trillion were similarly unmeritorious, for the following reasons:

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57 PBOD for CWU 164 of 2017 at pp 7–8, S/No. 4.

58 NE 22/02/2018 at pp 79–81.

59 PBOD for CWU 164 of 2017 at p 8, S/No. 5.

(a) Ms Ma found WKY's claim that the company owed him $942,065 for the purchase of a property at Shenton House suspicious. She pointed out that there was no objective evidence of this loan, the details of which even Mr Tan was not aware of.[60] She submitted that that was an example of WKY "ring-fencing" the company's assets (*ie*, claiming that monies were owed to him to the exclusion of other shareholders).[61] In response, Mr Palmer pointed out that the company's financial statements over several years, which reflect this debt, had been approved. In this vein, he highlighted that despite the Ms Ma's assertion that she had voted against the approval of these financial statements, there is no record of her objections in the minutes of the annual general meetings.[62] Mr Palmer also submitted that this debt was "historical", in the sense that it was already recorded in the company's 2009 financial statements[63] which were approved WKN.[64] Furthermore, the property was purchased in 1984.[65] There was therefore no "ring-fencing".[66]

In my judgment, there was insufficient evidence to conclude one way or the other on this issue. The 2009 financial statements, while recording a debt, did not state that the debt was owed to WKY.[67] Nevertheless, the burden remained on Ms Ma to prove that WKY had attempted to

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60 PBOD for CWU 163 of 2017 at p 4, S/No. 1.

61 Ms Ma's written submissions dated 14 February 2018 at para 191.

62 NE 22/02/2018 at pp 86-87; PBOD for CWU 163 of 2017 at Tabs 10–13.

63 NE 22/02/2018 at p 89; CBOD at p 332.

64 CBOD at p 329.

65 Ong's affidavit in CWU 163 of 2017 dated 12 October 2017 at para 12.

66 NE 22/02/2018 at p 91.

67 NE 22/02/2018 at p 90.

misappropriate the sum of $942,065 from the company. Her bare allegation was inconclusive.

(b) Another debt forming part of Ms Ma's allegation of "ring-fencing" is the sum of $642,843 owed by the company. Mr Tan said that the said sum was owed to WKY, but WKY clarified that it was owed to related offshore companies.[68] As Mr Palmer submitted,[69] the fact that WKY did not claim the money for himself absolved him of the "ring-fencing" allegation.

51 Ms Ma's allegations in relation to the management of Faxlink were untenable, for the following reasons:

(a) Ms Ma alleged that WKY had attempted to "ring-fence" the sum of $122,028 which he claimed was owed to him. According to WKY, these loans were for Faxlink's operating expenses. Ms Ma pointed out that he had not proved that the sum was owed to him. She also highlighted WKY's admission that WKN had dealt with the affairs of Faxlink, which made it likely that WKN had in fact paid Faxlink's expenses.[70] Mr Palmer highlighted at the hearing that it cost about $2,000 to $4,000 to keep Faxlink alive, and that since Faxlink was incorporated in 1989, it was not unusual for it to incur operating expenses of $122,028 over the years.[71] More pertinently, he emphasised that there was no dispute that Faxlink was a dormant company which

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68 PBOD for CWU 163 of 2017 at pp 5–6, S/No. 2.

69 NE 22/02/2018 at p 93.

70 PBOD for CWU 165 of 2017 at p 4, S/No. 1.

71 NE 22/02/2018 at p 94; Contributories' written submissions dated 14 February 2018 at para 90.

did not even have a bank account. Thus, WKY had no prospect of recovering debts from Faxlink, and in this sense there was nothing for WKY to "ring-fence".

(b) Ms Ma also complained that Faxlink's directors made false declarations to the Accounting and Corporate Regulatory Authority when filing an application to strike Faxlink off the Register of Companies. In particular, the directors stated that (1) the written consent of the majority of shareholders had been obtained (when actually Ms Ma did not consent); and (2) the company had no assets and liabilities (when it did have liabilities).[72] However, Ms Ma had not become a shareholder when the declarations were made on 23 April 2014.[73] The shares were only transferred to her on 7 August 2014.[74] Hence, her consent need not have been obtained. Indeed it was not unreasonable for WKY and WKC to apply for the company to be struck off, given that it was dormant and had no assets.[75] As for the declaration that the company had no liabilities, Ms Ma did not adduce any evidence to show that it was otherwise than an innocent mistake. Lack of probity was not established.

Conclusion on mismanagement contentions

52 In conclusion, there were no grounds to suspect any lack of probity on the part of the directors of the Companies. Far from revealing fraudulent behaviour, Ms Ma's laundry list of complaints smacked of spite.

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72 PBOD for CWU 165 of 2017 at pp 4–5, S/No. 2.

