

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0020

BETWEEN:

CHU KONG

Appellant

and

[1] LAU WING YAN

[2] OCEAN SINO LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

Appearances:

Mr. Richard Hacker, QC and Mr. John Carrington, QC with Ms. Pauline Mullings
for the Appellant

Mr. Philip Jones, QC with Mr. Daniel Warents and Mr. Renell Benjamin for the
Respondents

2019: July 18 and 19;

2020: January 17.

Commercial Appeal – Insolvency proceedings – Application by shareholder to wind up company on just and equitable ground – Insolvency Act 2003 – Deadlock in management of company – Whether learned judge erred in finding deadlock in the management of company – Approach of appellate court to evaluations of fact – Alternative remedies to a winding up order – Whether learned judge erred in the exercise of discretion

The appellant Mr. Chu Kong (“Mr. Chu”) and the first respondent Mr. Lau Wing Yan (“Mr. Lau”) are both 50% shareholders in Ocean Sino Limited (“OSL”), a BVI holding company. They are also the directors of OSL. OSL is the holding company of PBM Asset Management Limited (“PBM”), a company in Hong Kong. PBM in turn owns the minority shares of 49% in Beibu Gulf Ocean Shipping (Group) Limited (“Beibu Gulf”), a company in

Hong Kong, the latter of which is involved in, among other things, the ownership and chartering of ships through various subsidiaries.

PBM invested monies in Beibu Gulf. Mr. Lau required his share of the monies that PBM had invested in Beibu Gulf and sought to have them paid to him. Mr. Chu and Mr. Lau disagreed as to the course that should be taken in light of Mr. Lau's request. Following this, in May 2015, Mr. Lau applied to the Commercial Court in the BVI to wind up OSL on the ground that it was just and equitable to do so, asserting that there was a breakdown of trust and confidence between himself and Mr. Chu, and claiming that they had arrived at deadlock in the management of OSL. In 2017, the application was heard and granted by a judge of the Commercial Court. Liquidators were appointed, the court being satisfied that deadlock had been reached in the management and affairs of OSL, and Mr. Chu was ordered to pay Mr. Lau's costs in the proceedings.

Mr. Chu being, dissatisfied with the decision to wind up OSL, and for him to pay Mr. Lau's costs, appealed. The main issues that arise to be determined on this appeal are: (1) whether the learned judge was correct in finding that there was deadlock at OSL and ordering that Mr. Chu pay Mr. Lau's costs in the proceedings; and (2) whether the learned judge erred in the exercise of his discretion in ordering the winding up of OSL.

Held: allowing the appeal, setting aside the judgment in the court below winding up the company and the order appointing liquidators and setting aside the costs order in the court below and awarding costs in the high court to the appellant to be assessed if not agreed within 21 days of this judgment and awarding costs to the appellant on the appeal at two-thirds of the assessed costs in the court below, unless otherwise agreed within 21 days of this judgment that:

1. It is clear that the learned judge took into account issues related to Beibu Gulf which could not have affected OSL at the director and shareholder level. As a general rule, matters which concern a totally unrelated company which is not a subsidiary should not be taken into account to determine whether there is a deadlock in a company. The judgment of this Court in **Wang Zhongyong et al v Union Zone Management Limited and Jin Xiaoyong et al** makes it clear that the judge was wrong in doing so. Beibu Gulf was not a subsidiary of OSL. Neither was OSL the holding company of Beibu Gulf. Rather OSL, through PBM, merely owned a 49% share in Beibu Gulf. It is clear from these circumstances, along with the fact that Mr. Lau had only made complaints that went to matters that taking place at the level of Beibu Gulf, that the judge erred when considering facts in relation to Beibu Gulf in deciding whether OSL was deadlocked and should be wound up.

Wang Zhongyong et al v Union Zone Management Limited and Jin Xiaoyong et al BVIHCMA2013/0024 (delivered 12th January 2015, unreported) followed; **Rackind and others v Gross and others** [2005] 1 WLR 3505 distinguished.

2. There was cogent and objective documentary evidence before the judge pointing to the fact that there was no deadlock in relation to OSL. The documents evidenced negotiations between Mr. Chu and Mr. Lau after the date of the application, and showed that the men were able to take effective decisions regarding PBM. The actions of Mr. Chu and Mr. Lau clearly show that the relationship between them had not deteriorated to the point of deadlock. On the facts therefore the judge was plainly wrong in holding that there was deadlock in the management and affairs of OSL.
3. It is the law that a winding up petition should not be resorted to merely because there is dissension within a company. In the case at bar, the dispute and the main trigger of the winding up application, was a disagreement as to whether Beibu Gulf should repay PBM. On any view of the facts PBM was only a minority shareholder in Beibu Gulf. PBM therefore could not make any decisions as to what should occur in Beibu Gulf. The nature of the dispute simply did not lend itself to a finding of deadlock in the management of OSL.

Re Harris Maxwell Larder Lake Gold Mining Co Ltd (1910) 1 O.W.N 984 (H.C.). considered; **Loch and another v John Blackwood, Limited** [1924] AC 783 at p. 788. considered; **Re Anglo-Continental Produce Co Ltd** [1939] 1 All ER 99 considered.

4. The court is reluctant to make a finding of deadlock where there is some procedure under the company's constitution, its articles or memorandum of association which can lead to the resolution of a potential deadlock or an exit from the company. Clause 6 of the Articles of Association and clause 11 the Memorandum of Association of OSL clearly provided an exit route for either Mr. Lau or Mr. Chu, in the face of potential deadlock. These clauses do not appear to have been brought to the attention of the learned judge. In the face of these clauses, there could not reasonably have been a finding of deadlock between Mr. Chu and Mr. Lau at OSL. On any view of the facts, the judge was plainly wrong in finding that there was deadlock in the management of OSL. The judge's evaluation of facts must therefore be set aside.

Ebrahimi v Westbourne Galleries Ltd and Others [1973] AC 360 applied; **Assicurazioni Generali SpA v Arab Insurance Group**; **Practice Note** [2003] 1 WLR 577 applied; **Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others** [2013] UKPC 13 applied; **McGraddie v McGraddie** [2013] UKSC 58 applied; **Volcafe Ltd and others v Compania Sud Americana De Vapores SA (trading as CSAV)** [2018] UKSC 61 applied; **Wang Zhongyong et al v Union Zone Management Limited and Jin Xiaoyong et al** BVIHCP2013/0024 (delivered 12th January 2015, unreported) followed.

5. An appellate court will not interfere with the exercise of a trial judge's discretion unless satisfied that the judge's exercise of discretion exceeds the generous ambit within which reasonable disagreement is possible and is clearly or blatantly wrong. Even if there was deadlock, which this Court finds there was not, the learned trial judge erred in granting the winding up order without giving proper consideration to the alternative remedies available to Mr. Lau. In particular, the judge failed to properly take into account the alternative remedies, such as a buyout. The judge having taken into account irrelevant matters which concerned Beibu Gulf in concluding that there was deadlock, and therefore the exercise of his discretion to wind up OSL must be set aside, on the basis that it was plainly wrong. The judge having exercised his discretion improperly, it falls to this Court to exercise its discretion afresh. In doing so, this Court is of the opinion that the appropriate order would be either that Mr. Chu or Mr. Lau buy out each other, or that either one offers his shares to a third party.

Dufour and others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; Sections 162 and 167 of the **Insolvency Act 2003** Act No. 5 of 2003 applied; **Cumberland Holdings Ltd v Washington H Soul Pattinson and Co Ltd** (1977) 13 ALR 561 applied.

