

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION**

Claim No. BVIHC(COM) 0641 of 2024

BETWEEN

JIN YAO HOLDINGS LTD

Applicant

and

[1] FOREVER WINNER INTERNATIONAL LTD

[2] SINO CENTURY HOLDINGS LIMITED

Respondents

Appearances:

Mr Mathew Collings KC (instructed by Kendall Law) and, with him, Mr John Carrington KC, of Kendall Law, for the Applicant

Mr Michael Todd KC (instructed by Carey Olsen BVI) and, with him, Mr Alex Hall Taylor KC, of Carey Olsen, BVI, for the Respondent

2025: April 10

May 14

JUDGMENT

INTRODUCTION, BACKGROUND, AND ISSUES

- [1] **MITHANI J [AG]:** In this application (“the Main Application”), the Applicant is JIN YAO HOLDINGS LTD (“the Applicant”). It seeks the appointment of joint liquidators (“the liquidation order”) over Forever Winner International Ltd (“the Company”), a company incorporated and registered in the BVI. The Main Application is made pursuant to s. 162(1)(b) of the BVI Insolvency Act 2003 (“the BVIIA 2003”) on the ground that it is “just and equitable” to do so.
- [2] The Applicant owns half of the issued shares in the Company. The other half is owned by the Second Respondent, SINO CENTURY HOLDINGS LIMITED.
- [3] The Main Application was brought by the Applicant by way of an Originating Application dated 20 December 2024. The Company is a notional respondent to the Application. SINO CENTURY HOLDINGS LIMITED is the second respondent to the Main Application.
- [4] The brief circumstances of the dispute between the parties are as follows.
- [5] The Applicant is a company owned and controlled by Yao Guoliang (“Mr Yao”) and, as noted above, owns 50% of the issued shares in the Company. The other 50% shareholder of the Company is the Second Respondent, a company owned and controlled by Wang Jiansheng (“Mr Wang”). Mr Wang and Mr Yao are the only directors of the Company. Just as counsel did before me, I will, for the sake of convenience, when referring to Mr Yao or the Applicant, include either or both of them (or any company or entity controlled by them), as the context may require; and, likewise, when referring to Mr Wang or the Second Respondent, include either or both of them (or any company or entity controlled by them), also as the context may require.
- [6] The Company was incorporated as a quasi-partnership between Mr Wang and Mr Yao to hold shares in Strong Petrochemical Holdings Limited (“SPHL”), a company incorporated in the Cayman Islands. The shares in SPHL are listed on the Main Board of the Stock Exchange of Hong Kong Ltd. The Company holds 1,041,746,000 shares in SPHL, representing 49.06% of SPHL’s issued shares. The other shareholders in SPHL and the percentage shares they own in that company are:

- (a) Mr Yao: 5.89%;
- (b) Speed Success Group Limited, one of Mr Wang's companies: 2.38%; and
- (c) Hongkong Hengyuan Investment Limited ("Hengyuan"): 16.65%.

- [7] Mr Wang is a director of SPHL; Mr Yao is not. Mr. Yao resigned as a director of SPHL on 24 January 2025, one day before an extraordinary general meeting of SPHL, which Linda Chan J in the Court of First Instance in Hong Kong had directed to be held. The purpose of the meeting and the background circumstances relating to it are set out in Mr Wang's first affirmation and do not require further mention here.
- [8] Mr Yao maintains that SPHL is controlled by Mr Wang because, together with Hengyuan, which holds 16.65% of the shares in that company (with whom Mr Wang has a strong association and with whom he is alleged by Mr Yao to act in concert), they exercise shareholder-control over SPHL. Mr Yao also says that Mr Wang now has control of that company at directorial and managerial level because he, together with his son, are the only operational directors of the company.
- [9] Mr Wang and Mr Yao each make serious allegations against the other. Mr Yao states that Mr Wang, whether acting directly or indirectly, *inter alia*: (a) secretly and wrongfully purported to remove Mr Yao as a director of the Company and then concealed it so as to be in control of voting (or disenfranchising) the Company's shareholding in SPHL for the purpose of meetings convened by SPHL; (b) denied access to Mr Yao of information relating to the Company; (c) wrongly held up the payment of dividend from SPHL to the Company; (d) obstructed Mr Yao from having any access to the books and records of the Company; (e) wrongly presented a winding up petition against SPHL, which caused SPHL's share price to slump by more than 40% from HK\$0.216 within a matter of some 4 weeks; (f) submitted a requisition for an EGM of SPHL to consider resolutions to remove all of its directors of SPHL (including its independent non-executive directors) except for Mr Wang in purported breach of SPHL's articles of association and the Hong Kong Stock Exchange Listing Rules in an attempt to hand over unfettered control of SPHL to Mr Wang, which is ultimately what happened because the resolution was passed; (g) has been guilty of serious financial wrongdoing in respect of SPHL; (h) before gaining control of SPHL, sent letters to SPHL's major banks which led to its accounts being frozen, an inability to

pay wages and a halt in trading; and (i) secretly accumulated shareholdings in SPHL in breach of regulatory requirements.

[10] Mr Wang alleges that Mr Yao's motive for bringing the Main Application is due to his desperate desire to hold onto the management and control of SPHL against the wishes of the other shareholders of SPHL, following the breakdown in the negotiations that took place between him and Mr Wang in October 2024 regarding a buy-out by Mr Wang of Mr Yao's interest in SPHL. He further alleges that Mr Yao was guilty of serious wrongdoing by attempting, directly or indirectly, to misappropriate the assets of SPHL.

[11] Each party, therefore, makes serious allegations of impropriety against the other.

[12] For reasons which will become apparent, it is not necessary for me to say much more about the background facts and circumstances, other than to mention that there have been, and continue to be, several sets of proceedings between Mr Wang and Mr Yao in Hong Kong and elsewhere. Nor is it necessary for the allegations that each party makes against the other to be tested at this stage. It may be necessary for findings to be made about those allegations at the hearing of the Main Application if the Main Application proceeds to a final hearing.

[13] It is common ground between the parties (for the purposes of the Main Application) that the Company is "deadlocked". There is no suggestion by either party that the Company is, or may become, insolvent. Mr Yao's position is that this Court should exercise its discretion in favour of making a liquidation order against the Company under s. 162(1)(b) on the basis that it is deadlocked. Mr Wang states that a liquidation order is not appropriate because Mr Yao has failed to pursue other remedies available to him before seeking the liquidation order, including refusing to accept an offer by Mr Wang for the purchase of Mr Yao's shares at a fair price. He says that to allow Mr Yao to pursue the Main Application, in such circumstances, would be an abuse of the process of the Court. He accordingly applies to strike out the Main Application by way of an ordinary application dated 28 January 2025 ("the Strike Out Application").

[14] Mr Yao applies, by way of an ordinary application dated 14 January 2025, for the appointment of joint provisional liquidators ("the JPL Application") to the Company pending the final hearing of the Main Application. He does so on the basis that there is an urgent need to safeguard the Company and its assets. Specifically, he states that there is a valuable dividend due to the

Company, which needs to be secured for the Company, and which may be in jeopardy if Mr Wang is allowed to decide, by his control of SPHL, whether or not that dividend is paid.

