Sim Yong Kim v Evenstar Investments Pte Ltd
[2006] SGCA 23

Case Number : CA 121/2005

Decision Date : 18 July 2006

Tribunal/Court : Court of Appeal

Coram : Andrew Ang J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the appellant; Jimmy Yim SC and Kelvin Tan Teck San (Drew & Napier LLC) for the respondent

Parties : Sim Yong Kim — Evenstar Investments Pte Ltd

Companies – Winding up – Application by minority shareholder to wind up company on just and equitable grounds – Whether company being run contrary to original objects – Whether majority shareholder breaching assurance to allow minority shareholder to exit company at any time – Whether loss of mutual trust and confidence between company's shareholders existing – Whether just and equitable to wind up company – Section 254(1)(i) Companies Act (Cap 50, 1994 Rev Ed)

Companies – Winding up – Nature of court's power to make orders in connection with order for winding up on just and equitable grounds – Sections 254(1)(i), 257(1) Companies Act (Cap 50, 1994 Rev Ed)

18 July 2006 *Judgment reserved.*

Chan Sek Keong CJ (delivering the judgment of the court):

1 This is an appeal by Sim Yong Kim ("the petitioner"), against the decision of Justice Tay Yong Kwang ("Tay J") in Companies Winding Up No 111 of 2005 dismissing the appellant's petition ("the petition") to wind up the respondent, Evenstar Investments Pte Ltd ("Evenstar"), on the "just and equitable" ground under s 254(1)(*i*) of the Companies Act (Cap 50, 1994 Rev Ed) ("the CA").

The background facts

2 In 2002, the petitioner, then aged 40, and his older brother Sim Yong Teng ("Mike"), aged 58, were the only shareholders, since 1987, in a company called Sinwa Ship Supply Private Limited ("Sinwa SS"). Their father had started the business in the 1960s, and it had been run as a family company ever since. In 2002, a company called Sinwa KS Limited, now known as Sinwa Limited ("Sinwa"), was incorporated to acquire the entire share capital of Sinwa SS and another company called KS Seafirst Marine Services Private Limited, which was owned by KS Tech Limited ("KS Tech") (now known as KS Energy Services Limited ("KS Energy")). The intention was for the brothers to acquire shares in Sinwa in exchange for their shares in Sinwa SS so that Sinwa could be used as a vehicle to list the two businesses.

3 Prior to the listing of Sinwa, Mike had suggested to the petitioner that they pool their Sinwa shares in Evenstar, a dormant company which was incorporated in 1999. Following the injection of the Sinwa shares into Evenstar, Mike and the petitioner became Evenstar's only directors and shareholders, holding respectively 86.5% and 13.5% of its issued share capital, which reflected their former shareholdings in Sinwa SS. Subsequently, Evenstar transferred a parcel of Sinwa shares to KS Tech in exchange for KS Tech shares. After the share swap and Sinwa's listing on the Singapore Exchange Limited ("the SGX"), Evenstar held 54.9% of Sinwa's shares, with 47.5% and 7.4% representing Mike's and the petitioner's contributions respectively. The shareholdings in Sinwa and KS Energy (the former KS Tech) continue to form the bulk of Evenstar's assets. Both brothers remained the only directors of Evenstar until February 2005, when Mike's son and daughter were also appointed

directors. The brothers also held management positions in Sinwa, with Mike being the chief executive officer and the petitioner holding office as an executive director.

4 Before Tay J, the petitioner's case, as set out in the petition and his two affidavits, was as follows:

(a) Prior to the listing of Sinwa, Mike told the petitioner that "it would be in their interest to pool their shares in [Sinwa] together to be held by a separate holding company". Mike further assured the petitioner that should he "want to pull out [his] shares from the Company", Mike would buy him out, *ie*, that the petitioner would "give Mike the first right of refusal".

(b) Evenstar was in substance a partnership between the two brothers, formed for the sole purpose of holding their Sinwa shares as a nominee for them. It was only some time after their shares were pooled that the petitioner found out that Mike had been using Evenstar to invest in other assets contrary to their original plan.

(c) Mike now wanted to "control Evenstar and the Sinwa shares … with [the petitioner] having no say and no benefit". In 2005, Mike had added his son and daughter as directors of Evenstar. Furthermore, Mike had also attempted to transfer some of his shares in the company to his two children to enable him to hold shareholders' meetings without the petitioner being present, thereby rendering the petitioner "powerless" in Evenstar. The petitioner had opposed this attempt successfully.

(d) Through the years, various problems made it increasingly difficult for the petitioner to work in Sinwa, and thus impossible for him to continue his partnership with Mike. These problems were as follows: (i) Sinwa had become a "Tan family company", in which one Bettina Tan and her siblings were "running the show", rather than a "Sim family company". One example of this concerned how Bettina's sister had accepted the resignation of one of the petitioner's employees without his consent. (ii) After the petitioner informed Mike of his desire to exit Evenstar, Mike had intentionally harassed the petitioner by requiring that he be stationed in the office at all times during office hours and by making him deliver a Powerpoint presentation at extremely short notice. The petitioner felt that it was absurd to require that he be in the office from nine to five since the nature of his job involved him leaving the office to meet customers and going to the shipyards.

5 Conversely, Evenstar's case as set out in Mike's two affidavits, filed by him as the managing director of Evenstar, was as follows:

(a) Evenstar was not formed with the sole objective of holding the brothers' shares in Sinwa. Evenstar was intended to serve as an investment holding company, not only for Sinwa shares, but additionally for other shares and business ventures. The retention of Evenstar's profits for reinvestment was consistent with its objective as an investment holding company. The petitioner, as a director and shareholder of Evenstar, had himself agreed to the retention of profits for further investments. In addition, he had approved payments for these investments out of Evenstar's funds.

(b) Mike needed to get his son and daughter involved in the running of Evenstar as the petitioner had lost interest in the company and Mike, who already had substantial responsibilities as chief executive officer of Sinwa, needed help. The petitioner had blocked the purported transfer of shares to Mike's children even though he obviously had little interest in Evenstar by then.

(c) It was untrue that Sinwa was no longer a "Sim family company" as Mike was still its managing director. The petitioner's role as an executive director in Sinwa was insignificant as he had no executive functions. The petitioner's appointment was a mistake as he was unable to manage or command the respect of the staff working under him.