JUDGMENT

Introduction

- [1] **BLENNAN JA:** This is an appeal by Mr. Chu Kong ("Mr. Chu") against the decisions of two judges of the Commercial Court. In the first decision, the learned judge ordered that Ocean Sino Limited ("OSL") be wound up or liquidated. Subsequently, another judge appointed liquidators over OSL and ordered Mr. Chu to pay costs to Mr. Lau Wing Yan ("Mr. Lau"). There is also an appeal against the costs order. The appeal against the decisions is strenuously resisted by Mr. Lau.

Background

- [2] For the purpose of this judgment, the following are the summarised facts.
- [3] Mr. Chu and Mr. Lau are equal shareholders in OSL (each holding 50% of the shares) and directors of OSL. OSL was a holding company which was incorporated as a BVI company and held shares as the sole shareholder in PBM

Asset Management Limited (“PBM”). PBM is a Hong Kong company and Mr. Chu and Mr. Lau are its sole directors. PBM in turn held minority shares of 49% of the shareholding in Beibu Gulf Ocean Shipping (Group) Limited (“Beibu Gulf”), a Hong Kong company involved in, among other things, the ownership and chartering of ships through various subsidiaries. Mr. Chu and Mr. Lau were two out of five directors of Beibu Gulf. There were other business ventures in which both gentlemen seemed to have been involved. The dealings between the two gentlemen evidenced that they were very hard-nosed businessmen, who were not prepared to be outmanoeuvred by each other. There was a joint venture between PBM and the People’s Republic of China (“PRC”) which crystallised in Beibu Gulf. The PRC interests owned 51% of the shares in Beibu Gulf.

- [4] At some point in time, Beibu Gulf wanted to purchase ships for the purpose of its business. PBM made loans to Beibu Gulf for this purpose. The purchase of the ships however did not materialise, and following this, Mr. Lau requested Beibu Gulf to return the monies that PBM had invested into Beibu Gulf. In particular, Mr. Lau wanted to utilise his shares in the company for his own purposes. This disagreement affected the relationship between Mr. Chu and Mr. Lau. In Mr. Lau’s view, there was a complete loss of trust and confidence between them. The loss of trust and confidence between Mr. Chu and Mr. Lau is said to have been at the instance of several different matters, including the difference in opinion on the repayment of loans made by PBM to Beibu Gulf.
- [5] It is worth repeating that PBM was the minority shareholder in Beibu Gulf. Mr. Lau believed that Mr. Chu did not want the PBM loans repaid. Several attempts were made to secure separation via restructuring agreements in relation to Beibu Gulf, but those attempts were ultimately futile. There were even attempts to sell PBM shares in Beibu Gulf to the majority shareholders, the PRC. The evidence shows that the two gentlemen could not arrive at any consensus in relation to PBM’s investment in Beibu Gulf.

- [6] It is noteworthy that the PRC interests held the majority shareholding in Beibu Gulf and that the vast majority of the differences of opinion between the two gentlemen were in relation to Beibu Gulf. There were several steps taken between the two gentlemen and ongoing discussions were held with respect to Beibu Gulf. In fact, the PRC interests even offered to buy out PBM's interest in Beibu Gulf.
- [7] By the learned judge's account, they were deadlocked by January 2014. However, resolutions were passed after that date. Around March 2014, the differences in opinion between Mr. Chu and Mr. Lau grew. There was evidence before the judge which indicated that the two men engaged in discussions up to November 2014 in an effort to sell PBM's interest in Beibu Gulf but they were unsuccessful. In those circumstances, on 27th May 2015 Mr. Lau petitioned the Commercial Court to wind up OSL pursuant to section 162(1)(b) of the **Insolvency Act, 2003**¹ ("the Insolvency Act") on the just and equitable ground, stating that there was deadlock between himself and Mr. Chu. However, the evidence revealed that shortly before the filing, the PRC interests were discussing with both Mr. Chu and Mr. Lau in relation to Beibu Gulf and the possibility of buying out Mr. Lau's interests in Beibu Gulf.
- [8] For various reasons that are of no significance to this appeal, the application to wind up OSL was heard in May 2017 nearly two years after it was filed

Judgment in the High Court

- [9] The learned judge, in a written judgment, held that there was sufficient evidence to justify the liquidation of OSL on the basis of deadlock between Mr. Chu and Mr. Lau in the conduct of the affairs of OSL. The judge also held that Mr. Chu and Mr. Lau both bore some responsibility for the breakdown in trust and confidence and deadlock but Mr. Chu was more culpable than Mr. Lau. The judge also held that Mr. Lau had not acted unreasonably in seeking to wind up of the company and

¹ Act No. 5 of 2003.

that the remedy of winding up was justifiable in this case. The learned judge made several findings of fact in coming to those conclusions.

[10] Most of those findings are at the heart of the appeal. Accordingly, it is useful to reproduce some aspects of the learned judge's findings. At paragraph 61, the judge stated: "In these circumstances, I am more than satisfied that the factual basis for the deadlock as alleged in the claim form and Points of Claim were and are made out."

[11] At paragraph 81 the learned judge summarised his findings as follows:

"In summary, by the time of the hearing in May 2017,

- A. Mr Lau had fully justified his case as to deadlock on the facts;
- B. Their attempts to come to some reasonable parting of the ways under the two Restructuring Agreements had come to naught;
- C. Mr Chu had managed to engineer, in my judgment, a situation whereby he, or associates of his, seized effective overall control of Beibu Gulf by BGAL and Polyrise in order to exclude Mr Lau from any participation in management (via OSL and PBM) of PBM's 49% interest in Beibu Gulf and, thereby its subsidiaries. All this was done or engineered by Mr Chu ... without properly or fully informing Mr Lau despite his personal interest via PBM's 49% share and his own 50% share in OSL. He removed, or secured the removal of Mr. Lau as director of Beibu Gulf and its subsidiaries, and diverted the two operating subsidiaries ... to a company, Ausca, which he now accepts is owned by his son and of which he is a director and moreover without any cogent due diligence or any approach or explanation to Mr Lau. Mr Chu failed to explain or justify the commercial reasons for this ... but I infer and find it was done directly or indirectly to exclude Mr. Lau from any benefit;
- D. Moreover, he caused PBM, without PBM's and Mr Lau's true knowledge or consent, to participate in a re-financing transaction (the Lohas Transaction), to its detriment;
- E. Mr Chu has consistently and repeatedly obstructed, frustrated and blocked, Mr Lau's repeated requests for full and proper financial information as to the financial affairs of Beibu Gulf via a series of excuses ... and cynically blamed Mr Lau for failing to implement the Restructuring Agreements. Indeed, although Mr Chu was plainly

aware the details of many transactions about which Mr. Lau expressed concern, he consistently failed to produce the relevant supporting documentation in evidence and failed to give a full and proper explanation to many of the commercial and corporate machinations in Beibu Gulf.”

[12] The learned judge stated at paragraph 86 of the judgment:

“I have no hesitation in finding that OSL (and thereby PBM) is in a completely hopeless state of irretrievable deadlock at board and shareholder level. Having seen and heard the two of them in the witness box and having regard to the evidence as a whole I can see absolutely no real prospect of Mr Lau and Mr Chu ever getting on together again in the future. They are hardly on speaking terms (save perhaps with a grimace). It is a true irretrievable breakdown. All trust and confidence between them has gone.”

[13] The learned judge therefore ordered the liquidation of OSL. Following this, another judge made an order appointing liquidators over OSL and, in addition, ordered that Mr. Chu pay to Mr. Lau the costs of the proceedings in the court below.