- [15] I will refer to the Strike Out Application and the JPL Application collectively as “the Ordinary Applications”. There was what I thought was another issue that I needed to decide – see para. 79 of Mr Todd’s skeleton argument, but Mr Todd confirmed that this was not so.

THE LAW

- [16] For the purpose of determining the Ordinary Applications, it is not necessary for me to set out a detailed exposition of the law governing the Main Application. What follows is a brief treatment of that law, so far as it is relevant to the determination of the Ordinary Applications. I will deal with the law that governs the Ordinary Applications in the course of my analysis of the merits of each application.

- [17] Section 162(1)(b) of the BVIA 2003 provides that the court may, on the application of, among others, a member, appoint a liquidator of a company under s. 159(1) of that Act if the court is of the opinion that it “is just and equitable” to do so. However, this provision is subject to s. 167(3), which states that:

“Where an application to appoint a liquidator is made by a member under section 162(1)(b), if the Court is of the opinion that:

- (a) the applicant is entitled to relief either by the appointment of a liquidator or by some other means; and
- (b) in the absence of any other remedy it would be just and equitable to appoint a liquidator, it shall appoint a liquidator unless it is also of the opinion that some other remedy is available to the applicant and that he or she is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy.”

(Emphasis supplied).

- [18] The leading authority in this jurisdiction on the application of the above statutory provisions is **Chu v Lau [2020] UKPC 24**, a decision of the Privy Council, on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court. In the context of my determining the Ordinary

Applications, it is only necessary for me to refer to the following passages of the opinion of Lord Briggs (with whom Lord Hodge, Lord Leggatt, and Lord Burrows agreed):

[13] Remedies in the alternative to a just and equitable winding up include relief for the company itself, available by means of a derivative action and relief available on proof of unfairly prejudicial conduct, under Pt XA of the BVI Business Companies Act 2004. Relief for unfair prejudice includes a court order for a buy-out, the appointment of a receiver or the appointment of a liquidator under s 159 of the 2003 Act, on the just and equitable ground in **s. 162(1)(b)**.

[14] A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level. Functional deadlock of this paralysing kind was first clearly recognised as a ground for a just and equitable winding up by **Vaughan Williams J in Re Sailing Ship Kentmere Co [1897] WN 58**, a decision on the jurisdiction conferred by **s 79 of the (UK) Companies Act 1862 (25 & 26 Vict, c 89)**.

[15] Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership. This jurisprudence was developed as an aspect of the law of partnership in England in the mid-19th century, and is exemplified in the following passage from the judgment of **Sir John Romilly MR in Harrison v Tennant (1856) 21 Beav 482 at 496–497, (1856) 52 ER 945 at 951**: 'I do not base my decision upon any particular reported case, but upon the principle that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that taking all these matters together, it makes this a case in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership.'

It is clear, for example from **Pease v Hewitt (1862) 31 Beav 22, (1862) 54 ER 1045 and Atwood v Maude (1868) LR 3 Ch App 369 at 373**, that a dissolution of a partnership might be ordered even where both parties were to blame for the breakdown in mutual trust and confidence.

...

[18] The well-known leading case on whether a company is a quasi-partnership is **Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492, [1973] AC 360**. It contains a summary of the circumstances in which the relationship between the

members of a company may cause their strict legal rights to be subjected to equitable considerations which has stood the test of time. **Lord Wilberforce** said this ([1973] AC 360 at 379–380, [1972] 2 All ER 492 at 499–500): 'The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[19] The **Ebrahimi** case reinforces the principle that an applicant for a just and equitable winding up is not barred from his remedy merely because the breakdown or deadlock upon which he relies has been caused to some extent by his own fault ... [per **Lord Cross** ([1972] 2 All ER 492 at 503–504, [1973] AC 360 at 383–384) ...

[20] It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word. As is clearly enshrined in s 167(3) of the 2003 Act, the court carries out a three-stage analysis, asking:

(a) Is the applicant entitled to some relief?

- (b) If so, would a winding up be just and equitable if there were no other remedy available?
- (c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding up?

[21] The legal burden of proof is on the applicant at stages (a) and (b). But it shifts to the respondent at stage (c) ... In **Re a company (No 002567 of 1982) [1983] BCLC 151 at 158, [1983] 1 WLR 927 at 933, Vinelott J** held that 'other remedy' in s 225(2) was not limited to a statutory remedy provided only by the court. For example, an unreasonable refusal to accept a fair offer for the applicant's shares might bar relief by way of winding up. The Board agrees with this analysis."

THE STRIKE OUT APPLICATION

Introduction

- [19] Mr Wang resists the application for the liquidation of the Company on various grounds, including that the remedy of liquidation is not appropriate because Mr Yao has not pursued all the remedies available to him before seeking the liquidation order. As part of his case on this ground, he says that he has made a reasonable offer for the purchase of Mr Yao's shares in the Company, which Mr Yao has unreasonably refused to accept.
- [20] As Lord Briggs observed in **Lau**, at [21], the failure to pursue an alternative remedy is not restricted to a remedy specified in a statutory provision, such as bringing a derivative claim under s. 184C of the Business Companies Act 2004 ("BCA 2004")¹. It will also include an unreasonable refusal to accept a fair offer for the purchase of the applicant's shares.
- [21] Mr Wang contends that the refusal on the part of Mr Yao to accept his offer for the purchase of Mr Yao's shares in the Company on the terms was unreasonable. Accordingly, he submits that it would not be appropriate for the Main Application to be continued any further. The Strike Out Application is primarily brought on that ground.

¹ In the case of a petition to wind up a company under s. 122(1)(g) of the Insolvency Act 1986, as it applies to England and Wales ("IA 1986"), an appropriate alternative remedy would include putting the company in administration under s. 8 of, and Sch B1, to that Act: see *Re The Whitehall Partnership Ltd, Taylor v The Whitehall Partnership Ltd and another* [2023] EWHC 596 (Ch), [2023] 1 BCLC 495. However, that remedy is not available in this territory, not just because there would be no basis for the making of an administration order on the facts but, more importantly, because the provisions of Part III of the BVIA 2003, governing the making of administration orders, though implemented, have not been brought into effect. That was presumably why Lord Briggs did not refer to the possibility of that remedy being available in *Lau*.

[22] The Strike Out Application is made under r. 11.15 of ECSC CPR². The relevant terms of that provision state:

“In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that ... (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings ...”

[23] The basis upon which the Strike Out Application is made is summarised in the Strike Out Application in the following terms³:

- “6. On 19 December 2024 (prior to the filing of the J&E Application [i.e., the Main Application] and PL Application [i.e., the JPL Application]) the Applicant [i.e. Mr Wang] made the Second Respondent [i.e. Mr Yao] an offer to purchase all of its shares in the Company at a valuation to be undertaken by an independent accountant to be appointed by agreement, with the valuation to be conducted in accordance within the framework set out in O'Neill v Phillips [1999] 1 WLR 1092 (the "Offer").
7. The Second Respondent [i.e. Mr Yao] has failed to engage with the Offer and has persisted in pursuing its J&E application and PL Application notwithstanding the Offer.
8. In the circumstances, the Applicant [i.e. Mr Wang] respectfully requests that the Court strike out both the J&E Application and the PL Application on the grounds that the J&E Application, and therefore the PL Application filed in support of it, are (a) an abuse of process and/or (b) some other remedy is available to the Applicant [i.e. Mr Yao] and it is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy.”

