Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd
[2006] SGHC 190

Case Number : CWU 34/2005

Decision Date : 19 October 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Ooi Oon Tat and Nirmala Ravindran (Low Yeap Toh & Goon) for the petitioner; Philip Fong and Jacelyn Chan (Harry Elias Partnership) for the respondent

Parties : Summit Co (S) Pte Ltd — Pacific Biosciences Pte Ltd

Companies – Winding up – Petition to wind up company on "just and equitable" grounds by minority shareholder – Whether relationship between minority shareholder and majority shareholder irretrievably broken down and/or substratum of enterprise has disappeared – Whether petition functioning as means for minority shareholder to exit company at will – Section 254(1)(i) Companies Act (Cap 50, 1994 Rev Ed)

19 October 2006 *Judgment reserved.*

Belinda Ang Saw Ean J:

1 This petition is presented by Summit Company (S) Pte Ltd ("Summit") to wind up the respondent company, Pacific Biosciences Pte Ltd ("the Company") on the ground that it is just and equitable to do so under s 254(1)(*i*) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") in that, the relationship between Summit, as the minority shareholder, and the majority shareholders, Pasture Pharma Pte Ltd ("PPPL"), has irretrievably broken down. In addition, or as an alternative, Summit says that the substratum of the enterprise has disappeared.

2 The Company disagrees that the underlying facts of the case support the bases argued for by Summit. The operations of the Company are ongoing in that it has not ceased business. Counsel for the Company, Mr Philip Fong, contends that Summit was, by this petition, seeking to exit at will from the Company and that itself is not a case for relief under s 254(1)(*i*) of the Act. Simply put, there is no right generally to exit at will under the provisions of that subsection. Counsel also alleges bad faith on the part of Summit. The petition was initiated to bring about an improper or collateral purpose to force the majority shareholder to buy over Summit's shareholding on the latter's terms. On that latter ground alone, the petition should be dismissed.

The law on just and equitable winding up

3 Before I go into background facts and the details of the petition, I should state the basic points which have to be borne in mind in exercising the jurisdiction under s 254(1)(*i*) of the Act. There is little dispute in the parties' submissions as to the applicable principles of law.

4 The authorities cited by the parties serve to illustrate the application of the legal principles to the findings of fact by the court there. I need only refer to the recent decision of the Court of Appeal in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 ("*Evenstar*") which approved Lord Wilberforce's well-known exposition of the meaning of "just and equitable" in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 and concluded that the notion of fairness was the touchstone by which to decide whether the court should grant relief under s 254(1)(*i*) of the Act. Chan Sek Keong CJ (delivering the judgment of the Court of Appeal) stated at [31]:

> We accept that the notion of unfairness lie at the heart of the "just and equitable" jurisdiction in s 254(1)(*i*) of the [Act] and that that section does not allow a member to "exit at will", as is plain in 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.

5 The test for unfairness is an objective one. The test was stated by Nourse J in *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290, quoting the *dictum* of Slade J in *In re Bovey Hotel Ventures Ltd* (31 July 1981) as being "whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests".

6 Notably, the facts and circumstances making it just and equitable to liquidate the company must subsist at the time the order is made. Megarry J in *Re Fildes Bros Ltd* [1970] 1 WLR 592 at 597 said:

> [T]he question whether it is just and equitable to wind up the company is one which must be answered on the facts which exist at the time of the hearing. If on the facts existing when the petition was presented it was then just and equitable to wind up the company, but subsequently it has ceased to be so, I do not think a winding up order should be made. … No doubt if there were cogent grounds for complaint at the time when the petition was presented, but they afterwards melted away, there may be consequences in relation to costs: but a winding-up order under this head must be based on subsisting facts and not on past history.

7 Finally, a shareholder who tries to wind up the company under s 254(1)(*i*) in order to bypass the more appropriate and moderate remedies under s 216 of the Act is at risk of having his petition being struck out (*per* Chan CJ in *Evenstar* at [39]). If the company is a going concern in that it has not ceased trading, the court may look to see if there is a motive behind the petition to wind up the company. *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114 at 1142, [60] states:

> 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 …

Events leading to the filing of the petition

8 With these principles in mind, I turn to what is said in the petition, affidavits filed by the respective parties and their oral testimonies tested in cross-examination. I should clarify as I have referred to counsel by name in this judgment that Mr Ooi Oon Tat appeared before me as Summit's counsel and the closing submissions were later filed by Ms Nirmala Ravindran on behalf of Summit.