6 After the dismissal of the petition, the petitioner's employment with Sinwa Singapore Private Limited, a subsidiary of Sinwa, was terminated. In Summons No 1460 of 2006, this court granted both parties leave by consent to adduce further evidence regarding the basis of the termination. Mike, in his affidavit, averred that the petitioner's termination was a result of his own deteriorating work attitude and continued absence from the office, and that the board had made the decision to terminate the petitioner independently, at a meeting which Mike was absent from. The petitioner, however, produced a document showing that some five days before the incident, Mike had offered, as part of his proposal to purchase the petitioner's shares, to extend the petitioner's service contract on better terms. This purportedly cast doubt on Mike's credibility in claiming that the petitioner was "such a useless employee who he had to get rid of".

Trial without cross-examination

7 Before the hearing of the petition, the petitioner applied for an order that all deponents be cross-examined on their affidavit evidence. Tay J disallowed the application. As a result, Tay J, in hearing the case, had to determine the facts of the case on the basis of the materials before him and counsel's submissions, but without the benefit of hearing oral evidence.

8 Tay J, after considering the affidavit evidence and hearing counsel, dismissed the petition on the following findings:

(a) Evenstar's memorandum of association contained very broad objects that included investing in practically any lawful business in Singapore and abroad.

(b) The petitioner had voluntarily chosen to take a back seat in the management of Sinwa by reason of his poor health. His complaints appeared to be more the result of his inability to cope rather than the deliberate actions of the people working in Sinwa.

(c) Even if Mike had assured the petitioner from the inception of Evenstar that he would buy over the petitioner's shares, if necessary, this was no more than a "first right of refusal". Mike had not broken his promise as the brothers could not agree on the terms or the mechanism for a buyout.

9 With respect to the law, Tay J observed at the outset that the petitioner was not seeking relief from oppression under s 216 of the CA. He held that on the facts, there was no deadlock in the management of Evenstar and its business was thriving. Thus, authorities such as *Chua Kien How v Goodwealth Trading Pte Ltd* [1992] 2 SLR 296 ("*Goodwealth*") (a management deadlock case) and *Re Iniaga Building Supplies (S) Pte Ltd* [1994] 3 SLR 359 ("*Re Iniaga*") (a case involving alleged exclusion from management) were not relevant to this case. His Honour also held that the principle approved in the "oppression" cases, such as *O'Neill v Phillips* [1999] 1 WLR 1092 ("*O'Neill*") and *Quek Hong Yap v Quek Bee Leng* [2005] SGHC 111 ("*Quek Hong Yap*"), that a shareholder has no right to exit at will from a company having the character of a quasi-partnership, unless there is a specific provision allowing him to exit, was applicable to cases involving "just and equitable" winding up. Having regard to all the circumstances of the case, Tay J found that the petitioner was merely attempting to exit Evenstar at will. He accordingly dismissed the petition.

The appeal

10 The petitioner's case on appeal may be summarised as follows:

(a) Tay J erred in not allowing cross-examination as the material facts were disputed by the brothers.

(b) The brothers' original object in pooling the Sinwa shares in Evenstar was to control Sinwa. The petitioner was assured by Mike that he would be able to exit Evenstar which was only holding the Sinwa shares as a nominee for them.

(c) Mike had been using the assets of Evenstar to make other investments contrary to the brothers' original plan.

(d) The mutual trust and confidence between the brothers that was necessary to carry on Evenstar's business as a partnership had broken down.

(e) There was no practical alternative that would allow the petitioner to take his stake out of Evenstar at a fair and reasonable price.

(f) In all the circumstances of the case, it was just and equitable to wind up Evenstar.

11 Evenstar's case on appeal may be summarised as follows**:**

(a) Tay J did not err in not ordering cross-examination; he was entitled to look at the evidence before the court critically to determine whether to order cross-examination.

(b) The objective evidence clearly showed that the petitioner was not entitled to withdraw the Sinwa shares he had injected into Evenstar, which was intended to be a general investment holding company. The petitioner knew of Evenstar's investment activities and agreed to retain part of the Sinwa dividends paid to Evenstar to be used to make other investments.

(c) The petitioner's private dissatisfaction and lack of confidence in the way that the affairs of Sinwa were conducted was irrelevant. These complaints had to do with his personal incapacity, rather than any action on the part of others to put him in a difficult position. In any event, these difficulties were irrelevant to the petition, which concerned Evenstar, and not Sinwa.

(d) The petitioner's complaint that there was no practical alternative open to him was not a valid reason to wind up Evenstar. The mere desire of a shareholder to exit a company was not a sufficient basis for the court to wind up the company.

Decision of this court

Was Tay J correct in refusing cross-examination?

12 The petitioner's first ground of appeal is that Tay J was wrong in refusing to allow cross-examination of the deponents on their affidavits. Counsel for both parties addressed us on this issue, and cited numerous authorities on the point. In our view, it is too late for the petitioner to raise this issue as a ground of appeal. He should have appealed against Tay J's order in accordance with the prescribed rules long before the trial commenced. However, this failure by the petitioner is not

necessarily the end of the road for him. It does not mean that the findings of fact of Tay J would be automatically upheld or accepted by this court as if they had the quality of findings of fact made after a full consideration of oral testimony. It should also be noted that Evenstar had objected to the petitioner's application for cross-examination. Tay J, in upholding Evenstar's objection, did not record his reasons for his decision. Evenstar's objection is an important consideration to bear in mind having regard to the course this court intends to adopt. The point is that if Tay J had deprived himself of the opportunity to resolve real conflicts of evidence on the material facts by hearing oral evidence through cross-examination, and had found against one party merely by reading the affidavits, that party would not have had a fair trial. This would require this court to set aside the findings of Tay J and order a retrial.

13 On the other hand, if Tay J were able to make findings on the material facts based only on the materials before him and without hearing oral evidence, as appears to be the case here, then this court is in as good a position as Tay J to look at the same materials to see whether his findings of fact were supported by such materials. This court is equally qualified to examine and interpret the same materials and can make inferential findings of fact different from those found by Tay J, if so justified by the materials. Even so, Evenstar cannot be heard to complain about or be aggrieved by such findings. By objecting to cross-examination, it has agreed to assume the risk of the court making whatever findings of fact that may be supported by the affidavit evidence.

