

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

CLAIM NO. BVIHC (COM) 2015/0036

**IN THE MATTER OF CENTRAL SHIPPING CO., LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003**

BETWEEN:

FORTUNE BRIGHT GLOBAL LIMITED

Applicant

and

CENTRAL SHIPPING CO., LIMITED

Respondents

Appearances:

Robert Levy, Q.C., and Grant Carroll and Matthew Neal of Walkers, for the Applicant
Matthew Hardwick, Q.C., and Richard Evans and Murray Laing of Conyers Dill
& Pearman, for the Respondent

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2015: October 28, 29

2016: April 29
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JUDGMENT

Applicant sought that Respondent be wound up and liquidators appointed pursuant to Insolvency Act, 2003 on just and equitable grounds and on insolvency grounds – Applicant creditor and member of Respondent – Application part of numerous court proceedings in this jurisdiction and Hong Kong arising from total and

irretrievable breakdown of longstanding and wide-ranging business relationship between two businessmen who are the principle ultimate beneficial owners of businesses.

Application defended by one of principle ultimate beneficial owners in name of Respondent – Parties consented that Application be determined with written direct evidence and without cross-examination – Long trial with oral evidence of one of numerous pieces of uncoordinated litigation between the two men may have left Court no wiser on reasons for breakdown of relationship – Strong sense no ‘bad guy’ and ‘good guy’ – Both may have contributed to material degree to breakdown – Both have looked for and found ways to take advantage in their company and court disputes of structures they chose when relationship characterised by mutual trust, confidence and cooperation – Thus far unwilling to find commercial solution, part company, and end considerable litigation consuming disproportionate court resources.

Courts have struggled to draw just and equitable line between situations where just and equitable relief should be granted and those in which it should not – Tougher cases where shared responsibility for breakdown of relationship – While courts eschewed ‘no fault divorce’ where member simply ‘wants out’, they continue to struggle with shared responsibility situations.

Breakdown in relationship not, in of itself, justification for winding up: must be deadlock; breach of some underlying agreement, express or implied, between shareholders as to rights or participation in management and decision-making; or unauthorized change in business or activity for which company incorporated [Wang & Others v Union Zone Management Ltd & Others BVIHCMAP2013/0024, Court of Appeal, 12 January 2015, followed] – Principle ultimate beneficial owner who controls Respondent as sole director does so in breach of the underlying understanding or agreement with other principle ultimate beneficial owner – Basis for just and equitable winding up established – Respondent should be wound up.

In strict legal sense, no deadlock. However, only because of non-compliance with understanding or agreement upon which Respondent founded – If parties complied with understanding or agreement, would be deadlock.

Loss of substratum with financially unhappy end to vessel ownership and operation of Respondent – In any event, inability to carry on in compliance with arrangement or agreement fatal to continuation of Respondent.

Respondent is balance sheet insolvent – In any event, basis on which responding principle ultimate beneficial owner appears intent of preventing shareholder loans from being repaid, and balance sheet and cash flow consequences when they are repaid, supports just and equitable winding up.

Respondent should be wound up – Application granted – Liquidators to be appointed.

[1] **LEON J [Ag.]:** The Applicant, Fortune Bright Global Limited, applied for an order that the Respondent, Central Shipping Co., Limited, be wound up and liquidators appointed pursuant to the

Insolvency Act, 2003 (“**Act**”). The Application was brought on both just and equitable grounds¹ and insolvency grounds². The Applicant is both a creditor of the Respondent and a member of the Respondent (and as a member applying on insolvency grounds it needs and seeks leave to apply).

TOTAL AND IRRETRIEVABLE BREAKDOWN BETWEEN TWO BUSINESSMEN

- [2] This Application is part of numerous court proceedings in this jurisdiction and in Hong Kong³ arising from the total and irretrievable breakdown of the longstanding and wide-ranging business relationship between two businessmen, Lau Wing Yan (“**Mr. Lau**”) and Chu Kong (“**Mr. Chu**”). They are the principle ultimate beneficial owners of the businesses involved in the proceedings, even though in the case here, other ultimate beneficial owners hold a minority position and are aligned 50-50 with either Mr. Lau or Mr. Chu.
- [3] Two of the minority ultimate beneficial owners of the Respondent are aligned with Mr. Lau and two of the minority ultimate beneficial owners are aligned with Mr. Chu. Each ‘camp’ – Mr. Lau’s camp and Mr. Chu’s camp – indirectly holds 50% of the Respondent.

