IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 178

Companies Winding Up No 57 of 2019

Between

Kho Long Huat

… Plaintiff

And

Jian Rong Engineering Pte Ltd

… Defendant

GROUNDS OF DECISION

[Companies] — [Winding up] — [Share buyout]
[Civil Procedure] — [Judgments and orders] — [Consent order]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **2**

THE FACTS **3**

MY DECISION **4**

POWER OF THE COURT TO ORDER SHARE BUYOUT 4

THE TERMS OF THE SHARE BUYOUT THAT THE PARTIES WERE UNABLE TO RESOLVE 7

THE ISSUES 8

WHETHER THE CONSENT ORDER SHOULD BE SET ASIDE 8

TERMS OF THE SHARE BUYOUT 12

Approach to valuation *13*

(1) Basis of valuation 13

(2) Retention sums 16

Discount for lack of control and/or marketability *18*

Monies owed to Kho by the Company *27*

Information and documents to be made available *28*

Costs of valuation *29*

Timeline for completion and consequences of non-payment *30*

Confidentiality clause *32*

Summary of findings *32*

COSTS **34**

CONCLUSION **37**

Version No 1: 27 Oct 2020 (22:41 hrs)

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Kho Long Huat
v
Jian Rong Engineering Pte Ltd

[2020] SGHC 178

High Court — Companies Winding Up No 57 of 2019
Tan Siong Thye J
10 December 2019, 6 April, 13 July 2020

26 August 2020

Tan Siong Thye J:

Introduction

1 The plaintiff, Kho Long Huat ("Kho"), commenced Companies Winding Up No 57 of 2019 ("CWU 57/2019") to wind up the defendant, Jian Rong Engineering Pte Ltd ("the Company"). The Company's business is to provide electrical works in the building and construction industry.[1] There are three shareholders in the Company. Kho is a 40% shareholder of the Company while Wang Duan Gang ("Wang") and Zhao Zhihua ("Zhao") each holds 30% of the Company's shares.[2] Currently, Wang and Zhao are the only two directors of the Company. Until 16 August 2018, Kho was the Managing Director of the Company.[3]

2 In the course of the winding-up proceedings, the parties agreed to a consent order that ss 254(1)(*f*) and 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") had been established to wind up the Company ("the Consent Order").[4] This paved the way for a further consent order to invoke the court's power to order a buyout of Kho's shares by the remaining two shareholders/directors of the Company, Wang and Zhao ("the Share Buyout"). However, the parties were unable to agree on the terms of the Share Buyout and the Company took the opportunity to renege on the agreement and sought to have the Consent Order set aside.

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1 Affidavit of Kho Long Huat, dated 29 March 2019, at para 6.2.

2 Affidavit of Wang Duan Gang, dated 23 May 2019, at para 22; Affidavit of Zhao Zhihua, dated 23 May 2019, at paras 14 and 17.

3 Affidavit of Kho Long Huat, dated 29 March 2019, at para 1.

4 HC/ORC 8405/2019.

Version No 1: 27 Oct 2020 (22:41 hrs)

3 On 13 July 2020, after hearing the parties' submissions, I dismissed the application to set aside the Consent Order. I further ordered the Share Buyout on terms that I believed were fair and equitable. On 30 July 2020, the Company filed a Notice of Appeal against my decision. I now set out the reasons for my decision.

The facts

4 On 29 March 2019, Kho commenced CWU 57/2019 to wind up the Company. Kho alleged that since the incorporation of the Company on 30 November 2011 he had played an active role in running the Company and the Company was managed like a quasi-partnership. Most of the projects secured by the Company were as a result of Kho's efforts.[5] The relationship between Kho and both Wang and Zhao turned sour in August 2018. Kho alleged that Wang and Zhao had, in breach of the Company's Articles of Association, excluded him from the management and control of the Company when he was removed as the Managing Director.[6] Thereafter, Kho further asserted that Wang and Zhao managed the Company in their personal interest as they hollowed out the Company's assets for their personal gains.[7] The Company, through Wang and Zhao, generally disputed these allegations.[8] The Company further asserted that it was not just and equitable to wind up the Company which was a viable business and was successfully run and managed.

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5 Affidavit of Kho Long Huat, dated 29 March 2019, at paras 4.1 and 11.

6 Affidavit of Kho Long Huat, dated 29 March 2019, at para 22.

7 Affidavit of Kho Long Huat, dated 29 March 2019, at paras 25–35.

8 Affidavit of Wang Duan Gang, dated 23 May 2019, at para 4; Affidavit of Zhao Zhihua, dated 23 May 2019, at para 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

5 On 10 December 2019, at the hearing of the winding-up application, the parties agreed for the court to enter a consent judgment to the effect that the grounds for winding up the Company pursuant to ss 254(1)(*f*) and 254(1)(*i*) of the Companies Act had been established. The parties further agreed to the court exercising its power to order a share buyout under s 254(2A) in lieu of winding-up. The Consent Order stated as follows:[9]

> …
>
> 1. By consent, the grounds for winding up the Defendant pursuant to sections 254(1)(f) and (i) of the Companies Act have been established.
>
> 2. By consent, all expenditure of the Defendant save for (i) salaries; (ii) utilities; and (iii) outstanding mortgage payments, for now, shall henceforth be approved by the Plaintiff. If such approval is not granted within seven (7) days then the liquidator or accountant will ascertain whether the expenditure was for the benefit of the company, if not Wang Duan Gang and Zhao Zhihua will bear the expenditure. For the avoidance of doubt, this shall include all expenditure from the Defendant's (i) bank accounts; (ii) safe deposit box; and (iii) petty cash, amongst others. This arrangement shall remain in place until the terms of any buy-out pursuant to section 254(2A) of the Companies Act are ordered by the Court with liberty to apply for the arrangement to be extended thereafter.

My decision

Power of the court to order share buyout

6 I shall first deal with the issue of whether the court could order a share buyout pursuant to s 254(2A) of the Companies Act, instead of a winding-up. Two statutory requirements must be fulfilled before a share buyout may be ordered. First, the ground for winding-up pursuant to ss 254(1)(*f*) and/or

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9 HC/ORC 8405/2019.

Version No 1: 27 Oct 2020 (22:41 hrs)

254(1)(*i*) must be proven. Secondly, the court must be of the opinion that it is just and equitable to order a buyout pursuant to s 254(2A) of the Companies Act. Sections 254(1)(*f*) and 254(1)(*i*) of the Companies Act read:

> **254.**–(1) The Court may order the winding up if –
>
> …
>
> (*f*) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members;
>
> …
>
> (*i*) the Court is of opinion that it is just and equitable that the company be wound up;

7 And s 254(2A) of the Companies Act reads:

> (2A) 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.

