IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 27

Court of Appeal / Civil Appeal No 22 of 2023

Between

Tan Yew Huat

… *Appellant*

And

Sin Joo Huat Hardware Pte Ltd

… *Respondent*

Court of Appeal / Civil Appeal No 3 of 2024

Between

Tan Joo See

… *Appellant*

And

Tan Yew Huat

… *Respondent*

GROUNDS OF DECISION

[Companies — Winding up]
[Contract — Mistake — Mistake of fact]

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Tan Yew Huat
v
Sin Joo Huat Hardware Pte Ltd and another matter

[2024] SGCA 27

Court of Appeal — Civil Appeal Nos 22 of 2023 and 3 of 2024
Steven Chong JCA, Belinda Ang Saw Ean JCA and Woo Bih Li JAD
25 June 2024

7 August 2024

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 These two appeals concerned disputes between two siblings over a property at 16 Simon Walk ("the Property") beneficially owned by a company, Sin Joo Huat Hardware Pte Ltd ("the Company") for which they were both directors and shareholders ("CA 3 of 2024") and the related question of whether the Company should be wound up on the just and equitable ground ("CA 22 of 2023").

2 The High Court judge ("the Judge") dismissed the winding up petition on the basis that voluntary winding up was available and should have been invoked in lieu thereof. The Judge also dismissed the claim for specific performance with respect to an agreement ("the Settlement Agreement") for the transfer of the legal and beneficial interest in the Property from one sibling to

the other. The Property was purchased with funds from the Company and was registered in the names of the two siblings as tenants-in-common in equal shares.

3 The claim for specific performance was resisted in the court below on the factual basis that the Settlement Agreement was not concluded between the siblings. The Judge, in his oral grounds, dismissed the claim on the basis that the Settlement Agreement did not bind the Company, for whom a trust was declared over the Property. However, in his Grounds of Decision ("the GD"), he found that a valid and binding Settlement Agreement was indeed concluded between the siblings but nonetheless dismissed the claim on a different basis. He found that the Settlement Agreement was void for common mistake at common law because both siblings shared the incorrect premise that the beneficial interest in the Property resided with them even though they held the Property on trust for the Company.

4 We heard the appeals on 25 June 2024 and delivered our brief oral grounds. We allowed the appeal in CA 3 of 2024 and held that the Judge was mistaken in his finding that the siblings operated on a common mistake. On the facts, it was plain from the objective evidence that there was no common mistake since both siblings were at all material times fully aware that they held the Property on trust for the Company. Under the terms of the Settlement Agreement, the shares of the sibling who was to receive the transfer of the Property would be transferred to the other siblings such that there would no longer be any basis or reason to wind up the Company upon the exit of the outgoing sibling. Accordingly, we dismissed the appeal in CA 22 of 2023.

5 These are our detailed grounds.

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The material facts

The Company

6 The Company was originally a sole proprietorship established by the siblings' late father ("the late Mr Tan"). It was incorporated in Singapore in 1987 for the wholesale of general hardware and the retail sale of spare parts and accessories for motor vehicles. Upon its incorporation, the siblings, Tan Yew Huat ("TYH") and Tan Joo See ("TJS") were designated as the only shareholders and directors of the Company, each holding one of the two issued ordinary shares.

7 Subsequently, following instructions from the late Mr Tan, the late mother of TYH and TJS ("the late Mdm Goh") and their two sisters, Tan Hong and Tan Ai Keow ("the Other Siblings"), became shareholders and directors of the Company. Despite not being a director or shareholder, the late Mr Tan made all decisions regarding the Company, After the late Mdm Goh's demise, TYH, TJS, and the Other Siblings remained directors and shareholders of the Company. At the time of these applications, there were 200,000 issued and paid-up shares of the Company. TYH held 33.7% while TJS and the Other Siblings each held 22.1% of the total shareholding.

8 By early 2007, TJS had resigned from her employment in the Company and ceased active involvement in both the Company and the family business, although she retained her shareholding and directorship in the Company. Sometime in 2014 or 2015, the Company's primary operations in heavy machinery and vehicles came to a halt as a result of the dispute involving TJS and the Property.

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The Property

9 The late Mr Tan invested the surplus funds of the Company by purchasing the Property, a landed residence, in 1991. This property was registered under the names of TYH and TJS as tenants-in-common, each holding an equal share. They held the Property on trust for the Company, as instructed by the late Mr Tan. Similarly, in 1997, the late Mr Tan caused the Company to acquire another landed residential property at 79 Jalan Chengkek ("the Other Property"). This property was also registered under the names of TYH and TJS as tenants-in-common and held by them on trust for the Company.

10 The dispute in relation to the Property began in around January 2014. At a meeting convened by TJS which was attended by herself, TYH, and the Other Siblings, TJS expressed her desire to have full legal and beneficial ownership of the Property. However, no agreement or resolution was reached at that meeting.

11 Subsequently, between July 2014 and July 2019, TYH and TJS entered into negotiations about the Property and TJS's stake in the Company through their respective solicitors. By a letter from TYH's solicitors to TJS's solicitors dated 29 December 2014, TYH proposed to transfer his entire interest in the Property to TJS for the latter to exit the Company:

> We have been instructed that our respective clients have reached a settlement of all corporate and family interest as follows which they propose encompassing in a Deed of Settlement:-
>
> **1. Transfer of [the Property] to [TJS]**
>
> Our client [TYH] will transfer his entire legal and beneficial interest in [the Property] to your client [TJS] free from encumbrances. Your client will be released of any duties and obligations arising out of and in respect of any Trusts previously declared by your client in favour of the Company and/or SJH with respect to this property. Your client will bear all costs

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> incurred in effecting this transfer including all stamp fees/ buyer additional stamp fees etc arising out of or in respect of the said Transfer.
>
> …
>
> Please note that the above offer for settlement, shall not be binding upon our clients unless it is unconditionally accepted by your client without any qualification whatsoever. In this respect, we hope that all parties would allow good sense, logic and reason to prevail to allow for an amicable and lasting resolution of all outstanding issues[.]