APPLICANT AND RESPONDENT

- [4] **STRUCTURE OF COMPANIES.** The Applicant, a BVI company, is a 20% Shareholder of the Respondent, a BVI company. The Applicant is deadlocked at the shareholder level but not at the board of directors level. Hence its ability to bring this Application. At the shareholder level there are four 25% shareholders, two of whom are in Mr. Chu’s camp and two of whom are in Mr. Lau’s camp.

¹ Act, Sections 159(1)(a) and 162(1)(b).

² Act, Sections 159(1)(a) and 162(1)(a).

³ Respondent’s Written Submissions, paragraph 20, lists eight other proceedings. At the Court’s request, the parties provided the Court with a comprehensive list as of about November 2015 that shows 12 proceedings in the two jurisdictions.

- [5] The 80% owner of the Respondent is Prime Asia Global Ltd., a BVI company owned and controlled 50-50 by Mr. Chu and Mr. Lau, who are its two directors. It is deadlocked at both the shareholder and board of directors levels.
- [6] **OPPOSITION BY MR. CHU.** Mr. Chu filed a notice, dated 21 May 2015, of his intention to appear and opposed this application. As recited and provided in one of two consent Orders that this Court made on 26 May 2015 (on an application brought by the Applicant), this Application was defended by Mr. Chu, in the name of the Respondent, by virtue of a resolution of the directors of the Respondent other than Mr. Chu, and Mr. Chu is responsible for meeting the Respondent's costs of defending this Application.
- [7] **CONSENT PROCEDURES FOR THIS APPLICATION.** The same consent Order established the process for the exchange or pleading and the filing of affidavit evidence leading to the trial of this Application with a time estimate of 2 days. In its skeleton⁴, and at the commencement of the hearing of this Application, counsel for the Respondent raised a concern that there would be no live evidence; that the Application would be determined on paper (that is, with written direct evidence) and without cross-examination. The response of counsel for the Applicant was that the procedure was arranged by consent and embodied in a consent Order.
- [8] While consent should be, and in this Court's view is, a complete response to the concern raised, it may be important to add that given how submissions on the issues developed, this Court's view is that a long trial with oral evidence of one of numerous pieces of uncoordinated litigation between Mr. Chu and Mr. Lau may have left the Court no wiser on the reasons for the total and irretrievable breakdown of the longstanding and wide-ranging business relationship.
- [9] It is this Court's strong sense, having read the evidence and heard submissions, as well as having heard certain other proceedings involving these men and/or their business vehicles, that there may

⁴ Respondent's Written Submissions (for hearing on Wednesday 29 and Thursday 29 October 2015) ("**Respondent's Submissions**").

not be ‘a bad guy’ and ‘a good guy’ at the end of the day. It may be that both have contributed to a material degree to the breakdown, and perhaps both have come close to or possibly even crossed lines of appropriate commercial conduct on occasions in the course of their many disputes in company dealings, in commercial dealings and in litigation. Certainly both have looked for and found ways to take advantage in their company and court disputes of the structures they chose when their longstanding relationship was characterised by mutual trust, confidence and cooperation.

[10] It would surprise nobody to find that Mr. Chu and Mr. Lau blame each other for the breakdown. In this case, and in other litigation between them, one makes strong allegations about the other.

[11] Thus far they appear to be completely unwilling to find a commercial solution, to find a way to part company, and to find a way to end considerable litigation that is consuming an undue and disproportionate amount of this Court’s resources and one would expect the resources of the courts in Hong Kong.

[12] In Davis and Collett, Ltd, Justice Grossman stated, aptly for the present parties, as follows:

The parties are not prepared to come to some arrangement between themselves by which they can prevent the company from being wound up, although by not be so prepared they are only damaging themselves. In the absence of some arrangement of that sort, I must make an order in the usual form for the winding-up of the company.⁵

[13] Thus far the courts have not been able to manage the resolution of the disputes in a coordinated manner.