8 In *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*"), the Court of Appeal held at [42] and [79] that:

> 42 It is clear from the above that (a) s 254(2A) is not intended to be a direct buy-out remedy; (b) in making an application under s 254(1)(*f*) or 254(1)(*i*), applicants are still applying for a winding up and not a buy-out remedy; and (c) the court will still have to form the view that the requirements for winding up are satisfied before affording any remedy at all. …
>
> …
>
> 79 … To our minds, the key question should be whether, although the court has determined that the applicant is entitled to a winding-up remedy, it would in all the circumstances of the company be more equitable to allow a buy-out.

Version No 1: 27 Oct 2020 (22:41 hrs)

9 It was clear from *Ting Shwu Ping* that the buyout remedy under s 254(2A) was not a free-standing remedy; it depended on a finding that the grounds for winding-up had been made out such that the applicant was entitled to a winding-up. In this case, the parties had agreed that ss 254(1)(*f*) and 254(1)(*i*) had been established, and their agreement had been put into effect via the Consent Order (*ie*, a court order). This was sufficient to amount to a finding that the grounds for winding-up had been made out. Moreover, at the hearing on 13 July 2020, the counsel for the Company informed the court that if the court wanted to order a winding-up the Company could live with it. The counsel for Kho responded that Kho could also live with a winding-up. Therefore, since the grounds for winding-up had been made out, the court's power under s 254(2A) of the Companies Act had been invoked. This was not disputed by the parties.[10]

10 Further, I was of the view that the circumstances suggested that it would be more equitable to allow a buyout by Wang and Zhao of Kho's shares in the Company. One of the reasons for this was because Wang and Zhao had indicated that the Company was successful and still a viable business.[11] The parties were also agreeable to exploring the possibility of a Share Buyout.[12] The parties, therefore, were given time to engage in negotiations with a view to reaching an amicable agreement on the terms of the Share Buyout.[13]

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10 NE, 10 December 2019, at p 1, lines 18–23.

11 NE, 10 December 2019, at p 5, lines 23–25.

12 NE, 10 December 2019, at p 1, lines 29–32.

13 Joint letter from Kelvin Chia Partnership and Clifford Law LLC to the court, dated 26 May 2020 ("Joint Letter"), at para 4.

Version No 1: 27 Oct 2020 (22:41 hrs)

The terms of the Share Buyout that the parties were unable to resolve

11 By 26 May 2020, the parties managed to reach an agreement on several terms, including that Wang and Zhao were to purchase Kho's shares at a fair market value to be determined by an independent valuer.[14] However, seven issues remained outstanding. These were:[15]

(a) the approach that the independent valuer should take in valuing the shares, including the basis of valuation and whether the retention sums for the various projects undertaken by the Company should be taken into consideration;

(b) whether the independent valuer should apply a discount for lack of control and/or marketability in valuing the shares;

(c) whether the independent valuer should take into account any and all monies owing to Kho by the Company in valuing the shares;

(d) what information and documents should be made available to the independent valuer for the purpose of valuing the shares;

(e) who should bear the costs of the independent valuer;

(f) the timeline for completion of the Share Buyout and the consequences of non-payment for the shares; and

(g) the scope of the confidentiality clause, if any, that would apply to the final value of the shares, the independent valuer's final valuation

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14 Joint Letter, Annex B.

15 Joint Letter, Annex C.

Version No 1: 27 Oct 2020 (22:41 hrs)

report ("the Final Valuation Report") as well as the working documents and correspondence with the independent valuer.

12 Thereupon, I directed the parties to file written submissions on the above issues and the matter was fixed for hearing before me on 13 July 2020. In the written submissions filed on behalf of the Company, Wang and Zhao also sought leave of the court for the Consent Order to be set aside on the basis of mistake and/or inoperability.[16]

The issues

13 The issues that arose for my determination were:

(a) whether the Consent Order should be set aside on the basis of mistake and/or inoperability; and

(b) if the Consent Order was not set aside, the terms on which the Share Buyout should be made in relation to the seven issues set out at [11(a)]–[11(g)] above.

Whether the Consent Order should be set aside

14 The Company, directed by Wang and Zhao, submitted that the Consent Order was reached based on an understanding that the terms of the Share Buyout would be arrived at in good faith and consensually, with the parties making best efforts to come to an agreement. It had not been intended that the valuation should entail a re-litigation of the matters alleged in the parties' affidavits or

16 Defendant's Written Submissions, dated 8 July 2020 ("DWS"), at para 14.

Version No 1: 27 Oct 2020 (22:41 hrs)

operate as a fault-apportioning exercise between the parties.[17] In the oral submissions, the Company went so far as to suggest that it was implicit in the Consent Order that parties were obligated to mediate.

15 The Company further submitted that contrary to this understanding, Kho had sought to "weaponize" the Consent Order in a "hostile and uncompromising manner",[18] such that the valuation exercise would become a "proxy battle" for the allegations made in the parties' affidavits.[19] The Company pointed out that Kho had refused Wang and Zhao's offer to mediate.[20] The Company also contended that if Kho's proposed terms for the Share Buyout were adopted, it would amount to an account of profits[21] and allow Kho to benefit in a manner which he would not have been entitled to had he obtained the winding-up he originally sought.[22] The Company submitted that as a result of the above circumstances, the understanding underpinning the Consent Order no longer existed, rendering it inoperative.[23] In the oral submissions, the Company also submitted that it would be more practical for the Consent Order to be set aside, as a hostile buyout would lead to more protracted litigation.

16 Having considered the parties' submissions, I did not find that the grounds for setting aside the Consent Order had been made out. Preliminarily, I

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17 DWS, at paras 6 and 16.

18 DWS, at para 25.

19 DWS, at para 22.

20 DWS, at para 17.

21 DWS, at para 19.

22 DWS, at para 22.

23 DWS, at para 17.

Version No 1: 27 Oct 2020 (22:41 hrs)

noted that practicality was irrelevant; the sole question was whether the Consent Order had been agreed to by reason of a mistake or rendered inoperable. In this regard, the Company's arguments focused on inoperability rather than mistake. They were premised on an alleged understanding on the part of Wang and Zhao, which underpinned the Consent Order. However, the Company could not point to any evidence of such an understanding on Wang and Zhao's part. The Company did not even file any affidavits in this respect. Neither was there any evidence that such an understanding had been shared by Kho. The Consent Order agreed upon by the parties, with the assistance of their respective counsel, also did not suggest that there was such an understanding. In light of this, the Company's submission was nothing but a bare assertion unsupported by any evidence.