9 Summit is a company, which until June 2004 provided, *inter alia,* warehousing and logistics services to the Company. Its holding company is US Summit Corporation ("USSC"), a corporation organised under the laws of the Panama and with offices in New York, USA. It is a family business run

by one CC Wang and, amongst others, his son, Kenneth Wang ("Ken"). PPPL is a company involved in the sale and marketing of pharmaceutical products from overseas suppliers to the Asia-Pacific region. PPPL's director and shareholder is Soong Chin Kum Jonathan Lloyd ("Lloyd"). Summit and PPPL entered into commercial discussions that resulted in a broad agreement contained in or evidenced by a memorandum of understanding signed on 2 March 2000 ("the MOU"). The main objects of the MOU can be summarised as follows:

(a) The shareholding between PPPL and Summit shall be 75% and 25% respectively (cl 1.1).

(b) The objectives of the Company are to acquire new products as distributor for new principals and market existing ones (cl 2.1).

(c) The warehousing and distribution (*ie*, logistics and accounts receivable) services would be provided by Summit (cl 2.2).

(d) The day-to-day management of the Company would be the responsibility of PPPL (cl 4.1).

(e) Summit has a right to constant business review meetings to update each other or discuss new business strategies as well as the right to review the business and financial performance of the Company via regular management meetings (cl 4.2 and 4.3).

(f) The auditors of either party can inspect the accounting and other records of the Company (cl 4.4).

(g) The MOU can be terminated with one month's notice (cl 5.1).

10 The Company was incorporated on 11 May 2000. It was set up as a "total solution" company, providing sales, marketing as well as logistics and warehousing services. PPPL was to provide the sales and marketing services in relation to pharmaceutical products as well as to generate business opportunities. Summit was to provide warehousing and distribution services (as defined in cl 2.2 of the MOU) for the pharmaceutical products. Summit acquired 25% of the Company's issued share capital of 180,000 shares with PPPL acquiring the remaining 75% shareholding. In addition, Summit paid $64,250 to PPPL being 25% of PPPL's previous investments in various existing product lines as PPPL was to transfer these existing product lines to the Company for the latter to manage. The board of the Company consisted of two directors, namely, Lloyd and Summit's nominee, Ong Lam Huat ("Ong"), who was stationed in Malaysia on account of his responsibilities in Summit Malaysia Sdn Bhd. The MOU supposedly set out the principles and strategies in broad terms as the express intention was for the details of the association to be agreed in a formal joint-venture agreement. Significantly, no joint-venture agreement was drawn up and executed. The Company was managed based on the MOU and the affairs of the company were regulated by the terms of association contained in the articles of association, which were binding on the shareholders. However, the articles of association were not exhibited in any of the affidavits filed in these proceedings. The provision of warehousing and distribution services was detailed in a Distribution Agreement dated 1 January 2001. It was renewed on the same terms on 1 January 2003.

11 On 30 March 2004, Summit wrote to Lloyd giving the Company six months' notice to terminate Summit's Distribution Agreement dated 1 January 2003 on account of the restructuring of Summit's business. This came about as a result of the decision of USSC to cease its logistics business. At the hearing, Summit pointed out that it had a right under the Distribution Agreement to terminate the arrangement. It was not as if it had invoked any right under the MOU. Lloyd had no forewarning of

this decision. This termination led to the Company entering into an alternative warehousing and distribution arrangement with Diethelm Singapore Pte Ltd on or around 7 June 2004.

12 At around this time, CC Wang was suffering from health problems. He had left the restructuring of USSC's businesses around the world to his son, Ken, who is also a director of Summit. Ken, on the other hand, concerned with his father's health, delegated to Daniel Teh-Sen Mao ("Dan"), the vice-president of USSC, the task of resolving with Lloyd, Summit's participation in the Company following the termination of the Distribution Agreement.

13 Summit, in the petition, averred that it agreed with PPPL to "part amicably with PPPL buying out" the minority's shares in the Company. It was further averred that before discussing the price for its shares, Summit wanted a due diligence to be carried out on the Company to assist in determining a fair value of the Company and this was agreed to by Lloyd. Dan then instructed Summit's general manager, Lee Siew Fai ("Joseph"), to go through the financial statements and other financial information with the Company's finance personnel, Loe Chong Hui, ("Chong Hui"). On 10 May 2004, Joseph requested various documents from the Company and they included documents relating to the principal product lines.

14 Dan informed Lloyd in his e-mail of 1 June 2004 that in order to make an offer price, due diligence of the Company's books and records was required. By 1 June 2004, there was a hint of Lloyd's discomfort at dealing with Joseph, indicating his preference for dealing with Dan and Ong. Dan, however, insisted on relying on Joseph's accounting background to undertake the due diligence on behalf of Summit. On 2 June 2004, Dan sent to Lloyd a list of the documents he required for the due diligence. These included, *inter alia,* requests for all agreements between the Company and its principals; balance sheets for Financial Year ("FY") 2000, FY 2001, FY 2002 and FY 2003; sales and gross profit by reference to principal, product and customer respectively for FY 2000, FY 2001, FY 2002 and FY 2003 and also various supporting documents like cash flow statements, fixed assets listing and audit supporting schedules for FY 2000, FY 2001 and FY 2002 together with audit management letters. Lloyd's response of 6 June 2004 was that most of the requested documents were unnecessary, and all that was needed were the audited accounts as it was PPPL who was buying out Summit. Above all, Ong had signed the audited accounts. Dan remained adamant. On 9 June 2004, Dan again insisted on Summit's right to conduct a due diligence on the Company.