[14] In this case, it may be said (although it is not the basis of this Court’s decision on this Application) that the parties are not just damaging themselves but are consuming a disproportionate amount of

⁵ [1935] Ch 693.

the resources of the courts, a public resource funding by the states involved. In an era of the CPR and the Overriding Objective in CPR 1.1, it may be queried whether any parties have a right to litigate endlessly in the public systems rather than in a reasonable manner, while making genuine efforts to reach resolutions.

[15] In this litigation, Mr. Chu and his group, which by virtue of his asserted role as 'director for life' of the Respondent, opposes a liquidation of the Respondent. In other litigation, he and his group may see the shoe as being on the other foot.

[16] This Application is but one example: as noted elsewhere in this Judgment, the Applicant is able to bring this Application because the relationship led to Mr. Lau and his camp having board of directors control of the Applicant; Mr. Chu is in a position to seek to oppose the allegation of a deadlock at the board of directors level in the Respondent because the relationship led to Mr Chu having board of directors control of the Respondent (whether that control has or has not been dislodged, as referenced elsewhere in this Judgment).

[17] Counsel for the Respondent pointed out that the Articles vest the management of the Respondent in the director; Mr. Chu is the director; he has been managing for ten years; and the Respondent can function. Tellingly, he then stated: "The change is that there is a fall out."⁶

[18] The Court asked counsel for the Respondent "Why doesn't Mr. Chu want this company wound up?"⁷ The question was never answered directly. The answer is obvious, however. When the relationship of trust, confidence and cooperation, he was entrusted with the role of the director of the Respondent. Now that the trust, confidence and cooperation is dead, Mr. Chu hangs on to that position and is exploiting it. But as mentioned elsewhere, Mr. Lau's camp is able to exploit the structure established in the Applicant to bring this Application.

⁶ Transcript, 28 October 2015, page 25, lines 3 – 14.

⁷ Transcript, 28 October 2015, page 22, lines 5 – 6.

- [19] The procedure chosen by the parties has given this Court a clear picture of the situation between Mr. Lau and Mr. Chu and their camps. It has given this Court a clear picture of the grounds asserted, and resisted, for a just and equitable winding up of the Respondent.
- [20] The procedure, particularly in light of the Joint Provisional Liquidators and the Second Report of the Joint Provisional Liquidators dated 23 October 2015 (“**Second Report**”), has given this Court a sufficient basis for the determination of the insolvency ground for this Application.
- [21] In this Court’s view, the form of procedure chosen by the parties (and Mr. Chu) for the determination of this Application, given the nature of the contextual matrix of this Application, were reasonably efficient and cost-effective, at least relative to the alternative picture painted by counsel for the Respondent. As set out below, reaching a just and equitable result is possible in this Court’s view, and this Court considers that it has done so.
- [22] **JOINT PROVISIONAL LIQUIDATORS; RESPONDENT’S ASSETS.** This Court had appointed Joint Provisional Liquidators on 20 April 2015. They are not involved in the defence of this Application, which was confirmed by a second consent Order made 26 May 2015, on an application brought by Mr. Chu, varying the initial Order appointing them.
- [23] The Respondent is a holding company. Its principal underlying assets are owned through a wholly-owned subsidiary, Joint Silver Limited, a Hong Kong company which was being liquidated in Hong Kong. Those assets consisted of a dry bulk cargo vessel, M.V. Grain Pearl, which was being sold, and cash in a bank account in Hong Kong. The corporate structure was established for the purpose of owning and operating the vessel.
- [24] The Joint Provisional Liquidators were appointed when Mr. Chu, it was alleged, refused to return the vessel to Hong Kong as sought by the prime creditor, Credit Suisse.

JUST AND EQUITABLE GROUNDS

[25] **APPLICANT'S POSITION.** The Applicant's principle position in support of a just and equitable winding up was as follows:

- first, there has been an acknowledged total and irretrievable breakdown of the longstanding relationship of mutual trust, confidence and cooperation between the two men and between their two camps,
- second, there has been an absolute deadlock between the shareholders of the two companies that own the Respondent, and
- third, with the sale of the vessel the purpose for which the Respondent was formed no longer exists (loss of substratum; the Respondent "has run its course").