17 In this respect, the Court of Appeal decision in *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 cited by the Company was easily distinguishable. In that case, the trial judge had made a consent order directing parties to appoint an independent expert to value the shares that were the subject of the buyout. However, the independent expert valued the shares as "nil". On a construction of the consent order, the Court of Appeal held at [32], [38]–[40] and [41] that the trial judge could not have intended for the shareholder to "effectively give away its shares" as this would have been inequitable and contrary to the trial judge's use of the word "purchase". Therefore, it was envisaged that the shares would be sold and purchased for value. Consequently, since the trial judge had declined to exercise his discretion to adjust the valuation so that it remained at "nil" value, the consent order could not be implemented and became inoperative (at [42]). Although the Court of Appeal observed at [39] that "where a court order is intended to substantially give effect to the parties' intentions, it would be

Version No 1: 27 Oct 2020 (22:41 hrs)

relevant to consider these intentions", the Court of Appeal also remarked at [37] that since the parties' submissions "represented largely their subjective interpretation of the terms of the bargain, it [was] necessary for [the] court to adopt the tried and tested approach of focusing on the objective facts". Looking at the objective facts in this case, there was nothing in the Consent Order or even the circumstances surrounding the Consent Order to suggest that the understanding alleged by the Company formed the basis of the Consent Order.

18 That in itself disposes of the Company's application. However, for completeness, I also considered that even if such an understanding existed, the parties' conduct towards the Share Buyout and the valuation of the shares was consistent with such an understanding. This was for two reasons. First, the parties had in fact engaged in negotiations and managed to agree on some aspects of the Share Buyout, despite Kho's decision not to attempt mediation. The fact that the parties could not agree on *all* of the terms of the Share Buyout did not mean that Kho was acting in a hostile and uncompromising manner.

19 Secondly, it was incorrect to suggest that the court's determination of the terms of the Share Buyout would amount to an exercise in fault-apportionment or a re-litigation. My decision on the terms of the Share Buyout was based on the Consent Order and what was just and equitable for the parties. Moreover, even if the Share Buyout might eventually be more beneficial to Kho than a winding-up, this did not mean that the Share Buyout was an exercise in fault-apportionment or a re-litigation. It was misleading to compare the proposed terms with what would have been obtained on a winding-up. In *Ting Shwu Ping* ([8] *supra*), the Court of Appeal at [79] observed that in determining whether a buyout should be ordered, the court could compare the consequences for the parties in the event of a winding-up as opposed to a buyout. As such, one

Version No 1: 27 Oct 2020 (22:41 hrs)

of the reasons why a share buyout might be ordered in the first place is because it could potentially be more beneficial than a winding-up for all parties involved.

20 I would like to state that it is fundamental that the sanctity of an agreement must be adhered to and respected. It cannot be gainsaid that the parties had entered into an agreement that the grounds for winding-up had been established and that a Share Buyout should be ordered after much deliberation with the assistance of their respective counsel. This agreement was formalised into a consent judgment on terms that were to their satisfaction. Therefore, it was incumbent on the Company to provide cogent grounds to set aside the Consent Order. There were none in this case.

21 For the above reasons, I found that the Company had failed to prove either mistake or inoperability in relation to the Consent Order. As Kho pointed out in the oral submissions, the Company had agreed to the Consent Order on the basis of legal advice. It could not now seek to renege on it. Accordingly, I dismissed the Company's application to set aside the Consent Order.

Terms of the Share Buyout

22 Having declined to set aside the Consent Order, I shall now set out the reasons for my decision on the terms of the Share Buyout. In determining the terms of the Share Buyout, I bore in mind the cardinal principle that the terms of the Share Buyout must be just and equitable for the parties. In *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 ("*Liew Kit Fah*"), the Court of Appeal at [42] observed that what is "fair, just and equitable" must be decided on the facts of each case, based on the precise circumstances leading up to the sale of the shares and the ensuing need for valuation. I shall now address each of the seven issues in turn.

Version No 1: 27 Oct 2020 (22:41 hrs)

Approach to valuation

(1) Basis of valuation

23 Although the parties agreed that the shares were to be valued as of 14 August 2018,[24] the parties contended two substantially different bases of valuation. The Company submitted that the independent valuer should value the shares on a costs/assets basis. However, Kho submitted that the shares should be valued on an earnings basis.

24 In *CVC/Opportunity Equity Partners Ltd and another v Demarco Almeida* [2002] 2 BCLC 108 at [37], Lord Millett set out three possible bases for the valuation of minority shares:

> There are essentially three possible bases on which a minority holding of shares in an unquoted company can be valued. In descending order these are: (i) as a rateable proportion of the total value of the company as a going concern without any discount for the fact that the holding in question is a minority holding; (ii) as before but with such a discount; and (iii) as a rateable proportion of the net assets of the company at their break up or liquidation value.

25 This passage has been cited by the Singapore High Court in *Poh Fu Tek and others v Lee Shung Guan and others* [2018] 4 SLR 425 ("*Poh Fu Tek*") at [36] and *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2018] SGHC 107 at [28]. As Vinodh Coomaraswamy J explained in *Poh Fu Tek* at [37], Lord Millett's first option describes the earnings basis of valuation, whereas Lord Millett's third option describes the assets basis of valuation. It was apparent that Kho adopted Lord Millett's first option, whereas the Company adopted Lord Millett's third option.

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[24] Joint Letter, at Annex B, p 40, para 1.

Version No 1: 27 Oct 2020 (22:41 hrs)

26 After considering the parties' submissions, I found that the earnings basis was the fairest way to value the shares. It is well-established that the earnings basis is more appropriate where the company is a going concern. This is because the earnings basis reflects the future earnings potential of the company, whereas the assets basis does not (see Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 4.286). In *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 ("*Yeo Hung Khiang*"), the Court of Appeal at [66] observed that:

> In our view, both the capitalisation of FME [future maintainable earnings] basis and NTA [net tangible asset] basis of valuations would arrive at a valuation as at the given valuation date. The only difference was that different basis of valuation may be suitable for different businesses and in this case, *the FME basis was clearly more appropriate in view of the fact that the company was a profitable going concern.* [emphasis added]

27 Similarly, Coomaraswamy J in *Poh Fu Tek* explained at [37] that:

> … [The earnings] basis is usually appropriate *where the company is a going concern*: *CVC* at [38]. … [The assets basis] is usually appropriate for valuing a loss-making company or a company whose assets have a readily realisable value independent of its business … [emphasis added]

28 I note that the cases cited above were decided in the context of share buyouts pursuant to s 216(2)(*d*) of the Companies Act. Nevertheless, both ss 216(2)(*d*) and 254(2A) of the Companies Act pertain to court-ordered share buyouts. There was no reason why the principles set out in respect of one could not apply to the other, and *vice versa*. This was especially since the court's overarching consideration in both cases is to do what is just and equitable as between the parties. I shall elaborate on this further at [43] below.