12 Other terms of the settlement proposal required TJS to transfer: the Other Property to TYH; all her shares in the Company to TYH and the Other Siblings in various proportions for nominal consideration; and her entire interest in Island Factor Sdn Bhd ("Island Factor") to TYH (Island Factor was a company incorporated in Malaysia by the late Mr Tan and his close friend Datuk Teoh Hai Hin ("Datuk Teoh") and Datuk Teoh's brother). TJS was also to close a fixed deposit account with Maybank Malaysia in her name and transfer the proceeds thereof to a related company in Malaysia.

13 Following the letter of 29 December 2014, TYH and TJS maintained communication through their respective solicitors, negotiating on issues such as the valuation of the Property and the passing of the requisite shareholder resolutions. In August 2015, the settlement proposal was purportedly accepted by TJS ("the Settlement Agreement"). TJS had been in possession of and residing in the Property since September 2015 after obtaining the keys to the Property from TYH through Datuk Teoh.

14 On 25 February 2022, TYH filed HC/CWU 50/2022 ("CWU 50") against the Company, seeking a court-ordered winding up of the Company under s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). Section 125(1)(*i*) allows the court to wind up a company if it is "just and equitable" to do so. About two months after CWU 50

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was filed, on 27 August 2022, TJS initiated HC/OA 74/2022 ("OA 74") against TYH, seeking absolute ownership of the Property pursuant to the terms of the Settlement Agreement. TJS opposed the winding up of the Company, while TYH contended that no agreement was reached between the parties; both matters were consolidated and heard together before the Judge.

The decision below

15 The Judge dismissed CWU 50. He held that central to the court's power to order a winding up on the just and equitable ground under s 125(1)(*i*) of the IRDA is the notion of unfairness, and unfairness may be established if the applicant is not able to exit the company without the court's intervention (GD at [19]–[24]). However, on the facts, there was no unfairness to justify a winding up order since TYH and the Other Siblings (who collectively own the majority shares) could have put the Company into voluntary winding up, and so there was nothing preventing them from exiting the Company (GD at [27]).

16 As regards TYH's argument that a voluntary winding up would not be viable because the Company was unable to sell the Property and the Other Property without TJS's agreement or cooperation (as TJS was the registered legal co-owner of the properties), it was incumbent on the Company, as the beneficial owner of the properties, to pursue legal recourse against TJS, instead of invoking the insolvency court's just and equitable jurisdiction (GD at [28]). The Judge also found TYH's contention that TJS would frustrate the voluntary winding up process to be unsubstantiated and speculative (GD at [30]).

17 The Judge dismissed CWU 50 on the basis that a voluntary winding up would not be an unfair means for TYH and the Other Siblings to exit the Company. As such, the Judge considered it unnecessary to decide (and did not decide) (a) whether the Company had lost its substratum, (b) whether there was

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an irretrievable breakdown in the relationship of mutual trust and confidence between the shareholders of the Company, and (c) whether CWU 50 should be dismissed as an abuse of process (GD at [28]–[31]).

18 The Judge also dismissed OA 74. He initially justified his decision in his oral grounds on the basis that the Settlement Agreement did not bind the Company, for whom a trust was declared over the Property and thus no order could be made for the transfer of the Property. However, in his grounds of decision, the Judge did not allude to this basis but instead stated that while TYH did make an offer containing the terms of the settlement proposal which was accepted by TJS, the Settlement Agreement was void for common mistake at common law as it rested on an incorrect premise that both parties shared when entering into the agreement, *ie*, both TYH and TJS had assumed that beneficial interest in the Property resides with them even though they hold the Property on trust for the Company (GD at [32]–[33] and [39]).

19 As the Settlement Agreement was void, specific performance could not be granted, and OA 74 was accordingly dismissed (GD at [39] and [46]).

The parties' submissions

20 TYH appealed against the Judge's refusal to wind up the Company on the just and equitable ground in CA 22 of 2023. He argued that the Judge erred in holding that where an applicant could put the company into a voluntary winding up, the court would generally require him or her to do so instead of seeking a court-ordered winding up. TYH had two main reasons:

(a) First, the "exit mechanism" referred to in the precedents encompasses only a contractual exit mechanism in a company's articles and does not include a voluntary winding up.

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(b) Second, there is no statutory requirement in the IRDA prohibiting an applicant from seeking a court-ordered winding up when the applicant could avail himself or herself of a voluntary winding up. It is established law that a court hearing a winding up application will not be precluded from ordering winding up simply because a minority oppression remedy would otherwise be available.

21 TYH further contended that even if the Judge was correct, he erred in finding that TYH could have put the Company into a voluntary winding up. In this connection, TYH reiterated TJS's history of adversarial conduct in support of his argument that TJS would likely stymie a voluntary winding up of the Company and would not cooperate with a liquidator appointed by TYH and the Other Siblings. In contrast, a court-ordered winding up, conducted by a court-appointed liquidator, would alleviate the prejudice and hostilities that might otherwise occur in a voluntary winding up.