The Appeal

[14] Mr. Chu was aggrieved by the decisions of the learned judges, that OSL be put into liquidation and that liquidators be appointed and has appealed to this Court against both decisions and the order that he pay costs. Mr. Chu’s notice of appeal challenges the decision of the learned judge stating that the learned judge erred in the application of relevant legal principles, failed to give proper weight to material evidence led before him, and considered immaterial evidence. He also complained that the judge misunderstood or misapplied the relevant principles with the result that the exercise of his discretion to appoint liquidators over OSL was blatantly wrong. Mr. Chu in taking issue with the judges’ decisions has appealed on eight grounds.

[15] Mr. Lau vigorously defends both decisions and argues that the judges did not err in arriving at them.

Issues on Appeal

[16] With no disrespect intended to the learned counsel for the appellant, the following are the main issues that are distilled from the eight grounds of appeal:

- (a) whether the learned judge erred in holding that the affairs of OSL were deadlocked; and
- (b) Whether in the circumstances the learned judge exercised his discretion improperly in winding up OSL.

Submissions on behalf of Mr. Chu Kong²

[17] Learned Queen's Counsel, Mr. Hacker, complained that the learned judge, in making the findings on the ground that it was just and equitable to wind up OSL, made some impermissible findings. He said that the judge improperly conflated the dealings of OSL and Beibu Gulf in a manner as if they were one and the same. Mr. Hacker said that in any event the judge should have found that all pre-existing differences between Mr. Chu and Mr. Lau were resolved, given the December/January Resolutions. He stated that the judge was wrong to conclude that there was deadlock based on pre-commencement events. Mr. Hacker maintained that at the time the judge made the order for liquidation, there was no deadlock as the December/January Resolutions resolved any issues between Mr. Chu and Mr. Lau and that there was no proper basis for the judge to find that any deadlock existed after that time. Mr. Hacker further complained that the judge erroneously concluded that Mr. Chu and Mr. Lau had fallen out in a major way and therefore could not possibly work together in OSL. Critically, Mr. Hacker argued that based on the contemporaneous documentation there was objectively indisputable evidence to the contrary and, the judge fell into error in concluding that OSL was deadlocked. He emphasised that OSL was a holding company and therefore has no business activity on its own.

² On behalf of the appellant, written submissions filed by Mr. Carrington, QC; Reply Submissions filed by Mr. Hacker, QC, and Mr. Carrington, QC; Mr. Hacker, QC presented the oral arguments during the Court of Appeal hearing.

- [18] Mr. Hacker stated that the learned judge erred in making serious findings based on the post-commencement events, as there was neither any proper evidential basis nor any proper legal basis to do so. He pointed out that the learned judge made findings concerning Beibu Gulf and its directors, in the absence of Beibu Gulf and crucially, where the relevant individuals were not given the chance to be heard. Mr. Hacker referred this Court to the judge's findings at paragraphs 62 to 80 of the judgment and contended that those matters referred to Beibu Gulf and other third parties over which Mr. Chu neither had the authority nor power to represent at the trial. Mr. Hacker also argued that the judge, in reaching his conclusions on deadlock, improperly considered matters that occurred after the petition for winding up had been filed in 2015.
- [19] In addition, Mr. Hacker provided several other arguments as to why this Court should conclude that the learned judge erred in making findings based on post-commencement events. In summary, the main crux of his submission was that OSL, Beibu Gulf and Bright Good (Asia) Ltd. ("BGAL") are wholly separate entities and in the case of Beibu Gulf and BGAL, the companies and relevant parties were not before the court and were not heard. He argued that in that situation it was wrong for the judge to make findings when those companies were not before the Court. In any event, those findings had nothing to do with OSL and the judge could not properly use them to conclude that there was deadlock.
- [20] Mr. Hacker maintained that post-commencement events could not properly be used to create a legal basis for the application by Mr. Lau for the liquidation of OSL on the just and equitable ground under the Insolvency Act. He argued that the judge was wrong to place reliance on post-commencement events on the basis that the court should consider all evidence, facts and circumstances as they exist at the time of the filing of the petition. Mr. Hacker referred to and relied on **Re Unisoft Group Ltd (No. 2)**³, **Re Flex Associates Limited**⁴ and **Cheung Hon**

³ [1994] BCC 766.

Wah v Cheung Kam Wah and others⁵ which illustrate the principle in relation to post-commencement events and how it is to be applied, namely that they should feature only if the events demonstrate a continuance of what was pleaded. Mr. Hacker maintained that the cited cases establish that it is not proper to consider post commencement events as a matter of law, because to justify relief on the “just and equitable” ground, the case of deadlock must have been made out on the pleaded pre-commencement or pre-petition events.

[21] Mr. Hacker submitted that it was wrong to equate OSL with Beibu Gulf. In support of this contention, he relied on **Wang Zhongyong et al v Union Zone Management Limited and Jin Xiaoyong et al**⁶ (or “Union Zone”) for the proposition that while in some cases the conduct of a subsidiary can be regarded as conduct of the holding company, the court should not wind up a holding company for deadlock in relation to a company that was not a subsidiary of OSL. He emphasised that OSL is not the holding company of Beibu Gulf. Secondly Mr. Hacker argued, Mr. Lau’s complaints go to matters that took place at the level of Beibu Gulf, not OSL. Mr. Hacker acknowledged that the conduct of the affairs of a subsidiary may be the conduct of the affairs of the parent company where the directors of the parent company represented a majority of the directors of the subsidiary. He however emphasised that Mr. Chu and Mr. Lau while directors of Beibu Gulf, at all times represented a minority at both the board and general meeting levels.

[22] In any event, Mr. Hacker and Mr. Carrington argued that the learned judge made a material error of law in relying on allegations that concerned Beibu Gulf and not OSL or PBM and that those allegations had nothing to do with OSL or the case before the judge. Mr. Hacker complained that the judge was “wrong, as a matter of law, to treat the affairs and conduct of Beibu Gulf as the affairs of OSL”. Mr.

⁴ [2009] EWHC 3690.

⁵ [2005] 2 HKLRD 599. (Also referred to as Re: Kammy Town Ltd.)

⁶ BVIHCMAP2013/0024 (delivered 12th January 2015).

Hacker maintained that the judge was wrong to take into account deadlock, if at all, in relation to companies other than OSL, such as Beibu Gulf and use that as a basis to wind up OSL. He emphasised that the disputes, if any, were in relation to a company that was below OSL, namely Beibu Gulf. Relying on **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**⁷ and the well-known pronouncements of Lord Hodge along with other seminal cases such as **Watt (or Thomas) v Thomas**⁸, Mr. Hacker reminded this Court that it is entitled to reverse findings made by a judge and urged the Court to do so in this case.

[23] Mr. Hacker maintained that there was no deadlock. To support his contention, he pointed out that Mr. Lau highlighted the December/January Resolutions and that the Resolutions provided that PBM would have needed to raise the necessary finance to pay up the resulting shortfall following the Resolutions. Mr. Hacker argued that the judge was wrong to ignore evidence which illustrated that Mr. Lau was the contributor to the disagreements, if any, in relation to Beibu Gulf after the parties had agreed to a resolution. Mr. Hacker submitted that Mr. Lau interfered with and prevented PBM from performing the obligations under the December/January Resolutions.