Mr Wang's offer to purchase Mr Yao's shares

² They are applied to insolvency proceedings in the BVI (to include proceedings brought under s. 162 of the BVIA 2003) by r. 4 of the Insolvency Rules 2005.

³ The Strike Out Application erroneously refers to r. 11.5, instead of r. 11.15. In addition, the Court has an inherent jurisdiction to strike out an originating or ordinary application, though this is not expressly referred to in the Strike Out Application. The Strike Out Application also refers to the application to strike out being made on the ground that the Originating Application does not disclose a reasonable ground for appointing a liquidator. However, that ground has not been seriously pursued by Mr Wang.

[24] The principal basis of the Strike Out Application is summarised in the following terms at para. 18 of the skeleton argument lodged by Mr Michael Todd KC, who appears with Mr Alex Hall Taylor KC, on behalf of Mr Wang:

- “a Mr Wang has made an Offer to purchase Mr Yao’s shares in FWIL at a fair value and in compliance with those terms identified by Lord Hoffmann in **O’Neill v Phillips [1999] 1 WLR 1092**.
- b Acceptance of that Offer would give Mr Yao all that he could reasonably hope to receive in a winding up of FWIL. Such an Offer is an alternative remedy available to Mr Yao.
- c Mr Yao is acting unreasonably in seeking to have a liquidator appointed instead of accepting that offer.”

[25] To counter Mr Wang’s offer for the purchase of Mr Yao’s shares in the Company, Mr Yao decided to make a broadly similar offer for the purchase of Mr Wang’s shares in the Company. That offer is contained in a letter dated 12 February 2025, sent by Kendall Law, his legal practitioners, to Carey Olsen who act for Mr Wang.

[26] I agree with Mr Todd that the offer made by Mr Yao has little relevance to the Strike Out Application. The issue for this court on the Strike Out Application and the Main Application is not to decide whose offer is better. It is instead the more specific question of whether the offer made by Mr Wang is such as to make it unnecessary for the Main Application to proceed because it is the best that Mr Yao can hope to receive from any return of capital if the Company were to be liquidated.

[27] Mr Wang’s offer (“the Purchase Offer”) is contained in a “Subject to Contract” letter dated 19 December 2024 sent by Carey Olsen to Appleby, Mr Yao’s previous legal practitioners. The relevant terms of that offer are as follows:

“Instead of a winding up of the Company, our client is willing to purchase Mr Yao’s shares in the Company, as has been proposed by HKEx to address its serious regulatory concerns about Mr Yao’s continued influence on the directors and management of an HKEx-listed company.

Our client accordingly proposes, subject to contract and following the mechanism and guidance set out in **O’Neill v Phillips [1999] 1 WLR 1092**, to purchase all of Jin Yao’s shares in the Company at a valuation to be undertaken by an independent accountant to be appointed by agreement, with the valuation made on the following basis:

1. Jin Yao's shareholding will be valued at a fair value as between a willing buyer and a willing seller on a pro rata basis;
2. the valuer shall take account of the assets, profitability and prospects of the Company;
3. the valuation will be as at the date of this letter;
4. for the purposes of making submissions to the valuer, each party will have full access to all financial information concerning the Company;
5. the valuer will act as expert not arbitrator, and shall not give reasons for his decision;
6. The parties shall be bound by the decision of the valuer, which shall be final; [and]
7. The costs of the expert valuer be shared equally between the parties.'

[28] Mr Mathew Collings KC, who appears with Mr John Carrington KC, on behalf of Mr Yao on the Ordinary Applications, contends that **O'Neill v Phillips** does not apply to an offer of the type made in the Purchase Offer because **O'Neill v Phillips** involved an offer made by a majority shareholder to buy out the shareholding of a minority shareholder whereas this case concerns the buy-out of shares made by a 50% shareholder of the other 50% shareholder in a company that is deadlocked: see **O'Neill v Phillips** [1999] 1 WLR 1092 at 1101H, and 1107A-B; and **Harborne Road Nominees Ltd v Karvaski** [2011] EWHC 2214 (Ch), [2012] 2 BCLC 420, at [26].

[29] I agree with Mr Collings. However, whether **O'Neill v Phillips** applies to a situation such as this is not of any material significance. So far as the pursuit of an alternative remedy is concerned, this Court must consider every remedy reasonably available to an applicant that he has unreasonably failed to pursue before deciding the appropriateness of making an order for the appointment of a liquidator under the just and equitable ground. The position was correctly summarised by His Honour Judge David Cooke, sitting as a Judge of the High Court, in **Harborne Road Nominees Ltd v Karvaski** [2011] EWHC 2214 (Ch), [2012] 2 BCLC 420, at [26]:

"The question for the court is always whether in all the circumstances of the case the applicant has satisfied the conditions required to have the petition struck out, or summary judgment in his favour given on it. Mr. Shaw accurately

summarised as being that it must be shown that the continued prosecution of the petition after the making of the offer amounts to an abuse of process, or was bound to fail. The issue is highly sensitive to the facts and circumstances of each case, and consideration of the nature and terms of any offer made can only ever be an intermediate step in the process.”

[30] Judge Cooke went on to say, at [27]:

“One obvious difference between this case and **O'Neill v Phillips** is that Mr Morris is not a minority shareholder but an equal 50% shareholder, and he alleges that the company was established and run as a quasi-partnership. In fact he is willing to consider the sale of his shares to Mr Karvaski (that is the order he seeks) but in such cases, it is by no means always obvious which of two equal holders should sell to the other. Lord Hoffmann's remarks were not made in this context, but were expressly about cases where there is a majority shareholder. Ultimately, in a breakdown of relations between a majority and a minority shareholder, the solution is likely to be that the minority shareholder must exit the company, or be offered the opportunity to do so on fair terms. In the case of equal shareholders however, particularly if they are quasi-partners, there is a clear potential for injustice if one of them is able to seize de facto control of the company and effectively force the other either to accept his offer to buy or be forever excluded from the participation that he bargained for and cut out from any remedy in respect of what would be a continuing breach of the quasi-partnership arrangement originally made. Lord Hoffmann's remarks were not intended to have the effect of establishing a mechanism for seizure and exclusion.”

[31] I agree with Judge Cooke. The Court must, in a case such as this, carefully consider the terms of the offer to purchase the shares of the equal shareholder in order to decide whether it is reasonable and whether it is being unreasonably refused by the other equal shareholder. It must do so by reference to all the circumstances of the case. Just because the offer appears on its face to be reasonable does not mean either that it is reasonable or that it has unreasonably been refused by the other shareholder if, to quote Judge Cooke, “there is a clear potential for injustice, [such as where] one of them is able to seize de facto control of the company and effectively force the other either to accept his offer to buy or be forever excluded from the participation that he bargained for and cut out from any remedy in respect of what would be a continuing breach of the quasi-partnership arrangement originally made.”