22 On the other hand, TJS sought to affirm the Judge's holding that the availability of a voluntary winding up precludes the invocation of the court's just and equitable jurisdiction to wind up a company. While a voluntary winding up might be complicated by the parties' antagonism, this did not rise to the level of unfairness warranting a court-ordered winding up. TJS also repeated her assertion that CWU 50 was commenced by TYH in bad faith to avoid his obligations under the Settlement Agreement and hence CWU 50 should be dismissed as an abuse of process.

23 We now turn to TJS's appeal in CA 3 of 2024. In her appeal, TJS contended that the Judge erred in invoking the doctrine of common mistake to render the Settlement Agreement void. When entering into the alleged

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Settlement Agreement, both TYH and TJS knew that they hold the Property on trust for the Company. There was, therefore, no common mistake of that fact.

24 Predictably, TYH submitted that the Judge was correct in declaring the Settlement Agreement void for common mistake at common law. In the alternative, TYH sought to uphold the Judge's decision to dismiss OA 74 on account of the fact that the parties did not conclude the Settlement Agreement – contrary to the Judge's finding, no valid contract was formed as the settlement proposal from TYH was not accepted by TJS.

25 TYH additionally maintained that even if the Settlement Agreement was valid, a decree of specific performance should not be ordered on account of the following:

(a) First, TYH could not possibly compel the Other Siblings (non-parties to OA 74 and the Settlement Agreement) to vote in favour of any resolution authorising the Company to transfer its beneficial interest in the Property to TJS.

(b) Second, the equitable doctrine of laches should operate to preclude a remedy of specific performance as TJS had unreasonably delayed in the filing of OA 74 and filed it only after CWU 50 was brought by TYH.

(c) Third, TYH and the Other Siblings would suffer hardship should specific performance of the transfer of the Property be ordered with the transfer of TJS's shares to TYH and the Other Siblings, because TYH and the Other Siblings would be liable to pay hefty additional conveyance duties in respect of TJS's shares but such duties did not exist when the Settlement Agreement was concluded in 2014 (the duties are

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levied for the transfer of equitable interests of entities that primarily own residential properties in Singapore and it was not disputed that the Company was such an entity). Alternatively, should specific performance of the transfer of the Property be ordered without the transfer of TJS's shares, this would allow TJS to unfairly enjoy both the Property and the right to the proceeds of the Other Property and the Company's commercial property at Kaki Bukit as a shareholder. We can address the last point immediately as it is a non-starter. Obviously, TJS would have to transfer her shares in the Company as set out in the Settlement Agreement if the Property was to be transferred to her.

The issues

26 The following issues arose in CA 3 of 2024 for our determination:

(a) Was the Judge correct in declaring the alleged Settlement Agreement void under the doctrine of common mistake?

(b) If the answer is "no", was the Judge correct in finding that there was otherwise offer and acceptance and, therefore, a valid contract?

(c) If there was a valid Settlement Agreement, were there any merits to TYH's contention that specific performance should nonetheless not be ordered, and, more generally, should specific performance be ordered with respect to the terms of the Settlement Agreement?

27 As regards CA 22 of 2023, we had to consider if the Judge was correct in holding that there was no unfairness justifying the invocation of the court's just and equitable jurisdiction to wind up the Company due to the availability of a voluntary winding up.

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CA 3 of 2024

28 The two appeals were related. As the disposal of CA 3 of 2024 in favour of TJS would render CA 22 of 2023 moot, since TJS would consequently exit the Company, we dealt with CA 3 of 2024 first.

Was the Settlement Agreement concluded?

29 The dispute before the Judge was primarily on one factual issue *ie*, whether the settlement proposal by TYH dated 29 December 2014 was unconditionally accepted by TJS. The Judge held that the settlement proposal was indeed unconditionally accepted by TJS in August 2015 and confirmed in subsequent correspondence (GD at [34]–[36]). In our view, the Judge's finding on this issue was correct.

30 To begin, the 29 December 2014 letter from TYH's then-solicitors, Metropolitan Law Corporation ("Metropolitan Law") to TJS's solicitors, B T Tan & Company ("B T Tan"), containing the terms of the Settlement Agreement was undoubtedly an *offer* by TYH, as found by the Judge (GD at [33]). The terms of the settlement proposal were reflected in that letter which began by stating, "We have been instructed that our respective clients have reached a settlement of all corporate and family interest as follows which they propose encompassing in a Deed of Settlement …" The letter concluded with the following:

> Please note that the above *offer for settlement, shall not be binding upon our clients unless it is unconditionally accepted by your client* without any qualification whatsoever. In this respect, we hope that all parties would allow good sense, logic and reason to prevail to allow for an amicable and lasting resolution of all outstanding issues[.]
>
> [emphasis added]

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31 We observe that B T Tan's letter to Metropolitan Law on 12 March 2015 records, "[w]e are instructed that our client had never made or reached any agreement in respect of all the matters set out in your letter dated 29.12.2014." B T Tan further asserted that TJS had only agreed with TYH for the beneficial interest in the Property to be transferred to TJS in exchange for TJS transferring her shares in the Company and did not agree to the other matters stated in the settlement proposal.