[26] **RESPONDENT'S POSTION, AS ASSERTED BY MR. CHU.** The Respondent's principle position, as asserted by Mr. Chu, with one exception runs counter on each point, as follows:

- first, the breakdown occurred – the state of affair between the two men is accepted, even though the reasons for the irretrievable breakdown are disputed⁸, but that is not a sufficient basis in law for just and equitable relief,
- second, while there has been an absolute deadlock between the shareholders of the two companies that own the Respondent, there is no deadlock in the Respondent at the director level because Mr. Chu is the director and is able to make decisions in that capacity, and
- third, the sale of the vessel was always an objective (even if not quite in this manner) and there is now an opportunity to move in a new direction and pursue some new, so far unidentified, opportunity.

[27] **JUST AND EQUITABLE WINDING UP UNDER THE ACT.** The just and equitable basis for the appointment of a liquidator and the winding up of a company under the Act is broad. It has considered over many years by the House of Lords and other courts in England and Wales, in this

⁸ Points of Claim, paragraphs 39(a) and 44; Points of Defence, paragraphs 45 and 52(a) – (c). The Respondent and hence Mr. Chu declined to attribute the irretrievable breakdown in the relationship of mutual trust, confidence and cooperation to the matters pleaded in the Points of Claim.

jurisdiction and elsewhere. While the foundational principles are not new by any means, they continue to evolve and to be refined.

- [28] One important type of situation with which courts have struggled is where, like here, there has been a total and irretrievable breakdown of the longstanding relationship of mutual trust, confidence and cooperation between two business persons who established and managed the subject business or businesses based on that relationship.
- [29] The issue becomes even more focused where the breakdown is acknowledged by the parties, as it has been here, or is objectively established by a court.
- [30] If the once-existing mutual trust, confidence and cooperation led the parties to put one or the other (or their nominee) in a position to have some form of legal control over a company, without member exit mechanisms by contract or in the company's constitutional documents, are the parties to remain bound together in some form of company purgatory, consuming themselves and the courts with their multitude of disputes?
- [31] Courts have struggled long and hard to draw a just and equitable line between situations where just and equitable relief should be granted and those in which it should not.
- [32] On the 'not' side of the line is where a member decides to move on and declares a subjective loss of trust and confidence. That is an impermissible basis for just and equitable relief.
- [33] Clear bases for just and equitable relief are easy for the courts – they exude legal misconduct and commercial immorality. They may be brought under insolvency legislation and/or under pursuant to unfair prejudice provisions in company legislation (in which case unfair prejudice must be established).

[34] Then there are what the courts have found to be ‘the tougher cases’: situations with characteristics such as in this case, where in a company sense, ‘the love and trust is gone’, the parties ‘cannot live together’, the blame for what happened (if ‘blame’ is necessary the right word) is share even if not equally.

[35] While the courts have eschewed ‘no fault divorce’, as explained below, where a member simply ‘wants out’, they continue to struggle with the kinds of situations that real life more often presents: shared responsibility (to abandon the less helpful word “blame”) for the breakdown. Is it sufficient for just and equitable relief that the breakdown be due to shared responsibility or must there be something more, and if so, how much more? This Application may be a ‘poster child’ for that kind of case.

[36] While the tendency of lawyers and judges had been to try to create categories for the remedy, the House of Lords in *Ebrahimi v Westbourne Galleries Ltd. and Others* (“**Westbourne**”) made it clear that the tendency to create categories is wrong. Lord Willberforce stated emphatically as follows:

First, there has been a tendency to create categories or heading under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduce to the sum of particular instances.⁹

[37] There need not be a deadlock: “the words ‘just and equitable’ need or can be confined to such situations.” Whether there is a deadlock or not, the Court is looking for the company to be “in a state which could not have been contemplated by the parties when the company was formed ...”¹⁰

[38] Lord Wilberforce went on to say that “the courts have sometimes have been too timorous in give [the words “just and equitable”] full force.” He continued:

⁹ [1973] A.C. 360 at374, line H.

¹⁰ *Westbourne*, page 376, lines C – F, following *In re Yenidje Tobacco Co. Ltd.* (“**Yenidje**”) [1916] 2 Ch 426 a 432.