[24] Even if this Court were to conclude that indeed there was deadlock as found by the judge, alternatively, Mr. Hacker stated that Mr. Chu was not the original cause of the deadlock. He stated that the problem began when Mr. Lau insisted on the immediate repayment of the alleged PBM loan. In essence, Mr. Hacker contended that the alleged PBM loan had nothing to do with OSL as the funds paid into Beibu Gulf originated from PBM and PBM borrowed the loan monies from other companies. Mr. Hacker further argued that in any event, the insistence on the repayment was unreasonable as it was a cash investment made by shareholders of Beibu Gulf to acquire fixed assets and was not freely withdrawable. Furthermore, Mr. Hacker referred the Court to Mr. Lau's evidence where he, Mr.

⁷ 2014] 4 All ER 418; [2014] UKPC 21.

⁸ [1947] AC 484; [1947] 1 All ER 582.

Lau, stated that the disagreement over the repayment of the shareholders loan never became the cause of deadlock at the OSL level. Mr. Hacker further said that the learned judge erred by completely ignoring the fact that whether the PBM loan was to be repaid was a matter that fell for determination and decision at the level of Beibu Gulf, a separate legal entity from OSL and that was up to Mr. Lau as director of Beibu Gulf to pursue. In any event, PBM had minority shareholding in Beibu Gulf and could not have made any decision in relation to Beibu Gulf. He was adamant that it was plainly wrong for the judge to have focused on alleged disputes in relation to Beibu Gulf and use them as the basis to wind up OSL.

[25] Mr. Hacker referred to the evidence of Mr. Lau under cross-examination to illustrate that the learned judge did not consider the fact that Mr. Lau's removal as director from subsidiaries of Beibu Gulf did not require Mr. Chu's consent and those decisions were made by Beibu Gulf's Board of Directors as a result of him failing to sign certain documents to facilitate the transfer of money in his duty to Beibu Gulf as director. Learned Queen's Counsel, Mr. Hacker argued that Mr. Lau was never obstructed by Mr. Chu from seeking repayment of the PBM loan, on behalf of PBM. He argued that the judge contradicted himself when he found that the remaining directors and shareholders of Beibu Gulf were becoming weary of the issues between Mr. Lau and Mr. Chu and sought to extract themselves from the relationship in relation to Beibu Gulf. Mr. Hacker relied on an email from Mr. Chu to Mr. Lau to submit that Mr. Chu actually suggested that Mr. Lau make a request to the Board of Directors of Beibu Gulf. Mr. Hacker pointed out that the evidence shows that even Mr. Lau accepted that ultimately the question of repayment of the PBM loans were a matter for the directors and shareholders of Beibu Gulf to decide and not for Mr. Chu, who was only one of several directors.

[26] Mr. Hacker reminded this Court that if the ground of deadlock is utilised, it must be shown that the state of affairs has not been caused exclusively or substantively by the person seeking to take advantage of it. He argued that there were

fundamental flaws in the judge's analysis of the relevant facts, which are sufficient to result in the reversal of his decision by this Court.

[27] Mr. Hacker reiterated that the judge was wrong to order OSL to be wound up. He posited that as a matter of law, deadlock simpliciter is not sufficient to warrant a winding up decision. Mr. Hacker opined that the learned judge erroneously interpreted **Re Yenidje Tobacco Co Ltd**.⁹ He submitted that the principle emanating from **Re Yenidje Tobacco Co Ltd** is that as a matter of law, the court needed to consider whether OSL is, in substance, a partnership or in the guise of a private company and if not there is no reason why a deadlock simpliciter should warrant liquidation. Mr. Hacker further submitted that the judge's approach to wind up OSL without giving regard to the nature and substance of the company was wrong. He said that mere breakdown of relations is not sufficient to warrant winding up. He referred to the decision of this Court in **Union Zone** in support of his arguments.

[28] Turning to whether the judge erred in exercising his discretion by winding up OSL, Mr. Hacker stated that the learned judge was incorrect to order the remedy of last resort when there were reasonable alternatives available to Mr Lau. Importantly, he said that the judge erred in concluding that there was no alternative remedy. He said firstly that the judge was wrong to ignore the possibility of a buy-out under section 184(2)(a) of the **Business Companies Act**¹⁰ and was also wrong to dismiss Mr. Chu's intention and willingness to buy-out Mr. Lau.

[29] Mr. Hacker pointed out that clause 11 and 13 of the OSL's Memorandum of Association provided for the transfer of shares. Towards this end, Mr. Hacker maintained that each of the two directors in OSL could have convened a meeting and the other one had no ability to prevent this from happening, since all that was required is the holding of 30% of shares. He referred to other provisions of the

⁹ [1916] 2 Ch 426.

¹⁰ Act No. 16 of 2004, Laws of the Virgin Islands.

Memorandum of Association of OSL to highlight that each shareholder of the company had obligations and duties as directors in relation to OSL.

- [30] Mr. Hacker emphasised that OSL was not a company that was actively involved in the trading of shares and was a viable company. He further maintained that the judge ignored the consequences of any liquidation on Beibu Gulf. Mr. Hacker said that a letter from Mr. Lau to Mr. Zhou of Beibu Gulf shows that Mr. Lau understood that negative consequences would follow as a result of the liquidation of OSL. He therefore urged this Court to set aside the exercise of discretion by the learned judge to wind up OSL.

Submissions on Behalf of Mr. Lau Wing Yan

- [31] Learned Queen's Counsel, Mr. Jones¹¹, said the learned judge's decision, factual and evaluative conclusions were heavily determined by the judge's assessment of the relative credibility of the witnesses who gave evidence at trial. He reminded this Court that a very substantial proportion of the appeal relies on challenges to these factual decisions by the judge and that there is a heavy burden imposed on an appellant who seeks to overturn such factual findings by a first instance judge.
- [32] Mr. Jones also reminded this Court that an appellate court should be slow to overturn findings of primary facts where those findings are based on the judge's assessment of witnesses and their credibility. He said that only where there is no evidence at all to support the particular finding of fact then an appellate court can overturn that finding. Relying on **Watt (or Thomas) v Thomas** and **Re B (A Child) (Care Proceedings: Threshold Criteria)**¹², Mr. Jones stated that the principles governing appeals against findings of fact have been restated, emphasised and applied on numerous occasions not only by the courts in England

¹¹ Mr. Jones provided the Court with oral and written submissions.

¹² [2013] 1 WLR 1911.

but also by this Court.¹³ To further support his argument, he referred the Court to **FAGE UK Ltd and another v Chobani UK Ltd and another**¹⁴ where Lewison LJ stated that “Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so”. He therefore said that this Court should not interfere with the judge’s findings as Mr. Chu has failed to meet the high threshold for challenging the judge’s findings of primary fact in this case.

[33] Further, Mr. Jones reminded this Court that there is a distinction between findings of primary fact and evaluative judgments based on those findings of fact. Mr. Jones said that **Assicurazioni Generali SpA v Arab Insurance Group; Practice Note**¹⁵ endorsed by the Privy Council in **Central Bank of Ecuador and others v Conticorp SA and others**¹⁶ applies to the issues of the present matter in that it outlines the reasons why a first instance judge’s evaluation of primary facts should be respected and caution should be exercised by appellate courts in reversing a judge’s evaluation of facts. Mr. Jones relied on **Beacon Insurance** to emphasise that an appellate court should be especially slow to interfere with a judge’s evaluation of facts where that evaluation is based on an assessment of the credibility of witnesses. He contended that the judge’s findings of fact and evaluative judgments were justified and were clearly made by factoring the credibility or lack thereof of Mr. Chu.