Findings of this court

No loss of substratum

14 In our view, the initial object of Evenstar was to hold the brothers' Sinwa shares as an investment block that would allow Mike to retain majority control of Sinwa. Mike has not disputed the petitioner's statement that prior to the listing of Sinwa shares in the SGX, Mike had suggested to the petitioner that they pool their Sinwa shares into Evenstar, a dormant company controlled by Mike. Tay J found that the original scope of Evenstar's business was broader in that the objects clause in its memorandum of association empowered it to invest in practically any lawful business in Singapore and abroad. Whilst we agree that a company's memorandum of association is conclusive evidence of its objects *vis-à-vis* third parties, it is not necessarily so as between shareholders, such as the brothers here, who have entered into what is substantially a quasi-partnership using the company merely as a vehicle for an agreed object. *As between the brothers, what they had agreed on as the object or objects of Evenstar would be determinative*. The inconclusiveness of Evenstar's memorandum of association is *a fortiori* given that Evenstar was initially incorporated as a dormant or shelf company: see *Goodwealth* ([9] *supra*) at [38]–[39].

15 However, the petitioner, by his actions, had acquiesced, if not agreed, to Evenstar holding investments other than Sinwa shares. Indeed, this began at the time of the pooling, when Evenstar transferred a parcel of Sinwa shares to KS Tech (now called KS Energy) in exchange for KS Tech shares. This could only have been done with the knowledge and consent of the petitioner. Subsequently, the petitioner had acquiesced in Evenstar using its surplus revenue to invest in other stocks and shares, such as United Overseas Bank Ltd ("UOB Ltd"), China Food Industries Limited ("China Food") and Ezra Holdings Limited ("Ezra"), and also in a piece of land in Australia. Although the petitioner has claimed that he did not know about these investments, he was a signatory of the cheques that paid for these investments. We therefore agree with Tay J that in so far as the petitioner's case is based on a change in the original objective of Evenstar, it must fail.

No breakdown in mutual trust and confidence

16 For the same reasons, we also agree with Tay J that the mutual trust and confidence between the brothers that was necessary to carry on the business of Evenstar had not broken down. The petitioner had played no role in the investment activities of Evenstar, other than to sign cheques. Any distrust and loss of confidence by the petitioner in Mike did not stem from the way Mike was managing the affairs of Evenstar. The petitioner was unhappy because of Mike's refusal to buy him out when his declining health made it difficult for him to cope with his work, such as it was, in the Sinwa companies. He wanted to exit Evenstar for this reason and retrieve his Sinwa shares held in Evenstar. Hence, he called upon Mike to buy him out of Evenstar. We turn now to this aspect of the case.

What was the substance of Mike's assurance?

17 It is not disputed that Mike's idea of pooling the Sinwa shares to be held as a block was motivated by the desire to retain majority control of Sinwa. Pooling them into Evenstar would also give Mike control of Evenstar. Although Mike had said that the pooling was in the interest of the brothers, it was obvious that he would benefit much more from the arrangement than the petitioner. Under the arrangement, Mike would remain free to liquidate his Sinwa shares at any time, as he had control of Evenstar, but the petitioner would not be able to do so without Mike's agreement. The petitioner's apparent benefit was his retention of his executive directorship of Sinwa with no executive functions. But that could not have been adequate compensation for exchanging his marketable Sinwa shares for unmarketable Evenstar shares. It was therefore not surprising that Mike held out a carrot to the petitioner to get him to agree to pool the Sinwa shares. This came in the form of Mike's promise to buy the petitioner out should he wish to "pull out [his] shares from the Company". Mike's assurance was neither made in writing, nor were the terms of the buyout discussed, but it is reasonable to infer that the petitioner, being the younger brother, trusted Mike to live up to his promise to buy him out in due course. After all, Mike was his elder brother and the Sinwa shares had their origins in their family company.

18 It is important to have regard to this factual matrix in determining the substance of Mike's assurance in the light of the petitioner's recollection of Mike's promise. In his first affidavit, the petitioner stated:

> … Mike assured me that should I want to pull out my shares from the Company, that he would buy me out, ie. I would give Mike the first right of refusal. I agreed to the same.

It was the petitioner's infelicitous explanation of the meaning of Mike's promise that has led to his grief before Tay J. Mike seized on the words "first right of refusal" to deny that he had an obligation to buy the petitioner out and his counsel was able to persuade Tay J that Mike's refusal was not a breach of his assurance, leading to the dismissal of the petitioner's case.

Was Mike in breach of his assurance?

19 Before us, the petitioner's case has been put on the basis that: (a) the "first right of refusal" placed an obligation on Mike to buy the petitioner's shares in Evenstar at a reasonable price; (b) Mike's offer, which valued the petitioner's shares at a discount to their net asset value, was unreasonable; and (c) Mike's unreasonable conduct had led to a breakdown in mutual trust and confidence between the brothers. Evenstar disputes all these allegations, contending that since Mike had no obligation to buy the petitioner's shares, his refusal to do so could not be unreasonable. This refusal, together with all the other allegations of the petitioner, did not lead to any breakdown in mutual trust and confidence between the brothers. Instead, the petitioner just wanted to exit Evenstar at will.[note: 1]

20 The petitioner has, in his affidavit, identified "the Company" ([18] *supra*) in the context of Mike's assurance as Evenstar and not Sinwa. Based on this, Evenstar avers that Mike's assurance was given in relation to the petitioner's shares *in Evenstar*. However, it should be recalled that Mike gave his assurance *before*, and not *after*, the pooling of the Sinwa shares. At that point of time, Evenstar was a dormant company with an issued share capital of two subscriber's shares. It is therefore reasonable to infer from this that what the petitioner understood Mike's assurance to mean was that Mike would allow the petitioner to "pull out" the *Sinwa* shares from Evenstar. This could be done easily as Sinwa shares would soon be traded on the SGX. The mechanics to pull out the Sinwa shares from Evenstar was not a matter of concern to the petitioner nor was it something that would have preoccupied him. It was for Mike to effect the "pulling out". The reference to "the Company" as Evenstar is also reconcilable with this understanding. In the context of Mike's assurance, there was no difference between Sinwa and "the Company", *ie*, Evenstar, with respect to the Sinwa shares. To the brothers at that point of time, no distinction could be made between Sinwa and Evenstar as the latter was merely a vehicle to hold Sinwa shares.