15 Lloyd met Dan and Ken in New York on 9 June 2004. The meeting was inconclusive. It listed as options the possible buyout by either party, or a continuance of the joint venture or even a sale of the Company to a third party. In cross-examination, Dan stated that whilst it was an option that was open to Summit to buy over PPPL's shares in the Company, it was not something that it "really … entertained".[note: 1] The same can be said of the option to inject additional funds into the Company and carry on with the joint venture. It is true that Lloyd never went back to Dan or Ken with his business proposals after the meeting in New York, but it is pretty obvious that recapitalisation was not something that Summit would equally entertain. It seems to me that much was said to assuage Lloyd particularly after some uncomplimentary remarks about him were inadvertently forwarded to Lloyd. Selling the Company to a third party was an option that was listed down but there was no interested buyer in the wings. On 24 May 2004, Lloyd had remarked about selling the Company to The Government of Singapore Investment Corporation Pte Ltd. Nothing, however, turns on this except that it may perhaps explain the thinking behind the riders to Summit's offer made on 24 November 2004 (see [22] below).

16 There was no notable progress after this June 2004 meeting. Still of concern to Summit was the due diligence it had wanted to determine the value of the Company. On 11 August 2004, Dan asked that Lloyd persisted in sending regular management reports to Summit. This reminder as I see

it, was made in the same vein as his instructions to Joseph not to sign Company cheques. It was Dan's way of getting Lloyd's attention. In cross-examination, Dan explained that Lloyd had not answered his e-mails for about a month and his instruction to Joseph was a means to an end, namely, to elicit a response from Lloyd whom Dan felt had been ignoring his e-mails. On 14 August, Lloyd complained about Joseph's refusal to sign cheques. Joseph replied the next day saying "it's just too onerous for me to simply sign cheques without knowing what's going on. I ask to be relieved of this task". Understandably, this caused Lloyd some degree of exasperation.

17 On 9 September 2004, Lloyd wrote to Ong to complain about Joseph's repeated refusal to sign certain cheques. Further, notice was given to dissolve the MOU; and at the same time, Lloyd made an offer of $3,202.50 for Summit's shares based on a valuation of five times of the Company's FY 2004 earnings. The offer was rejected. An amicable parting was still desired. After Ong's intervention, on his part, Lloyd was asked to withdraw the termination; otherwise they would have to resolve the sale of Summit shares within 30 days. Dan directed Joseph to resume signing cheques at the Company's premises, and to do so with the relevant documentation. He further instructed Joseph to make arrangements for the due diligence to be carried out at the Company's premises. As a result of these arrangements, Lloyd wrote on 21 September 2004 to rescind the 9 September 2004 letter giving notice to terminate the MOU. Lloyd also agreed to send regular managements reports in a template provided by Summit.

18 I note that the offer of 9 September 2004 was made after the accounts for FY 2004 were audited. According to Lloyd, he decided to wait for the 2004 accounts to be audited before putting forward any proposals. His explanation was that it would be more meaningful once the audit was done to begin to "look at what plans we could do".[note: 2]

19 On 16 October 2004, Lloyd on behalf of PPPL made another offer to Ong for PPPL to purchase Summit's shares in the Company for $23,500. Ong replied on 25 October, rejecting this offer. Ong also asked that the staff be informed to allow Joseph to audit the books and records of the Company.

20 Finally, between 28 October and 1 November 2004, Joseph, with two other assistants, was allowed on the Company's premises for the due diligence. However, Lloyd later on was of the view that Joseph was disrupting the day-to-day running of the business and wanted Joseph to leave on the evening of 1 November unless Lloyd was given an explanation as to why Joseph's continued presence was required. In Lloyd's view, past years' accounts had already been given to Summit and he asked, rhetorically, if there was a hidden agenda which he was not aware of. Joseph's position was that he was not allowed access to the documents supporting the audited accounts. Thus continued a series of e-mails about the auditing of the books and access to documents. Chong Hui maintains that she had shown Joseph and his two assistants, when they were in the office, the following documents and books of accounts:

(a) all the files and accounts for FY 2004, which includes the general ledgers, balance sheets, profit and loss statements and other relevant supporting documents including debit and credit notes, invoices and payment vouchers;

(b) accounts from July 2004 to September 2004 and the relevant supporting documents, which includes credit and debit notes, invoices and payment vouchers;

(c) general ledgers, balance sheets and profit and loss statements for FY 2001, FY 2002 and FY 2003 as well as supporting documents for invoices, debit and credit notes from July 2002 to June 2003;

(d) the Distribution Agreements; and

(e) a soft copy of the profit and loss statements from July 2003 to June 2004.