[32] I do not find the decision of Leon J in **Kandy & Kandy Ltd v Harjeev Singh Kandhari BVIHC (Com) 2014/127, 2014/128 and 2014/129 (13 May 2016)** to be of much assistance in deciding this issue. In that case, Leon J had to deal with the issue of costs arising from Bannister J's judgment in which Bannister J had decided that an application to appoint a liquidator of a deadlocked company should be stayed (rather than, for practical reasons, struck out) because

the offer made by the respondent was **O'Neill v Phillips** compliant and should have been accepted by the applicant. The respondent's contention that the offer was not **O'Neill v Phillips** compliant was based on the following five points, set out at para. [10] of Leon J's judgment, which Bannister J rejected:

- "a. that there were allegations of misfeasance and breach of duty in relation to the Intended Appellants – Justice Bannister found they were immaterial to the overall material to the overall value of the Intended Appellants;
- b. that the valuation of the Intended Appellants would be complex, expensive and with no time limit for completion – Justice Bannister found that it would be the same processes in a liquidation, and there would be additional costs in a liquidation;
- c. that there would be no "equality of arms" between the Intended Respondent and the Intended Appellants – Justice Bannister rejected this on the basis that the latest offer provided as much protection for an excluded minority shareholder as is practically possible;
- d. that the draft agreement "did not embody a promise on the part of the majority shareholders to purchase [the Intended Respondent's] shares but only a "best endeavours" promise to raise sufficient funds – Justice Bannister held that when the Intended Appellants committed at the hearing of the Strike Out Application to amend the draft agreement to include a binding obligation to purchase, there was a satisfactory resolution of that concern; and
- e. that there was no provision to enable the Intended Respondent to buy out the majority shareholders in case they would not be able to raise funds to pay the price arrived at by the valuer (a "fail-safe mechanism") – Justice Bannister held such a provision would go beyond that to which the Intended Respondent would be entitled in a liquidation and was not a provision suggested as necessary in an **O'Neill v Phillips** Offer."

[33] It would have been helpful to have seen Bannister J's judgment to ascertain the full reasons for his decision. At any rate, I respectfully disagree with Bannister J, so far as he suggests that the offer for the purchase of the shares only had to be **O'Neill v Phillips** compliant, and respectfully adopt the observations of Judge Cooke on the issue. But even if Bannister J is right, I am unable to accept that the reasons for his refusal to accept some of the points advanced by him, on the specific facts of that case, would apply to the Purchase Offer in the present case.

[34] I agree, broadly for the reasons that Mr Collings gives, that it is not appropriate for this Court to determine, on the Strike Out Application, the adequacy of the Purchase Offer by going into the minutiae of the terms of that offer. For the reasons referred to below, the Court can only strike out an application for a liquidation order made on the just and equitable ground if the respondent

can demonstrate that the offer was one which it was “clear and obvious” the applicant should have accepted.

- [35] In my judgment, an offer for the purchase of the shares of an equal shareholder must be capable of being unconditionally accepted by the purchasing shareholder. This means that the terms of the offer (express or implied) must be sufficiently certain to be capable of being unconditionally accepted and should not be made on a “subject to contract” or any other basis that would not result in any immediate binding agreement being concluded on the acceptance of the offer. Bannister J alluded to this in **Kandy & Kandy Ltd** in the context of whether the offer made in that case was **O’Neill v Phillips** compliant. He rejected the objection of the offeree that the offer, in that case, was ineffective (because the “best endeavours” promise made by the offeror did not commit the offeror to complete any agreement reached between them) on the basis that the offeror had changed his position at the hearing of his strike out application by agreeing to be unconditionally bound by the terms of his offer.
- [36] No such concession has been made here by Mr Wang. But even if such a concession had been made, I do not consider that the terms of the Purchase Offer are sufficiently certain to be capable of being accepted. In addition, even if they were, I do not consider the terms to be nearly as sufficient or reasonable to have made it unreasonable for Mr Yao to decline to accept them.
- [37] On the basis that I agree with Mr Collings that the prefix “subject to contract” makes the alleged offer no more than a proposal, rather than an offer capable of being accepted, the Strike Out Application must be dismissed, and I need say no more about it. But it is right that I do, not only in deference to the characteristically attractive way in which Mr Todd put Mr Wang’s case but also because whatever an **O’Neill v Philips** compliant offer should include (and it is not for me to decide that in these applications as compliance with **O’Neill v Philips** is not strictly relevant to the Strike Out Application), particular care needs to be given to the formulation of an offer that is said to constitute an alternative remedy to a liquidation order.
- [38] In my judgment, it would often, as an abundance of caution, so far as the basis and machinery for the valuation of the shares is concerned, be wise for an offeror to include provisions in an offer which, wherever possible, give the offeree a wide choice about what that basis and machinery should be. This may not always be possible, but where it is, it would avoid arguments about the fairness of how the value should be fixed and what the machinery for that valuation should be: see, for example, the view that Morritt J (as he then was) took on the facts in

Re Boswell & Co. (Steels) Ltd (1989) 5 B.C.C. 145. Of course, even the best formulated and attractive offers may not necessarily be appropriate for the offeree to accept but, at least, it addresses some of the issues that have arisen in this case and those that arose in **Kandy & Kandy Ltd**.

- [39] Before I deal with what I consider to be the defects in the Purchase Offer, it is necessary for me to mention three important points.
- [40] The first is a reiteration of the principle that Judge Cooke referred to in **Harborne Road Nominees Ltd v Karvaski**. The appropriateness of an offer under a just and equitable liquidation of a deadlocked company must be considered in the light of the different types of situations that apply in such a case, as opposed to a situation where a majority shareholder seeks to buy the shares of a minority shareholder. Even the best-formulated offer in a just and equitable liquidation case may not be sufficient to prevent a liquidation of the company on that ground if, on the facts, the context described by Judge Cooke (i.e., one shareholder being able to seize control of the company and effectively force the other either to accept his offer to buy or be forever excluded from the participation that he bargained for) produces a result which is unjust or capable of being so.
- [41] Of course, the Court will carefully consider the availability of other alternatives, i.e., alternatives other than the purchase of one shareholder's shares by another in such a case. However, in considering the appropriateness of an offer, or any alternative remedy available to an applicant to an application for the winding up of a company on the just and equitable ground, the Court will not accept, at face value, the allegations made by the applicant in support of a liquidation order, even on a strike out application.
- [42] Second, Mr Collings is correct that where a respondent seeks to strike out an originating process of a statement of case, he must demonstrate that the case for the strike out is clear and obvious. As Mr John Brisby KC, sitting as a deputy Judge of the High Court of England and Wales, observed in **Re Belfield Furnishings Ltd Isaacs and another v Belfield Furnishings Ltd and others [2006] EWHC 183 (Ch)**, at [6] and [7]:

“Mr Downes, who appeared with Ms Lee for the petitioners, reminded me that in **Copeland v Craddock [1997] BCC 294 at 300** – a case that concerned a petition seeking relief under s 459 and a just and equitable winding up in the alternative –

Bingham LJ had this to say about the court's jurisdiction: 'It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or a claimant or a petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the claimant is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed. In this case, the judge clearly regarded the plaintiff's claim to wind up this company as one which was unlikely to succeed, but he did not feel that the claim was so manifestly unarguable as to justify him in striking it out. Having heard Mr Snowden's very clear and well-presented argument, I share the judge's view that this claim is unlikely to succeed. I am indeed persuaded that the case is very close to the borderline where striking out would be appropriate. But I am not persuaded that the claim is unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence.'