21 The factual matrix also explains the meaning of the petitioner's statement that Mike had been given "the first right of refusal" to buy his shares in Evenstar. This statement has enabled Mike to contend that he was not obliged to buy the petitioner's shares at all, and that if he refused to do so, the petitioner was free to sell his Evenstar shares to any other person. However, this argument is based on the literal and technical meaning of the words "the first right of refusal" outside the context of the factual matrix. It is clearly wrong. The fundamental question is whether Mike did promise to "buy out" the petitioner, *ie*, to allow the petitioner to exit Evenstar, as a condition for the petitioner's agreement as to the pooling. If Mike did promise to "buy out" the petitioner from Evenstar, which is clearly what the evidence shows, he cannot now be heard to say that he was only given a right of first refusal. This would make no sense, as a promise to buy is a direct contradiction of a right not to buy, which is what the right of first refusal means. What is important here is the substance of the promise made by Mike and not what the petitioner thought he heard or understood by his recollection of the words "first right of refusal". This misunderstanding is not difficult to explain. The petitioner, being a layman, might have thought that the two statements meant the same thing. More likely, he might have understood the words "first right of refusal" to refer to the *Sinwa* shares which Mike had agreed to pull out from Evenstar should the petitioner want to exit from Evenstar. In the petitioner's mind, Evenstar's shares would be the same as Sinwa's shares as Evenstar was merely holding the latter as a nominee. In our view, the "first right of refusal" was not meant to negate or override the fundamental promise to pull the petitioner's Sinwa shares out of Evenstar, but was intended to explain what would happen *after* these shares had been taken out of Evenstar. In that event, if Mike exercised his right of first refusal to buy the petitioner's Sinwa shares, the petitioner would be free to sell his Sinwa shares in the market.

22 This interpretation makes perfect sense given the present factual matrix. Mike's assurance would only be assuring to the petitioner if it guaranteed the petitioner's right to exit Evenstar but not if it only gave Mike an option to purchase the petitioner's Evenstar shares. The assurance would make no sense for the petitioner if he had to find a buyer for his minority shares in Evenstar in the event that Mike refused to buy his minority shares since no sensible person would want to lock up his capital in a private company as a minority shareholder. It would also make perfect sense for Mike, as he could cause Evenstar to return the petitioner's Sinwa shares in exchange for the petitioner's Evenstar shares, and then decide whether or not to exercise his right of first refusal with respect to those shares. This would not impose an unreasonable burden or cost on him.

Critical issue – the promise to let the petitioner exit Evenstar

23 The crux of this case is the substance of the assurance given by Mike to the petitioner. In

our view, Mike assured the petitioner that he could exit from Evenstar by pulling out his *Sinwa* shares whenever he wanted, provided that Mike was given a right of first refusal on these shares. However, in view of the fact that Evenstar subsequently acquired additional assets, Mike's assurance should now extend to include these other investments. All these additional investments were attributable to the original Sinwa shares that the brothers pooled in Evenstar. They were acquired either by way of a share swap with Sinwa shares (in the case of the KS Energy shares) or by using the dividend income from the Sinwa shares and the other shares acquired using the Sinwa shares. However, for present purposes, it is not a matter of any significance whether the assurance applied to Sinwa shares or Evenstar shares or even the other investments. There is no difficulty in Mike carrying out his promise in any of these cases. All the assets of Evenstar as at 31 May 2005, except for the investment in a piece of land in Australia, consisted of marketable shares, such as China Food, Ezra, Gates Electronics Limited, KS Energy, Labroy Marine Limited, Lasseters International Holdings Limited, UOB Ltd and Sinwa itself. All these assets are easily realisable in the market and no reason has been given why the land in Australia could not be disposed of in the open market.

24 Our interpretation is also not inconsistent with Mike's affidavit evidence. He has not given his own version of what his promise was. He was careful not to say more than was necessary in regard to the assurance he gave to the petitioner. He took advantage of the petitioner's imperfect recollection and latched on the words "the first right of refusal" as his defence.

Mike's breach of his assurance

25 The affidavit evidence shows that Mike took undue advantage of the petitioner's imperfect recollection of Mike's words of assurance and the petitioner's legal predicament caused by his contradictory recollection. First, Mike refused the petitioner's request to pull out his Sinwa shares and suggested that the petitioner should get a third party to buy the petitioner's shares in Evenstar, when he knew that this was a totally unreasonable suggestion. Second, Mike offered an unfair and unreasonable price for the petitioner's shares in Evenstar and on unfair terms. The evidence is as follows:

(a) As at 20 December 2004, Mike had refused to implement the buyout "quite a few times". This continued in the months that followed up to the presentation of the petition.

(b) In February 2005, Mike had offered to purchase the petitioner's shares in Evenstar based on a valuation of the Sinwa shares that reflected their current market price. This was conditional upon profits of not less than $1m from Sinwa's projects managed by the petitioner. Mike would pay 10% of the purchase price upfront and the balance over *two years*, but *all* the shares had to be transferred on payment of the initial 10%. In a letter to Mike, the petitioner suggested that the value of his Evenstar shares should take into account assets other than the Sinwa shares, and that his shares should be purchased on an instalment basis. Mike then *unilaterally* chose to "treat the matter as closed" simply because the petitioner's letter had not specified Mike's additional term requiring the value of the shares to be decreased by 10% if the $1m target was not reached.

(c) In March 2005, the petitioner's lawyers made a fresh offer to Mike. The terms of this offer were that the petitioner's shares in Evenstar should either be valued at $4.5m *or* by an independent accountant appointed by both parties. Once again, Mike unilaterally terminated negotiations, informing the petitioner that he wanted to put matters in abeyance pending the release of Sinwa's 2004 audited accounts.

(d) A month later, in April 2005, Mike offered to buy the petitioner's shares in Evenstar, but

his offer valued the Sinwa shares at $0.20 per share when they were being traded at the significantly higher price of $0.30 to $0.31. The petitioner had no choice but to reject Mike's proposal.