73 Tab 8 of PBOD for CWU 165 of 2017.

74 Tab 2 of CBOD at p 34.

75 NE 22/02/2018 at p 98.

Loss of substratum argument

Applicable principles

53 Mismanagement not proved, I come to the loss of substratum argument. It is useful to begin with an observation that in such cases, the unfairness arises not from the loss of substratum *per se*, but "from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree": *O'Neill v Phillips* [1999] 1 WLR 1092 ("*O'Neill v Phillips*") at 1101H, *per* Lord Hoffmann, cited with approval in *Evenstar* at [31].

Double Ace and Trillion

54 In relation to Trillion, Ms Ma submitted that it was established to acquire and invest in land. Since it is only "renting" the Shenton House property to Double Ace without actually receiving payment, and having regard to its debts and the lack of revenue, it is "clearly not fulfilling its original purpose and is virtually dormant".[76] As for Double Ace, Ms Ma relied on WKY's assertion that it was incorporated "for the purpose of trading in spare parts used by the WTK Group of Companies and subsequently dealing with the trading and sale of timber by the WTK Group to customers", a business which it is no longer in. Hence, Double Ace should be wound up. In reply, the contributories submitted that that Double Ace is obtaining rent from a company called "Hallaway", which is permitted under the company's constitution. Ms Ma pointed out in response – and contradicting her premise somewhat - that a company's true object cannot be determined solely from its constitution.[77]

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[76] Ms Ma's written submissions dated 14 February 2018 at paras 147–148.

[77] Ms Ma's written submissions dated 14 February 2018 at paras 155–160.

55 Professor Walter Woon emphasised in *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2012) at para 17.59 that the test for establishing loss of substratum is a "practical rather a theoretical one", because the Court looks beyond the company's constitution to determine the intention of its members. He explains at paras 17.59 and 17.60:

> … It may be appropriate to allow a member to get his money back even if he was not one of the original promoters of the company, if *his participation in the company was predicated on the assumption that it would be conducting a specific business.*
>
> … Where an investor goes along for the ride, as it were, he cannot complain if the company diversifies in a direction that he does not agree with. In such a case, it would not necessarily be just and equitable to wind the company up on the ground that the original business had been abandoned.
>
> [emphasis added]

In other words, a member may rely on this ground only if he had joined the company on the understanding that it would continue pursuing certain goals.

56 It is plain that it cannot be said that Ms Ma's participation in these companies "was predicated on the assumption that they would be conducting a specific business". She is merely the executrix of WKN's will and in this context, tasked only with transferring ownership of the shares to the trust company specified in the will.

Faxlink

57 As stated at [51] above, it was common ground that Faxlink has been dormant since incorporation. As a result, the contributories agreed Faxlink could be wound up, provided that the company is wound up solely on the ground of loss of substratum, and that the OR (rather than a private liquidator) is appointed to administer the winding up.[78] The contributories submitted that it

would make "no commercial or common sense" to appoint a private liquidator as Faxlink has no assets (since it has been dormant since incorporation) and a paid up share capital of $2.[79] Ms Ma's request for a private liquidator rested on her wish to investigate the affairs of the company, in light of the "improper" manner in which it has been managed.[80] Given my finding that the mismanagement contentions were not made out, this submission had no merit.

58 Notwithstanding the contributories' concession that Faxlink may be wound up on the ground of loss of substratum, I dismissed Ms Ma's application. Faxlink remained as a company despite being dormant solely because of her stance. First, the directors had previously filed an application to strike it off the Register of Companies. This striking off did not take place because Ms Ma objected.[81] Secondly, after she filed the application, the contributories were willing to wind up the company. Their condition that the OR be appointed liquidator was a sensible course given that this company was not a going concern. Furthermore, as I will explain below, Faxlink's articles contained an exit mechanism which Ms Ma could have used. As she has chosen not to, it should be left to those charged with the management of Faxlink to decide how best to deal with its demise in the most cost efficient way.

Presence of exit mechanisms

59 I have explained, thus far, why I found no commercial unfairness on the facts. *Ting Shwu Ping* at [107] makes clear that, even where unfairness is established, exit mechanisms are relevant in assessing whether the Court should

78 Contributories' written submissions dated 14 February 2018 at para 182.

79 Contributories' written submissions dated 14 February 2018 at para 183.

80 Ms Ma's written submissions dated 14 February 2018 at para 216.

81 Ms Ma's first affidavit in CWU 165 of 2017 dated 12 July 2017 at para 55.

intervene. In this exercise, the focus is on the terms of the separation, such as who should buy out whom, and the terms of the buy-out. Exceptions arise where the shareholder has a legitimate expectation to have his shares valued in another way than that provided, where impropriety has affected the value of the shares, or where the method of valuation provided was arbitrary. Where no attempt has been made to invoke the share buy-out mechanism in the company's articles, unfairness is unlikely to be established.