21 On 16 November 2004, Lloyd requested the following information: (a) materials Joseph had already gone through; (b) further documents Joseph required; and (c) an estimate of the time Joseph required to finalise the due diligence. Joseph replied on 22 November 2004 with his list of more documents he wanted sight of. It is the Company's position that between March 2001 and October 2004, the Company had provided copies of or made available various documents for Summit's inspection. Having spent three days at the Company's premises, Joseph and his team must have seen a lot more documents than he was prepared to admit to.

22 Accordingly to Dan, he became thoroughly exasperated with Lloyd so much so that he eventually made an offer that put aside any need for due diligence. As he put it in his e-mail of 24 November 2004, the buyback offer price "is … straightforward … no argument on valuation, no digging up under the carpet of PacBios, etc". Dan's counter offer of 24 November 2004, which was a rough-and-ready not "rocket science" formula for PPPL to purchase Summit's minority shareholding, was substantially more than Lloyd's offer. The buyback price would be the amount of Summit's original contribution in the sum of $109,250 and, if the Company was sold within a year of the buyback, Summit and PPPL would share any gain and loss but only for the non-premium component of $45,000 with a cap of 25% on the loss only. As Lloyd had still not reverted on this offer, Dan sent a chaser with a warning that if Lloyd did not reply, Summit would insist on an audit. On 8 December 2004, Ong wrote officially to Lloyd for inspection by Joseph of the Company's accounting and related records, as was Summit's right under cl 4.4 of the MOU. Lloyd on 12 December 2004 rejected Summit's proposal but was, however, agreeable to Summit buying out PPPL's shareholding based on Summit's proposed formula. Dan was not interested as Summit's decision was to dispose of its shares in the Company. Lloyd subsequently allowed Joseph to return to the Company's premises on 14 December 2004 to continue his audit. Joseph must have been denied access to some documents, because on 21 December 2004, the solicitors for Ong wrote to the Company for an inspection of the documents pursuant to s 199 of the Act. M/s Chio Lim & Associates were named as the firm of accountants to conduct the inspection. The Company rejected the request, citing a variety of reasons. In the meantime, Joseph continued to sign cheques for the Company.

23 The anticipated application under s 199 of the Act did not materialise. Instead, on 18 February 2005, Summit filed a petition to wind up the Company. On 23 February 2005, Summit obtained an *ex parte* order appointing Mr Kon Yin Tong and Mr Wong Kian Kok of M/s Foo Kon Tan Grant Thornton as provisional liquidators of the Company. The *ex parte* order was subsequently set aside on 12 April 2005. Joseph's affidavit in support of the application to appoint a provisional liquidator cited the reluctance of the Company or PPPL to allow the Summit to conduct an audit of the Company and its failure to provide management reports and maintained that unless a court order was granted, which would enable the provisional liquidators:

> … among others, to take charge and control of all the books of accounts and supporting documents of the Company, including those already warehoused, the true state of affairs of the Company or its financial position will not be known and given the Company's or PPPL's proposal to buy out the Petitioner's rights, share an interest in the Company for which the Petitioner paid a 'premium' and the Company only recently incorporated in 2000, I verily believe that they could be removed and not only the Petitioner but other creditors of the Company would be defeated in the distribution of the Company's assets to cover its liabilities.

24 I now turn to the two main contentions raised by Summit to wind up the Company on just

and equitable grounds.

Irretrievable breakdown in relationship

25 According to Summit, the breakdown in the relationship between shareholders arose in circumstances where there has been justifiable loss of confidence and trust in the managing director of the Company, Lloyd, who is also a director and shareholder of PPPL. The matters complained of were wide-ranging in the petition, but broadly, it was asserted in closing submissions that:

(a) the Company's accounts were irregular, specifically, in respect of an audit adjustment which made provision for $103,000 worth of discounts thereby reducing the profits for FY 2004 to $3,000. The audit adjustment was an attempt by PPPL to buy Summit's shares at an undervalue. Had there been no audit adjustment, the profits of the Company would have been $106,000 and using the same method of calculation, Lloyd's offer should have been $132,500 (25% share of $106,000 x 5 times earnings);

(b) the withholding of documents prevented Summit from ascertaining a fair value of the shares and it also left Summit to conclude that the Company had something to hide;

(c) PPPL made plans to transfer the Genzyme agency line for the product Thyrogen from the Company to PPPL in June 2004 without Summit's knowledge;

(d) there was a unilateral increase by the Company of the rent and administration charges;

(e) there was misuse of the Company's assets; and

(f) there was a drop in sales of the product, Abelcet .