32 Despite the above, the offer remained open. In its reply letter dated 20 March 2015, Metropolitan Law stated:

> Our clients reject the assertions made by your client in the aforementioned letter under reply and reiterate their position as set out and contained in our letter to you of the 29 December 2014.
>
> In view of your clients continued intransigent attitude and conduct, *our clients will await your client to reflect on all matters and decide for herself what she wants to do.*
>
> [emphasis added]

33 On 20 August 2015, Metropolitan Law wrote the following to B T Tan:

> We have been instructed by our clients that your client [*ie*, TJS] *is prepared to unconditionally accept* the terms of our clients' proposal as contained in and evidenced by our letter dated 29 December 2014 as addressed to your goodselves …
>
> [emphasis added]

34 Eventually, on 6 January 2016, B T Tan corresponded with Metropolitan Law by letter (erroneously dated 6 January 2015), alluding to a telephone conversation which took place between the solicitors in August 2015 when the offer was accepted:

> We also refer to the telephone conversation in August 2015 wherein our *Mr B.T. Tan spoke and confirmed to your Mr Devadas Naidu that our client had accepted the contents of your letters dated 29.12.2014* and requested your Mr Devadas

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> Naidu to forward to us all the necessary Transfer Forms in relation to the relevant immovable properties and company shares for our clients' execution.
>
> Pending execution of the Transfer Forms your client had handed over to our client the keys to and possession of [the Property].
>
> [emphasis added]

35 Metropolitan Law replied to the 6 January 2016 letter on 19 February 2016. Critically, it did not dispute the existence of the phone call nor the conclusion of the Settlement Agreement. The letter merely contained a request for Metropolitan Law to "have the updated Transfer with the consideration amount for [their] further perusal." This indicated that a settlement had been reached and the parties were working towards performing the terms of the Settlement Agreement. Above all, the parties did not dispute the authenticity or veracity of the letters in these proceedings. We note that B T Tan did not immediately write to Metropolitan Law to confirm the telephone discussion in August 2015 in which TJS accepted the settlement proposal stated in the 29 December 2014 letter from Metropolitan Law. This left much to be desired. Nevertheless, it was clear that TJS had accepted the settlement proposal through her solicitors. In our view, as the Judge found, it was evident that the settlement proposal was accepted in August 2015, thereby giving rise to a valid Settlement Agreement.

36 TYH sought to cast doubt on the existence of the Settlement Agreement by relying heavily on the parties' subsequent conduct. In *G-Fuel Pte Ltd v Gulf Petrochem Pte Ltd* [2016] SGHC 62 ("*G-Fuel*") at [50], the High Court held that subsequent conduct may be relevant in determining whether or not a contract was concluded between the parties. In support of this proposition, reference was made to another High Court decision in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 ("*Midlink*

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Development") at [39] where the High Court took into account the parties' subsequent conduct in determining the existence of an agreement.

37 In our judgment, subsequent conduct may be relevant in determining whether or not a contract was concluded *if* there is some ambiguity as to whether an offer was accepted. For instance, ambiguities may arise where the alleged agreement was evidenced by a number of documentary evidence or, on the other hand, where there is little to no documentary evidence (*ie*, in the case of oral agreements). Therefore, in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), this Court held at [60] that in the absence of objective evidence, the court will attempt its level best by examining closely the precise factual matrix in determining the existence of a concluded agreement. In our view, the factual circumstances to be considered would necessarily include subsequent conduct.

38 Indeed, some ambiguity and complexity arose in *G-Fuel* (where the agreement was evidenced by a number of text messages and emails) and *Midlink Development* (where an oral agreement was purportedly entered into at a meeting). The courts were therefore justified in considering subsequent conduct in those cases. However, where there is evidently a binding agreement, in the sense that the evidence clearly shows a written offer had been unconditionally accepted, as was the case here, subsequent conduct is irrelevant. Once an offer is accepted, it is converted into a binding agreement (*Gay Choon Ing* at [47]) and subsequent conduct cannot change that legal consequence. To the extent that the High Court in *G-Fuel* stands for the wider proposition that subsequent conduct can *always* be considered in determining if the parties have actually formed a contract, we respectfully disagree.

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39 In any event, contrary to TYH's assertion, the subsequent conduct in fact reinforced the finding that a valid contract was entered into, as evidenced by the parties' performance of the Settlement Agreement:

(a) First, TYH handed over the keys to the Property within a month *after* the Settlement Agreement was entered into. It was common ground that the family friend, Datuk Teoh, arrived in Singapore from Malaysia in September 2015 to mediate the dispute between the siblings, and it was at that point when TYH handed over the keys to the Property to Datuk Teoh, who passed them on to TJS. TJS subsequently took possession of the Property and renovated it using her own funds to live in the Property. A strong inference could therefore be drawn, from the overt steps taken by TJS after gaining possession of the Property, that TYH handed over the keys and granted TJS possession of the Property in *performance* of his obligations under the Settlement Agreement.

(b) Second, TJS transferred all her shareholding in Island Factor to TYH in July 2019. She was required to do this pursuant to cl 4 of the Settlement Agreement.

(c) Third, TJS accompanied TYH to close a UOB bank account in their joint names on 28 July 2017, with the credit balance transferred to TYH's bank account. This was consistent with TYH's obligation under cl 6 of the Settlement Agreement to "have her name removed as a signatory to this Bank Account".

40 The parties also took steps to transfer the Property and TJS's shares in the Company. This was clear from the various correspondence between B T Tan and Metropolitan Law following the Settlement Agreement, though the parties could not agree on the consideration to be stated on the transfer forms. To the

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extent that TYH was suggesting that the consideration for the transfer of the Property was outstanding, and this implied that there was no concluded agreement, we disagreed. The consideration was clearly spelt out in the Settlement Agreement. What the parties were mulling over was how the consideration in the transfer instrument should be reflected for the purpose of stamp duty, and in this regard, there was some discussion about the valuation of the Property. That was a separate point altogether and, in any event, had no bearing on the agreed consideration under the Settlement Agreement.