Like Bingham LJ, I too have been troubled by the fact that the petition in the case before me is thin, if not close to the borderline where striking out would be appropriate. None the less, I accept that the petitioners are entitled to the court's adjudication on the merits of their petition at trial unless the respondents are able to demonstrate that the claims made in it could never succeed, and that as a result, the continued prosecution of the petition constitutes an abuse of process. The onus on the respondents in this regard is a heavy one."

(Emphasis supplied).

- [43] However, Mr Todd is right that having to demonstrate a clear and obvious case does not mean that this Court cannot, to quote Mr Todd, "separate the wheat from the chaff", and determine the Strike Out Application based on those parts of the written evidence only that support his allegations and ignore those parts that undermine or provide an explanation for them. It has long been held in summary judgment cases, at any rate, that if an allegation does not withstand the scrutiny of the court either because it is inherently inconsistent with the other evidence adduced in the proceedings or is weak and tenuous, the court will grant summary judgment: see, by way of examples, **National Westminster Bank Plc v Daniel and others** [1994] 1 All ER 156 (a pre-CPR case of the Court of Appeal of England and Wales); **ED & F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472, [2003] All ER (D) 75 (Apr), [2003] CP Rep 51, [2003] 24 LS Gaz R 37, (2003) Times, 18 April; **Ostrich Farming Corp Ltd v Wallstreet LLC** [2009] EWHC 2501 (Ch); **Ashworth v Newnote Ltd** [2007] EWCA Civ 793, [2007] BPIR 1012, [2007] All ER (D) 436 (Jul); and **Orange Personal Communications Services Ltd v Squires** [1998] Lexis Citation 3751⁴.

⁴ Although, rightly, there is no application for summary judgment in this case as there was in *Harborne Road Nominees Ltd v Karvaski*. Judge Cooke dismissed both the application to strike out and the application for summary judgment.

- [44] So far as I make any findings or derive any conclusions from the material submitted to me, they are restricted to the Strike Out Application, regardless of the language that I use in this judgment. In other words, whatever findings I have made or conclusions I have arrived at, they are only to enable me to decide whether a clear and obvious case for a strike out has been shown by Mr Yao.
- [45] Third, as I have already indicated, I accept Mr Collings' premise that in a 50/50 quasi-partnership where mutual trust and confidence have broken down, either party may offer to purchase the shares of the other party. However, once an application for a liquidation order is made by the applicant, any offer made by the applicant to buy out the respondent's shares is largely irrelevant, other than in the context of whether the applicant has pursued an alternative remedy and, specifically, whether, in pursuit of that remedy, the offer for the purchase of the applicant's shares is, at least, comparable to the offer made by the applicant for the purchase of the respondent's shares.
- [46] Even disregarding the fact that the Purchase Offer was not capable of being accepted by Mr Yao, I do not consider, for the purpose of the Strike Out Application, that the terms of the offer were sufficiently clear or certain, or were reasonable for Mr Yao to accept, such as to warrant the Main Application to be struck out. I set out below why, in my judgment, that is so. However, I make it clear that the matters to which I refer below are not exhaustive. In addition, they cannot be said to be of general application in every case. As I have already indicated, the appropriateness of an offer will depend on its own individual facts and circumstances. This Court cannot state definitively whether the matters set out below (which are given by way of examples only) will apply in any other case any more than it can state whether a matter not mentioned below may not apply in another case. Each case will turn on its own individual facts and circumstances. Just because the circumstances of a particular case display similarities to another case does not mean that the court must slavishly follow that case.
- [47] The Purchase Offer takes no account of Mr Wang's alleged misconduct in respect of SPHL, which Mr Yao states will have depressed the value of that company and, therefore, the value of the Company's shareholding in it. Mr Yao states that the offer should have provided for the value of his shares to be adjusted to reflect the effect of that misconduct, citing **Re Tobian Properties Ltd [2013] Bus LR 753 at 760G** in support of that proposition. This must be right and is supported by a wealth of authorities. For example, in **Scottish Co-operative Wholesale Society Ltd v**

Meyer [1958] 3 All ER 66 at 86, [1959] AC 324 at 364⁵, Lord Keith of Avonholm stated that, as a general rule, the court will value the shares of a respondent on the basis that the unfairly prejudicial conduct complained of had not taken place.

- [48] If an offer by a 50% shareholder of a company to purchase the other 50% shares in the company does not make proper allowance for this, it is likely to be held to be unreasonable. As Arden LJ (as she then was) observed in **Graham v Every [2014] EWCA Civ 191, at [47], [2015] 1 BCLC 41 at 53f:**

“Mr Graham was not able to make any submissions to the valuer before the valuation was completed or to have access to the information which was to be placed before the valuer. His witness statement disclosed that he had information he would have wanted to place before the valuer. These are important rights. Moreover, he was not offered his costs. In addition, the valuation takes no account of his allegations about the financial mismanagement of the fitting out. In the circumstances, I conclude that his failure to accept this offer was not unreasonable.”

- [49] Mr Todd purports to counter this argument by saying that even if one accepts the allegations made by Mr Yao in their entirety, it is difficult to see what loss is likely to have been caused to the Company.

- [50] I do not see this at all.

- [51] Mr Todd may well be correct that once the Court has heard evidence on this issue, it will come to the conclusion that there is nothing in the allegations made by Mr Yao or that even if the allegations can be established, the Company cannot be said to have suffered any loss arising from them. However, it is not obvious to me that on the material before the Court, it could properly come to that conclusion.

- [52] Based on the allegations made by Mr Yao set out above, it is at least possible that the Company could have suffered loss. Mr Yao claims that he has been excluded from having any involvement in the affairs of SPHL as a result of Mr Wang acting in concert with Hengyuan, so for Mr Wang to suggest that it is clear that no loss could have been caused to the Company seems to be to

⁵ A case under the former s. 210 of the Companies Act 1948 (as it applied to England, Wales, and Scotland), the distant forbear of the present legislation in those jurisdictions, which was designed to protect the members of a company from the “oppressive” conduct of the other members of the company.

be incorrect. There is no clear and obvious basis for the Court to accept what Mr Wang says, even if this were an application for summary judgment, still less on a strike out application.

[53] The preamble to the terms of the Purchase Offer states that the valuation of Mr Yao's shares is to be "undertaken by an independent [valuer] to be appointed by agreement ...".

[54] There is no provision for what is to happen if the parties are unable to come to an agreement for the appointment of an independent valuer. In the context of this case, this is no empty formality. Based on the fact that the parties cannot agree on anything, and there are so many different proceedings on foot between them, it is unclear how the valuer will be appointed.