Version No 1: 27 Oct 2020 (22:41 hrs)

29 Here, it was not disputed that the Company was a going concern. Indeed, one of the reasons why I considered the Share Buyout more appropriate than a winding-up was precisely because the Company was still viable notwithstanding that the relationship between its shareholders had deteriorated (see *Ting Shwu Ping* ([8] *supra*) at [79]).[25] Therefore, since the Company was a viable going concern, the earnings basis was better-suited to approximate the value of the Company and obtain a valuation that was fair as between the parties.

30 I shall briefly address the arguments raised by the Company. First, the Company submitted that the earnings basis would put Kho in a better position than in a winding-up, which was the outcome he had originally sought.[26] However, as I explained above at [19], one reason why a share buyout might be preferred over a winding-up is precisely because it would be more beneficial for all parties involved. In fact, the Share Buyout would also be more beneficial for Wang and Zhao as it meant that the Company could continue its business as a going concern, the profits of which would be enjoyed by Wang and Zhao as the Company's only two shareholders. Counsel for the Company also submitted that the Company was being successfully run and managed by Wang and Zhao.[27]

31 Secondly, the Company submitted that the earnings approach was "imprecise and inherently speculative". As such, it would result in the valuation outcome being "endlessly litigated".[28] This was entirely unmeritorious. As seen from the cases cited above, the earnings basis is an established basis of valuation

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25 NE, 10 December 2019, at p 5, lines 23–25; p 7, lines 20–21.

26 DWS, at paras 29(1), 30–32.

27 Defendant's Written Submissions, dated 21 November 2019, at para 216.

28 DWS, at paras 29(2) and 33.

Version No 1: 27 Oct 2020 (22:41 hrs)

and has been applied by the courts in numerous cases. There was no reason to suggest that it could not now be applied in this case.

32 Finally, the Company submitted that the earnings basis might not be beneficial to Kho as it would have to include the decrease in earnings occasioned by the COVID-19 pandemic.[29] In my view, which basis of valuation was more beneficial to either party was irrelevant; the question was which basis of valuation was *fairer and more equitable as between both parties*. For the reasons I have given above, the earnings approach was the fairer and more equitable basis of valuation.

(2) Retention sums

33 An issue also arose as to how the independent valuer should treat the retention sums already vested in the Company but which had yet to be paid to the Company. The background to this was that the Company operated as a subcontractor in the construction industry. As such, a retention sum – representing a percentage of the total value of the contract – would be retained by the main contractor and withheld from the Company until the end of the defects liability period. During the defects liability period, should the Company fail to properly rectify any defects, the main contractor could deduct the costs of making good the defects from the retention sum (see Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) ("*Law and Practice of Construction Contracts*") at para 8.067).[30]

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29 DWS, at paras 29(3) and 34.

30 Plaintiff's Written Submissions, dated 6 July 2020 ("PWS"), at para 6(b); Defendant's Written Submissions, dated 16 January 2020, at paras 86–88.

Version No 1: 27 Oct 2020 (22:41 hrs)

34 Kho's position was that such retention sums should be taken into account as they formed part of the revenue from the Company's projects and were the fruits of Kho's labour.[31] Kho contended that most of the Company's projects were secured by him. In the oral submissions, the Company submitted that appropriate discounts should be applied to the retention sums to account for the uncertainty as to whether and how much of the retention sums would eventually be paid out. Therefore, the Company implicitly accepted that the retention sums should be taken into account in the valuation of the shares.

35 Therefore, I held that the independent valuer should take into account the retention sums already vested in the Company as at 14 August 2018. This was fair because the general position in common law is that until such time when the retention sum is actually applied towards disbursing the main contractor for the rectification of defects, the property in the retention sum resides with the Company (see *Law and Practice of Construction Contracts* at para 8.068; *Nam Fang Electrical Co Pte Ltd v City Developments Ltd* [1996] 3 SLR(R) 298). In other words, the Company was already entitled to the retention sums although they had not yet been paid out. Therefore, it would be fair to take into account such retention sums in the valuation of the shares. As far as the *valuation* of these retention sums was concerned, including whether discounts should be applied, I held that this was a matter for the independent valuer's discretion.

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31 PWS, at para 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

Discount for lack of control and/or marketability

36 I turn now to the second issue of whether the independent valuer should apply a discount to the value of the shares for lack of control and/or marketability. Unsurprisingly, Kho submitted that no discounts should be applied, whereas the Company submitted the opposite.

37 The discounts for lack of control and/or marketability were defined by the Court of Appeal in *Liew Kit Fah* ([22] *supra*) at [45]–[46] as such:

> 45 … [The discount for lack of control] refers to the one that applies as a result of the minority status of the bloc of shares being sold, which consequently do not confer on its holder any ability to exert control over the management decisions of the company.
>
> 46 As to the discount for lack of marketability, we use this term, advisedly, to refer to the difficulty of *selling shares in a private company* as a result of the typical transfer restrictions that apply in this context. This difficulty is *independent* of the status of the bloc of shares being sold, and thus applies regardless whether the shares constitute a minority or majority shareholding in the company concerned. …
>
> [emphasis in original]

38 I shall first set out the principles governing the application of the discounts for lack of control and/or marketability. In *Liew Kit Fah*, the Court of Appeal at [29] and [48]–[49] considered that in determining whether the discounts should apply, the key issue was whether the seller could be treated as a "willing seller":

> 29 As evident from the decision below as well as the parties' submissions before us, ***whether the relevant discounts ought to apply largely turns on the question whether the respondents can be treated as willing sellers of their shares*** …
>
> …

Version No 1: 27 Oct 2020 (22:41 hrs)

> 48 Hence, in the context of a buyout of a minority shareholding pursuant to a consent order ***where the seller is to be treated as akin to a willing seller***, the discount for lack of control should typically apply. See *Thio Syn Kym (CA)* ([33] *supra*) at [19], where this court referenced the rule that ***a free election by the minority shareholder to sell its shares may, albeit not necessarily, mandate applying a discount in contrast to a situation where there is no choice on the part of the minority shareholder, which would justify not applying discount***. …
>
> 49 Conversely, cases in which the courts have declined to apply a minority discount for lack of control are often cases where there has been a finding of minority oppression. As we have observed above, if it is established that the minority shareholder has unjustifiability been on the receiving end of unfairly prejudicial conduct, the courts will almost invariably order a buyout on terms that *do not* include a minority discount for lack of control. This is to reflect the fact that ***it would not be 'fair, just or equitable'*** in these circumstances for the minority shareholder to be bought out on terms that do not allow him to realise the full value of his investment; that it would also not be 'fair, just or equitable' for the oppressor to benefit from a buyout on discounted terms is but the flip side of the same coin.
>
> [emphasis in original in italics; emphasis added in bold italics]