41 We should add that even after three years, Metropolitan Law continued to acknowledge the existence of the Settlement Agreement. Their letter of 19 July 2019 to B T Tan reads:

> To begin with, *we reiterate that there is already a binding agreement between our respective clients regarding the above matters as evidenced by exchange of letters between our respective terms*. The bundle of right and obligations created under the Agreement, in our vie[w] forms the basis of the consideration for the transfers of the property as well as the shares. This is clearly reflected in the said letters exchanged between our respective firms. *As such, what remains to be completed is to give effect to and/or implement the terms of this Agreement.*
>
> [emphasis added]

42 In light of the above, we upheld the Judge's finding that the settlement proposal was indeed unconditionally accepted by TJS in August 2015. The consequence is that a valid Settlement Agreement came into being at that point.

Was the Settlement Agreement void by virtue of common mistake?

43 However, the Judge went on to find, on his own initiative, that the Settlement Agreement was void on the basis of common mistake at common law (GD at [39]–[45]). In our judgment, there were several difficulties with this finding.

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44 At the outset, a defence of common mistake is necessarily fact-sensitive. However, TYH did not raise this defence at any stage during the hearing. It was also not raised by the Judge until it was featured in his GD. The Judge did not invite the parties to submit on common mistake though he specifically directed the parties to file further submissions in relation to the impact of available alternatives on the court's discretion to order winding up on the just and equitable ground. Therefore, the court did not have the benefit of further submissions from the parties on this issue since the defence of common mistake was not before the court.

45 With respect, the Judge erred first in considering the issue of common mistake and second, in examining it only with reference to the terms of the Settlement Agreement. Where the common mistake allegedly pertains to a misapprehension as to the facts in a situation where the parties are agreed on the terms of the contract, as was the case before us, the law is clear that the court is entitled and in fact required to examine all the factual circumstances including but not limited to the terms of the contract.

46 As the learned authors of *Chitty on Contracts* (Hugh G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty on Contracts*") explain (at para 5-001), common mistake arises when parties enter into a contract under a shared misapprehension as to the facts or law:

> … In the … situation [of common mistake], the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law.

The authors also explain (at para 5-002) that a common mistake stands in contrast to a unilateral mistake in that the latter arises when one party is mistaken over the terms of the contract or the identity of the other party, but the

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former arises when both parties labour under the same mistake regarding the subject matter or the underlying factual basis of the contract when entering into the agreement:

> For the purposes of the law, there is … [a] vital distinction between common mistake on the one hand and on the other: namely, that unilateral mistakes or mutual misunderstandings are relevant only if the mistake is over the terms (or the identity of one party), while the doctrine of common mistake concerns mistakes about the facts. … Common mistake cases are ones in which:
>
> > "… both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract."

47 The House of Lords decision in *Bell v Lever Brothers Ltd* [1932] AC 161 illustrates that in determining whether the contracting parties have entered into the agreement under a shared misapprehension of facts, the court is not limited to the four corners of the written agreement. In that case, Lever Brothers Ltd ("Lever Brothers") intended to terminate the employment of Bell and Snelling prior to the expiry of their employment contracts. To this end, Lever Brothers entered into separate compensation agreements with Bell and Snelling individually. However, unknown to Lever Brothers, Bell and Snelling had been in breach of their original employment agreements by engaging in private dealings and making profits whilst in the employment of Lever Brothers. This would have entitled Lever Brothers to terminate their employment summarily without the need for compensation.

48 The House of Lords found that this mistake was shared with Bell and Snelling because, as a matter of fact, they had been unaware, prior to the conclusion of the compensation agreements, that their private dealing and profiteering would have entitled Lever Brothers to terminate their original employment agreements without compensation. Both sides thus shared the same

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mistaken belief that Lever Brothers was not entitled to terminate the employment agreements without compensation. This *belief* was not part of the *terms* of the compensation agreements that were sought to be set aside but rather concerned mistakes about the facts that formed the underlying bases for the parties to enter into the compensation agreements.

49 In the present case, the purported common mistake was that both TYH and TJS were belabouring under the mistaken understanding that both had beneficial interests in the Property when, in fact, the beneficial interests resided with the Company. However, it was clear from the objective evidence before the court that there was in fact no common mistake because both were at all material times fully aware that they held the Property on trust for the Company and had not suggested otherwise. This was clear from the correspondence between TYH and the Company's auditors as well as the correspondence between the Company and the Inland Revenue Authority of Singapore and Singapore Land Authority. In our view, the fact that both were aware that the Property was subject to a trust in favour of the Company could also be gleaned from the 29 December 2014 settlement proposal wherein it was explicitly stated that TJS "will be released of any duties and obligations arising out of and in respect of any Trusts previously declared by [TJS] in favour of the Company … with respect to this [P]roperty".

50 We should add that while it is always open to a judge to raise a point not specifically addressed by the parties, as far as possible, the judge should always alert the parties of the potential relevance of the point and invite submissions from the parties. In this way, the judge would not only have the benefit of submissions from the parties, but more importantly, it would serve to vindicate the fair hearing rule.

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Should specific performance be ordered?

51 Having determined that the Settlement Agreement had been concluded and that there was no common mistake, we next considered whether a decree of specific performance should be granted in favour of TJS.