... a 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 submerge in the company structure.

After stating that it would be impossible and wholly undesirable to define the circumstances in which these considerations may arise, he pointed out that it is not enough that the company is small or private, and that there are very many situations the association is a purely commercial one and exhaustively laid down in the articles.

The superimposition of equitable considerations requires something more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence ... (ii) an agreement, or understanding, that all, or some ... of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company. ... It is these, and analogous factors which may bring into play the just and equitable clause ...¹¹

[39] A question remained whether a court must attribute fault for a just and equitable winding up under insolvency or other legislation that simply provides a just and equitable remedy (as opposed to under unfair prejudice remedies which appear to require a showing of unfair prejudice).

[40] It was submitted to this Court that fault is required, picking up the catchy phrase of Lord Hoffman in *O'Neill and Another v Phillips and Others* ("**O'Neill**"), "No-fault divorce?"¹²

[41] However, there are two important points of distinction from the situation here under the Act.

[42] First, *O'Neill* was an unfair prejudice case, so the 'cause of action' needed to be established for a remedy to be granted.

¹¹ Westbourne, page 379.

¹² [1999] 1 WLR 1092 at 1104, line B – C.

[43] Relying on O'Neill, *Hollingworth on Shareholders*, Law Practice and Procedure ("**Hollingworth**")¹³ states that a breakdown of trust and confidence cannot justify the grant of relief on the unfair prejudice ground. The author deals with non-unfair prejudice applications by concluding "It is unclear, however, whether a breakdown of trust and confidence in a quasi-partnership can of itself justify a winding up on the just and equitable basis."

[44] Were there not binding Court of Appeal authority, discussed and followed below, this Court would be inclined to hold that a breakdown of trust and confidence – admitted or objectively established (see below) – can and should justify a just and equitable winding up. As Lord Cozens-Hardy M.R. observed in *Yenidje*:

Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation has been held sufficient to justify a dissolution. It is not necessary to show personal rudeness "or even any gross misconduct as a partner.

He continued:

All that is necessary to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.¹⁴

.....

Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered? They assume, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other ... I think the company should not be allowed to continue.¹⁵

¹³ Victor Joffe QC, 7th Edition, page 439, section 10-62.

¹⁴ At page 430.

¹⁵ At page 431.

- [45] Second, Lord Hoffman characterized the submission in O'Neill, which he rejected, as being that it did not matter whether Mr. Phillips "had done anything unfair" because trust and confidence had broken down and there ought to be a parting of the ways as "one partner being entitled at will to require the other partner or partner to buy his shares at fair value but simply declaring that trust and confidence has broken down." He characterized the submission as a claim that there is "a stark right of unilateral withdrawal", and as noted, rejected that notion.
- [46] However, at its heart, Lord Hoffman was holding, in this Court's view, that the test for a breakdown is not subjective but objective. O'Neill stands for the proposition that there is no right to a just and equitable remedy "at will" or put another way, because of a subjective view of the party seeking the winding up that there has been a breakdown of trust and confidence.
- [47] That is not the case before this Court.
- [48] The Respondent and Mr. Chu have acknowledged, and in any event this Court has concluded that there has been total and irretrievable breakdown of the longstanding relationship of mutual trust, confidence and cooperation between Mr. Lau and Mr. Chu.
- [49] However, as allude to above, in Wang & Others v Union Zone Management Ltd & Others¹⁶ ("**Union Zone**"), the Court of Appeal (per Farara JA [AG]) held that there must be something more than a breakdown, as follows:

The breakdown in the relationship between shareholders is not, in of itself, justification for winding up a company [citing Hollingworth, paragraph 2-20(1)]. For such a state of affairs to rise to the level of a just and equitable winding up of the company, it must represent or lead to deadlock on the board or between the shareholders in general meeting or a breach of some underlying agreement, express or implied, between the shareholders as to their rights inter se or the extent to which they are to participate in the management and decision-making of the

¹⁶ BVIHCMAP2013/0024, Court of Appeal, 12 January 2015, page 26, paragraph 53.

company, or some unauthorized change in the type of business or activity for which the company was incorporated in the first place.