39 Based on the Court of Appeal's reasoning, whether the seller should be treated as akin to a willing seller is closely-linked to whether it is fair and equitable to apply the discount for lack of control. Where the seller is akin to a willing seller, it would be fair, just and equitable to treat the transaction as similar to a typical voluntary commercial sale where such a discount is common and expected (see *Liew Kit Fah* at [47]). Conversely, where the seller is not akin to a willing seller, such as in cases of oppression under s 216 of the Companies Act, it would not be fair, just or equitable to apply a discount for lack of control because the unwilling seller had been deprived of the opportunity to sell on more beneficial terms, and it would effectively allow the party at fault to benefit from his own wrongful behaviour.

Version No 1: 27 Oct 2020 (22:41 hrs)

40 Similar considerations apply to the discount for lack of marketability. In *Poh Fu Tek* ([25] *supra*) at [38], Coomaraswamy J observed that:

> … [There is a] general rule that the court will not apply a discount for non-marketability when making a share purchase order under s 216(2) of the Act … The principle behind this rule is that an oppressed minority should not be treated as having elected freely to sell his shares to a party external to the company. Therefore, fixing the price for the minority's shares *pro rata* according to the value of all the shares in the company as a whole is the only fair method of compensating him … After all, an order for a buy-out on terms is an exercise of the coercive power of the court …

41 The next question then is what amounts to an unwilling seller. In this respect, the Court of Appeal in *Liew Kit Fah* held at [34] that:

> … [T]he relevant inquiry in the context of a consent order is whether the party, who the court eventually decides will be the seller, is able to establish any ***proven misconduct on the part of the other party in relation to the affairs of the company, which misconduct makes it no longer tolerable for the seller to continue on in business as a fellow shareholder***. If so, a seller under such circumstances can legitimately be classified as an unwilling seller. Conversely, a court-ordered buyout of shares that is made in the absence of a finding of minority oppression is not, in and of itself, a sufficient basis for regarding the seller as an unwilling seller of shares. It remains relevant to examine how the buyout issue came to be decided by the court under such circumstances. [emphasis in original omitted; emphasis added in bold italics]

42 Preliminarily, I dealt with the Company's submission that "vastly different considerations apply" to a share buyout pursuant to s 254(2A) of the Companies Act as compared to that pursuant to s 216(2)(*d*) of the Companies Act.[32] The Company further submitted that the discount for lack of control

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32 DWS, at para 42.

Version No 1: 27 Oct 2020 (22:41 hrs)

and/or marketability should only be applied where the grounds for oppression under s 216(1) of the Companies Act have been established.[33]

43 I did not agree with both of these submissions. First, *Liew Kit Fah*, a case cited by the Company itself, involved a share buyout pursuant to a consent order, rather than the court's powers under s 216(2) of the Companies Act (see *Liew Kit Fah* at [23]). Furthermore, while ss 216 and 254(2A) of the Companies Act are worded differently, the court's underlying concern in both cases is to ensure a fair and equitable outcome. In *Yeo Hung Khiang* ([26] *supra*), a case involving a share buyout pursuant to s 216(2)(*d*) of the Companies Act, the Court of Appeal observed at [72] that the "role of the court was merely to determine a price that is fair and just in the particular circumstances of the case". Therefore, the same valuation principles should apply regardless of whether the case involves a share buyout under s 216(2)(*d*) or s 254(2A) of the Companies Act. This was also sound as a matter of policy. As observed in the *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) by the Ministry of Finance at para 135, it is common for parties to pray for relief in the alternative under s 216 or s 254(1)(*i*) or 254(1)(*f*) of the Companies Act. The Steering Committee thus recommended that s 254(1)(*i*) be amended to allow a court to order a buyout where it was just and equitable to do so. As the Steering Committee observed, the "mirroring of the new buy-out remedy in both sections 254(1)(*i*) and 254(1)(*f*) would prevent the parties from engaging in arbitrage between these two limbs". This recommendation was accepted by the Ministry of Finance (see *Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act* (3 October

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33 DWS, at paras 43–44.

Version No 1: 27 Oct 2020 (22:41 hrs)

2012) at para 49). The same principle applies as between ss 216 and 254 of the Companies Act. Therefore, it would be preferable for the valuation principles to be consistent in order to avoid undesirable arbitrage occurring between the two avenues of court-ordered share buyouts.

44 In this regard, none of the authorities laid down the general proposition that the applicability of the discounts is dependent on a finding of minority oppression. Rather, as I have explained above, the courts have made clear that the critical question is whether the seller should be treated as a willing or unwilling seller. This is in line with the rationale underlying the application of the discounts, which is to approximate the conditions of a typical voluntary commercial sale. While the cases in which the courts have not applied the discounts are often minority oppression cases, this was not because of the finding of minority oppression *per se*. Rather, because of the way in which the term "unwilling seller" has been defined (see [41] above), a finding of minority oppression will often lead to the conclusion that there has been some proven misconduct, thereby making the seller an unwilling one. Indeed, although there was no finding of minority oppression in *Liew Kit Fah*, the Court of Appeal did not stop there; it went further to analyse the issue of the seller's willingness. This shows that the court can still decline to apply the discounts even if the case does not involve minority oppression under s 216 of the Companies Act. The ultimate question is whether the seller should be treated as a willing seller, such that it is fair and equitable to apply the discounts for lack of control and/or marketability.