52 TYH raised several arguments to resist the order for specific performance, notwithstanding a finding that the Settlement Agreement was validly concluded (see [25] above). In our view, none of them had merit.

53 First, TYH contended that he could not compel the Other Siblings (non-parties to CA 3 of 2024 and the Settlement Agreement) who were aligned with him to vote in favour of any resolution to authorise the Company to transfer the beneficial interest in the Property to TJS. In our judgment, it was strictly unnecessary for TYH to compel the Other Siblings to vote in favour of the resolution. Under s 160(1) of the Companies Act 1967 (2020 Rev Ed), an ordinary resolution is sufficient, and this could be passed with the collective affirmative votes of TYH and TJS:

> **Approval of company required for disposal by directors of company's undertaking or property**
>
> **160.**—(1) Despite anything in a company's constitution, the directors must not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

54 For completeness, the Company's articles did not require a special resolution for the disposal of the Property. We should also add that the underlying factual premise of this argument was that the Other Siblings were not in favour of passing the requisite resolution. If TYH wished to pursue this argument, the burden lay on him to adduce the evidence. However, there was simply no evidence that the Other Siblings would oppose the resolution. Given

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that TJS was required to transfer her shares to TYH and the Other Siblings proportionately according to their respective shareholding percentages under the Settlement Agreement, we thought it unlikely that the Other Siblings were unaware of the terms of the Settlement Agreement. That said, it was strictly unnecessary for us to make this finding, since both legally and factually (based on the evidence before the court), there was no legal impediment for the Company to pass the resolution. There was also no need for us to speculate as to what steps the Other Siblings might take if the resolution is passed with the affirmative votes of TYH and TJS only.

55 Second, TYH sought to invoke the equitable doctrine of laches to preclude a remedy of specific performance. The operation of the doctrine does not depend on the length of delay *per se*. What is important to examine is whether the delay amounted to an abandonment of the contract and whether there was any unconscionability: see *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [46] and *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765 at [27]. Viewed from this perspective, this defence was a non-starter because any delay was due partly to the attempts by the parties to work out the consideration to be stated in the relevant transfer documents and partly to the parties' disagreement over the Settlement Agreement. Also, the fact that TJS was in possession of the keys to the Property with the consent of TYH, continued to be in occupation of the Property and had incurred expenditure to renovate the Property would defeat any suggestion of abandonment or unconscionability on her part.

56 Lastly, TYH complained that he and the Other Siblings would suffer hardship should specific performance be ordered because they would be liable to pay the additional conveyance duties in respect of TJS's shares when such duties did not exist at the time the Settlement Agreement was entered into. In

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our view, the additional conveyance duties, if any, would be the consequence of the delay caused by both parties. In any case, there was nothing unfair for TYH and the Other Siblings to pay the transfer duties as this was expressly provided for in cl 3 of the Settlement Agreement. Besides, TJS was likewise required to pay stamp duty for the transfer of the Property.

57 While none of the arguments raised by TYH had any merit, we were still left with the task of deciding whether specific performance should be ordered. Clause 1 of the Settlement Agreement remained infelicitously drafted to require TYH to transfer "his entire legal and beneficial interest" in the Property to TJS. In our judgment, specific performance should be granted.

58 In OA 74, TJS sought the following:

> 1. An Order directing [TYH] to procure and obtain the members/shareholders resolution [of the Company] approving the transfer of [the Property] freed of the trust in favour of the Company to [TJS].
>
> 2. An Order of Specific Performance by [TYH] to execute and deliver the Instrument of Transfer (in such form and manner satisfactory to [TJS]) of all [TYH's] legal and or beneficial interest in the said Property to [TJS] within seven (7) days upon receipt of the same from [TJS] or her solicitors failing which the Registrar of the Supreme Court is empowered to execute the said Instrument of Transfer pursuant to Section 14 Supreme Court of Judicature Act (Chapter 322) and to deliver the same to [TJS] or her solicitors.

59 Given our finding that there was no common mistake in that both TYH and TJS were, at all material times, fully aware that they hold the beneficial interest in the Property on trust for the Company, we found that cl 1 of the Settlement Agreement, which stipulated that TYH was to transfer his entire legal and beneficial interest in the Property to TJS, was intended to require TYH to procure the Company to transfer the beneficial interest in the Property to TJS. TYH was aware of the true legal effect of cl 1 and this was borne out by the fact

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that he did not assert that he had made any mistake in his interest in the Property. In short, by TYH's own case, there was no doubt as to what was required of him and TJS to effect the transfer of the legal and beneficial interest in the Property to TJS pursuant to cl 1.

60 Accordingly, we allowed CA 3 of 2024 and ordered TYH to take all necessary steps to procure the transfer of the Property to TJS free of the trust in favour of the Company. Likewise, TJS was to take all necessary steps to perform the outstanding terms of the Settlement Agreement. The parties were also to agree on the consideration for the transfer of the Property and we granted them liberty to apply in the event of any dispute over such consideration.

CA 22 of 2023

61 The effect of our decision in CA 3 of 2024 was that TJS would be required to transfer her shares to TYH and the Other Siblings. TJS would consequently exit the Company and CA 22 of 2023 was rendered moot.

Whether the availability of a voluntary winding up precludes a court-ordered winding up under s 125(1)(i) of the IRDA

62 In any event, we saw no basis to disturb the Judge's decision in dismissing TYH's winding up petition on the basis that TYH and the Other Siblings who were aligned with him could and should have proceeded with a voluntary winding up. In other words, we affirmed the Judge's view that, as a matter of law, the availability of a voluntary winding up is a factor which generally militates against the granting of an order to wind up a Company under the just and equitable ground pursuant to s 125(1)(*i*) of the IRDA.

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The applicable principles

63 The principles surrounding the court's jurisdiction to wind up a company on the just and equitable ground are well-established and can be gleaned from the following key decisions of this Court.

64 In *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*"), the appellant and his older brother ("Mike") pooled their shares in a company ("Sinwa") into a dormant company ("Evenstar"). The appellant was the sole minority shareholder in Evenstar, while Mike was the sole majority shareholder. Evenstar later transferred a parcel of Sinwa shares to a company ("KS Energy") in exchange for KS Energy shares. Although Evenstar subsequently acquired other assets, the shares in Sinwa and KS Energy remained the bulk of Evenstar's assets at the time the proceedings were heard. Eventually, the appellant petitioned to have Evenstar wound up on a just and equitable basis under s 254(1)(*i*) of the Companies Act (Cap 50, 1994 Rev Ed) ("Companies Act") (the predecessor provision of s 125(1)(*i*) of the IRDA). The appellant claimed, among other things, that Mike had assured him that if he ever wanted to withdraw his shares from Evenstar, Mike would buy him out, but Mike refused to do so. The appellant's petition was dismissed at first instance.

65 On appeal, this Court allowed the petition. Of particular relevance is this Court's holding that the notion of *unfairness* lies at the heart of the just and equitable jurisdiction under s 254(1)(*i*) of the Companies Act. This Court recognised that unfairness could arise in different situations and from different kinds of conduct in different circumstances but emphasised that "[i]t cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will" (at [31]). On the facts, this Court found that unfairness was present. The brothers' partnership in Evenstar was premised

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throughout on the fundamental understanding that their association would only continue as long as the appellant was a willing party. The appellant had a legitimate expectation of being bought out by Mike on reasonable terms if he sought to be bought out. This Court observed that the unfairness flowing from Mike's breach of his promise to let the appellant pull out from Evenstar was obvious as it left "[the appellant] trapped in Evenstar and placed him at the mercy of Mike" (at [42]–[43]).

66 We turn next to *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 ("*Ting Shwu Ping*"), where the plaintiff, Mdm Ting Shwu Ping ("Mdm Ting"), in both her personal capacity and as executor of her late husband's estate, applied to wind up Autopack Pte Ltd ("Autopack") and Scanone Pte Ltd ("Scanone") (collectively, "the Companies"). Autopack and Scanone were founded and operated by Mdm Ting's late husband ("Chng") and his partner, Chan Key Siang ("Chan"). Chng and Mdm Ting, on one side, and Chan and his wife, on the other, each held 50% of the shares in Autopack and Scanone. The Companies' articles governed the transfer of shares, giving the remaining members a right of pre-emption if an existing shareholder wished to transfer the shares, with the share price determined by the company's auditor in case of a dispute.

67 Following the breakdown of the relationship between Mdm Ting and Chan after Chng's death, Mdm Ting petitioned to wind up both Autopack and Scanone on the just and equitable ground. The High Court dismissed the petitions on the basis that they were (a) an abuse of process and (b) the just and equitable ground for winding up was not satisfied. Mdm Ting's appeal was dismissed by this Court.

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68 In respect of the just and equitable ground, this Court found that Mdm Ting's inability to extract any value from her shares because the Companies never paid dividends and Chan was unwilling to pay her a salary *prima facie* created unfairness justifying a just and equitable winding up (at [101]–[105]). However, since there was a buy-out mechanism in the Companies' articles for Mdm Ting to be bought out of the Companies at fair value, any such unfairness would be negated. Further, on the facts, Mdm Ting had no legitimate expectation that the buy-out mechanism in the articles would not apply and neither were there any issues with requiring Mdm Ting to avail herself of the buy-out mechanism (at [106], [108]–[109], [124] and [130]).

69 In *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*"), the respondents were three holding companies involved in an integrated development project that included a theatre, a hotel, a retail mall and a residential development. The two appellants collectively owned 50% of the shares in the respondents, while Chesham Properties Pte Ltd ("Chesham") held the other 50%. The articles of association of the respondent companies contained a clause ("Art 22") that provided a right of pre-emption for the remaining members if any member wished to transfer their shares. The share price was to be agreed upon or, in the event of a dispute, determined at fair value by the company auditor. Relations between the appellants and Chesham deteriorated, leading to a management deadlock. Despite this, the appellants were unwilling to invoke Art 22. They filed applications to wind up the respondent companies on the just and equitable ground under s 254(1)(*i*) of the Companies Act. Alternatively, they sought buy-out orders under s 254(2A) of the Companies Act. The High Court judge dismissed the winding up applications, stating that the appellants could not demonstrate the required unfairness to invoke the court's just and equitable jurisdiction. According to the

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judge, Art 22 eliminated any unfairness caused by the deadlock by providing the appellants with an option to exit the company at fair value.

70 The appeal to this Court was dismissed. Although this Court observed that the words "just and equitable" are words of the widest significance, they do not give the court *carte blanche* – the court's jurisdiction must be exercised with caution (at [40]). It held that in situations of deadlock, unfairness stems from the shareholders being locked into the company rather than the deadlock *per se*. It is a disaffected shareholder's inability to exit, and not the impasse or discord between the shareholders, which gives rise to unfairness. Even in situations where the shareholder is being marginalised or shut out from management, or where there is a loss of trust and confidence, it is the notion of being locked into such a situation that is unfair. As such, in the usual circumstances, having a mechanism for exit negates the unfairness required to justify winding up on the just and equitable ground (at [45] and [49]–[51]). Where the articles of association provided a mechanism for a disaffected shareholder to exit the company, this would usually negate the unfairness engendered by any deadlock unless there were extenuating circumstances, such as where the exit mechanism was arbitrary, artificial or contrary to the legitimate expectations of the parties (at [67]).