Double Ace and Faxlink

60 The exit mechanism of Double Ace, at article 27 of the Articles of Association,[82] allows a member (whom I shall refer to as the "transferor") to give the company notice of his desire to transfer his shares, at a price to be agreed by the transferor and the directors, failing which the company's auditor will be called to certify a fair price. The transferor is entitled to cancel the sale after being informed of the certified fair price. Otherwise, the company will give notice to the other members and invite them to purchase those shares. As for Faxlink, articles 22 and 23 of its Articles of Association[83] allow any member to transfer any or all of his shares by instrument in writing in any usual or common form or in any other form which the directors may approve, provided that the instrument is left for registration at its registered office with a fee of up to $2.00. As with Double Ace, any dispute as to the price of the shares will be resolved by the auditor of the company. I should also point out here that clauses which leave the determination of fair value to auditors are reasonable and commonplace: *Ting Shwu Ping* at [114].

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82 Tab 11 of CBOD at pp 481–482.

83 Tab 12 of the CBOD at pp 501–502.

61 Ms Ma contended in response that the mismanagement contentions made it impossible for a fair valuation to be obtained. This argument was not sustainable in the light of my findings on the mismanagement contentions.

Trillion

62 Finally, I deal with the fact that Trillion's articles do not provide a specific exit procedure for shareholders who seek to be bought out, save for article 22, which only states that any member may transfer any or all of shares by instrument. Notwithstanding this deficiency in Trillion's articles, WKY offered, in his affidavits dated 12 October 2017, to purchase Ms Ma's shares in the Companies at fair value (*ie*, by fixing the price of her shares through a joint independent valuer, if not agreed).[84] As a result, the contributories submitted that Ms Ma could have exited the Companies on fair and reasonable terms, and the availability of this choice would negate any finding of unfairness.[85]

63 I agreed with the contributories in this respect. In *O'Neill v Phillips*, where the majority shareholder offered to buy out the minority shareholder, Lord Hoffmann made the same point at 1107C:

> But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out.

Lord Hoffmann listed (at 1107D–1108B) various criteria to determine if an offer was a reasonable one. The first three – that the value not be discounted, that it be set by a competent expert and determined by that expert as an expert – were

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84 Contributories' written submissions dated 14 February 2018 at para 119. Ms Ma's written submissions dated 14 February 2018 at para 178.

85 Contributories' written submissions dated 14 February 2018 at paras 135 and 138.

made out on WKY's offer. The last two, that parties ought to have equality of information relevant to the valuation and to be reasonable on the issue of costs (in that case, in the context of the timing of the offer), did not arise for consideration because Ms Ma dismissed the offer out of hand. Even if unfairness was made out, which it was not, it would have been incumbent upon Ms Ma to engage the contributories on the terms of an offer that was on its face reasonable.

Contributories' request in the alternative for buy-out

64 Finally, even when the conditions for winding up are satisfied, the Court may order that the plaintiff's shares be bought out under s 254(2A) of the Companies Act instead, if it considers this outcome to be more equitable. Relevant considerations include whether the company is viable and profitable, and the inquiry may involve a comparison of the consequences for the parties in the event of a winding up as opposed to a buy-out: *Ting Shwu Ping* at [79].

65 The contributories pointed out that an *en bloc* sale of Shenton House was imminent, and a premature winding up would in all likelihood lead to a lower sale price than the $750,000 and $2,162,282.70 envisaged for the properties. Absent mismanagement, such a result would unduly prejudice WKY, a creditor of these two companies.[86] The beneficiaries of the estate might also lose the opportunity to fully realise their share of the Companies' assets, as a market valuation will likely be higher than a liquidator-actuated sale of the assets. It was not necessary for me to decide this point in view of my findings above. In *Ting Shwu Ping* at [42], the Court of Appeal held that the conditions for winding up must first be satisfied before a remedy under s 254(2A) of the Companies Act may be ordered. The same point was reiterated in *Perennial*

[86] Contributories' written submissions dated 14 February 2018 at paras 143–145

(Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals [2018] SGCA 11 at [58].

Conclusion

66 Justice and equity, not expediency, is the premise of the court's exercise of its discretion under s 254(1)(*i*) of the Companies Act. In the circumstances, I dismissed the three applications. For the applications concerning Trillion and Double Ace, I fixed costs at $8,000 each, inclusive of disbursements. As the application to wind up Faxlink involved fewer issues, costs were fixed at $4,000, including disbursements.

Valerie Thean
Judge

Seah Yong Quan Terence, Ong Huijun, Christine and Denise Chong (Virtus Law LLP) for the plaintiff;
Palmer Michael Anthony and Jaime Lye (Quahe Woo & Palmer LLC) for the contributories.