[55] It has long been the law that where a contractual provision contains a process to determine the value of an asset, and that process has failed, the court will not be entitled to undertake the valuation itself if that process is mandatory, as it appears to be in the present case. However, if the process is not mandatory, i.e., it is only permissive, the court has power to make that determination itself: **Sudbrook Trading Estate v Eggleton [1983] 1 A.C. 444**. Whether or not the terms of the Purchase Offer make it possible for this Court to undertake the valuation is not clear. However, even if the Court can, it will substantially delay the conclusion of the valuation. That delay will, for the reasons set out below, likely only adversely affect Mr Yao. In those circumstances, it would not be unreasonable for Mr Yao to refuse to accept the Purchase Offer.

[56] Paragraph 2 of the Purchase Offer, which states that the valuer shall take account "of the assets, profitability and prospects of the Company", appears to me to be meaningless. It is difficult to see when a valuer would refuse to take those matters into account in determining the value of a person's shareholding, other than – in the case of an insolvent liquidation – profitability and prospect.

[57] Nor am I clear about why the valuation should be "as at the date of this letter", i.e., as at 19 December 2024. This date may benefit Mr Yao if the value of SPHL falls after that date, but it will be prejudicial to him if it increases after the date. This objection might have had less force if Mr Yao had been given the option of choosing from valuations prepared on different dates or, at least, had the option of deciding the date on which he wished the valuation to take place. As Mr Collings correctly points out, there is some evidence that the petition presented by Mr Wang on 20 November 2024 in Hong Kong to wind up SPHL caused a significant slump in the value of SPHL's share price.

- [58] Paragraph 5 of the Purchase Offer states that the valuer shall not give reasons for his valuation. In a situation where the parties cannot agree upon anything, the suggestion of the determination of a fair price for Mr Yao's shares by way of a "non-speaking" valuation seems to me to be inappropriate. Again, in my judgment, this part of the offer could have been improved if Mr Yao had been given the option of deciding whether the valuation should be speaking or non-speaking.
- [59] The Purchase Offer does not deal with how the costs of the Main Application should be dealt with. It should have done. In **Graham v Every**, the failure on the part of the respondent to make an offer to pay the petitioner's costs was found to have made the overall offer made by the respondent unreasonable. In the present case, the Main Application was issued a day after the Purchase Offer was made, so the circumstances were different from **Graham v Every**, but some provision about the incidence of costs should have been included in the Purchase Offer. It seems to me that this part of the offer could have been improved if Mr Wang had agreed to pay Mr Yao's costs of the Main Application, at least up to the point when the time for accepting the Purchase Offer (2 January 2025) had passed.
- [60] Aside from the specific terms of the Purchase Offer not being adequate, there is an important reason why the Purchase Offer is not reasonable.
- [61] First, there is no provision about when the valuation process needs to start and when it should be completed. Nor is there any provision about how quickly Mr Yao can expect to be paid for his shares and what his rights are pending full payment to him of the value of his shareholding.
- [62] Even supposing that the appointment of the valuer can be made in short order, which is unlikely unless, remarkably, the parties can agree on the identity of the valuer, no provision is made in the Purchase Offer about when the valuation should commence and when it should be completed. There would have been no objection if the procedural aspects of the valuation had been left to the valuer to decide. However, in the absence of a specific provision dealing with this, it is difficult to see what the timeline would be for the completion of the purchase.
- [63] Nor is there any provision in the Purchase Offer about when Mr Yao should receive payment for his shares and what would happen if that payment were delayed. One would expect a provision to be included in the Purchase Offer about when payment should be made and about the payment of interest for any late payment. Given that litigation has affected almost every aspect

of the parties' relationship, if issues arose about the value of Mr Yao's shares, it would have helped for the Purchase Offer to have included a provision enabling Mr Yao to seek a payment on account, based on the likely value of the shares. It would also have been appropriate for the Purchase Offer to include a "non-set off" provision so that this aspect of their dispute could not be carried through other disputes between them to avoid payment for Mr Yao's shares being withheld or delayed until all those disputes were finally resolved.

[64] Even in what is a basic procedure for the valuation of the shares of a company under s. 179 of the BCA 2004, where the requirements of s. 176 of that Act apply, a tight timetable (as clarified in a decision I gave in this Court in **Oasis Core Investments Fund Ltd and others v Hollysys Automation Technologies Ltd BVIHCOM2024/0619, 0620, 0621 & 0622 (1 April 2025)** to carry out the valuation specified in s. 179(9) of the BCA 2004) is prescribed. There is no similar, or indeed, no timetable for completion of the transaction and payment for Mr Yao's shares specified in the Purchase Offer.

[65] I appreciate that the points referred to in the preceding paragraph did not find favour with Bannister J on the facts of **Kandy & Kandy Ltd**. It is possible that, on the specific facts of that case, Bannister J's reasons for not acceding to the application to appoint liquidators were justified. However, so far as the position is otherwise, I respectfully disagree with Bannister J. In a liquidation, both parties will have an opportunity to bid for the purchase of the assets of the company, and the liquidator will usually be able to stipulate when he would want the completion of the purchase to take place. In the present case, there is no certainty about when Mr Yao can receive payment for his shares and what should happen in the meantime.

[66] In my judgment, therefore, the Purchase Offer was neither reasonable nor one that should reasonably have been accepted by Mr Yao.

Other alternative remedies

[67] However, Mr Todd refers to other alternatives that Mr Yao should have pursued, which he did not. At para. 76-78 of his skeleton argument, Mr Todd says:

"76 The disputes between Mr Wang and Mr Yao overlap considerably with the subject matter in other sets of proceedings.

77. There are many courses of action available to Mr Yao in this jurisdiction for the determination of the subject matter of those disputes.
78. Mr Yao could:
- (a) ...
 - (b) Pursue an unfair prejudice claim: s.184I [of the BCA 2004];
 - (c) Bring a derivative claim: s. 184C [of the BCA 2004];
 - (d) bring a personal claim in the BVI: see, for example, **Tianrui (International) Holding Ltd v China Shansui Cement Group Ltd [2024] UKPC 36**; or
 - (e) Seek a restraining Order in [the] BVI: s.184B [of the BCA 2004].

[68] Apart from considering whether Mr Yao should have brought an unfair prejudice claim, which I do below, I am not sure that it is open to this Court, based on the material that it has seen, to decide whether bringing the proceedings suggested by Mr Todd in para. 79(c), (d), and (e) of his skeleton argument would be a suitable alternative remedy for Mr Yao to pursue. I do not know enough about the disputes between Mr Yao and Mr Wang to conclude that it would be clear and obvious for him to have pursued any of those remedies.

[69] In any event, in my judgment, each of these courses is speculative. I do not consider that it would be reasonable for Mr Yao to pursue any course of action that could expose him to a liability for costs if he was unsuccessful or place him in a position where findings made against him in those proceedings might be carried through to other proceedings: see, for example, **Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2) [1967] 1 AC 853, [1966] 2 All ER 536, HL**;

[70] As the above passages cited from **Lau** make clear, the availability of a remedy that an application is required to pursue has to be reasonable.

[71] It seems to me clear that Mr Yao would be taking on an unacceptable risk if he sought to exercise any of the above remedies.

[72] Nor is it possible for me to see how the pursuit of such remedies would resolve the deadlock that exists in the Company. The most it would do would be allow the Company or Mr Yao to recover sums which are alleged by him to have been misappropriated by Mr Wang or losses which the Company or Mr Yao may have suffered as a result of Mr Wang's alleged misconduct.

[73] The pursuit of an unfair prejudice claim may have been an appropriate alternative remedy for Mr Yao to pursue. In **Whitehall Partnership Ltd**, I readily acknowledged that this was a remedy that a shareholder in the position of Mr Yao should consider. I made the following observations about that:

“[28] ... the remedy of winding up is one of last resort and an exceptional remedy in the context of disputes between shareholders. As **Patten LJ** observed in **Fulham Football Club (1987) Ltd v Richards** [2011] EWCA Civ 855, [2012] 1 BCLC 335, [2012] Ch 333(at [54]–[56]):

'[54] The power of the court to wind up on the just and equitable ground is also contained in s 122 of the 1986 Act but, in relation to a contributory's petition, the conditions for its exercise are very different. As a general rule, the shareholder seeking the winding-up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see *Re Rica Gold Washing Co* (1879) 11 Ch D 36, [1874–80] All ER Rep Ext 1570.

[55] A shareholder will not therefore be permitted to petition under s 122(1)(g) for the winding up of an insolvent company and, in the case of a solvent company, the court's power will only be exercised in his favour with a view to dividing the net assets of the company where no other means can be found of resolving the dispute between shareholders in relation to their rights and interests as members. To this end, s 125(2) of the 1986 Act provides that: 'If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding-up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.'

[56] Section 994 [of the Companies Act 2006] will usually provide the source of a satisfactory alternative remedy such as a buy-out order so that winding up under s 122(1)(g) is therefore a last resort and, in my experience, an exceptional remedy to grant in the context of disputes

between shareholders. This is confirmed by the terms of the current Practice Direction 49B which draws attention to the undesirability of asking, as a matter of course, for a winding-up order as an alternative to an order under s 994.'

[74] However, what I also said, at [29], was:

“... although the remedy of winding up is a remedy of last resort, it does not mean that the remedy is not available to a member if he has another remedy. As Lord Briggs JSC said in **Lau v Chu [2021] 1 BCLC 1, [2020] 1 WLR 4656**(at [20]): 'It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word.'”

[75] In my judgment, as I said in **Whitehall Partnership**, these and several of the matters analysed below cannot be regarded as preconditions to the exercise of the discretion of the Court under s. 162(1)(b). They are matters that the court must take into account in deciding how it should exercise its discretion. Some will have substantial significance; others less so. But ultimately, they go to the discretion of the court, and their importance will vary depending on the circumstances of each individual case.

[76] In that case, I also said, at [110]:

“[110] The Petitioner contends ... [first] that [he] did everything he could to resolve the deadlock which had arisen between the parties and that, rather than consider his proposals or come up with counter-proposals for the determination of their dispute, she failed to respond substantively to his attempts to bring about a settlement of their dispute; second, referring to the dicta of **Lord Briggs in Lau v Chu [2021] 1 BCLC 1, [2020] 1 WLR 4656**, that the court should not take an over-zealous approach to what remedies or options were available to, and should have been pursued by, the Petitioner. He had plainly pursued the most suitable remedy before resorting to the Unfair Prejudice Petition and, subsequently the Present Petition, and received no satisfactory response from the Respondent; and third, as the overtures he made were a genuine attempt to resolve the dispute, the court should take that into account in deciding how it should exercise its discretion.”

[77] On the facts of this case and based on the material before me, the failure to bring a claim for unfair prejudice would not, for the purpose of deciding whether the Main Application should be

struck out, amount to a failure to pursue a reasonable alternative remedy. There are several reasons for this, including the following.

- [78] First, the burden of proving that Mr Yao should have pursued such a claim is upon Mr Wang: see **Lau** above. Other than saying that Mr Yao should have done so, there is nothing else to support that assertion.
- [79] Second, as I understand it, the parties had sought to negotiate the possibility of the parties going their separate ways before the Main Application was issued, but this did not come to fruition. It is difficult to see why an unfair prejudice should have been pursued by Mr Yao in those circumstances.
- [80] Third, it is by no means certain that the unfair prejudice claim would succeed if Mr Yao could not demonstrate that he had been unfairly prejudiced by the acts or omissions of Mr Wang.
- [81] Fourth, it is by no means certain that if an unfair prejudice claim had been brought by Mr Yao, it would be on the basis that Mr Wang should buy him out. Based on the fact that he made a broadly similar offer to purchase Mr Wang's shareholding, there is the possibility that if Mr Yao established his allegations in the claim, the Court would order Mr Wang's shares to be sold to Mr Yao.
- [82] Fifth, Mr Wang could himself have made the unfair prejudice claim. However, he failed to do so. If the allegations he makes against Mr Yao were to have been established in that claim, he is likely to have been able to purchase Mr Yao's shares. It ill-behoves him to complain about Mr Yao's failure to do so when he has himself failed to pursue that remedy.
- [83] It follows, for all these reasons, that the Strike Out Application must be dismissed.

THE JPL APPLICATION

- [84] There is no doubt that the Court has jurisdiction to appoint a provisional liquidator where an application for a liquidation is pending before it.
- [85] The jurisdiction is contained in s. 170(4)(b)(i) of the BVIA 2003, which states as follows:

“(4) The court may appoint a provisional liquidator under subsection (1) if ...the court is satisfied that the appointment of a provisional liquidator ... is necessary for the purpose of maintaining the value of assets owned or managed by the company.”

[86] The leave of the Court is required before such an application can be made. By the JPL Application, Mr Yao seeks both the leave of the Court to make the application and the appointment of the joint provisional liquidators (“JPLs”) if such leave is granted.

[87] Section 170(4) sets out the test for the appointment of a provisional liquidator:

“(4) The Court may appoint a provisional liquidator under subsection (1) if ... the Court is satisfied that the appointment of a provisional liquidator— (i) is necessary for the purpose of maintaining the value of assets owned or managed by the company ...”

[88] Mr Collings relies upon the following passages of Hollington on Shareholders' Rights 10th Edn, Ed Robin Hollington KC, 2023, Sweet and Maxwell to support his contention that the JPL Application should be granted:

“8-42 “Where it is established that it is likely that a petition seeking winding-up on the just and equitable ground would succeed ... and the assets are at risk of dissipation and need to be protected so as to preserve the relief that the petitioner is seeking, then the court may appoint a provisional liquidator ...”

[89] In the same paragraph of that work, the author states:

“In general, the court will be very reluctant to appoint a provisional liquidator by way of interlocutory relief because of the expense involved, the slur cast on the business and the risk of injustice to the respondent. It is not uncommon for a provisional liquidation to fail to achieve its objectives, particularly if the costs run out of control. In **Shih Hua Investment Co Ltd v Zhang Aidong [2017] HKEC 88**, the court, whilst acknowledging that the power to make such an order was to be sparingly exercised, made by way of interim injunctive relief an order replacing the existing directors of a solvent and profitable business with suitable independent professionals, rather than appointing provisional liquidators or receivers, thereby reducing the risk of a slur being cast.