[34] Next, Mr. Jones stated that the appeal is a direct challenge to the judge’s exercise of discretion to order the winding up of OSL on the “just and equitable” ground as made clear by **Re Union Zone**. Learned Queen’s Counsel said that an exercise of discretion should not be overturned simply because an appellate court could

¹³ Zorin Sachak Khan et al v Gany Holdings (PTC) SA et al BVIHCP2014/0018 (delivered 14th March 2016)..

¹⁴ [2014] EWCA Civ 5.

¹⁵ [2003] 1 WLR 577.

¹⁶ [2016] 1 BCLC 26.

have come to a different view. Relying on **G v G**¹⁷ and **Dufour and others v Helenair Corporation Ltd and Others**¹⁸ Mr. Jones said that the judge was entirely entitled to exercise his discretion so as to order the winding up of OSL and there is no proper basis upon which to interfere with the judge's decision.

[35] Turning to the pre-commencement complaints, Mr. Jones stated that there was no resolution of the issues surrounding the PBM loans. Furthermore, Mr. Jones stated that as a matter of fact, the December/January Resolutions did not deal with the repayment of the loans. Mr. Jones said that Mr. Chu's contention that the judge found that there was an agreement or solution resolved upon the December 2015 and January 2016 meetings is a gross misrepresentation of the judgment. Mr. Jones said that the judge was not saying there was an agreement or solution but that actually; there was never any true agreement between Mr. Chu and Mr. Lau. Mr. Jones stated that the judge was correct in stating that the court must consider all evidence, facts and circumstances. Continuing on this point, he stated that the judge was entitled and correct to make the factual findings he did, in view of the evidence before him at trial and that there is no proper basis for overturning those findings.

[36] In relation to post commencement, Mr. Jones argued that the judge was fully entitled to take those matters into account on the evidence before him but alternatively, he pointed out that judge made it clear in the judgment at paragraphs 60 to 61 that there were sufficient grounds to justify winding up OSL on matters which occurred prior to the application by Mr. Lau. Accordingly, Mr. Jones posited that even if post- commencement events should not have been considered, it would not have affected the outcome of the case below.

[37] Mr. Jones submitted that as a matter of law, post commencement events can be taken into account to establish grounds for winding up a company. In support of

¹⁷ [1985] 1 WLR 647.

¹⁸ (1996) 52 WIR 188.

his proposition, he purported to rely on **In Re Fildes Bros Ltd**¹⁹, **Re Walter L Jacob & Co Ltd**²⁰ and on **Re Dux Investment Funds Limited**²¹ where Henry J held at paragraph 7 that “[i]n deciding whether it is just and equitable to order that a company be liquidated and dissolved, the court examines the facts which exist at the time of the hearing”. Mr. Jones submitted that the judge was fully entitled to take into account post-commencement events as additional grounds for justifying a winding up order.

[38] Mr. Jones sought to distinguish the cases upon which Mr. Chu relied on from the case at bar. He said the Hong Kong decision in **Cheung Hon Wah v Cheung Kam Wah** should not be followed because the applicable legislation in Hong Kong is materially different from the BVI legislation. This is because in Hong Kong the winding up is deemed to commence as at the date of the petition whereas in the BVI the winding up only commences as at the date of the appointment of a liquidator. Furthermore, Mr. Jones submitted that the law as in Hong Kong is not a rule of universal application and that other jurisdictions, as illustrated by the English Court of Appeal, have taken the opposite approach. Mr. Jones opined that the passage quoted by Mr. Hacker from **Re Unisoft Group (No 2)** is per incuriam. He said that the case concerned unfair prejudice and not an application for a winding up on the just and equitable ground and that English Court of Appeal cases such as **Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd**²² would be more relevant than the first instance case of **Re Unisoft Group (No 2)**. Mr. Jones submitted that the same distinction can be made for **Re Flex Associates Limited**.

[39] Mr. Jones said that Mr. Chu’s arguments and attempts to attack the judge’s findings on post commencement events are without merit. According to Mr. Jones, the judge was correct in drawing adverse inferences about Mr. Chu based

¹⁹ [1970] 1 WLR 592.

²⁰ [1989] BCLC 345.

²¹ SVGHCV2015/0132 (delivered 14th April 2016)..

²² [2002] EWCA Civ 369.

on his failure to call any other witnesses and based on the evidence before him. In addressing Mr. Chu's complaint that the judge was "wrong as a matter of law, to simply treat the affairs and conduct of Beibu Gulf as the affairs of OSL", Mr. Jones submitted that the assertion that the judge should have entirely disregarded Mr. Chu's misconduct at Beibu Gulf should be rejected. Purporting to rely on **Rackind and others v Gross and others**²³ and **Re Coroin Ltd (No 2.)**²⁴, Mr. Jones stated that unlike in unfair prejudice proceedings there is no statutory requirement to establish that the applicant's complaint concerns the affairs of the company. According to Mr. Jones nothing in **Rackind** suggests that the Court should constrain itself from considering conduct in relation to subsidiaries. Mr. Jones submitted that the court was entitled to consider the position of OSL's subsidiaries as part of its assessment of the business realities of the case. Mr. Jones posited that there is a distinction in relation to unfair prejudice matters vs. matters relating to the just and equitable ground for winding up a company.

[40] In relation to the judge's finding that Mr. Lau was not the substantive cause of the deadlock, Mr. Jones relied on his submissions relating to an appellate court and the interference of first instance judge's evaluative judgment and findings of fact. Mr. Jones submitted that Mr. Chu was the original cause of the deadlock in his actions and dishonesty. Mr. Jones said that the judge quite properly concluded that one of the main causes of the deadlock was Mr. Chu's misconduct in relation to the PBM loans.

[41] Mr. Jones said that the judge properly made the order to wind up OSL. Relying on the dicta of Lord Donovan in **Ng Eng Hiam v Ng Kee Wei**²⁵, Mr. Jones states that whether a deadlock is sufficient to justify a winding up on the just and equitable basis is a question of fact, which an appellate court should be slow to interfere with. Mr. Jones argued that the court in **Re Yenidje Tobacco Co Ltd** never laid

²³ [2005] 1 WLR 3505.

²⁴ [2013] 2 BCLC 583.

²⁵ (1964) 31 MLJ 238.

down a rule to the effect that a deadlock would only justify a winding up in circumstances where there was a quasi-partnership between the shareholders of the company, but that the authorities suggest that it is merely a factor which may lead to the exercise of the discretion. Mr. Jones said that the learned judge exercised his discretion properly.

- [42] Finally, Mr. Jones submitted that the judge was correct to conclude that Mr. Lau had not acted unreasonably in pursuing a winding up order. He pointed out that the judge found on the evidence that there was no reasonable alternative, as there was no belief that Mr. Chu had the inclination to buy out Mr. Lau and that the relationship had broken down so badly that negotiation between the two men was unlikely. The only workable solution, Mr. Jones posited, was the liquidation of OSL. Mr. Jones said that any potential consequences of the liquidation of OSL were fully addressed by the learned judge. Finally, and relying on **Re Yenidje Tobacco Co Ltd**, Mr. Jones argued that if there were adverse consequences, they would not, as a matter of law, justify the refusal of a winding up order in the case where deadlock is established. He posited that in the circumstances, the judge quite correctly ordered that OSL be wound up. He therefore urged this Court to dismiss the appeal and affirm the decision of the court below.