26 In rejecting the assertions, the Company explained that the initial offer was not an undervalued offer. The offer was premised on the audited accounts for FY 2004 and was done on a willing buyer-willing seller basis. There was nothing in Summit's insinuation that the accounts of the Company contained irregularities or were not kept in a proper and acceptable manner. The audit adjustment in question was recommended by the auditors. Moreover, there was no withholding of documents. It is the Company's position that between March 2001 and October 2004, the Company had provided copies of or made available various documents for Summit's inspection. It also relies on Chong Hui's evidence on the documents she had made available to Joseph and his team between 28 October and 1 November 2004 (see [20] above). Besides, there was no reason for Summit to question the accuracy of the past audited accounts, especially, since Ong had signed on all these accounts. If anything, Ong as a director of the Company could have applied under s 199 of the Act to inspect the Company's accounts and supporting documents. On the allegation of misuse of Company assets, the complaint was that the Company purchased an increasing number of laptops though the number of employees had dwindled. The Company's position on this was that three laptops were purchased and in use by personnel. They had to be upgraded because of obsolescence. The Company's computers were still accounted for. On the issue of rental, it was explained that as the Company's premises were shared and before the incorporation of the company known as Truste, the rental of $3,100 was borne by the Company. After the incorporation of Truste in July 2004, the costs of renting the premises was split between three companies from September 2004 and the Company paid $2067.77.

27 In my judgment, this is not a case where as a result of a breakdown of the relationship between shareholders, the minority shareholder's director was removed from the company or excluded

from management. Notably, Ong is still a director of the Company and, under the MOU, day-to-day management of the Company was by agreement assumed by PPPL. Nothing has been said about the relationship of the directors (*ie*, Lloyd and Ong) and it was not the relationship of the directors that has broken down. Lloyd in the witness box said that it was Joseph whom he did not get along with. Indeed, the lines of communication between Ong and Lloyd were opened and there were instances where Ong was asked to speak to Lloyd. One such occasion in September 2004 was where Lloyd withdrew the notice of termination of the MOU after Ong had, what Dan described as, "a heart-to-heart talk"[note: 3] with Lloyd.

28 It is evident from Dan's answers in cross-examination (see [30] to [33] below), and I so find, that this is not a case where there has been an irretrievable breakdown in the conduct and management of the affairs of the Company. In *Loch v John Blackwood, Limited* [1924] AC 783, the Privy Council held that the relationship of trust and confidence between directors which had allegedly broken down must, under the just and equitable ground to wind up a company, lie in the management of the company. In that case, the board of directors was dominated by the majority shareholder whose acts led inevitably to the conclusion that he regarded the company as the product of his own labours and was trying to buy out the minority shareholders who were not directors, at an undervalue. The Privy Council held (at 788):

> It is undoubtedly true that at the foundation for applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

29 The context and background to Dan's and Joseph's involvement from May 2004 onwards is important. Summit in the petition acknowledged that the events that set the scene from which Summit says demonstrates or that this court should draw the inference that a winding up is fair and equitable were *after* the decision to end Summit's participation in the Company with PPPL buying out Summit's shareholding in the Company. This is also borne out by the respective testimonies of Joseph and Dan. I find the point in time particularly significant for the apparent irreconcilable differences in the ensuing seven months from May 2004 onwards were not directed at the conduct of the affairs of the Company as such but, in the final analysis, arose from the parties' inability to come to an amicable severance of their relationship. Dan's testimonies, which I have set out below (see [30] to [33]), reinforce this analysis of the evidence and the court's findings below.

30 By late November 2004, Summit had all but given up the idea of completing the due diligence exercise on the Company. Dan explained his offer of 24 November 2004 in these terms which was seen as an amicable way of extricating itself from the Company:

> … in one of my last telephone conversations with Lloyd, namely that of the 24th of November, I informed him that one amicable way out, given his refusal to allow the petitioner to inspect the accounting records, which generically means all the books, again however you wish to define them, of the company, was for the petitioner to buy off … the records of the company was to buy off the petitioner at the original cost with certain riders set out in my email of November 24 …[note: 4]

31 By late December 2004, Summit did not want to see the books and records of the Company. This is borne out by the averments in the petition and Dan's evidence:

> Q: So, between the 24th December and 18th of February 2005, you made the decision not to pursue the documents anymore?
>
> A: Correct.[note: 5]

32 On the averment in the petition that an application under s 199 of the Act would be futile, Dan's answers to Mr Fong's questions were as follows:

> Q: … that even if you have access to the books, unimpeded, without undue delay, it will not resolve the disagreement, the parties will still have ... to agree to a price?
>
> A: Well, as I've said, trying to do due diligence, come to a valuation, one can argue net book value, price earning ratios … there is a number of ways of doing it. So in order to even arrive prior to that, have some idea of what the company is worth, you need to do some ... to do the due diligence that we are talking about here, okay? So the answer would be yes.
>
> Q: Yes.
>
> A: I mean, then we'd have to haggle over the price after we've agreed on what is the valuation. And it is a time consuming ... it is costly and by that time as I have mentioned, either in February but probably in November and then October, the whole issue of, you know, winding up came up in our mind because of what we … you know, we had real suspicions about his behaviour and all these … all things which are outlined which ... you know, I personally … I mean, I don't want to put on record, you know, that I don't trust a guy but … all right, at that point, we didn't trust him. If we do section 199 today, we are still not going to resolve it.[note: 6]

33 Given the undisputed fact that the parties were unable to reach an agreement on a price for Summit's shares, the objective of taking out the petition was in keeping with the latter's desire to withdraw from the Company. Ms Ravindran submitted that by late December 2004, Summit had given up on pursuing due diligence. The logical solution in the circumstances was to wind up the Company, distribute assets and part ways.[note: 7] Dan confirmed this during cross-examination in these terms:

> Q: And … this entire exercise of filing a winding up petition has the collateral purpose of forcing Pasture Pharma to buy back the shares from Summit at a price favourable to Summit?
>
> A: The winding up petition is simply from what counsel tells me, a way of resolving shareholder disagreement in a format that we don't argue with him, he doesn't argue with us, a provisional liquidator is appointed either by the Court or some party… that they would dissolve the company and however the assets are deemed in terms of valuation would then be … I assumed shared, 75% shareholder Y, 25% shareholder Z. And the operations would cease. We have by this time … the filing [of the petition], you know, I mean it's not ... it's no longer an issue of valuation or buyback or whatever. I made the offer back in November just to make us … forget about valuations, forget about looking at books, forget about price earning ratios, net book value, just give us back what we've invested and let's just forget about it and just move on, okay.[note: 8]

34 In respect of the allegations and counter allegations, whatever may have been the rights and wrongs of what had gone on in the past several months on access to the books and records of the

Company for the due diligence to be completed from the perspective of Summit, the evidence all point to and were in connection with the parties having failed to reach an amicable agreement as to the terms of severance of the parties' relationship. It has to be remembered that the situation then was that the parties were agreed that the minority should leave the Company but had not reached an agreement as to terms of the buyout and to fix a price for the minority's shares.

35 If there was a breakdown at all in the relationship between the shareholders, in my judgment the breakdown was, and I so find, for lack of consensus as to the terms on which they were to amicably sever their relationship. Such disagreement is not a matter concerning the conduct of the company, but rather a dispute as to the disposal and value of the shares. In my judgment, there is no jurisdiction to wind up the Company on the just and equitable ground under s 254(1)(*i*) merely because shareholders cannot reach an agreement as to the terms on which they are to sever their relationship.

36 I am satisfied on the evidence before me that the winding up of the Company was seen by Summit as a mechanism to extricate itself from the Company. Summit's objective is consistent with a desire to exit the Company at will. That is, however, not an allowable basis under s 254(1)(*i*) of the Act. The legal position is affirmed in *Evenstar* ([4] *supra*) where Chan CJ said (at [31]) that the just and equitable ground in s 254(1)(*i*) does not permit a shareholder to exit at will from a company. *Evenstar* is distinguishable on its facts in that it was as Chan CJ (at [42]) said "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 Court of Appeal (at [43]) emphasised that, "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." At the outset, Evenstar was a dormant company with an issued share capital of two subscriber's shares and it was used by the two brothers as a vehicle to hold Sinwa Limited ("Sinwa") shares. There was a clear finding of fact that the majority shareholder did promise to allow the petitioner to "pull out" the Sinwa shares from Evenstar, *ie*, to allow the petitioner to exit Evenstar, as a condition for the petitioner's agreement as to the pooling of the Sinwa shares. Furthermore, the assurance was that the petitioner could exit from Evenstar by pulling out his Sinwa shares whenever he wanted provided that the majority shareholder was given a right of first refusal on these shares.

37 Reverting to Ms Ravindran's submissions that the majority had improperly denied the minority information about the Company's affairs and such denial of information justifies a winding up on just and equitable ground in that PPPL was trying to purchase Summit's shares at an undervalue, I have this to say. That assertion was premised on nothing more than Summit's suspicion.[note: 9] There were no proven improprieties. Suspicion was fuelled when the due diligence exercise to determine the value of the Company met with resistance from Lloyd who was said to have refused to open the books to representatives of Summit. The adjustments in the accounts to provide for contingent discounts caused further suspicion and misunderstanding. In my judgment, to succeed on this ground, Summit has to show that Lloyd lacked probity in the conduct of the affairs of the Company and that requires a finding that his object in keeping Summit in ignorance of the state of the Company was to acquire its shares at an undervalue. I find that in the present case, Summit has failed to prove a lack of probity on the part of Lloyd in the management of the Company's affairs unlike in the case of *Loch v John Blackwood, Limited* ([28] *supra*) wherein the court found that the object in keeping the petitioners who were not directors in ignorance of the state of the Company was to acquire their shares at an undervalue. Summit's case was founded on "suspicion" as Dan's testimony and Summit's closing submissions bear out. Paraphrasing Ms Ravindran's arguments, she said that the facts bespeak of a director representing the majority interests who withheld information from the petitioners in circumstances that gave rise to "reasonable suspicion" of the director's attempts to force a buyout of

shares at undervalue.[note: 10] The other director of the Company was Ong and he could have proceeded with the application under s 199 of the Act if he had wanted to follow up on the suspicions. That was not the concern of Summit. Notably, its concern as was submitted was that costs of appointing auditors to inspect the books and records pursuant to an application under s 199 could have wiped out any remaining net tangible assets of the Company.[note: 11] Lack of probity on the part of the director(s) in the conduct of the affairs of the Company has to be established before an order to wind up under s 254(1)(*i*) will be made (see *Chong Choon Chai v Tan Gee Cheng* [1993] 3 SLR 1).

38 There is an additional point. In the witness box, Joseph claimed that the sales discount of $103,000 was "fictitious". It was as he claimed "just to bring down the profit of the company to arrive a lower NTA for Mr Soong to then offer us at a … price".[note: 12] This was not covered in any of the affidavits he had previously filed. He claimed that he reached this conclusion after seeing the Statement of Affairs dated 16 March 2005 submitted by Lloyd after the appointment of provisional liquidators. A serious allegation of such *mala fide* conduct was not averred to in the petition and no leave was sought to amend the petition. It was therefore highly improper for Summit in closing submissions to maintain that the initial offer was disingenuous[note: 13]. In any case, I accept Chong Hui's evidence that it was the auditors who recommended the audit adjustments to the 2004 accounts. It can be seen from the documents relied upon by the Company that the adjustment on profit came from the auditors. Notably, Summit had moved on since the initial two offers from Lloyd to its own offer of 24 November 2004, which was not based on the value of the Company or audit adjustments. The alleged improprieties – Lloyd's refusal to make available all the books and records of the Company to Summit provided the ground for the "suspicion" that Lloyd or PPPL had something to hide thereby putting into question the integrity of the Company, the management and accuracy of the books of accounts and records of the Company – were afterthoughts to shore up the petition.

39 I should also comment on the argument that Summit was excluded from the management of the Company. It was argued that management reports were to be in lieu of regular business review meetings and management reports since January 2004 were not given despite chasers. The court should avoid evaluating the details of past dealings between the parties and more so in the absence of any evidence from Ong on the matter. Lloyd had testified that business review meetings were frequent between him and Ong and the previous general manager of Summit, David Teo. There is, in my view, no merit in the ill-founded averments in the petition that PPPL terminated the MOU on 9 September 2004 to avoid having to produce monthly management reports and stop any audit on the Company. If Summit will have us believe that to be true, it renders inexplicable the subsequent withdrawal of the notice of termination after Ong had spoken with Lloyd. Dan explained that Summit wanted an amicable parting of ways and to avoid the attendant costs and expense of accountants.

40 It cannot be said that the Company's business was crippled by the endless disputes between the shareholders. The apparent irreconcilable differences were, as I have found, not directed at the conduct of the affairs of the Company as such but arose from USSC's decision to get out of the logistics business and dispose of its shares in PPPL. Besides, the day-to-day running of the business management and operational decisions of the Company were decided by PPPL and this was not the type of case where the Company cannot continue to function because management decisions will always be deadlocked. At one stage, there were refusals to sign cheques, but this was no longer the situation. Summit continues to sign cheques save for a selected few that bear on the dispute between the parties. This is relevant as the court takes into consideration the facts and circumstances which are subsisting at the time the order is made (as to which see Megarry J in *Re Fildes Bros Ltd* [6] *supra* at 597).

Loss of substratum of the Company

41 The additional or alternative ground relied upon by Summit that winding up is just and equitable is the loss of substratum of the Company. From the time Summit pulled out of the logistics business, the picture was not of a company in hiatus. A substitute warehouse and distributor was found so that business could continue with as little interruption as possible. Dan's e-mail of 19 May 2004 assured Lloyd of Summit's logistical support until a substitute was found. At the time of the hearing, the Company has not ceased to trade. It is not to be overlooked that the Company is still engaged in business activities and has employees. Mr Fong submits that the Company has a niche business with a unique licence for importing a number of drugs like Thymoglobulin, an anti-rejection drug for transplant patients, Thyrogen, a drug for use in thyroid cancer patients on a named-patient basis and, Agrippal and Fluad which are influenza vaccines. These are matters that are also to be weighted in the balance in exercise of the court's jurisdiction.