45 I turn now to this case. After considering the parties' submissions and all the circumstances, I held that Kho should not be treated as a willing seller of his shares. Therefore, it was fair and equitable not to apply the discounts for

Version No 1: 27 Oct 2020 (22:41 hrs)

lack of control and/or marketability. The key distinction between this case and *Liew Kit Fah* was the terms of the relevant consent orders. In *Liew Kit Fah*, the consent order explicitly stated that the terms of the share buyout were to be determined without admission of liability in respect of any alleged acts of oppression (at [6]). As a result, the Court of Appeal found at [39]–[40] that:

> 39 … *By entering into the Consent Order and dispensing with the need for the court to make any finding on the alleged oppressive acts, the respondents had, in effect, agreed that they were no longer willing to remain as shareholders with the majority.* …
>
> 40 In any event, we do not think there is any real distinction between the situation in *Hoban (HC)* or *Abhilash (HC)* where the minority agreed to settle the oppression suit without any finding of oppression by agreeing to sell out to the majority and the present case. In both situations, it could well be said that the oppression action by the minority was commenced on the premise of some alleged misconduct by the majority. However, *once the minority agrees to dispense with the issue of oppression but wishes nonetheless to proceed to solely contest the issue as to who should buy out whom, the question of unfair prejudice (which is essential for a court-ordered buyout under s 216(2)) would be taken out of the equation.* In our view, there is no real distinction between these two situations. Both sellers should be regarded as willing sellers for the purposes of deciding on the applicability of any relevant discounts. In both situations, given their decision to dispense with any finding of oppression, the eventual sellers had a choice to remain in the company but elected to consent to the court deciding on the buyout issue. *Without such consent, the court would not have the jurisdiction to make any buyout order in the first place.* …
>
> [emphasis added]

Therefore, the share buyout in *Liew Kit Fah* was ordered pursuant to the consent order, and not the court's power under s 216(2)(*d*) of the Companies Act. This consent order represented the seller's agreement to sell his shares. Furthermore, since the consent order had been made without admission of liability, there was no basis to suggest that the seller had suffered any unfair prejudice or that there

Version No 1: 27 Oct 2020 (22:41 hrs)

had been any misconduct on the part of the buyer. Accordingly, the seller was taken to be a willing seller.

46 In contrast, the Consent Order in this case did not contain any such express reservation.[34] To the contrary, the Consent Order made clear that the grounds for winding up the Company pursuant to ss 254(1)(*f*) and 254(1)(*i*) of the Companies Act had been established. Such grounds having been made out, the Share Buyout was ordered pursuant to the parties' agreement that the court exercises its power under s 254(2A) of the Companies Act. The Consent Order merely formed the basis for which the court's power under s 254(2A) had been invoked (see [9] above). In particular, s 254(1)(*f*) referred to the company's directors having acted in their own interests rather than in the interests of the members as a whole in a manner which appears to be *unfair or unjust* to the other members. This amounted to an admission of misconduct on the part of Wang and Zhao, which made it no longer tolerable for Kho to continue on in business with them as a shareholder of the Company, especially when Wang and Zhao were taking the assets of the Company for their personal benefits. In these circumstances, it was incorrect for the Company to characterise the Consent Order as merely "a voluntary agreement between the parties for [Kho] to sell his shares to Wang and Zhao".[35] Wang and Zhao could have sought a consent order on similar terms as in *Liew Kit Fah*, or solely on the fault-neutral basis of s 254(1)(*i*), however, they did not. Having agreed to the terms of the Consent Order, it lay ill in the mouth of Wang and Zhao to claim that Kho was selling his shares as a willing seller.

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34 PWS, at para 12.

35 DWS, at para 52.

Version No 1: 27 Oct 2020 (22:41 hrs)

47 As the parties agreed that s 254(1)(*f*) of the Companies Act had been satisfied, there had been misconduct by Wang and Zhao. This made it intolerable for Kho to continue on as a shareholder of the Company. As such, Kho should not be treated as akin to a willing seller and the discounts for lack of control and/or marketability should not apply.

48 In any case, even if Kho was treated as a willing seller, I was of the view that Wang and Zhao would obtain a collateral benefit from the Share Buyout which justified valuing Kho's shares without any discounts. This was explained by the Court of Appeal in *Liew Kit Fah* at [50] as such:

> … Having said that we recognise that in determining the application of the discount for lack of control, there may well be situations that can justify valuing the minority's shares on a pro-rated basis even where the minority shareholder is regarded as a willing seller …
>
> > (a) where the purchasing majority consolidates control of the company …
> >
> > …
>
> The common denominator of the three situations set out above is that the purchaser of the shares would be enjoying some tangible or collateral benefit from the purchase such as consolidation of control, business synergy or in preventing a competitor from acquiring control. It is this collateral benefit that provides the principled basis to explain why such a purchaser should not enjoy a *further* benefit through the discounts. …
>
> [emphasis in original]

49 In evaluating the consolidation of control, the court will consider the number of shares as a percentage of the entire company's shares. This is both in relation to the shares being sold, as well as the shares currently being held by the buyer prior to the share buyout. In *Re Edwardian Group Ltd; Estera Trust (Jersey) Ltd and another v Singh and others* [2018] EWHC 1715 (Ch), cited in

Version No 1: 27 Oct 2020 (22:41 hrs)

Thio Syn Pyn v Thio Syn Kym Wendy and others and another appeal [2019] 1 SLR 1065 ("*Thio Syn Pyn*") at [39], the English High Court observed at [639] that "a 2% shareholding will be considerably more valuable to an existing shareholder with 49% or 74% of a company's shares than it will be to an outside investor".

50 In this case, treating Wang and Zhao as a collective bloc, the Share Buyout would enable them to consolidate their control of the Company as their shareholding would increase from 60% to 100%. This is a significant increase in control as it would give them complete control over the Company. It would enable them to pass special resolutions, thereby giving them the power to, for instance, alter the Company's constitution and reduce the Company's share capital (see *Thio Syn Pyn* at [38]; s 26(1) of the Companies Act; Art 42 of the Company's Memorandum and Articles of Association). Even if one were to consider the benefits accruing to Wang and Zhao individually, the Share Buyout would allow each of them to increase their shareholding from 30% to 50%, giving each of them the ability to pass ordinary resolutions. This in turn meant that they could each, for instance, object to the issuance of shares, issue preference shares, increase the Company's share capital, increase or decrease the number of directors and appoint or remove a director (see Arts 2, 3, 40(a), 67 and 69 of the Company's Memorandum and Articles of Association).[36]

51 For the above reasons, I held that a discount for lack of control and/or marketability should not apply. Kho was not a willing seller and therefore the Share Buyout could not be treated as akin to a voluntary commercial transaction.

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36 Affidavit of Kho Long Huat, dated 29 March 2019, at Tab 2, pp 35–49.

Version No 1: 27 Oct 2020 (22:41 hrs)

Moreover, even if Kho was treated as a willing seller, the Share Buyout would provide collateral benefits to Wang and Zhao, either collectively or individually, therefore justifying Kho's shares being valued without any discount. I should also mention that before Kho was unceremoniously ousted by Wang and Zhao, he was the Managing Director of the Company who had control of the Company which he alleged was managed in a quasi-partnership arrangement. Thus, to impose a discount for lack of control and/or marketability under these circumstances would not be fair and equitable.