(e) About two weeks later, the petitioner's solicitors sent a copy of the draft petition to Mike to show him that the petitioner was serious about going to court to resolve the matter. Mike then restarted negotiations. Following a meeting between the brothers, the petitioner's solicitors sent Mike's solicitors the terms of the buyout that the brothers had agreed on, which included all material terms except for the period of moratorium during which the petitioner could not sell his Sinwa shares. Mike did not reply to this offer.

(f) The parties' last attempt to reach an agreement was through mediation by their other brother, Sim Yong Chan. A provisional agreement had apparently been struck during the mediation, and the chain of correspondence following it indicated the petitioner's willingness to reach an agreement. When Mike objected to a number of clauses in the draft agreement, the petitioner's solicitors replied agreeing to *all* the proposed changes and requesting Mike's suggested wording. Despite the petitioner's agreement to compromise on all the points in dispute, Mike ceased the negotiations, forcing the petitioner to commence these proceedings.

26 According to the brothers' agreement, Mike had two options open to him: he could either exercise the right of first refusal and give the petitioner his Sinwa shares by way of an *in specie* capital reduction of Evenstar, or choose not to exercise the right of first refusal and buy the petitioner out from Evenstar. Up to the hearing of this appeal, Mike failed to explain why it was not an appropriate time for him to do *either*. In his affidavits, Mike repeatedly raised concerns that any distribution of Sinwa shares to the petitioner could adversely affect Sinwa's share price if the petitioner were to indiscriminately unload these shares on the open market. We do not find this argument convincing. First, the evidence shows that the petitioner had agreed, following the mediation by Sim Yong Chan, to a three-year moratorium on any Sinwa shares distributed to him. Secondly, Mike had the financial means to buy the petitioner's shares since, having effectively 86.5% of the assets of Evenstar, he could have sold some of them to pay the petitioner. It is clear to us that Mike was just trying to find excuses not to live up to his promise to the brother. We find that he was in breach of his promise to allow the petitioner to exit from Evenstar. The next question we have to decide is whether, by reason of this breach, it is just and equitable to wind up Evenstar. We turn now to this aspect of the law.

The law – section 254(1)(*i*) and its relationship to section 216 of the Companies Act

2 7 Counsel for Evenstar has contended that the petitioner has suffered no inequity from Mike's refusal to buy him out as Mike had no obligation to do so. Mike's conduct was not unfair to the petitioner who, furthermore, had made no attempt to sell his Evenstar shares to any other person. The petitioner was merely trying to exit Evenstar at will which is not a valid basis under s 254(1)(*i*) of the CA. Counsel referred to *O'Neill* ([9] *supra*) (an "oppression" case), where Lord Hoffmann rejected such a submission in these words (at 1104):

I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases … in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can

> demand that his shares be purchased *simply because he feels that he has lost trust and confidence in the others*. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. [emphasis added]

Counsel for Evenstar submitted that the same principle applies to petitions for just and equitable winding up. The petitioner had not been wrongfully dismissed or excluded from the management of Evenstar. Unless the articles of association allowed him to exit at will, he could not do so under s 254(1)(*i*) of the CA. Counsel also referred to Parker J's decision in *Re Guidezone Ltd* [2000] 2 BCLC 321 ("*Guidezone*") at 359 (an "oppression" case, with an alternative prayer for winding up under the "just and equitable" ground), that in the absence of unfair conduct, the court will not wind up a company just because the aggrieved shareholder is not offered the price he would like for his shares. Reference was also made to the case of *Quek Hong Yap* ([9] *supra*), another "oppression" case where there was no promise to buy out the minority shareholder's interest. The court held that the defendant's refusal to buy the petitioner's shares was neither oppressive to the petitioner or in disregard of his interests under s 216(1)(*a*) of the CA, nor unfairly discriminatory against or otherwise prejudicial to him in terms of s 216(1)(*b*) of the same.

2 8 *O'Neill* and *Guidezone* were both "unfair prejudice" cases under s 459 of the Companies Act 1985 (c 6) (UK) ("the UK Companies Act 1985") (corresponding to our s 216, except for the absence of the remedy of winding up). Lord Hoffmann has in *O'Neill* provided a clear analysis of the concept of unfairness as the underlying basis of the s 459 jurisdiction as follows (at 1098–1100):

> In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history ... that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared to be just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. …
>
> Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used. *Conduct which is perfectly fair between competing businessmen may not be fair between members of a family*. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and the background are very important.
>
> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms

on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in section 459 runs parallel to that which … [the House of Lords in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360] adopted in giving content to the concept of "just and equitable" as a ground for winding up.

…

I should make it clear that the parallel I have drawn between the notion of "just and equitable" as explained … in [*Ebrahimi*] and the notion of fairness in section 459 does not mean that conduct will not be unfair unless it would have justified an order to wind up the company. There was such a requirement in section 210 of the Companies Act 1948 but it was not repeated in section 459. … [The] grant of one remedy does not necessarily require proof of conduct which would have justified a different remedy … The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair.

[emphasis added]

29 In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*"), Lord Wilberforce gave content to the concept of "just and equitable" in the former s 222(f) of the Companies Act 1948 (c 38) (UK) ("the UK Companies Act 1948") (presently s 122(1)(g) of the Insolvency Act 1986 (c 45) (UK) ("the UK Insolvency Act 1986")), which is the equivalent to our s 254(1)(*i*) of the CA, as follows (at 379–380):

The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. … The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably 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.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. *It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sums these up in the law of partnership itself*. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

[emphasis added]

30 Our courts have followed *Ebrahimi* in s 254(1)(*i*) cases: see *eg*, *Re Iniaga* ([9] *supra*); *Goodwealth* ([9] *supra*); *Ng Sing King v PSA International Pte Ltd (No 2)* [2005] 2 SLR 56; *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114 ("*Tang Choon Keng*"). Consistent with Lord Wilberforce's reference in his judgment to "these, *and analogous*, factors", they have not limited their jurisdiction to superimpose equitable considerations to merely the three circumstances mentioned by Lord Wilberforce in his judgment: *Re Goodwealth Trading Pte Ltd* [1990] SLR 1239 at 1245, [13].