71 On the facts, Art 22 allowed a shareholder to exit the respective companies, and so there was no situation of "lock-in" on which a finding of unfairness could be made. While Art 22 did not expressly contemplate the situation of deadlock or specify which party should leave in the event of a deadlock, this was irrelevant. As long as the exit mechanism provided an option for the disaffected shareholder to be bought out of the company on fair terms, there would generally be no basis for the court to order a winding up on the just and equitable ground (at [59] and [68]–[69]).

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72 The following principles can be distilled from the above precedents:

(a) While the words "just and equitable" are words of the widest significance, they do not give the court *carte blanche.* The court's just and equitable jurisdiction under s 125(1)(*i*) of the IRDA must be exercised with caution, especially when such an order would have the effect of releasing the applicant from any obligation to comply with the scheme of things set forth in the company's constitution (*Perennial* at [40]).

(b) The notion of unfairness lies at the heart of the just and equitable jurisdiction under s 125(1)(*i*) of the IRDA (*Evenstar* at [31]; *Perennial* at [40]).

(c) Unfairness could arise in different situations and from different kinds of conduct in various circumstances (*Evenstar* at [31]). However, it does not arise just because a minority shareholder feels aggrieved or wishes to exit at will (*Evenstar* at [31]).

(d) It is a disaffected shareholder's inability to exit, and not the impasse or discord between the shareholders, which gives rise to unfairness. In the usual circumstances, having a mechanism for exit would negate the unfairness required to justify winding up on the just and equitable ground (*Perennial* at [45] and [49]–[51]).

(e) This is unless (i) the disaffected shareholder has a legitimate expectation that he is entitled to have his shares valued in some way other than that provided in the articles; or (ii) there is bad faith or plain impropriety in the respondents' conduct (*eg*, by conduct which has

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affected the value of the shares); or (iii) the articles provide for some arbitrary or artificial method of valuation (*Ting Shwu Ping* at [107(c)]).

73 It is unsurprising that the precedents did not expressly consider the situation where the petitioner could have placed the company into a voluntary winding up as a possible bar to the invocation of the court's just and equitable jurisdiction, as cases involving s 125(1)(*i*) of the IRDA (or its predecessor) would almost invariably be brought by a minority or equal shareholder. In the present case, however, TYH was on the side of the majority. As is apparent from our survey of the cases, unfairness lies at the heart of the court's just and equitable jurisdiction. The Judge was therefore correct in holding that the court would generally require an applicant to pursue a voluntary winding up if he is able to do so instead of invoking a court-ordered winding up under s 125(1)(*i*) of the IRDA.

74 While TYH was right in stating that there is no statutory requirement in the IRDA prohibiting an applicant from seeking a court-ordered winding up before pursuing a voluntary winding up, this misses the point as it is *still* for the petitioner to establish unfairness in persuading the court to exercise its just and equitable jurisdiction. It is in this context that the viability of a voluntary winding up becomes relevant in assessing whether there is unfairness. If a voluntary winding up is not viable, the petitioner would obviously have no corresponding duty to pursue it.

Application to the facts

75 On the facts, TYH and the Other Siblings who were aligned with him commanded more than 75% of the total shares of the Company. In the circumstances, any perceived unfairness to TYH and the Other Siblings would be negated by the availability of voluntary winding up, which would allow them

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to exit the Company. While TYH alluded to instances when TJS was difficult to deal with, it was not suggested that TJS had the means to completely stymie a voluntary winding up. TYH further submitted that a court-ordered winding up, which must be conducted by a court-appointed liquidator, would be preferable to a voluntary winding up as TJS would be less likely to adopt a hostile and antagonistic stance. However, as we pointed out during the hearing to counsel for TYH, Mr Favien Kang, his suggestion was speculative and regardless of whether a voluntary winding up or court-ordered winding up is to be pursued, TJS would be entitled to raise queries as a shareholder of the Company.

76 In the absence of any other evidence that a voluntary winding up was not viable, we upheld the Judge's decision in dismissing TYH's winding up petition on the ground that he ought to have pursued a voluntary winding up instead of seeking to invoke the court's just and equitable jurisdiction.

Other observations

77 Although we agreed with the Judge to dismiss CWU 50, in the interest of clarity, we should make some observations about the Judge's approach in relation to CWU 50. In evaluating the availability of an alternative option to exit the Company (which was not raised by TYH or TJS), the Judge did not examine whether, on the facts as presented by TYH, the petitioner, there was any basis to invoke the court's just and equitable jurisdiction as that was the ground advanced by TYH. In our view, such a *prima facie* assessment of the evidence was necessary to first determine the petitioner's application before examining alternative avenues such as voluntary winding up.

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Conclusion

78 For the foregoing reasons, we allowed CA 3 of 2024 and dismissed CA 22 of 2023. As costs should follow the event, TYH was ordered to pay TJS costs fixed at $30,000 inclusive of disbursements each for CA 3 of 2024 and CA 22 of 2023. The usual consequential orders were also made.

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Kang Kok Boon, Favian (Adelphi Law Chambers LLC) for the appellant in CA/CA 22/2023 and respondent in CA/CA 3/2024;
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