Monies owed to Kho by the Company

52 The third issue was whether the valuation of the shares should take into account the monies owing to Kho by the Company. These monies consisted of Kho's unpaid salary and a sum of $280,000.[37] In the course of the oral submissions, it became apparent that Kho's position was that these monies should be taken into account *in so far as they enhanced the Company's assets and thus indirectly enhanced the value of the Company's shares*. Kho was not seeking a repayment of the monies from Wang and Zhao. Kho further submitted that it should be left to the independent valuer precisely how such monies would affect the valuation. The Company's position was not that far off from Kho's; it submitted that this matter should be left to the independent valuer's discretion and there was no need for an order to be made in this respect.

53 I, therefore, ordered that the monies owed to Kho by the Company should be taken into account by the independent valuer in his valuation of the

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[37] Plaintiff's Written Submissions, dated 22 November 2019, at para 44(c).

Version No 1: 27 Oct 2020 (22:41 hrs)

shares. The monies were to be factored into the value of Kho's shares, rather than as an additional sum payable over and above the value of the shares.

Information and documents to be made available

54 The fourth issue was what documents should be made available to the independent valuer for the purpose of valuing the shares. Kho proposed that "all the information and documents [should be] provided and made available to him including the financial statements and other financial/accounting records of the Company". In contrast, the Company proposed that all "necessary documents and accounts (whether audited or unaudited) of the Company up to 14 August 2018 should be provided to the Valuer".[38]

55 Kho submitted that documents dated after 14 August 2018 were required to determine if the retention sums had been paid. Moreover, an "unduly restrictive" provision would "compromise the ability of the [i]ndependent [v]aluer to reach a fair valuation".[39] The Company submitted that using the audited accounts would be more cost-effective. However, it indicated that it was not opposed to giving the independent valuer access to "all necessary documents" without binding the independent valuer's discretion.

56 I saw no reason to restrict the independent valuer's access to particular documents. The independent valuer should have access to all relevant information and documents in order to reach a fair and informed valuation of the shares. As such, I ordered that the independent valuer was to have access to

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38 PWS, at p 11.

39 PWS, at para 14.

Version No 1: 27 Oct 2020 (22:41 hrs)

all information and documents he thought necessary to determine the value of the shares.

Costs of valuation

57 The fifth issue was who should bear the costs of the independent valuer. Kho proposed for the costs to be paid by the Company.[40] The outflow of monies from the Company as a result of such payment would not be taken into consideration by the independent valuer because this payment would post-date the valuation date of 14 August 2018. As such, it would ultimately be borne by Wang and Zhao, the Company's two remaining shareholders after the Share Buyout. On the other hand, the Company proposed that it should bear the costs of the valuation first; following the completion of the valuation process, Kho, Wang and Zhao would then reimburse the Company in proportion to their shareholding.[41]

58 I did not adopt either of the parties' positions. Instead, I ordered that the costs of the independent valuer were to be shared equally by Kho, Wang and Zhao. Given that the Share Buyout was pursuant to the Consent Order agreed to by all parties, and the Share Buyout provided some degree of benefit to all parties, dividing the costs equally amongst Kho, Wang and Zhao was the most fair and equitable method of apportioning costs.

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40 PWS, at p 13.

41 DWS, at para 56.

Version No 1: 27 Oct 2020 (22:41 hrs)

Timeline for completion and consequences of non-payment

59 The sixth issue involved the timeline for completion of the Share Buyout and the consequences of non-payment by Wang and Zhao for Kho's shares. The parties' proposals in this regard were quite different.

60 On one hand, Kho proposed that Wang and Zhao be given seven days from the release of the Final Valuation Report to inform Kho whether they were able to complete the Share Buyout within one month. If so, they were to make full payment to Kho within one month from the date they informed Kho that they were able to complete the Share Buyout and Kho would execute the transfer of the shares on the same day. Should Wang and Zhao inform Kho that they were unable to complete the Share Buyout or should they eventually be unable to make payment within one month, the Company was to be wound up.[42]

61 On the other hand, the Company proposed that instead of one month, Wang and Zhao be given one and a half months to complete the Share Buyout. Furthermore, the Company proposed that if Wang and Zhao were unable to complete the Share Buyout within one and a half months, they should be permitted to make payment via 12 equal monthly instalments, with the first instalment commencing one month after the date that they had informed Kho of their ability to complete the Share Buyout. Wang and Zhao should also be given a grace period of seven working days to make the payment for each instalment. Not only that, Kho was to execute the transfer of the shares to Wang and Zhao within seven working days of the receipt of the first monthly instalment.[43] The

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42 PWS, at pp 14–15.

43 PWS, at p 15; DWS, at para 59.

Version No 1: 27 Oct 2020 (22:41 hrs)

Company submitted that its proposal was more realistic and would avoid the "overly drastic consequence" of a winding-up.[44]

62 Having considered the parties' submissions, I held that Wang and Zhao were to notify Kho within seven days of the release of the Final Valuation Report whether they could complete the Share Buyout within two months. If so, they were to make full payment within two months of the date of notification, and Kho was to execute the transfer of the shares on the same day of the full payment. If Wang and Zhao informed Kho that they could not complete the Share Buyout within two months, or they were ultimately unable to make full payment within two months, the Company would be wound up.

63 In coming to this decision, I considered that this was the best way to facilitate a clean break between the parties, while giving Wang and Zhao sufficient time to get their financial affairs in order. As pointed out by Kho in the course of oral submissions, Wang and Zhao should have known since the making of the Consent Order that the Share Buyout was a distinct eventuality. Furthermore, the period of valuation would also give Wang and Zhao additional time of a few months to obtain the money required for payment. Moreover, the Company's proposal was not even-handed. Not only would Kho bear the risk of non-payment by Wang and Zhao, the lack of an interest provision meant that Kho would also suffer loss in terms of the time value of money.

64 I also took my cue from other cases where the court had made similar orders. For example, in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776, the Court of Appeal at [132] gave the respondent 14 days

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44 DWS, at paras 58 and 60.

Version No 1: 27 Oct 2020 (22:41 hrs)

from the receipt of the valuation report to decide whether to purchase the appellant's shares. If so, the purchase was to be completed within three months of such decision. If not, then the appellant could wind up the company.

Confidentiality clause

65 The seventh and final issue was the scope of the confidentiality clause that would apply to the final value of the shares, the Final Valuation Report as well as the working documents and correspondence with the independent valuer. The Company proposed a clause stating that the parties would not reveal or use any information or document obtained other than for the purpose of the valuation, and that the terms of the Final Valuation Order as well as all working documents and correspondence with the independent valuer were to be kept strictly confidential. Kho submitted that no confidentiality clause was required, or that a standard confidentiality clause would suffice.[45]

66 In my view, the terms contained in the clause proposed by the Company were much too broad. Any documents of the Company containing sensitive commercial information would already be confidential and thereby protected. This was an open court hearing and a matter of public record. Therefore, I held that no confidentiality clause was required.