[50] In Union Zone, at trial Justice Bannister had found that while in the early stages there was “a golden age of managerial harmony ... whereby decisions were usually reached by way of consensus fell short of any common understanding with regard to the management or operation of these companies akin or amounting to a quasi-partnership.”¹⁷

[51] In Union Zone, it was found by Justice Bannister that in essence there was no “common understanding” or “underlying agreement, express or implied” regarding the management or operation of the companies; no breach of some underlying agreement, express or implied, between the shareholders as to their rights inter se or the extent to which they are to participate in the management and decision-making.

[52] It is on this point that the facts before this Court differ.

[53] **BREAKDOWN OF RELATIONSHIP.** It is evident that there has been an acknowledged total and irretrievable breakdown of the longstanding relationship of mutual trust, confidence and cooperation between Mr. Lau and Mr. Chu and between their two camps.

[54] The Respondent, and hence Mr. Chu, accepted that is the state of affair between the two men even though it and he disputed the reasons for the irretrievable breakdown and disputed (for reasons explained in this Judgment) that there is a deadlock in the Respondent (at the director level).¹⁸

¹⁷ Union Zone, page 26 – 27, paragraph 55.

¹⁸ Points of Claim, paragraphs 39(a) and 44; Points of Defence, paragraphs 45 and 52(a) – (c). The Respondent and hence Mr. Chu declined to attribute the irretrievable breakdown in the relationship of mutual trust, confidence and cooperation to the matters pleaded in the Points of Claim.

- [55] As counsel for the Respondent put it in this case, “you’ve got two camps with evidence which discloses disputes on pretty much everything”.¹⁹
- [56] The longstanding relationships between the two men – and later the two camps – were established as, and functioned until they broke down as, relationships of mutual trust, confidence and cooperation. Those words characterize their relationships in the corporate structure that owned and operated the vessel, and in particular in the Respondent.
- [57] It was said by Mr. Chu, in relation to other of their companies, that there was a “mutual understanding” that he and Mr. Lau would have “joint control” and “we would seek each other’s approval before making any important management decisions.”²⁰
- [58] The Applicant pointed to various things said in writing by Mr. Chu that support this view of their relationship. While perhaps no single statement or position in and of itself would be sufficient to support that characterization of the relationship, collectively they paint a picture that is consistent with and supportive of that conclusion. In any event, this Court would find that characterization of the relationship even without those statements,
- [59] This Court finds that their relationships were always intended to be governed by the principles described above and not merely by the constituent documents of their companies.
- [60] If Mr. Chu is correct that he was entrusted with the role of sole director of the Respondent, as he submitted, it is all the more reason that this Court can find, and does find, the relationship to have been based on mutual trust, confidence and cooperation and an understanding that Mr. Chu and Mr Lau have “joint control” and “would seek each other’s approval before making any important management decisions.”

¹⁹ Transcript, 28 October 2016, page 21, lines 14 – 16.

²⁰ Third Affidavit of Chu Kong sworn 7 September 2015, paragraph 41. While the Applicant alleged and the Respondent, and hence Mr. Chu, disputed two oral agreements, even absent such agreements, this Court is convinced of the nature of the relationship, as described in this Judgment.

[61] That no longer occurs, irrespective of which one of them is in the legal position to make decisions.

[62] In the words of Justice Farara in *Union Zone*, even though Mr. Chu may have control of the board of directors in the Respondent, he is in breach of the underlying agreement, express or implied, (or as Justice Bannister termed what is needed, to the same effect, understanding) between himself and Mr. Lau as to their rights inter se or the extent to which they are to participate in the management and decision-making of the company.

[63] It would surprise nobody to find that Mr. Chu and Mr. Lau blame each other for the breakdown. In this case, and in other litigation between them, one makes strong allegations about the other. It appears clear that there was a common understand, at a minimum, or an underlying agreement, express or implied and that on various occasions one or the other (or their respective camps) do not comply with it. In this case, it is Mr. Chu who is not complying with it.

[64] Section 167(3) of the Act provides that on an application by a member, which this is in part,

... 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 the 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 the liquidator appointed instead of pursuing that other remedy.

[65] The Respondent submitted, and cited authority for the proposition, that this makes it clear that a winding up on the just and equitable ground is a remedy of last resort.