31 We accept that the notion of unfairness lies at the heart of the "just and equitable" jurisdiction in s 254(1)(*i*) of the CA and that that section does not allow a member to "exit at will", as is plain from its express terms. Nor does it apply to a case where the loss of trust and confidence in the other members is self-induced. It cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will. However, unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the "just and equitable" jurisdiction under s 254(1)(*i*) has been successfully invoked can be re-characterised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can also arise in the loss of substratum cases. In *O'Neill* ([9] *supra*), Lord Hoffmann said (at 1101–1102):

I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. *For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association*. The analogy of contractual frustration suggests itself. *The unfairness may arise not from what the parties have positively agreed 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: non haec foedera veni*. *It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground* … and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459. But this form of unfairness is also based upon established equitable principles and it does not

arise in this case. [emphasis added]

Relationship between sections 216 and 254(1)(i) of the Companies Act with reference to the UK position

32 Counsel for the parties have also addressed us on the relationship between ss 216 and 254(1)(*i*) of the CA by reference to English jurisprudence. In this regard, the debate in the English courts essentially concerned Parker J's decision in the case of *Guidezone* ([27] *supra*) and his comments on another English High Court case, *viz*, *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 (*"Noble")*. Though strictly speaking, this appeal does not turn on this point, as counsel for both parties did spend some time canvassing this novel issue, we feel that we ought to give our views on it in order to shed some light on the Singapore position.

33 Under the UK legislative framework, the remedy for "oppressive" conduct in s 210 of the UK Companies Act 1948 has been replaced with one for conduct which is "unfairly prejudicial" under s 459 of the UK Companies Act 1985. Under s 210, conduct justifying an "oppression" remedy such as a buy-out order had to additionally satisfy the requirement of otherwise warranting "just and equitable" winding up. This requirement was omitted from the present s 459, thus leading Lord Hoffmann to say in *O'Neill* ([9] *supra* at 1099–1100) that conduct under s 459 may be unfair whether or not it satisfies the "just and equitable" requirement. Since a winding up under the "just and equitable" jurisdiction will lead to the death of the company, logically the kind of blameworthy conduct that justifies a winding-up order has to be more serious than conduct that justifies a less serious order under s 459. Mummery J explained this in *Re a company (No 00314 of 1989), ex parte Estate Acquisition and Development Ltd* [1991] BCLC 154 at 161 as follows:

> Under ss 459 to 461 the court is not … faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more of the ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.

34 This line of reasoning led Parker J in *Guidezone* ([27] *supra*) to disagree with the decision of Nourse J in *Noble* ([32] *supra*), that conduct which is not "unfair" for the purpose of a s 459 action can nevertheless found a case for winding up on the "just and equitable" ground, as being inconsistent with the reasoning of Lord Hoffmann in *O'Neill* ([9] *supra*). Parker J was of the view that:

> [T]he winding-up jurisdiction is, at the very least, *no wider than the 459 jurisdiction*: a proposition which is consistent with the winding-up order being, as it were, the death sentence on a company … and with the statutory recognition in s 125(2) of the Insolvency Act 1986 … that a winding up order is an order of last resort. [emphasis added]

35 It is not for us to enter this debate as to whether Parker J's or Nourse J's approach represents the correct position under *English* law. In any case, the legislative framework in Singapore is different from that obtaining in the UK. In our view, the provisions of our CA do not support any suggestion that the "just and equitable" jurisdiction under s 254(1)(*i*) is *necessarily* a subset of the "oppression" jurisdiction under s 216 for the following reasons. First, in contrast to the UK statutory regime, where winding up is available as a remedy *only* under the court's "just and equitable" jurisdiction, *both* s 254(1)(*i*) and s 216 of our CA empower a court to wind up the company. These two provisions should therefore be treated as prescribing *different* grounds to warrant winding up, rather than raising the threshold of the "just and equitable" jurisdiction to allow winding up as a higher order remedy for the more severe "oppression" cases.

36 Secondly, equating the scope of s 254(1)(*i*) with that of s 216 would be inconsistent with the express language used in the two sections; a plain reading of ss 254(1)(*i*) and 216 necessitates the conclusion that relief under the two sections is founded on different bases. Under s 216, the categories of conduct that fall within the court's purview are limited to: (a) the conduct of the company's affairs or the exercise of the directors' powers under sub-s (1)(*a*); and (b) acts of the company or resolutions by members or debenture holders under sub-s (1)(*b*). In contrast, s 254(1)(*i*) is phrased more *generally* as requiring the existence of "just and equitable" grounds, and is not limited to any particular category of conduct. As a result, the jurisdiction under s 254(1)(*i*) may in some cases be *broader* than that under s 216. The most obvious example of this would be cases involving a deadlock between equal shareholders; whilst it may be difficult to attribute oppressive or unfairly discriminatory conduct on either party in such cases, the courts have, nevertheless, been ready to grant winding-up orders pursuant to their "just and equitable" jurisdiction: see *eg*, *In re Yenidje Tobacco Company, Limited* [1916] 2 Ch 426 at 430. The inequity justifying a winding-up order in such situations does not lie in the oppressive or wrongful conduct of the other shareholder in the *management of the company or the conduct of its affairs*, but in the opposing shareholder's insistence on locking the applicant shareholder in the company *despite the stalemate they have reached concerning the conduct of the company's business*. Restricting the court's jurisdiction under s 254(1)(*i*) to that under s 216 would unjustifiably deprive shareholders in deadlock situations of any recourse. To reiterate what I said in *Tang Choon Keng* ([30] *supra*) at 1141, [55]–[56], "the [winding-up and oppression] petitions *cover different types of complaints* … An oppression petition may not be adequate to remedy wrongs which support a winding-up petition" [emphasis added].

37 Hence, it is our view that the "just and equitable" and "oppression" regimes under our CA each have their own respective spheres of application. However, at the same time, we also recognise that these two jurisdictions, though distinct, do in fact overlap in many situations since they are both predicated on the court's jurisdiction to remedy any form of unfair conduct against a minority shareholder. In this regard, although s 216 does not expressly adopt the "just and equitable" principle, the concept of unfairness is common to both sections. *In such overlapping situations*, we agree with Parker J's *dictum* in *Guidezone* ([27] *supra*) that in order to reconcile the concurrent jurisdictions under the two provisions in a principled manner, the degree of unfairness required to invoke the "just and equitable" jurisdiction should be as onerous as that required to invoke the "oppression" jurisdiction.