Summary of findings

67 In summary, I decided as follows:

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[45] PWS, at p 18; DWS, at para 61.

Version No 1: 27 Oct 2020 (22:41 hrs)

(a) I did not set aside the Consent Order as the Company had failed to prove the grounds of mistake and/or inoperability.

(b) Kho's shares were to be valued on an earnings basis, and the independent valuer was to take into account the retention sums vested in the Company as at 14 August 2018 even if they had not yet been paid out to the Company.

(c) No discount for lack of control and/or marketability was to apply to the value of Kho's shares.

(d) The independent valuer was to take into account any and all monies owing to Kho by the Company in valuing the shares in so far as such sums enhanced the value of the Company and thereby enhanced the value of Kho's shares. These sums were not to be payable by Wang and Zhao over and above the value of Kho's shares.

(e) The independent valuer shall have access to all information and documents he thought necessary to determine the value of the shares.

(f) The costs of the independent valuer would be borne by Kho, Wang and Zhao equally.

(g) Wang and Zhao would have seven days from the release of the Final Valuation Report to notify Kho whether they could complete the Share Buyout within two months. If so, they were to make full payment within two months of the date of notification, and Kho was to execute the transfer of the shares on the same day. If Wang and Zhao informed Kho that they could not complete the Share Buyout within two months,

Version No 1: 27 Oct 2020 (22:41 hrs)

or they were ultimately unable to make full payment within two months, the Company would be wound up.

(h) No confidentiality clause was required.

Costs

68 At the end of the hearing, I ordered that Wang and Zhao were to personally pay to Kho costs of $15,000 in addition to disbursements, as I had adopted most of Kho's proposals in relation to the terms of the Share Buyout.

69 I dealt first with the quantum. Appendix G to the Supreme Court Practice Directions provides that for contentious originating summons before the High Court without cross-examination and with Digital Transcription Service, party-to-party costs should be $15,000 per day. I considered that prior to the half-day hearing on 13 July 2020, there had been two other hearings on 6 April 2020 and 10 December 2019, which lasted one hour and two hours respectively.[46] Put together, this amounted to approximately one day's worth of hearings. Further, two hearings which had been fixed on 13 August 2019 and 25 November 2019 had been vacated on the day itself. This meant that Kho would have had wasted time and costs spent preparing for these hearings. Thus, $15,000 in addition to disbursements was appropriate.

70 Next, I also ordered that Wang and Zhao personally bear these costs as the directors of the Company. The law on costs against non-parties is relatively settled, most recently summarised by the Court of Appeal in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118

46 PWS, at Annex 2, p 37.

Version No 1: 27 Oct 2020 (22:41 hrs)

("*SIC College*"), citing its previous decision in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*"). In *SIC College* at [89], [90] and [93], the Court of Appeal stated the following:

> 89 The leading Singapore authority on when non-party costs should be ordered is this court's decision in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2010] 3 SLR 542 ("*DB Trustees*"), in which the following general principles were summarised:
>
> (a) A court is not precluded from awarding costs in favour of or against a third party (at [23]).
>
> (b) Such costs orders are exceptional in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense – the ultimate question is whether in all the circumstances it is just to make the order (at [26]–[27]) …
>
> (c) There are two factors, among the myriad of possibly relevant considerations, that ought to almost always be present to make it just to award costs against a non-party, even though they do not necessarily have to be present (see generally at [29]–[36]):
>
> (i) There must be a close connection between the non-party and the proceedings – it is sufficient that the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them – and whether there is a close connection depends on the facts of the case (at [30] and [34]).
>
> (ii) The non-party must have *caused* the incurring of the costs – it would not be fair to order costs against the non-party if the litigant would have incurred the costs regardless (at [35]).
>
> 90 Some clarification was provided by this court in *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 (at [66]) where it was stated that the two factors in *DB Trustees* are by no means conclusive and the award of costs is ultimately a matter of discretion.
>
> …

Version No 1: 27 Oct 2020 (22:41 hrs)

> 93 Whilst impropriety or bad faith on the directors' or shareholders' part in causing the company to bring proceedings is an important factor in deciding whether they should be made personally liable for costs, we should emphasise that there is no *strict* requirement that such elements should be made out before an order can be made. … The lodestar is always whether it is just to do so in all the circumstances of the case concerned.
>
> [emphasis in original]

71 In this case, I considered it just to order costs against Wang and Zhao personally. Critically, although the proceedings began as a winding-up application against the Company, the remedy ordered was the Share Buyout, which operated as between Kho, Wang and Zhao. Most of the dispute revolved around the terms of the Share Buyout, which would directly impact Wang and Zhao as the potential purchasers of Kho's shares. In effect, therefore, once the Consent Order was made, the proceedings involved essentially only Kho, Wang and Zhao.

72 The two factors set out by the Court of Appeal in *DB Trustees* and *SIC College* were also fulfilled. There was clearly a close connection between the proceedings and Wang and Zhao. They were the purchasers of the shares under the Share Buyout. Moreover, as the Company's directors, Wang and Zhao controlled the proceedings with the intention of ultimately deriving a benefit from them, namely, their acquisition of Kho's shares on beneficial terms. By the same reasoning, Wang and Zhao also caused the costs to be incurred. As noted by the Court of Appeal in *DB Trustees* at [35]:

> … Of course, this factor [of causation] may be established by the very same facts which go toward the establishment of the first factor, *ie*, a close connection between the non-party and the proceedings. …

73 Therefore, it was just in all the circumstances to order Wang and Zhao to personally bear the costs of the action.

Version No 1: 27 Oct 2020 (22:41 hrs)

Conclusion

74 For the above reasons, I dismissed the Company's application to set aside the Consent Order and determined the terms of the Share Buyout as detailed above. I also awarded costs of $15,000 in addition to disbursements to Kho, which were to be personally borne by Wang and Zhao.

Tan Siong Thye
Judge

Calvin Liang (Essex Court Chambers Duxton (Singapore Group Practice)) (instructed), Thio Ying Ying, Khoo Shuzhen Jolyn and Kuan Ling Hui Amy (Kelvin Chia Partnership) for the plaintiff; Choo Zheng Xi and Wong Thai Yong (Peter Low & Choo LLC) (instructed), Choy Wing Kin Montague (Clifford Law LLP) for the defendant.

Version No 1: 27 Oct 2020 (22:41 hrs)