Discussion

The Court's Winding up Jurisdiction – the Just and Equitable Ground

- [43] Before addressing the issues as I have identified them at paragraph 15 above, it is important first to examine the relevant statutory provisions and case law which regulate the court's jurisdiction to wind up a company on just and equitable grounds in the Territory of the Virgin Islands.
- [44] It is not disputed that the court has jurisdiction under the Insolvency Act to wind up a company and to appoint liquidators for that purpose. The court's power is expressly set out in section 162(1) of the Insolvency Act, which provides:

“The Court may, on an application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if

- (a) the company is insolvent;
- (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed; or
- (c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed.” (Underlining supplied)

Section 162(1)(b) was specifically engaged by Mr. Lau and by the learned judge, and relates to the court’s power to appoint liquidators where the court is of the opinion that it is just and equitable to do so. The court’s power under section 162(1)(b) is circumscribed generally by section 167(3) of the Act which provides 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 is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy.”

[45] It is acknowledged that the just and equitable ground is a wide one. In **Union Zone**, this Court cited with approval the dictum of Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd and Others**²⁶ to the effect that the just and equitable route to winding up must be generously construed to include a wide range of circumstances capable of invoking the court’s jurisdiction. In **Ebrahimi**, his Lordship rejected restrictive interpretations of the just and equitable route to winding up and stated:

“It has been suggested, and urged upon us, that...the words [of the petition] must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice

²⁶ [1973] AC 360.

or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.” (Underlining supplied)

[46] In **Union Zone**, this Court, relying on Lord Wilberforce in **Ebrahimi**, further held that:

“Just and equitable provisions for winding up a company enable the court to subject the exercise of legal rights to equitable considerations which make it unfair for those conducting the affairs of the company to rely on their strict legal powers. There are a plethora of circumstances to which the equitable considerations may be applied. A court must look to the common law for types of circumstances which have been found to give rise to the application of the just and equitable ground when considering the winding up of a company and exercising its discretionary powers and remedies under section 162 and 167 of the Insolvency Act.”

[47] Whether it is just and equitable that a company should be wound up is also referred to as an “inference of law” from the facts of the case before the court. This long-standing characterisation is evidenced in decisions as far back as that of Jessel MR in **Re Rica Gold Washing Co.**²⁷ Stated differently, a judge’s conclusion on a winding up application made on the footing of the just and equitable ground is a legal finding based on an evaluation of the relevant circumstances of the application. In **J F Ming Inc. et al v Ming Siu Hung, Ronald et al**²⁸ this Court stated that: “[t]he court has to look at all of the relevant circumstances in deciding what kind of order it is just and equitable to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order.” This Court’s recent decision in **Kathryn Ma Wai Fong v Wong Kie Yik et al**²⁹ has also acknowledged this settled judicial principle.

[48] Importantly, there are many bases upon which a court can determine that it is just and equitable to wind up a company. There is no exhaustive list or closed category of events that defines what amounts to just and equitable grounds for

²⁷(1879) 11 Ch D 36 at p. 41.

²⁸ BVIHMAP2016/0039 (delivered 30th June 2017, unreported).

²⁹ BVIHMAP2018/0001 and BVIHMAP2018/0002 (delivered 27th March 2019).

winding up a company. On this point, I accept and am guided by Lord Wilberforce in **Ebrahimi v Westbourne Galleries** where his Lordship stated that:

“There has been a tendency to create categories or headings under which cases must be brought if the just and equitable clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.”

Lord Wilberforce’s statement, to a large extent, underscores the fact that the court’s discretion to wind up a company on just and equitable grounds, must be exercised after having evaluated the particular facts and circumstances before it.

Issue (a) Whether the Learned Judge erred in holding that the Affairs of OSL were Deadlocked

[49] I turn now to address whether, as a matter of fact, the judge erred in holding that deadlock had been arrived at in the management of OSL.

[50] It is not disputed that the just and equitable ground may be properly invoked in circumstances where deadlock has been arrived at in the management of a company. This was confirmed in **Re Yenidje Tobacco Ltd** where it was further held that the court’s power in this regard equally applies to companies which operate in the nature of quasi-partnerships. The court’s jurisdiction was reinforced, with even more force, by Lord Donovan in **Ng Eng Hiam** where his Lordship stated that: “[t]he principle is clear that if the Court is satisfied that complete deadlock exists in the management of a company the jurisdiction...will be exercised.”

[51] I hasten to add further, that it is clear from cases like **Re Yenidje Tobacco Ltd** and **Ng Eng Hiam**, that, as with the just and equitable ground generally, the issue of whether or not a company is deadlocked is a question of fact to be determined by the judge following an evaluation of the relevant facts and circumstances before the court. Though it is recognised by cases such as **Assicurazioni Generali SpA**, that there is a difference between conclusions based solely on primary facts and

those involving an assessment of a number of different factors (“evaluations of fact”), the approach of an appellate court to evaluations of fact is the same as the approach to findings of fact.

- [52] The approach of appellate courts to findings of fact by a trial judge is well-settled and needs no detailed recitation. The United Kingdom Supreme Court in **McGraddie v McGraddie and another**³⁰ succinctly restated the age-old principle on this point, in the following terms, that “an appellate court should not interfere with the trial judge’s conclusions on primary facts unless satisfied that he was plainly wrong.” More recently, Lord Sumption, in **Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others**,³¹ adopting the words of Lord Hoffman in **Biogen Inc v Medeva Plc**,³² emphasised that an appellate court will rarely reverse a trial judge’s finding of fact and opined as follows:

“The need for appellate caution in reversing the judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.”

Similarly, the United Kingdom Supreme Court in the case of **Volcafe Ltd and others v Compania Sud Americana De Vapores SA (trading as CSAV)**³³ reiterated the approach of an appellate court in relation to a judge’s factual findings. In **Volcafe**, Lord Sumption stated:

“...a trial judge’s findings of fact should not be overturned simply because the Court of Appeal would have found them differently. It must be shown that the trial judge was wrong: i.e. that he fundamentally misunderstood the issue or the evidence, or that he plainly failed to take the evidence into

³⁰ [2013] UKSC 58.

³¹ [2013] UKPC 13 at para 28.

³² [1997] RPC 1, 45.

³³ [2018] UKSC 61.

account, or that he arrived at a conclusion which the evidence could not on any view support.”

[53] The above principles from **Assicurazioni**, **Mutual Holdings**, **McGraddie** and **Volcafe** are very applicable to the appeal at bar. I therefore apply them as I examine the aspect of the appeal challenging the learned judge’s evaluation of facts. In order to overturn the judge’s finding that there was deadlock at OSL between Mr. Chu and Mr. Lau, it must be demonstrated that the judge was plainly wrong. Indeed, I have reviewed and given careful consideration to both the documentary and oral evidence that was before the learned trial judge, along with the contents of the learned judge’s written judgment. It is very clear that much of the evidence upon which the judge relied to determine that OSL was in deadlock had very little to do with OSL. Much of the judge’s assessment in fact had to do with Beibu Gulf and was concerned with circumstances which arose following the filing of the winding up petition (“post commencement events”). On any view of the evidence, in my judgment, it was not open to the judge on the evidence relevant to OSL to find that there was deadlock.

Post-Commencement Events

[54] First, in relation to the post-commencement events, it is important to note that the winding up petition was heard two years after the filing of the petition, and that the judge’s findings appear to depend substantially on circumstances which existed at the time the petition was heard, and not those which prevailed at the time that the petition was filed. I am of the considered view that a finding of deadlock at OSL ought only to have been made in relation to the facts as they existed at the time of the filing of the petition. Post-commencement events to the filing of the petition, in my judgment, would only have become relevant for the purposes of determining whether the company should be wound up given a change in circumstances.