42 It was mainly contended that despite the terms of the MOU that all lines of PPPL were to be transferred to the Company, that was not the case with the Spirig line of skin products which was billed by the principals of Spirig to PPPL who subsequently billed the Company. Lloyd said Ong was happy with that arrangement so long as the Spirig product was distributed by Summit through the Company. He had earlier explained to Ong that PPPL's agreement with Spirig was for the Asia-Pacific region and it was for PPPL to then appoint sub-distributors in the region and the sub-distributor for Singapore was the Company and the sub-distributor in Malaysia was Summit Malaysia Sdn Bhd. Ong did not testify at the hearing nor was an alternative view put forward to challenge Lloyd's testimony. I find the assertion that the non-transfer of the Spirig lines was a loss of the substratum of the Company to be untenable. It was to me yet another complaint dragged into issue to bolster the petition.

43 The petitioner has to show that the substratum of the business of the Company has gone or, in the words of Lord Justice Baggallay in *In re German Date Coffee Company* (1882) 20 Ch D 169 at 188, that there is an impossibility in carrying on the business of the company as at the date of the petition. It is, in my view, difficult to see how it can be said on the evidence before me that at the date of the petition it was impossible for the business to continue.

Section 199 of the Companies Act

44 As stated, Summit alluded to suspicion on its part that Lloyd had something to hide from the refusal to make available the books and records of the Company. Similarly, the accusations of misconduct and mismanagement in the conduct of the affairs of the Company were primarily based on suspicion. Summit recognised this but alluded that it was the best evidence it could offer to the court, having been denied access to the books and records of the Company, and the misconduct could only be successfully investigated after the company was wound up. Summit's reasons for not wanting to incur the expense of a s 199 application is no justification for its contention that misconduct can only be successfully investigated then. Rather than appoint provisional liquidators, Summit could have used s 199 to prove its suspicion because without the relevant information the director (*ie*, Ong) would not be in a position to (a) adequately carry out duties as a director of the Company; (b) to know whether the affairs of the Company have been managed in the best or, alternatively, a proper manner in the interests of the Company and of its members including, in particular, Summit; and (c) to have any idea of the true value of its shareholding in the Company. The third reason (c) was a matter Dan said he wanted to forego but there were the other two matters, (a) and (b), which are relevant to the probity question. Summit's claim that this was a case where the misconduct of the director can only be successfully investigated after the Company has been wound up is misplaced.

Other matters

45 Summit says on the one hand that it wanted to wind up the Company in order to enjoy a distribution of assets of the Company. In the next breath, it says that the Company is not a going concern in the sense that its net tangible assets as at 22 February 2005 were negative at minus $23,513.82. If that were so, there would be no assets, which a winding up would unlock and be distributed to enable each of the two parties to go its own way. In *Re Ah Yee Contractors (Pte) Ltd* [1987] SLR 383, L P Thean J in that case pointed out that a petitioner who is a shareholder of fully paid-up shares had to show that he had a tangible interest in winding up the company. This requires the shareholder to show that upon the winding up, after payment of all debts and liabilities of the company, there was a surplus divisible among the shareholders. If he is unable to do that, then the petitioner had no interest "sufficient to induce the court to interfere on [its] behalf" (*per* Thean J at 387, [11]). Section 257(1) of the Act was not brought to the judge's attention. Whilst that statutory provision appears to have altered the common law position as stated in *Re Ah Yee Construction (Pte) Ltd*, I will reserve for another forum to definitively decide on the point as it was not argued before me. Suffice it to say that despite s 257(1), the court still has a discretion not to, on the merits, grant an order to wind up a company (see *Halsbury's Laws of Singapore* vol 6 (LexisNexis, 2006 Reissue) at para 70.504).

46 For completeness, I should mention that a number of other points were ventilated, and many authorities cited. I have, however, not found it necessary to refer to them in this judgment having reached the views expressed above.

Result

47 For the reasons above, Summit has not made out a case under s 254(1)(*i*) of the Act. Accordingly, the petition is dismissed. I will hear parties on costs including costs in relation to the application for the appointment of provisional liquidators which have been reserved.

[note: 1]Transcripts p 112 line 32

[note: 2]Transcripts p 213.lines 26–29.

[note: 3]Transcripts p 119 line 8–9

[note: 4]Transcripts p 123 lines 3–9

[note: 5]Transcripts p 135 line 23–25

[note: 6]Transcripts p 137 line 1–18

[note: 7]Summit's closing submissions paras 99 & 101

[note: 8]Transcripts p 143 lines 10–24

[note: 9]Summit's closing submissions para 29(a)

[note: 10]Summit's closing submissions para 106

[note: 11]Summit's closing submissions para 100

[note: 12]Transcripts p 35 line 9–11

[note: 13]Summit's closing submissions para 37

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