38 Such an approach would not render either of the provisions superfluous. As I recognised in *Tang Choon Keng* ([30] *supra*) at 1142, [58], a successful oppression application may not necessarily result in a winding-up order. Even if the applicant in such a case would have been able to prove facts justifying a winding-up order under s 254(1)(*i*), he may not necessarily be entitled to such an order under s 216 because *a winding-up order is an order of last resort for an oppression application*: at 1141, [55] and 1142, [61]. Hence, whilst the same degree of unfairness may be required to *invoke* ss 254(1)(*i*) and 216 in cases concerning loss of substratum or exclusion from management, the ultimate *remedy* that would be granted under each section may differ. In this regard, it should be highlighted that our statutory framework does not contain any equivalent to s 125(2) of the UK Insolvency Act 1986, which allows a court hearing a winding-up application on the "just and equitable" ground to refuse to order winding up based on the petitioner's unreasonableness in omitting to pursue an alternative remedy. Accordingly, a court hearing a s 254(1)(*i*) application would not be precluded from ordering winding up simply because a s 216 remedy would otherwise be available.

39 One might then wonder whether the state of the law would allow a malicious shareholder to try to wind up his company under s 254(1)(*i*) and to bypass the more appropriate and moderate remedies available under s 216. In our view, a shareholder who prefers a s 254(1)(*i*) remedy in order to harass the company will risk having his application struck out as being vexatious. As I stated in

Tang Choon Keng ([30] *supra*) at 1142, [60]:

> There is no reason to believe that where a company is a 'going concern', an aggrieved minority member would want to wind up the company if the real relief he seeks can be satisfied without a winding up. *In other words, unless motivated by spite, he will not ask for a winding-up order except as a last resort*. [emphasis added]

Legitimate expectation

40 Having set out the framework within which the court's "just and equitable" jurisdiction operates, we will now consider whether the facts before us are sufficient to warrant the exercise of this jurisdiction. Turning first to the issue of "legitimate expectation", we note at the outset that the petitioner has not expressly pleaded that he had a legitimate expectation that Mike would exercise his "first right of refusal" on a reasonable basis. Indeed, it would be difficult to make that argument because a "first right of refusal" does not give rise to any expectation that the right would be exercised at all, much less on reasonable terms. However, if, as we have found, Mike did make a promise to allow the petitioner to pull out his Sinwa shares, then the petitioner would have a legitimate expectation of Mike carrying out his promise. In *O'Neill* ([9] *supra*), Lord Hoffmann (at 1101) approved the following passage from the judgment of Parker J in *Re Astec (BSR) plc* [1998] 2 BCLC 556 at 588*:*

> [In] order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.

Lord Hoffmann then continued (at 1101):

> This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask *whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed*. Would it conflict with the promises which they appear to have exchanged? … In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. *Nor is it necessary that such promises should be independently enforceable as a matter of contract***.** A promise may be binding as a matter of justice and equity although for one reason or another (for example, because of a third party) it would not be enforceable in law. [emphasis added]

4 1 Lord Hoffmann, in the passage quoted above, referred to instances of unfairness resulting from breaches of promises that would be unfair for a member to ignore. Such a promise may be binding as a matter of justice and equity, although for one reason or another it would not be enforceable in law. Indeed, the passage makes it clear that if the petitioner in the present case had proved that Mike had breached his promise to let the petitioner exit from Evenstar, a court would have been justified to order a buyout under s 216. However, the petitioner has not filed a s 216 application, but a s 254(1)(*i*) petition, presumably because he thought or was advised that he could not prove such a breach if all that he had given to Mike was a right to refuse to buy his shares.

42 In our view, this does not matter. The petitioner's decision to seek winding up, rather than any of the alternative remedies under s 216 is of no moment since, for reasons we will explain later

(see [46] to [48] below), the winding-up order *in this case* can be tailored to make it effectively no different from a buy-out order. In addition, the unfairness flowing from Mike's breach of his promise to let the petitioner pull out from Evenstar is obvious. It has left the petitioner trapped in Evenstar and placed him at the mercy of Mike. The promise is not enforceable as a contract for lack of essential terms. The petitioner admitted, candidly, that he did not know what would happen if Mike did not buy him out. But that does not mean that as a matter of justice and equity this court cannot give effect to it on terms that are just and equitable to the petitioner, or to both brothers, if this is called for. This is not a case of exit at will but one of exit by right due to the failure of the majority shareholder to live up to his promise to allow the minority shareholder to do so as a condition of their associating in a separate legal entity for a specific object. The petitioner had a legitimate expectation of being bought out by Mike on reasonable terms should he seek to be bought out.

43 In *O'Neill* ([9] *supra*), Lord Hoffmann (at 1101) suggested a cross-check: "Would [the exercise of the power in question] conflict with the promises which they appear to have exchanged?" When Mike's conduct is compared with his assurance to the petitioner, the answer is undoubtedly "Yes". Furthermore, the petitioner's decision to enforce Mike's promise to buy him out "puts an end to the basis upon which the [brothers] entered into association with each other, making it unfair that one shareholder [Mike] should insist upon the continuance of the association": *O'Neill* ([9] *supra*) at 1101. The brothers' partnership in Evenstar was premised throughout on the fundamental understanding that their association would only continue as long as the petitioner was a willing party. In light of the petitioner's decision to exit from Evenstar, Mike's conduct "in insisting upon the continuance of the [brothers'] association in the changed circumstances" is sufficiently inequitable to warrant this court's intervention: *Guidezone* ([27] *supra*) at [176].