[66] In this case, there is no other remedy that is as appropriate, or as just and equitable, if indeed there is any other reasonably effective remedy at all. This is a most appropriate case for a liquidation to

be the remedy. The Applicant was not acting unreasonably in seeking a liquidation of the Respondent.

[67] The basis for a just and equitable winding up has been established.

[68] The Respondent should be wound up.

[69] **DEADLOCK.** As noted above, the Applicant submitted that there was an absolute deadlock between the shareholders of the two companies that own the Respondent. The Respondent through Mr. Chu submitted there is no deadlock at the board of directors level.

[70] Mr Chu asserts that he controls the Respondent at the board of directors level, and in effect is 'director for life' (this Court's term, not Mr. Chu's term).

[71] He submitted that ensconcing him in that role was an intentional decision of those involved and was not problematic.

[72] The Applicant's position was that neither the board of directors of the Respondent, nor the boards of directors of its two shareholders, manage the affairs of their companies with the consent of the majority of shareholders, and as found above, in accordance with the understanding or agreement, express or implied, between Mr. Chu and Mr. Lau.

[73] Further there is an issue concerning the rightful composition of the Respondent's board of directors, the Applicant asserting that additional directors were appointed by Mr. Lau's camp and Mr. Chu asserting the purported appointments were improperly made by invalid resolutions.

[74] In a strictly legal sense, there is no deadlock. However, that is the case only because of non-compliance with the understanding or agreement upon which the company was founded.

[75] If the parties complied with that understanding or agreement, there would be a deadlock.

[76] The Respondent should be wound up.

[77] **LOSS OF SUBSTRATUM.** The Applicant submitted that with the sale of the vessel the purpose for which the Respondent was formed no longer exists. There has been a loss of substratum. The Respondent “has run its course”.

[78] The Respondent submitted that there has been no loss of substratum. Counsel for the Respondent, in putting Mr. Chu’s position, sought to make it sound as though the world in unfolding as it should; that the hopes and dreams of the members were finally reaching a new plateau. He said a follows:

... what we’ve got here is not loss of substratum, but we’ve got an absolutely pivotal moment in [the Respondent’s] corporate history ... there would be time for some key corporate decisions, what to do next, what should [the Respondent] do next ... whether another vessel is invested in, more chartering business done to generate more profit, that’s going to be a key managerial decision for Mr. Chu. But the idea that this is dead or defunct or all the wonderful, colorful adjectives that were deployed by my learned friend, is not right. We say it’s a key point in the corporate history of [the Respondent]. This is what everyone has been waiting for, this is the investment. It’s true to say that the investment did not generate the money that was intended. ... And as I said, when Chu has made his decision making, whether dividend are made, ... whether there is full or partial redemption of these loans, that will be decided by the proper organ of this Company with powers vested in the director in due course. But the suggestion that the Company is dead now it’s just wrong. It’s not dead, it’s not been wound up. It’s at its pivotal point in its history.²¹

[79] Really?

²¹ Transcript, 28 October 2015, page 40, line 8 – page 42, line 8.

[80] This vision of a second coming of the Respondent is totally inconsistent with the arrangement or understanding upon the relationship between Mr. Chu and Mr. Lau was founded and proceeded until it broke down.

[81] Mr. Chu may have visions of a new substratum but with the financially unhappy end to the vessel ownership and operation of the Respondent, the substratum is gone.

[82] Even with that were not the case, fundamentally the inability to carry on in compliance with the arrangement or agreement is fatal to the continuation of the Respondent.

[83] The Respondent should be wound up.

INSOLVENCY GROUNDS

[84] Further, the Applicant submitted that the Respondent has been left insolvent. It relies on both balance sheet and cash flow insolvency.

[85] The Applicant submitted that the Respondent is insolvent on a balance sheet basis and that if the ultimate beneficial owners were to call their loans (described below), it would be insolvent on a cash flow basis.

[86] The Second Report showed and stated that the Respondent “is insolvent on a balance sheet basis”, based on a sale price for the vessel of approximately \$16.7 million (after a deduction for commission), and that if the loans from the ultimate beneficial owners were to be called, it would be insolvent on a cash flow basis.