[90] Mr Collings states that there is an urgent need to appoint JPLs to safeguard the Company and its assets. The value of the Company’s only asset is its shareholding in SPHL. There is a dividend that is due or will shortly be due to the Company. That dividend is or may be in serious jeopardy, given Mr Wang’s unfettered control of SPHL and his alleged past conduct in preventing the payment of a dividend to be made to the Company.

- [91] Mr Collings further states that JPLs would be able to employ the Company's shareholding in SPHL so as to ensure safe stewardship of SPHL (by an appropriate board of directors) and thereby preserve the value of the Company's shareholding in it.
- [92] He also maintains that, on the basis that the Company is not trading, little harm would be caused by JPLs being appointed. At the very least, it would preserve the status quo and allow independent decisions to be taken on behalf of the Company about how the Company should vote its shareholding in the SPHL.
- [93] In **Re a Company [1987] BCLC 133**, a petition was presented against the company that included a claim for a just and equitable winding up. The petitioner applied for the appointment of a receiver to the company. Harman J granted the application.
- [94] Harman J regarded the situation in that case to be similar to a situation where a partnership was deadlocked, stating, at 135g, that "[i]n a partnership dispute it is almost as of course for the court, where the partners have fallen out and there has to be a dissolution, to order the appointment of a receiver, on motion, at an early stage of the partnership action. That is done to hold the ring, to ensure that the partner or partners who happen to be in possession of the partnership trading assets do not obtain advantage, nor damage the partnership assets to the harm of the dissenting partner, nor siphon them away or otherwise maltreat the partnership affairs. It is done without any judgment of the rights or wrongs in the partnership action or any attempt to take a view as to why the partnership has broken up. It is simply designed to hold the ring and ensure that the status quo of the assets is preserved, that the value of the business is there, so that the whole thing may best be realised for the advantage of all partners in due course."
- [95] He then went on to say, at 136c, that the "reasons which apply to cause the court almost as of course to appoint a receiver in a partnership dispute have considerable similarities to, and are in my judgment properly applicable as guides to the court in a company of this sort", stating at 139f, that:

"I am comforted to find that P O Lawrence J, a very considerable authority in the practice of this court, in **Stanfield v Gibbon [1925] 1 WN 11**, acted in a very similar way, held that he had jurisdiction to appoint a receiver where disputes between

directors had led to dereliction of the management of the company's affairs and appointed a receiver for a limited period ...”

[96] He concluded, at 140b, that the appointment of a receiver provided a “neutral management, a security of the assets of the company, a proper discharge of the company's liabilities and a preservation of it for the benefit of all in due course.”

[97] Mr Todd rightly points out that there has to be a *prima facie* case for the making of a liquidation order before a provisional liquidator may be appointed to a company, referring to the Court of Appeal authority of England and Wales in **Commissioners for HM Revenue & Customs v Rochdale Drinks Distributors Ltd** [2011] EWCA Civ 116, [2013] B.C.C. 419, at [76]-[77] in support of that premise. He says that no *prima facie* case has been shown by Mr Yao.

[98] I disagree. For the reasons referred to above, Mr Yao has demonstrated that, depending on the factual findings the Court makes, he is likely to be able to establish that the Company should be liquidated. He only needs to establish the first two limbs of the three-limb test in **Lau**. The first limb has been accepted by Mr Wang. If Mr Yao can satisfy the second limb, it then becomes necessary for Mr Wang to establish the third limb.

[99] Of course, there may be issues – such as which party caused the deadlock and whether the other party contributed to it – that may militate against the making of an order for the appointment of liquidators, as happened in **Whitehall Partnership**. However, I am unable to accept that Mr Yao has not shown a *prima facie* case for the making of a liquidation order.

[100] These matters are sufficient for me to exercise my discretion to grant leave under s. 160(4).

[101] However, whether substantive application should be allowed is a different matter.

[102] In my judgment, it should not be.

[103] Mr Todd says that the appointment of JPLs is bound to adversely affect the financial standing of the Company. Whether or not this is correct, his main reasons for seeking the dismissal of the JPL Application are compelling.

[104] First, no decision to declare a dividend is to be made by SPHL until late August 2025.

- [105] Second, there is neither any evidence that the Company is insolvent nor any credible evidence of a risk of dissipation. The only significant asset held by the Company is its shareholding in SPHL. It is difficult to imagine how there could be any risk of dissipation of that shareholding.
- [106] Third, and importantly, I refused the JPL Application when I heard the application on 21 January 2025. No material change in circumstances has taken place to warrant this Court taking a different view on the same facts in what is effectively a renewed application.
- [107] Fourth, there is a considerable amount of litigation involving the parties taking place elsewhere. It should be possible for any judgment made by this Court to be enforced against Mr Wang here and abroad, including against any interest he has in the return of capital if a liquidation order is made against the Company. I am not convinced by Mr Collings' argument that any judgment or order made against him will be impossible to enforce, whether in this or any other jurisdiction.
- [108] The above said, my mind has changed on more than one occasion in the course of hearing the JPL Application about whether I should appoint JPLs. However, that was due entirely to both Mr Todd and Mr Collings' erudite and detailed submissions on the issue. In the final analysis, I found that decision a straightforward one to make
- [109] The JPL Application will be dismissed. However, Mr Yao can make a fresh application for the appointment of JPLs if there is a material change in circumstances that makes it appropriate for the Court to intervene.

PROGRESS OF THE MAIN APPLICATION

- [110] I agree with Mr Todd that it would have been desirable for this matter to be dealt with by way of pleadings. However, most, if not all, of the written evidence in connection with the Main Application has been filed and, at this late stage, I do not see that it is necessary to do so. Mr Collings said that he did not have any strong views about the matter. I envisage that it will now only be necessary for updating evidence to be filed and served before this matter is ready to be tried. However, if the parties agree that pleadings would be more desirable, even at this late stage, I will be content to direct pleadings to be served and make any other directions consequent upon this. Otherwise, there is no need to.

[111] Mr Collings submitted that Mr Hall Taylor's skeleton for the hearing of the Main Application on 17 February 2025 appeared to concede that if the Strike Out Application was dismissed, the Court was bound to make a liquidation order. While appreciating that this is a possible interpretation of what it said, I do not take this as a binding indication of Mr Wang's position in the Main Application. But even if it were, I do not think that the decision to make a liquidation order is down to the parties. The Court retains a residual discretion to decide whether to make a liquidation order, based on matters such as which party caused the deadlock and whether the other party contributed to it, as happened in **Whitehall Partnership**, where, on the usual facts of that case, I refused to make a winding up order. That makes it necessary for the Main Application to go to trial.

CONCLUSION AND MATTERS ARISING

[112] Both applications will be dismissed.

[113] I would request the parties to obtain a listing of this matter for judgment to be handed down (and for any ancillary matters arising from that) on a date to be fixed in the usual way. I suggest a time estimate of 30 minutes. I am content to deal with the hearing by Zoom. I am also content to dispense with attendance by counsel and any other representatives who are based outside the jurisdiction.

[114] It remains for me to thank counsel and the legal representatives for all their assistance in the matter.

Abbas Mithani KC
High Court Judge

By the Court
Registrar