[55] To put it another way, there must have been, at the date of the commencement of proceedings, an irretrievable breakdown of trust and confidence between Mr. Chu and Mr. Lau at OSL, at both the director and shareholder level. I therefore agree

with Mr. Hacker's submission that, in these circumstances, it was not open to the judge to conclude that, at the date of filing the petition, there was deadlock between the two gentlemen, and by extension, the management and affairs of OSL. Notwithstanding this, even if the judge was correct in taking into consideration the facts as they were at the date of the hearing of the petition, as I will discuss later in this judgment, I fail to see how the judge could have concluded that there was a deadlock in the management of OSL.

Complaints in Relation to Third-Parties as the Basis for Winding Up

[56] Secondly, and more critically, having closely examined the learned judge's judgment, I observe that the judge took into account issues going on at Beibu Gulf and other third-party companies, which could not be said to have affected OSL at the director and shareholder level. In doing so the judge sought, at paragraph 88 of his judgment, to rely on the case of **Rackind v Gross**. I agree with Mr. Hacker that the judgment of this Court in **Union Zone** makes it clear that the judge was wrong in doing so. Farara JA [Ag.], at paragraph 67 of **Union Zone** held that the principle in **Rackind v Gross** may be applied in certain situations involving a holding company and its subsidiary, whereby the affairs of a company can include the affairs of a subsidiary and that a court has the power to make an order regulating the future management of the affairs of the holding company where the affairs of the subsidiary have been conducted in a prejudicial manner. This, though, is only applicable in situations involving a holding company and its subsidiary. The relationship between OSL and Beibu Gulf is not readily apparent from the evidence that was adduced at trial. What is clear is that Beibu Gulf is not a subsidiary of OSL, OSL is not the holding company of Beibu Gulf, and that the directors of OSL had no duties in relation to Beibu Gulf. Rather OSL, through PBM, merely owned a 49% share in Beibu Gulf. These circumstances, along with the fact that Mr. Lau has only made complaints that go to the matters that take place at the level of Beibu Gulf, therefore beg the question - why liquidate OSL?

[57] Furthermore, though it is clear that PBM, as minority shareholders in Beibu Gulf, have to submit to the ruling and management of the majority shareholders, this, in and of itself, is not a justification for the winding up of OSL as there was no nexus to Beibu Gulf and OSL. This appears to me to be a significant point of departure with my reasoning from that of the learned judge's. It appears to me that the judge treated the three companies as if they were one and the same, without recognising the clear hierarchical structure of the three companies, and that the three companies were independent entities, with Beibu Gulf having its own directors. The fact is also that Mr. Lau and Mr. Chu were only two of five directors of Beibu Gulf and they were directors of PBM, which was the minority shareholder of Beibu Gulf. Neither Mr. Lau nor Mr. Chu could, by themselves, have influenced the direction of Beibu Gulf. So, even where it is clear that Mr. Chu and Mr. Lau could not agree on decisions to be made, they were simply not in a position where they could not be reasonably expected to work together and make decisions which affected OSL. The judge fell into error by conflating the three separate companies and the various roles of Mr. Lau and Mr. Chu in relation to the three companies and failed to distinguish the responsibility which they owed to Beibu Gulf which was separate and distinct from that which they owed to OSL.

[58] For the avoidance of doubt, I find that:

- (i) the learned judge erred in concerning himself with the affairs of a third-party company (Beibu Gulf) which was not a subsidiary of OSL;
- (ii) the learned judge's application of **Rackind v Gross** to the case at bar was misplaced and the principle as stated by this Court in **Union Zone** is clear on that point;
- (iii) The learned judge erred in his treatment of OSL, Beibu Gulf and PBM as one and the same;

- (iv) The judge erred in concluding that the management of OSL had reached deadlock on the basis of facts related to Beibu Gulf.

The Finding of Deadlock

[59] As I have found, the main factual evidence before the judge, upon which he concluded that there was a deadlock at OSL was not relevant to OSL. I will now examine the judge's deadlock finding in further detail.

[60] I accept Mr. Hacker's position that if the court is to take into account the evidence in other companies, there is cogent and objective documentary evidence that points to there being no deadlock in relation to OSL. There were documents which evidence negotiations after the date of the application and that both gentlemen met, were engaged in discussions with each other and were able to take effective decisions regarding PBM. There were actions between the two men that clearly show that there had not been that level of breakdown which constituted deadlock. My view therefore is that the judge was plainly wrong in holding that there was deadlock in OSL.

[61] I am fortified in my view that the judge was plainly wrong by the numerous circumstances which the court has consistently held do not amount to a deadlock. It is the law that a winding up petition should not be resorted to mainly because there is dissension within the company. This was made clear by Middleton J in **Re Harris Maxwell Larder Lake Gold Mining Co Ltd**.³⁴ In **Loch and another v John Blackwood Limited**,³⁵ Lord Shaw of Dunfermline in assessing the consideration of the justice and equity of pronouncing an order for winding up said:

"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's

³⁴ (1910) 1 O.W.N 984 (H.C.).

³⁵ [1924] AC 783 at p. 788.

business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.”.

[62] Another very settled circumstance in which the courts have consistently refused to hold that there was deadlock is where an investor or shareholder of a company simply wishes to take his investment out of the company. Indeed, the petitioner's desire to realise an investment in the company does not in of itself justify winding up. If any authority is needed for this principle, that authority can be found in **Re Anglo-Continental Produce Co Ltd**.³⁶ I remind myself that in the case at bar, the dispute and the main trigger of the winding up application was a disagreement as to whether Beibu Gulf should repay PBM. On any view of the facts, PBM only had minority shareholding in Beibu Gulf and therefore could not make any decisions as to what should occur in Beibu Gulf. As I have stated earlier I do not see where any finding of deadlock can arise on these facts. Stripped to its barest, Mr. Lau, in his petition, was complaining about what was happening at Beibu Gulf. It is worth emphasising that Beibu Gulf is not a subsidiary of OSL. I fail to see on what basis the learned judge could have held that there was deadlock in OSL.

[63] Furthermore, and very importantly also, it was held by Lord Cross of Chelsea in **Ebrahimi v Westbourne Galleries Ltd**,³⁷ that the courts are reluctant or less inclined to find deadlock where there is some procedure under the company's constitution, articles or memorandum of association by which a decision can be made which leads to the resolution of a potential deadlock or an exit from the company. Clause 6 of the Articles of Association and clause 11 of the Memorandum of Association of OSL very clearly contemplate the issue of a deadlock arising in the company and gives the option to Mr. Lau to transfer his shares as a way to get out of the company in that event. It does not appear that

³⁶ [1939] 1 All ER 99.

the judge's attention was adverted to these clauses. Applying the principle in **Ebrahimi** to the case at bar, there could not have been a finding of deadlock between Mr. Chu and Mr. Lau at OSL when there existed an internal procedure for an exit, contained in the company's constituent documents, which is in fact the contract that was freely entered into by the company's shareholders.

- [64] It is worth reiterating that the joint venture structure between Mr. Chu, Mr. Lau and the PRC, was established so that the PRC interests would have control over Beibu Gulf. It is settled law that the winding up order is a remedy of last resort. The Memorandum of Association and Articles of Association are a contract freely entered into by the shareholders. To find that there was deadlock, the court is in effect, rewriting the contract that was made between the members, by not subscribing to the Articles and the Memorandum and fundamentally altering the rights of members by compelling them to accept a forced distribution of the assets of a solvent company. What is worse is the fact that OSL is a mere holding company.