[87] Mr. Chu asserted earlier in the proceedings, without valuation or other independent evidence, that the value of the vessel was greater than that amount but he consented to the sale.

- [88] The balance sheet provided with the Second Report showed the Respondent's investment in Joint Silver Limited to be worth \$5,796,000, cash to be \$2,007, and accounts receivable to be \$601,600, for total assets of \$6,399,607. The liabilities were shown to be two shareholder loans, one to the Applicant and one to Prime Asia Global Ltd, totaling \$12,002,400, leave net liabilities exceeding next assets by \$5,602,793. The Second Report also provided a balance sheet for Joint Silver Limited, with a note that as it "is clearly insolvent, the unsecured creditors ... will only receive a percentage return of the amounts owed to them (48%)".
- [89] Regarding the loans, the ultimate beneficial owners loaned funds through the Respondent to its subsidiary company which are said by Mr. Chu to require the ultimate beneficial owners to consent unanimously to a demand for repayment. He said they were made on the basis that "no repayment would be sought unless all of the shareholder lenders unanimously agreed to seek repayment" and therefore the "not only is the debt not presently due and owing: it will never become due and owing unless all the shareholders unanimously agree to seek repayment."²²
- [90] The Respondent submitted that the Joint Provisional Liquidators had not heard Mr. Chu's position on the loans, and as to whether they are current or longer term debt. While it was submitted they were "working capital", that seems to beg the question as to how they should be treated on the financial statements and in an assessment of insolvency.
- [91] There was no suggestion that the loans should be treated as shareholders' equity. Yet the approach submitted by Mr. Chu would have the loans removed from the determination because they are "not due".²³ This Court cannot understand how there is any basis to simply leave the loans out of a calculation as to whether liabilities exceed assets.

²² Chu Kong First Affidavit sworn 28 April 2015, paragraph 55.

²³ Respondent's Submissions, paragraph 82.

- [92] In any event, the Respondent could have sought to submit expert accounting evidence on how the loans should be viewed. It did not do so. While there were some submissions in that regard, they have not been of particular assistance on this issue.
- [93] Mr. Lau's camp wishes a demand for repayment of the loans to be made and Mr. Chu's camp opposes making of demand (for reasons that appear to be tied to each camp being intent on taking an opposite position to the other on virtually every conceivable issue).
- [94] The Applicant's position is that in the current circumstances of the Respondent, the loans should be repaid, and if there is a liquidation, they will be repaid.
- [95] On the evidence available to the Court, the Court finds that the Respondent is balance sheet insolvent.
- [96] In addition, even if the Court is wrong in that conclusion, the basis on which Mr. Chu's camp appears intent of preventing the loans from being repaid, and the balance sheet and cash flow consequences when they are repaid, supports a just and equitable winding up.
- [97] The Respondent should be wound up.

RESPONDENT'S REQUEST TO DEFER HANDING DOWN OF THIS JUDGMENT

- [98] The Respondent sought by way of letter to the Court dated 28 April 2016 that the handing down of this Judgment be deferred, notwithstanding that the date of this Judgment is the date by which this Application must be determined pursuant to Section 168 of the Act and the Order of the Honourable Justice Bannister dated 15 April 2016 extending the period under that section to this day. The request was based on what was said to be Mr. Chu's understanding) that "an update" report of the Joint Provisional Liquidators is to be issued and "that it appears the report will address

a number of crucial issues relating to the determination of [this Application].” No application was brought to reopen the evidence on this Application.

[99] In those circumstances, the Court concluded that this Judgment should be handed down as scheduled this day.

[100] Later yesterday afternoon, the Court receive a letter from counsel for the Joint Provisional Liquidators advising the Court that the Joint Provisional Liquidators’ proposed report “is still in a very basic form and in light of the handing down of the judgment tomorrow the [Joint Provisional Liquidators’] present intention is not to complete it pending the Court’s decision.”

ORDERS

[101] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. The Applicant is granted leave to bring this application as a member of the Respondent.
2. The Application is granted.
3. Respondent shall be wound up and the Joint Provisional Liquidators appointed as Liquidators pursuant to the Act.
4. The costs of this Application shall be reserved pending submissions thereon.

Justice Barry Leon
Commercial Court Judge
29 April 2016