44 Mike has no difficulty in allowing the petitioner to exit Evenstar in a number of ways. Evenstar is merely an investment holding company and substantially all its assets are freely marketable securities. Mike owns 86.5% of Evenstar. He has the power to cause Evenstar to sell or distribute a sufficient amount of its investments to enable the petitioner to exit Evenstar. The petitioner's many unsuccessful attempts to reach an agreement with Mike have been detailed earlier in this judgment (see [25] above). Mike's responses to these attempts show that he intended to maintain the *status quo* for as long as possible to extract as many concessions as he could from his brother. His delaying tactics were intended to force the petitioner to agree to a buyout of the petitioner's shares in Evenstar at a value acceptable to him, regardless of their true value. This is borne out by Mike's buy-out offer to the petitioner in which Sinwa shares were valued at $0.20 when they were then trading at $0.30 to $0.31 in the market. The total discounted amount pursuant to this offer was approximately $1,035,535, which was about 55% of the price that Mike was offering the petitioner. The gross inequity of such an offer is immediately evident.

45 In the present appeal, the petitioner calls upon this court to exercise a jurisdiction based on the guiding principle that a majority shareholder in a "quasi-partnership" company may not act unfairly towards a minority shareholder in the management of the company's affairs. The "just and equitable" jurisdiction in s 254(1)(*i*) leaves room for equity to impose contemporary standards of corporate responsibility on errant members. Majority shareholders in quasi-partnership companies, such as Evenstar, are expected to keep their promises and assurances to minority shareholders. They are expected to take a broader and more generous view of their obligations having regard to what is fair to minority shareholders. In this case, Mike has adopted a legalistic approach to the meaning and effect of his own assurance which, in the context in which it was given, was reprehensible. Winding up Evenstar would restore to the petitioner what Mike had promised to restore when they agreed to pool the Sinwa shares.

Court's jurisdiction to make other orders

46 Section 254(1)(*i*) of the CA calls for the application of equitable principles to determine whether a winding-up order should be made in the circumstances of each case. There are two aspects to this jurisdiction: first, whether there is sufficient cause to order a "just and equitable" winding up, and second, whether the winding-up order resulting in the destruction of the company is just and equitable: in other words, whether the cure is worse than the illness, as the winding up might result in loss for all parties. Historically, it was the harsh consequences of a winding-up order on the "just and equitable" ground in many cases where many minority shareholders had been denied a remedy that led to the enactment of s 216. However, in our view, the court has the power to avoid or militate against such consequences in certain cases, of which the present is one of them. The court has ancillary powers under s 257(1) of the CA which it can use to this end. Even though counsel for both parties have not addressed us on the scope of the court's ancillary powers under this statutory provision, we believe that no injustice would be done to the parties if we were to proceed to state our views on the scope of the law without assistance from counsel.

47 Under s 257(1) of the CA, the court may "make any interim or other order that it thinks fit" on a winding-up application. As a general principle, s 257 must give the court the power to ensure that no avoidable injustice is done to the parties when ordering the winding up of a company under s 254(1)(*i*). The Canadian courts have held that the corresponding Canadian legislative provision does not enable the court to give "an entirely independent remedy that will operate outside a prospective winding-up": see Laskin JA in *Re RJ Jowsey Mining Co Ltd* [1969] 2 OR 549 at 551, but that it does enable the court to make "any order" in connection with the winding up. In *Re Hillcrest Housing Ltd* (1992) 94 DLR (4th) 165, Carruthers CJ held that the Canadian equivalent of s 257(1) of our CA confers a court hearing a winding-up application with the jurisdiction to make "an order *in furtherance of or otherwise in connection with* a … winding-up order" [emphasis added]. The court then exercised this jurisdiction to order the appellant company to pay interim costs pending the determination of the appeal. We are of the view that s 257(1) should be similarly interpreted. On this basis, a court making a winding-up order under s 254(1)(*i*) may therefore give directions to the liquidator to temper the harshness and inequity that may otherwise result from, for example, his converting all the assets of the company to cash and distributing the proceeds when an *in specie* distribution would be more beneficial to the shareholders. In the case of Evenstar, whose business is investment and whose assets are readily realisable in the open market, an order to wind it up, if made subject to suitable ancillary directions, will ensure that both parties can walk away at the lowest financial cost. The petitioner wants his investment back in a liquid form. We assume that Mike would certainly want to continue to retain control of Sinwa and might therefore wish to have the Sinwa shares distributed to him.

48 Apart from directing *how* the winding up should be conducted, we are also of the view that the court's power under s 257(1) also allows it to *defer* the winding up until parties have been given adequate opportunity to reach a compromise. This practice of staying a winding-up order to allow parties to reach an alternative arrangement is one which is well-established in jurisdictions such as Australia: see *eg*, *Re Cumberland Holdings Ltd* (1976) 1 ACLR 361 at 380; *Bernhardt v Beau Rivage Pty Ltd* (1989) 15 ACLR 160 at 166.

Conclusion

49 We allow the petitioner's appeal. Costs of the appeal and in the court below will follow the event, with the usual consequential orders.

50 At the conclusion of the hearing before us, we indicated to the parties that we hoped they would be able to settle their dispute before we delivered judgment. They have not been able to do so. Accordingly, in the exercise of our powers under ss 254(1)(*i*) and 257(1) of the CA, we order that

Evenstar be wound up, but to ensure a fair resolution between the parties, we order that the winding up be subject to the following conditions and directions:

(a) The order is stayed for a period of 30 days from the date hereof. Upon the expiry of this period, if the parties are unable to settle their dispute amicably, the winding-up order will take effect immediately. If the parties reach an agreement but cannot implement it fully, the order will be stayed for another 30 days, upon the expiry of which the winding-up order will take effect immediately.

(b) If the parties are able to settle their dispute fully within the aforesaid 30 days or 60 days, as the case may be, the winding-up order will cease to have effect from the date of the settlement.

(c) In the event that Evenstar is wound up, the liquidator(s) may allow Mike to acquire a sufficient number of Sinwa shares from Evenstar, whether by way of an *in specie* distribution or otherwise, to enable him to retain majority control of Sinwa, subject to due compliance with any applicable law or regulations or The Singapore Code on Take-overs and Mergers, as the case may be.

(d) Either party may apply to the High Court for such directions as they consider necessary for the liquidation of the assets of Evenstar in the manner most beneficial to both of them.

(e) As Mike is the real respondent in these proceedings, the value of the petitioner's share in Evenstar shall not be diminished by the costs and disbursements incurred by Evenstar in this appeal and in the court below, and such costs and disbursements shall be reflected solely against the value of Mike's share in Evenstar.

[note: 1]Respondent's Case at [41]-[42].

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