Conclusion – Issue (a)

- [65] While caution must be had in differing from a judge's conclusions based on an evaluation of the facts, I have no doubt that the judge was plainly wrong in concluding as he did. The judge took into consideration post-commencement events, gave improper weight to irrelevant matters related to Beibu Gulf and formed a view that the management of OSL was in deadlock when it was not open to the judge on the evidence to make such findings. Applying the principles that were enunciated in **Assicurazioni**, **McGraddie** and **Volcafe**, this court is justified in interfering with the judge's conclusions based on his evaluation of the facts. In view of the totality of circumstances, the judge's findings that the management of OSL was in deadlock must be set aside. It follows therefore that, in the circumstances, it was not just and equitable to wind up OSL.

[66] This finding disposes of the appeal. For the sake of completeness however, I will address the second issue.

Issue (b) Whether in the Circumstances the Learned Judge erred in Exercising his Discretion to Wind Up of OSL

[67] It is the law that if the judge considers there was deadlock, the judge could refuse to exercise the discretion to wind up the company. Even if there was deadlock, which by emphasis, I find did not exist factually, the judge must still, in determining whether to exercise his discretion, properly give weight to all the relevant factors whilst omitting irrelevant factors. Section 162(1)(b) creates a statutory judicial discretion to wind up a company. Both Section 162(1)(b) and 167(3) must be read together. The court must consider whether the facts, at the time when the petition was filed, still exist, when making the order. In **Re Fildes Brothers**, the court had this to say:

“First, in my judgment the question whether it is just and equitable to wind up the company is one which must be answered on the facts which exist at the time of the hearing. If on the facts existing when the petition was presented it was then just and equitable to wind up the company, but subsequently it has ceased to be so, I do not think a winding up order should be made.” (Underlining supplied)

[68] I apply the above principles to the case at bar and I agree with Mr. Hacker’s submission that the judge should have decided whether or not, at the time of trial, in all of the circumstances, it was just and equitable for the company to be wound up. The evidence shows that several months after the filing of the application, the two gentlemen were still engaging in conversation and trying to find a way to work out their differences. That hardly justifies the appointment of a liquidator. In any event, the discussions were in relation to Beibu Gulf.

[69] There was no deadlock but even if there was, the question arises as to whether the learned judge exercised his discretion correctly, based on the facts and evidence. It is noteworthy that the effect of the order to wind up OSL is effectively to deprive Mr. Chu of his right to retain his investment in OSL.

[70] In granting the application to wind up the company, the judge was exercising his discretion. The test for setting aside the exercise of a judge's discretion is well known. Sir Vincent Floissac, CJ in what is regarded as the locus classicus of **Dufour and Others v Helen Air Corporation Ltd and Others**³⁸ stated:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[71] In order to set aside the exercise of discretion by the judge and for an appellate court to interfere, the trial judge must have erred and as a result his or her decision was outside the generous ambit of reasonable disagreement or was blatantly wrong. It is clear from the section 167(3) of the Insolvency Act, that the judge could only have made the order to wind up OSL if there was evidence presented by Mr. Lau that there was no alternative remedy reasonably available to him. In the case at bar, in determining whether OSL should be liquidated, it seems clear that the judge took into account irrelevant factors and failed to fully take into account relevant factors such as the sale to a third party. The judge should have concluded on the evidence that there was an alternative remedy of Mr. Chu buying out Mr. Lau's shares.

[72] I do agree with Mr. Hacker that the remedy of a buy-out was reasonably available to Mr. Lau and that the judge was wrong to ignore this possibility. The learned judge could have adjourned the hearing, or even at the conclusion of the trial, given directions with respect to that alternative remedy. Recourse could also have

³⁸ (1996) 52 WIR 188 at pp. 190-191.

been had to the making of a suspended order to allow the parties the opportunity to resolve any differences they may have had.

[73] I remind myself of **Cumberland Holdings Ltd v Washington H Soul Pattinson and Co Ltd**³⁹ Lord Wilberforce stated that “to wind up a successful and prosperous company... must clearly be an extreme step and must require a strong case to be made”. In **Re Walter L Jacob** Nicholls LJ states

“...that to wind up an active company compulsorily is a serious step, and he who asserts that it is just and equitable for the court to take that step must put forward and establish reasons which have a weight justifying the court taking that step.”

[74] Applying the principles in **Dufour**, I am also of the view that the decision to wind up the company was outside the generous ambit within which reasonable disagreement is possible or was clearly and blatantly wrong. There were alternative remedies available to Mr. Lau, and as such the draconian remedy of a winding up was a blatantly wrong exercise of discretion. It therefore falls to this Court to exercise its discretion afresh. In my view, taking into account the relevant factors, the option of the buy-out should have been presented.

[75] As I have stated, there is no doubt that there were alternative remedies to the draconian remedy of winding up OSL. Accordingly, in exercising the discretion afresh, and having regard to the circumstances of the case as set out above, the appropriate order would not be to wind up the company but rather, in the alternative, to order Mr. Lau to offer for sale, his shares to Mr. Chu so that they may be transferred to Mr. Chu in accordance with the Memorandum of Association and the Articles of Association, or to order that Mr. Lau's shares be placed for sale to an interested third party.

³⁹ (1977) 13 ALR 561.

Costs

- [76] The judge below ordered Mr. Chu to pay Mr. Lau's costs. In so far as Mr. Chu has prevailed in this appeal, I would set aside the costs order in the court below in its entirety and in its place, order that Mr. Lau shall pay to Mr. Chu the costs in the court below, such costs are to be assessed if not agreed within 21 days of this judgment. On this appeal, Mr. Chu having succeeded, Mr. Lau shall pay to him two-thirds of the assessed costs in the court below unless otherwise agreed within 21 days of this judgment.

Conclusion

- [77] For all the above reasons, I conclude that the judge improperly ordered OSL to be wound up on the 'just and equitable' ground. There simply was no deadlock between Mr. Chu and Mr. Lau. I have no doubt that the judge made critical findings of fact that were not open to him on the evidence. Given the fact that OSL is not a holding company of Beibu Gulf, he erred in considering factors concerning Beibu Gulf and other third-party companies. As a matter of fact, the learned judge also erred in holding that there was deadlock when the Memorandum of Association and the Articles of Association of OSL make provision for an exit route which would prevent a situation of deadlock. All of this is contrary to the well-established principles referred to above. I would therefore allow the appeal and set aside the judgment below.
- [78] Further, even if there is deadlock on the facts relating to OSL, in any event the judge failed to exercise his discretion properly. The judge did not properly or fully consider the relevant factors in determining whether to wind up OSL. He failed to fully consider the possibility of alternative remedies and failed to exercise his discretion properly. There simply was no good reason for the judge to "kill off" an otherwise viable company based on the totality of the circumstances. He erred in the exercise of his discretion, which is set aside. Exercising the discretion afresh and taking into account the totality of circumstances, this Court would direct that Mr. Lau's shares in OSL be sold either to Mr. Chu or a third party.

Disposition

- [79] For the reasons above, I would allow Mr. Chu's appeal and set aside the orders winding up OSL and appointing liquidators over OSL.
- [80] In relation to the claim below, I would set aside the costs order in its entirety and order Mr. Lau to pay Mr. Chu's costs, such costs to be assessed if not agreed within 21 days of this judgment. On the appeal, Mr. Lau shall pay Mr. Chu two-thirds of the assessed costs in the court below unless otherwise agreed within 21 days of this judgment.
- [81] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar