
**Michaelmas Term**
[2020] UKPC 24
**Privy Council Appeal No 0021 of 2020**

# JUDGMENT

# Chu (Respondent) v Lau (Appellant) (British Virgin Islands)

## From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

**before**

**Lord Hodge**
**Lord Briggs**
**Lady Arden**
**Lord Leggatt**
**Lord Burrows**

## JUDGMENT GIVEN ON

## 12 October 2020

**Heard on 29 and 30 July 2020**

| *Appellant* | *Respondent* |
| --- | --- |
| Philip Jones QC | Richard Hacker QC |
| Rosalind Nicholson | |
| Daniel Warents | John Carrington QC |
| Renell Benjamin | William Wong SC |
| Sparsh Garg | Michael Lok |
| (Instructed by Walkers | (Instructed by Charles |
| and Blake Morgan LLP) | Russell Speechlys LLP) |

**LORD BRIGGS: with whom Lord Hodge, Lord Leggatt and Lord Burrows agree**

1. Lau Wing Yan ("Mr Lau") and Chu Kong ("Mr Chu") are experienced Hong Kong based businessmen with complementary skills and experience. They became friends and business colleagues, investing in a number of jointly owned commercial enterprises, mainly in shipping and logistics. In November 2009 they together set up Ocean Sino Ltd ("OSL"), a British Virgin Islands company in which they each owned one of the two issued shares. They were its only directors. OSL has a wholly owned subsidiary PBM Asset Management Ltd ("PBM"), a Hong Kong company. Again, Mr Lau and Mr Chu were its only directors.

2. OSL and PBM were Mr Lau's and Mr Chu's corporate vehicles for a joint venture with a state-owned entity of the People's Republic of China ("PRC"). The joint venture company was Beibu Gulf Ocean Shipping (Group) Ltd ("Beibu Gulf"), in which PBM held 49% of the shares. The remaining, and controlling, 51% was held by the PRC's corporate vehicle Beibu Gulf Holding (Hong Kong) Co Ltd ("PRC Holdco"). Both Mr Lau and Mr Chu were executive directors of Beibu Gulf, but a majority of the directors were appointees of PRC Holdco. Both Beibu Gulf and PRC Holdco were Hong Kong companies, and the intended business of Beibu Gulf was ship-owning, commodity trading and supply chain services all for dry bulk commodities.

3. In 2010 Beibu Gulf ordered a fleet of 8 dry bulk carriers from shipbuilders. Four were delivered in 2012-13 but the orders for the remainder were cancelled. The purchase prices had been funded by contributions from PBM and PRC Holdco and from bank lending.

4. From (at the latest) early 2014 the previously constructive relationship between Mr Lau and Mr Chu broke down. That led first to an ultimately abortive attempt to sever their many business relationships by agreement and then to multiple legal claims and cross-claims, mainly in the courts of Hong Kong. In May 2015 Mr Lau applied to the BVI High Court for the winding up of OSL on the just and equitable ground, alleging (i) an irretrievable breakdown of trust and confidence between him and Mr Chu, and (ii) functional deadlock in the management of OSL (and therefore PBM) both at board and shareholder level.

5. After a six day trial in May and June 2017, at which both Mr Lau and Mr Chu were cross-examined at length, Justice Roger Kaye QC granted the relief sought, finding that both Mr Lau's main allegations had been proved. At the end of a careful (and prompt) reserved judgment he said:

> "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."

On the order of Wallbank J made on 28 July 2017 liquidators were appointed over OSL.

6. In January 2020, on Mr Chu's appeal, the Court of Appeal of the Eastern Caribbean Supreme Court (Blenman, Michel and Thom JJA) unanimously reversed the judge and discharged the winding-up order made by Wallbank J. They held that the judge had made the following four errors:

(a) He had wrongly taken into account aspects of the dissension between Mr Lau and Mr Chu which occurred at the Beibu Gulf level, which ought not to be taken into account in assessing whether there was deadlock in OSL.

(b) He had failed to concentrate on the question whether OSL was deadlocked at the date of the filing of the application, rather than at the time of the hearing, and thereby failed to take into account evidence that Mr Lau and Mr Chu were able to negotiate and agree matters after May 2015, so that their breakdown in co-operation was not then irretrievable.

(c) He had failed to take into account the freedom of Mr Lau and Mr Chu to sell their shares in OSL as a means of avoiding deadlock.

(d) He had failed to consider alternative remedies reasonably available to Mr Lau, such as a buy-out, before ordering a winding up as a last resort.

The Court of Appeal therefore concluded that there had been no deadlock. Even if there had been, a winding-up was not the appropriate remedy.

7. Mr Lau appealed to the Board. In outline, he claims that there had been no basis for the Court of Appeal to interfere either with the essentially factual finding of deadlock by the judge, or with his exercise of discretion to make a winding-up order, rather than leave Mr Lau to some alternative remedy. On the specific errors identified by the Court of Appeal, Mr Lau submits as follows:

(a) The judge never lost sight of the need to examine whether OSL (and PBM) rather than Beibu Gulf were deadlocked, and the matters arising at the Beibu Gulf level on which the judge relied were relevant to the management (or lack of it) of the affairs and interests of OSL and PBM.

(b) There is no rule that grounds for a just and equitable winding up must be established as at the date of filing the application, separately from the date of the hearing. Even if there is such a rule, the judge had found that the grounds (deadlock and irretrievable breakdown of trust and confidence) were established as at the earlier date, and that there was ample evidence from which he did so.

(c) The judge had been aware that Mr Lau and Mr Chu were free to sell their shares in OSL, but that this was unlikely to secure for Mr Lau a fair price for his interest in the company.

(d) The judge had properly assessed alternative remedies available to Mr Lau and concluded that he was not acting unreasonably in pursuing a winding up instead.

8. Mr Lau added a separate appeal against the costs order made against him by the Court of Appeal. For his part Mr Chu sought to support the decision of the Court of Appeal on four additional grounds. Both parties presented their cases by distinguished teams of counsel, led for Mr Lau by Mr Philip Jones QC and for Mr Chu by Mr Richard Hacker QC. OSL was joined as a respondent but took no active part in the appeal.

*Just and Equitable Winding up in the BVI*

9. The jurisdiction to wind up a BVI company on the just and equitable ground is entirely statutory. It closely follows the similar jurisdiction in the UK, which dates back to the mid-19th Century. The result is that the UK case-law is the primary source of authority for the scope of the jurisdiction, and for the principles upon which it is to be exercised, although the Board was helpfully referred to a wealth of additional authority from around the common law world, in jurisdictions which have broadly followed the same model.

10. Jurisdiction to wind up in the BVI is expressed in terms of a power of the court to appoint a liquidator, in the Insolvency Act 2003. By section 159(1) the Court may appoint the official receiver or an eligible insolvency practitioner as liquidator of a BVI company, on an application under section 162. That section provides, so far as is relevant, as follows:

> "(1) The Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if
>
> ...
>
> (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed …
>
> (2) Subject to subsections (3), (4) and (5), an application under subsection (1) may be made by one or more of the following:
>
> ...
>
> (c) a member; …"

11. Section 167(3) of the 2003 Act provides as follows:

> "(3) 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."

12. By section 160 of the same Act a liquidation commences upon the appointment of a liquidator rather than, as in the UK, upon the date of the presentation of the petition to wind-up, if an order to wind-up is subsequently made.

13. Remedies in the alternative to a just and equitable winding-up include relief for the company itself, available by means of a derivative action and relief available on proof of unfairly prejudicial conduct, under part XA of the BVI Business Companies Act 2004. Relief for unfair prejudice includes a court order for a buy-out, the

appointment of a receiver or the appointment of a liquidator under section 159 of the 2003 Act, on the just and equitable ground in section 162(1)(b).

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

15. Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding-up, essentially on the same grounds as would justify the dissolution of a true partnership. This jurisprudence was developed as an aspect of the law of partnership in England in the mid-19th Century, and is exemplified in the following passage from the judgment of Sir John Romilly MR in *Harrison v Tennant* (1856) 21 Beav 482, at 496-497:

> "I do not base my decision upon any particular reported case, but upon the principle that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that taking all these matters together, it makes this a case in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership."

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

16. This ground for the dissolution of a partnership was developed as the basis for the just and equitable winding-up of a company in the UK in the early 20th century, where the relationship between the members approximated to that of partners.

Landmark cases include *Symington v Symingtons' Quarries Ltd* (1905) 8 F 121, a decision of the Scottish Court of Session, and in *In re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426, a decision of the English Court of Appeal. In the latter case, at p 432, speaking of two businessmen holding equal shares in the company who had spectacularly fallen out, Lord Cozens-Hardy MR said:

> "If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible."

17. The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two party quasi-partnership like the present.

18. The well-known leading case on whether a company is a quasi-partnership is *Ebrahimi v Westbourne Galleries Ltd* (*In re Westbourne Galleries Ltd)* [1973] AC 360. It contains a summary of the circumstances in which the relationship between the members of a company may cause their strict legal rights to be subjected to equitable considerations which has stood the test of time. At pp 379-380 Lord Wilberforce said this:

> "The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force.
>
> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the

> expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations.
>
> A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

19. The *Ebrahimi* case reinforces the principle that an applicant for a just and equitable winding-up is not barred from his remedy merely because the breakdown or deadlock upon which he relies has been caused to some extent by his own fault. As Lord Cross put it, at pp 383-384:

> "People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended— unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen."

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

(a) Is the applicant entitled to some relief?

(b) If so, would a winding-up be just and equitable if there were no other remedy available?

(c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding-up?

21. The legal burden of proof is on the applicant at stages (a) and (b). But it shifts to the respondent at stage (c): see *Moosa v Mavjee Bhawan (Pty) Ltd* (1966) (3) SA 131 at 152 and *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] ACSR 227 at paras 32 and 43. Section 167(3) is in substantially the same terms

as was section 225(2) of the UK Companies Act 1948. In *In re a Company (No 002567 of 1982)* [1983] 1 WLR 927, at p 933, Vinelott J held that "other remedy" in section 225(2) was not limited to a statutory remedy provided only by the court. For example, an unreasonable refusal to accept a fair offer for the applicant's shares might bar relief by way of winding-up. The Board agrees with this analysis.

22. With this general introduction to the relevant law it is now possible to address directly each of the criticisms of the judge's legal analysis by the Court of Appeal, accepting as it did that it was not enough for it simply to take a different view from the judge about the evidence or about his exercise of discretion.

*Looking at the Beibu Gulf Level in Assessing Deadlock.*

23. It is necessary to start with a little more analysis of the law. Leaving aside corporate quasi-partnership, when addressing the question of functional deadlock it is the management of the company sought to be wound up that must be addressed. Deadlock about other matters is neither here nor there, if the subject company is still capable of being effectively managed, and decisions made about important aspects of the direction of its business and assets. Nonetheless the breadth of the parties' falling-out over other business matters may be very relevant to the court's assessment of the question whether an apparent deadlock within the subject company has become irremediable.

24. In concluding that the judge had impermissibly taken account of disputes between Mr Lau and Mr Chu at the Beibu Gulf level the Court of Appeal placed reliance on its previous decision in *Wang Zhongyong v Union Zone Management Ltd* 12 January 2015 (BVIHCMAP 2013/0024). It was there held that exclusion of the applicant from the management of a company, which was not a subsidiary of the subject company, could not be relied upon as unfairly prejudicial conduct of the affairs of the subject company, relying upon *Rackind v Gross* [2004] EWCA Civ 815, [2005] 1 WLR 3505. *Union Zone* was not a deadlock case, nor was the subject company a corporate quasi-partnership. At para 53 Farara JA said:

> "The breakdown in the relationship between shareholders is not, in of itself, justification for winding up a company. 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

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

Dicta to similar effect are to be found in *Loch v John Blackwood* [1924] AC 783, where Lord Shaw of Dunfermline said, at p 788:

> "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 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."

That was neither a deadlock nor a quasi-partnership case. The winding-up was sought (successfully) on the ground that the minority shareholder petitioner had lost confidence in the probity of the directors.

25. Where the subject company is a corporate quasi-partnership the position is otherwise. What matters is the relationship between the quasi-partners, and the extent to which the necessary basis of trust and confidence has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant. In the *Ebrahimi* case, at p 375 Lord Wilberforce said:

> "…it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words ['just and equitable'] 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 or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders."
>
> That was a quasi-partnership case.

26. Turning to the facts, the breakdown in trust and confidence which the judge found had occurred between Mr Lau and Mr Chu manifested itself to a substantial extent in their activities in connection with Beibu Gulf, of which they were both directors, on the nomination of PBM. A substantial part of the funding for the purchase of the Beibu Gulf fleet had been contributed by PBM, and an early and fundamental point of difference between Mr Lau and Mr Chu was whether this had taken the form of on-demand lending (which PBM could seek to recover summarily) or capital injection. This question directly affected the interests of both PBM and Beibu Gulf, and was an important matter of debate for the boards of both companies.

27. An early method by which Mr Lau and Mr Chu tried to disengage their business affairs was by a form of asset division in which Mr Chu would take Mr Lau's half interest in OSL while Mr Lau would take Mr Chu's half interest in another jointly owned enterprise, equality money being paid in respect of their differing values. The valuation of OSL critically depended upon financial information about the business of Beibu Gulf, of which Mr Chu was managing director. An important plank in Mr Lau's case about loss of trust and confidence in Mr Chu arose from Mr Chu's alleged failure to make that financial information available to Mr Lau and his advisers, an allegation which the judge upheld.

28. Another disengagement alternative consisted in negotiation with PRC Holdco for PRC Holdco to buy out Mr Lau. When this failed, due to PRC Holdco being unwilling to buy out Mr Lau alone, rather than both him and Mr Chu (who was not willing to sell), it was resolved at board level in Beibu Gulf in December 2015 that its four ships would be divided equally between PBM and PRC Holdco. Mr Chu then engineered what he called a re-financing of the two ships due to be transferred to PBM (called the Lohas Transaction) which, although taking place primarily at the Beibu Gulf level, involved what the judge held to be a commitment of valuable assets of PBM without authority and behind Mr Lau's back.

29. In January 2016 PRC Holdco sold its interest in Beibu Gulf to Bright Good (Asia) Limited ("BGAL") which in February 2016 sub-sold a 6% stake in Beibu Gulf to Polyrise Team Ltd ("Polyrise"). Mr Lau claimed, and the judge found, that Mr Chu and associates beneficially owned both BGAL and Polyrise, which then combined at shareholder level in Beibu Gulf to remove Mr Lau as a director, and then to sell its ship chartering and commodity trading businesses to Cosmic Glory Ltd, a company beneficially owned by Mr Chu's son. The judge held that the acquisition of control of Beibu Gulf by BGAL and Polyrise, without disclosure of his interest, may arguably have amounted to a breach by Mr Chu of his fiduciary duty to PBM and OSL.

30. All of these matters were plainly relevant to the breakdown of trust and confidence between Mr Lau and Mr Chu. The judge held, applying Lord Wilberforce's test in the *Ebrahimi* case, that OSL was a quasi-partnership company, and (which is not

challenged) that the management of OSL included the management of the affairs of its wholly owned subsidiary PBM. Neither of these findings were departed from by the Court of Appeal, but Mr Chu has put in issue on this appeal whether OSL was a corporate quasi-partnership. Mr Hacker relied on the undoubted fact that the third of Lord Wilberforce's indicia (restrictions on the transfer of a member's shares) (see para 18 above) is not part of the constitution of OSL.

31. In the Board's view, it is clear from the part of Lord Wilberforce's judgment quoted at para 18 above that none of the three indicia of quasi-partnership represent necessary elements, in the sense that the absence of one or more of them is fatal to such a finding. The judge found both the other indicia to be established (relationship of mutual confidence and an understanding that both shareholders would be involved in management) and there was, in the Board's view, ample evidence to support his conclusion that OSL was a company in which the superimposition of equitable considerations was fully justified.

32. It follows therefore that all the matters upon which the judge relied which may be said to have occurred between Mr Lau and Mr Chu at the Beibu Gulf level were relevant and admissible evidence on the question whether the former relationship of trust and confidence between them had so far evaporated as to justify the winding-up of OSL on the just and equitable ground, regardless of functional deadlock.

33. But at least some of those matters were relevant also to the question whether the management of OSL and PBM was deadlocked. PBM's main asset was its 49% shareholding in Beibu Gulf, and the maximisation of its value was a matter about which its management needed to form a view, and present (albeit as a minority joint venture partner) to PRC Holdco, on a united basis. If Mr Lau and Mr Chu could not agree upon or (latterly) even discuss how that contribution to the direction of Beibu Gulf should be made, an important aspect of the management of PBM's affairs was paralysed.

34. More importantly, the other main asset of PBM was the chose in action represented by its large financial contribution to the amount needed by Beibu Gulf for the acquisition of its fleet. Mr Lau and Mr Chu could not even agree whether it was debt or capital or, therefore, whether PBM could demand immediate payment, let alone whether it should. The nature of that asset, and the question how it should be realised, was just as much a matter for the management of PBM as it was for the management of Beibu Gulf.

35. Mr Chu's refinancing in the form of the Lohas Transaction was or involved, on any view, a dealing with an important asset of PBM which ought to have involved both him and Mr Lau as PBM's directors. The fact that Mr Chu chose to implement the transaction behind Mr Lau's back, and not to disclose even its existence until April

2017, a month before the hearing, was powerful evidence of deadlock, in the sense that Mr Chu no doubt feared that, if he involved Mr Lau in the necessary decision-making, disagreement between them would have prevented the refinancing from happening.

36. Finally, the fact that Mr Chu may have acted in breach of fiduciary duty owed to OSL or PBM arising from the buy-out of PRC Holdco presented a major management challenge for those two companies, namely whether to sue Mr Chu for an account, about which the two men would be bound to be deadlocked.

37. It follows in the Board's view that the Court of Appeal was wrong, both in law and on a factual analysis, in its first main criticism of the judge.

*Failure to assess deadlock and breakdown of trust and confidence as at the date of filing the application*

38. The Court of Appeal held that the judge's analysis of whether the application for winding-up was well-founded should have been by reference to the factual position prevailing as at the date of filing the application, disregarding matters arising subsequently, at least to the extent relied upon by Mr Lau as demonstrating deadlock, or a breakdown in trust and confidence between him and Mr Chu. Further the Court of Appeal found that evidence after that date demonstrated that any deadlock or breakdown apparent at that date cannot have been irretrievable, having regard to the parties' ability to agree upon important matters thereafter. This criticism of the judge's analysis raises questions both of law and fact.

39. The Board considers that this criticism by the Court of Appeal is mistaken for three reasons:

(a) There is no rule that a just and equitable application for winding-up must be justified solely by reference to the position as at the date of the filing of the application.

(b) In any event the judge found that there was both deadlock and an irretrievable breakdown of trust and confidence by May 2015, when the application was filed.

(c) There was ample evidence about matters which occurred thereafter from which the judge could conclude (as he did) that, rather than demonstrating continued co-operation between the two men, they just made matters worse.

40. The apparent origin of the supposed rule that a just and equitable winding-up application in the BVI must be made good solely by reference to matters occurring by the date of the filing of the application lies in the decision of the English Divisional Court in *Eshelby v Federated European Bank* [1932] 1 KB 254. The defendants were guarantors of a series of instalments payable to the plaintiff for alterations and repairs to a club-house in Soho, London. The plaintiff sued the defendants for the first instalment after it became due. By permitted amendment they later added a claim for the second instalment after it became due, and recovered at first instance for both. The Divisional Court disallowed the recovery of the second instalment, in part on the ground that the amendment to plead its recovery asserted a cause of action which did not exist as at the date of the issue of the writ. In fact the plaintiff lost altogether because the Divisional Court also held that a condition precedent to the defendant's liability as guarantor had never been satisfied.

41. The *Eshelby* rule has had a chequered career, and nowhere more so than in relation to winding-up proceedings. It is no longer applicable at all in England and Wales, mainly due to changes in the procedure rules: see *Hendry v Chartsearch Ltd* [1998] CLC 1382 (CA) at paras 21-23 per Evans LJ and *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 1 All ER (Comm) 653 at [54] per Chadwick LJ. It was applied to an unfair prejudice application in Hong Kong in *Cheung Hon Wah v Cheung Kam Wah* [2005] 2 HKLRD 599 (also referred to as *Re Kammy Town Ltd)*, but that first instance decision was doubted in both *Geoglobal Partners LLC v Peaktop Technologies (USA) Hong Kong Ltd* [2007] HKCFI 1286 and *Lu Jun v Yu Qi* [2011] HKCFI 1516. In England and Wales the authorities are firmly against its application to members' winding-up proceedings: see *In re Walter L Jacob & Co Ltd* [1989] BCLC 345 and *In re Fildes Bros Ltd* [1970] 1 WLR 592. In New Zealand the High Court has followed the English analysis: see *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (a deadlock case). The Supreme Court of New South Wales followed New Zealand's lead in *Bessounian v Australian Wholesale Mortgages Pty Ltd* [2007] NSWSC 35 at paras 6-7. There is some contrary authority in Australia but, as was pointed out in the *Jenkins* case, in those cases the winding-up order took effect from the date of the application rather than, as in New Zealand and the BVI, upon the making of the order.

42. In the present case, the judge decided that the date of the hearing was the relevant date, following the *Jacob* case. The Court of Appeal had the *Kammy Town* case cited, but gave no reasons of its own for preferring the application date rule.

43. In the Board's view, even if it had any continuing effect in civil proceedings generally in the BVI, the *Eshelby* rule has no application to proceedings for a "just and equitable" winding-up. The reasons are as follows. First, section 162(1)(b) of the 2003 Act is couched in the present tense. The court has to ask itself, at the time of the hearing, whether it *is* just and equitable that a liquidator should be appointed. In the absence of any requirement in the 2003 Act or in the Insolvency Rules 2005 to ignore relevant

evidence (and there is none), it naturally follows that the court should consider all relevant matters as at the date of the hearing. Secondly this is entirely in accordance with the court's ordinary practice when considering whether to grant discretionary relief of an equitable nature. Thirdly, the *Eshelby* rule performs no concrete function. It can easily be evaded by the filing of a fresh application just prior to the hearing, relying on matters occurring since the filing of the original application, with a request that the two applications be heard together. Provided only that the respondent has sufficient notice of the new material relied on, the court would have no good case management reason to refuse. In the present case all the additional matters, except the Lohas Transaction (of which Mr Lau only learned shortly before the hearing) were the subject of an application to amend, which Wallbank J dealt with by directing written evidence rather than a proliferation of pleadings, as he was entitled to do under the Insolvency Rules. Mr Chu did not appeal his ruling.

44. The second reason why the Court of Appeal's criticism is mistaken is self-explanatory. After a detailed recitation of the facts prior to the making of the application the judge stated in the clearest terms, at para 57, that the litany of complaints, counter-complaints, suspicions, allegations and by then existing proceedings between the two men were:

> "at the very least, entirely symptomatic of a complete and utter acrimonious breakdown of trust and confidence between Mr Lau and Mr Chu."

He added that he was more than satisfied that the allegation of complete deadlock at both board and shareholder level in OSL pleaded in the application was made out, before even considering what he called the post-commencement events. There was no finding by the Court of Appeal that this conclusion was not justified by the facts about the pre-commencement period. Mr Chu had himself by then been loudly asserting in written evidence (or in documents supported by a statement of truth) in other proceedings that the relationship of trust and confidence between him and Mr Lau had irretrievably broken down. The main basis for the Court of Appeal's ultimate conclusion that the judge had been wrong to find deadlock by May 2015 (when the application was made) was because of its review of post-commencement events, and mainly at the Beibu Gulf level. To this the Board now turns.

45. On 15 and 16 December 2015 there was a board meeting of Beibu Gulf, attended by both Mr Lau and Mr Chu, at which the minutes record that it was agreed by all the directors that each of PBM and PRC Holdco would acquire two of Beibu Gulf's four ships, outstanding shareholder loans being used towards the acquisition price. The Court of Appeal treated this as evidence of the continuing ability of Mr Lau and Mr Chu to agree a way out of their difficulties, and Mr Hacker made this apparent agreement the mainstay of Mr Chu's case on this appeal that there was neither a complete deadlock

nor an irreversible loss of trust and confidence between them at this stage, more than six months after the filing of the application.

46. The Board does not accept this analysis, and nor did the judge. He dealt with the December board meeting and its aftermath in detail at paras 67 to 72. On his analysis, the meeting left outstanding all the important aspects of the proposed demerger by ship transfers from PBM's perspective and that of the two men. How were the ships to be managed after the transfer? Were they to remain within the control of PBM, or distributed one each to Mr Lau and Mr Chu? How was their acquisition by PBM to be financed?

47. In the event, the two ships destined for PRC Holdco were duly transferred, but the two destined for PBM were not. They were refinanced by the Lohas Transaction behind Mr Lau's back by documents (which have never been disclosed but were apparently dated less than two weeks after the board meeting); and Mr Chu's buy-out of PRC Holdco, through BGAL and Polyrise, took place in January and February 2016. Looked at in context, the December 2016 board meeting of Beibu Gulf looks more like the preparation for an ambush of Mr Lau than part of any process for the consensual resolution of their difficulties.

*Mr Lau's Freedom to Sell his Shares in OSL*

48. As already noted, there was (perhaps unusually) no restriction in the Articles of Association of OSL against dealings by each member with his shareholding. Mr Lau was, in theory at least, free to disengage from his association with Mr Chu in OSL simply by selling his shares. The Court of Appeal treated this as a self-sufficient reason on its own for a finding that there was no deadlock, and as a point to which the judge's attention had not been drawn. The same point arises in relation to the question whether OSL was a quasi-partnership, dealt with above, and again in relation to the question of alternative remedies, considered below. For present purposes the Board examines only the question whether it constitutes an answer to the allegation of deadlock.

49. It might in the Board's view be an answer to a case based purely on functional deadlock that a member could extract himself by a sale of his shares, but only if he could be expected to be able to do so upon fair terms. In the present case, an incoming third party purchaser of Mr Lau's shareholding would face the following disincentives to paying full value. First, he would be faced with Mr Chu as sole director, with no right to appoint himself or a nominee of his to the board. Incoming 50% shareholders of a private company do not usually pay full value with no concomitant share in management or control. Secondly, the incoming buyer would face the difficulties arising from Mr Chu's reluctance to provide financial information about Beibu Gulf, upon which any serious appraisal of the value of a 50% holding in OSL would have to

be based. Thirdly, having regard to the notoriety of the dispute between Mr Lau and Mr Chu, an incoming purchaser would be likely to expect Mr Lau to be an involuntary seller, and reduce his offer price accordingly.

50. The only evidence before the judge about a possible buyer for Mr Lau's shareholding was that PRC Holdco might have been prepared to buy, but only if it could at the same time acquire Mr Chu's shareholding, which he was unwilling to sell. As for Mr Chu as a potential buyer, the judge found that he was unwilling to do so, and of doubtful financial ability in any event.

51. It does appear that little if anything was made at the trial about Mr Lau's theoretical ability to avoid deadlock by selling his shareholding in OSL to a third party. The Board thinks it most unlikely that this experienced judge was unaware of the lack of any restriction on sale. But the fact that it was not mentioned appears more consistent with the fact that Mr Lau's freedom to sell was purely theoretical, and properly ignored both by the parties and the judge. It does not, in the Board's view, provide any basis for the Court of Appeal to have departed from the judge's finding of functional deadlock.

*Alternative remedies*

52. As already explained, section 167(3) of the 2003 Act enables the respondent to a just and equitable winding-up application to resist it by showing, the onus being on him, that the applicant has unreasonably failed to pursue an available alternative remedy, either in or out of court. Bearing in mind the onus of proof, a judge may reasonably expect the respondent (especially if represented by an experienced legal team) to put forward one or more remedies which it is alleged were both available and sufficiently attractive as an alternative to make it unreasonable to continue to seek a winding-up. It was not for the judge to imagine every potential alternative remedy and deal with it, in the absence of a properly formulated invitation to do so.

53. The judge addressed alternative remedies at paras 96-97 and 101B of his judgment. He rejected any out of court settlement of their differences by the two men, in the light of their evident acrimony and inability to achieve such an outcome over several years. In particular he rejected a buy-out of Mr Lau by Mr Chu because of Mr Chu's reluctance to do so, and his failure to demonstrate the financial means to do so. He noted that any valuation of Mr Lau's interest in OSL required Mr Chu to produce materials to enable the two ships to be allocated to PBM to be valued and that, despite promising to provide expert evidence for that purpose, Mr Chu had failed to do so.

54. The judge considered alternative shareholder remedies, such as relief from unfair prejudice, but regarded it as not unreasonable for Mr Lau to confine himself to seeking a winding-up, mainly because of the risk that it would increase the range of litigation

already on foot between the parties and would be both speculative and expensive, by comparison with a winding-up application.

55. It does not appear that the judge considered a third party purchase as a suitable alternative remedy. For reasons already given (in para 52) he should not be criticised for not dealing with it expressly if, which is not clear, it was even suggested to him.

56. The Court of Appeal took the view, at para 71, that it was for Mr Lau to demonstrate that there was no alternative remedy reasonably available to him. This was a misdirection in law. As explained above, the legal onus on this issue lies with the respondent to the application. The Court of Appeal appears also to have concluded that, if a case for winding-up had been established, the court could itself have ordered a buy-out of Mr Lau's shareholding: see para 75. This was also wrong in law. On a just and equitable winding-up application the BVI court has no such jurisdiction. Only if Mr Lau had brought unfair prejudice proceedings would the court have had such a power and, incidentally, a power to wind-up as well.

57. The Court of Appeal's view was that, if a case of deadlock had been proved, a buy-out by court order or by agreement under the threat of a suspended order would have been more appropriate than what it described as the "draconian" remedy of liquidation. Alternatively it contemplated a court order that Mr Lau's shares should be placed for sale to an interested third party.

58. Taking those in reverse order, there was no evidence to suggest that an interested third party might be likely to offer fair value to an involuntary seller like Mr Lau, selling pursuant to a court order, even if the court had power to make such an order. In fact an order for sale of Mr Lau's shareholding would have required proceedings based on, and proof of, unfair prejudice, and the judge gave a satisfactory reason why it was not unreasonable for Mr Lau to avoid such proceedings. The Board would add that unfair prejudice in the management of a company is a different allegation from either deadlock or breakdown of trust and confidence. It is not lightly to be assumed that an applicant who can prove the latter will equally be able to prove the former: see *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427 at [108] and *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 at [36].

59. The judge had found, rightly in the Board's view, that this was a paradigm case of breakdown in trust and confidence in a quasi-partnership company, and of functional deadlock, for either of which winding-up is the typically appropriate remedy provided by statute.

60. The judge himself gave convincing reasons why the prospect of a sale to Mr Chu was not a realistic available remedy, and there is no convincing reason why a suspended

order for winding-up would have made all the difference. A buy-out order would have required unfair prejudice proceedings.

61. In conclusion on this issue, there was no basis for the Court of Appeal to set aside the judge's analysis on the issue of alternative remedy, and its own assessment was vitiated by errors of law.

*Mr Chu's Additional Points*

62. Mr Chu submits that the Court of Appeal's decision can be supported by the following additional grounds:

(a) That OSL was not in truth a quasi-partnership company to which equitable considerations should be applied.

(b) That Mr Lau should be refused relief because he did not come to court with clean hands.

(c) That the documents show that there was no deadlock between the two men, and that their relationship had not irretrievably broken down.

(d) That there were two further alternative remedies which Mr Lau unreasonably failed to pursue, namely derivative litigation in Hong Kong or a share split at the PBM or Beibu Gulf level.

63. Taking those in turn, the Board has already rejected the first. There is no basis for challenge to the judge's finding that OSL was a corporate quasi-partnership: see para 31 above.

64. Just and equitable winding-up is a statutory remedy, albeit of an essentially equitable nature. The clean hands doctrine finds appropriate expression in this context by the requirement, expressed in the *Ebrahimi* case, that the applicant should not have been the sole cause of the breakdown in trust and confidence or of the deadlock: see para 19 above. The Board sees no reason to disturb that well-known, long standing analysis from the highest authority. Although the judge found that the two men must to some extent share the blame for the breakdown and the deadlock between them, he said, at para 101C, that Mr Chu was the more culpable of the two. Without having seen both of them being cross-examined, as the judge did, the Board cannot fault his assessment.

65. Mr Hacker attempted at length, both in writing and orally, to re-argue the deadlock and breakdown issues by reference to the documents. But the attempt does no more than raise an arguable case which the judge rejected with cogent reasons, after hearing cross-examination, which was no doubt of particular value on issues of that kind. It amounted to no more than what the English Court of Appeal rightly criticised as "island hopping" in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29, para 114. It is not, in the Board's view, a proper use of the appellate procedure.

66. The judge dealt compendiously with litigation as an alternative remedy, as already described. His conclusion that it was not unreasonable for Mr Lau not to pursue it is as valid in relation to a Hong Kong derivative action as to any other type of alternative proceedings.

67. Finally, the notion of a share split at the PBM or Beibu Gulf level does not appear on its face to be as suitable as a winding-up of OSL. It would not achieve a clean break between Mr Lau and Mr Chu, and it would not (if it operated at the Beibu Gulf level) do anything about those assets of PBM consisting of its claims in relation to its loan to Beibu Gulf, or its claims against Mr Chu for misfeasance and breach of fiduciary duty, which would better be investigated and (if thought fit) pursued by a liquidator.

68. It follows that, neither singly nor in the aggregate, do Mr Chu's additional points amount to a basis for upholding the order of the Court of Appeal.

*Costs*

69. Mr Lau's free-standing costs appeal arises only in the event that his appeal was otherwise unsuccessful. Accordingly the Board says nothing about it.

*Disposition*

70. This is an unusual case in which the Court of Appeal took it upon itself to overturn an essentially factual decision followed by the exercise of discretion. It depended upon the judge having made relevant errors of law, taken into account inadmissible matters, ignored relevant matters and exercised his discretion on a flawed basis. The argument before the Board has demonstrated that all the Court of Appeal's criticisms of the judge were ill-founded.

71. For the foregoing reasons the Board will humbly advise Her Majesty that this appeal should be allowed, the order of Wallbank J made on 28 July 2017 be restored,

and the order of the Court of Appeal dated 17 January 2020 be set aside and the order of the judge restored.

**LADY ARDEN:**

72. I agree that this appeal should be allowed. Moreover, in my judgment, the judge was entitled to, and did find, that the originating application succeeded, not merely on the ground explained by Lord Briggs - that there was deadlock between Mr Lau and Mr Chu - but also on the ground that Mr Lau had been wrongly excluded from participation in the management of OSL, its subsidiaries and affiliates.

73. There was nothing in the articles of OSL which gave Mr Lau the right to participate in management, but the judge found that OSL was a "quasi-partnership". It follows from this that the court must have regard not merely to the articles of association but also to the equitable obligations which Mr Lau and Mr Chu owed each other. I will amplify these points, starting with the judge's findings.

*Summary of the factual allegations which the judge found proved*

74. In this section of my judgment, I summarise the judge's core findings on exclusion. In a nutshell, he found that OSL had been set up by Mr Chu and Mr Lau on the basis that each of them would participate in their various ventures, whether carried on by it or indirectly through subsidiaries or affiliated companies, that Mr Lau was excluded in various ways from management participation in OSL's business, and that that exclusion was in breach of the equitable obligations which Mr Chu owed to Mr Lau and that accordingly it was just and equitable that OSL should be wound up.

75. OSL, a 50:50 company of which Mr Lau and Mr Chu were the sole directors and shareholders, had been established on the basis that they would both participate in the management of OSL's business ventures. OSL had a wholly owned subsidiary, PBM. This company made loans of approximately $36.34m (and a capital contribution of approximately $9.8m) to Beibu Gulf Ocean Shipping (Group) Ltd ("BGL") in which it held 49% of the shares, to buy ships but the orders for the ships were cancelled and the money was not used for this purpose. Mr Lau wanted the loans to be repaid, but Mr Chu wanted to leave the money in BGL. The parties tried to agree terms for separation of their interests, but the negotiations failed. Mr Chu refused to give Mr Lau financial information about BGL to evaluate any proposal for separation of his interest from that of Mr Chu. Mr Chu, without consulting Mr Lau, approved the making by BGL of loans to its parent company, Beibu Gulf Holding (Hong Kong) Co Ltd. Mr Chu claimed that he was in charge of PBM. He had also been appointed managing director of BGL. Mr Chu extracted monies from PBM without any explanation to Mr Lau. He procured the

removal of Mr Lau as a director of subsidiaries of BGL. He appeared to be interested in businesses which competed with BGL or which should have been acquired for its benefit.

76. In May 2015, Mr Lau filed an originating application for the winding up of OSL on the just and equitable ground. There were further attempts to negotiate a division of Mr Lau's interests from those of Mr Chu. Under an agreement reached in December 2015, two of the vessels operated by BGL were to be transferred to PBM as a first stage in the separation of interests between Mr Lau and Mr Chu but the transfer did not happen in the way Mr Lau (whose evidence the judge preferred) intended. He understood that finance would be raised for PBM to complete this purchase if the PBM loans were insufficient. This did not occur. Instead Mr Chu arranged for the ships to be mortgaged to Lohas without consultation or explanation to Mr Lau. Kaye J found that Mr Lau had simply been presented with a fait accompli (para 71).

77. The majority shareholders in BGL transferred their interest in BGL to Bright Good (Asia) Ltd ("BGAL"), a company believed to be associated with Mr Chu. The judge considered that it was at least arguable that Mr Chu and BGL held the 51% interest so acquired on trust for PBM. BGAL transferred 6% of the shares in BGL to Polyrise Ltd. A meeting to remove Mr Lau would now be quorate, and he was removed as a director of BGL. BGL sold its ship chartering business to Cosmic Glory Limited (subsequently known as Ausca Group Limited) in which Mr Chu's son was interested. Mr Lau continued to complain about the lack of financial information and in September 2016 BGL resolved to opt out of its obligation to circulate financial reviews to its shareholders.

78. Kaye J held that:

> "The plain purpose of this (with all the other steps previously taken including Mr Lau's removal as director) was in my judgment to hi-jack the business of Beibu Gulf and to prevent PBM as shareholder (and more especially Mr Lau) from finding out any financial information about the business and its activities thus preventing any proper valuation of PBM's interest and thereby OSL for any buy-out purposes." (para 80)

79. The judge went on to summarise his relevant findings on just and equitable winding up as follows:

> "**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 in its subsidiaries. All this was done or engineered by Mr Chu (in breach, it might well be said, of his fiduciary obligations to his partner in OSL, Mr Lau) 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 (BBG Shipping and BBG Resources) 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 (by which he had effectively engineered a situation whereby Beibu Gulf was stripped of its apparently potentially valuable operating assets, thereby reducing the value of PBM's interest), 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 (such as it was confidential, he needed the permission of fellow directors to provide the requested information, or the issue was irrelevant, or contrary to some unspecified agreement) and cynically blamed Mr Lau for failing to implement the Restructuring Agreements. Indeed, although Mr Chu was plainly aware of 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 his commercial and corporate machinations in Beibu Gulf." (para 81)

80. The word "hi-jack" is striking. The judge used it again at para 92 of his judgment.

"As to the allegation that Mr Lau was excluded from Beibu Gulf: the gravamen here of course is that whilst both initially contemplated they would, through PBM, share in the commercial

> venture of the Beibu Gulf Group, Mr Chu has effectively hi-jacked a business venture that was intended to benefit the two of them via OSL and PBM. I accept Mr Lau's case on this."

81. In my judgment, for the reasons contained in this judgment, the judge was entitled to analyse this case as one of exclusion from management participation. The starting point is the judge's finding that OSL was a "quasi-partnership" as Lord Briggs has explained. I agree with Lord Briggs that that conclusion had to be reached on an assessment of the facts of the case as a whole and that the fact that there was an unrestricted right for a shareholder to transfer his shares does not in this case prevent the conclusion that this company was a quasi-partnership company. I now come to the significance of that conclusion.

*The significance of OSL being found to be a quasi-partnership*

82. Prior to the decision of the House of Lords in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, the courts tended to hold that the rights of the shareholders were exclusively governed by the company's articles. The classic case is *In re Cuthbert Cooper & Sons Ltd* [1937] Ch 392, in which the directors and sole registered shareholders blocked the registration of the shares of their deceased father to his younger sons. Those sons petitioned for the company to be wound up on the just and equitable ground because they could not get the shares registered in their own name and the directors were paying themselves salaries, denying them financial information and not authorising any dividends. Simonds J refused relief. He held that, even though the company bore a resemblance to a partnership and the partnership analogy applied, the rights of the younger sons were only those set out in the articles of association of the company. This decision was criticised in *Ebrahimi* as having taken too narrow a view of equitable obligations. As I explained in *Strahan v Wilcock* [2006] 2 BCLC 555, it was clear to the House in *Ebrahimi* from several sources, including *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, Scottish cases such as *Symington v Symington's Quarries Ltd* (1905) 8 F 121 and Australian cases, such as *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458, that the approach illustrated in *In re Cuthbert Cooper* did not meet the case of participants in private companies where an analogy with partnership applied.

83. On its facts, *Ebrahimi* was a strong case for being a quasi-partnership because the company had previously been a partnership in which the partners had been involved in management and shared the profits, but a pre-existing partnership is not a universal requirement for a quasi-partnership. There were initially two, then three shareholders who were also directors. Two of the shareholders removed the third by resolution of the company in general meeting. He therefore ceased to be entitled to remuneration as a director and was at the mercy of the remaining directors as to his share in the profits. It was not suggested that he had been guilty of misconduct which would justify his expulsion if the company had been a partnership. As Lord Briggs has explained, Lord

Wilberforce laid down a description of a quasi-partnership company, but it was never intended to be read as a statute. Where there was a quasi-partnership, then it was possible to read obligations into the articles of association.

84. In *Ebrahimi* and many other cases, one of the fundamental understandings between the quasi-partners was that they would all be entitled to be involved in the management and share in the profits of the business. By analogy with the rights of partners, the power of expulsion was to be interpreted strictly (see *Blisset v Daniel* (1853) 10 Hare 493). In particular, in the case of the power to remove a director, that meant that, if the quasi-partners exercised their power to remove one of their number as a director against his will, without justification and giving him an opportunity to put his case, and paying him the full value of his share in the company, the court would make an order for the winding up of the company on the just and equitable basis: see per Lord Wilberforce at page 380. Exclusion from management might be justified if there was serious misconduct or where the quasi-partner in question came to the court without "clean hands" (per Lord Cross at pp 386-7).

85. In my judgment the facts found by the judge show that exclusion from participation in management occurred in substance in this case. There would be no basis for confining exclusion from management to the case where a quasi-partner is removed from office as a director as opposed to making it effectively impossible in some other way for him to take part in the management of the company's businesses, as such a distinction would be artificial and enable his rights of participation to be easily circumvented. It must include preventing him from participating in the management of the company's assets without removal as a director. In this case, Mr Chu ensured that the question of the recovery of the substantial PBM loans was shifted to BGL, where PBM has only a minority shareholding. Mr Chu by working with the other shareholders of BGL was able to procure the removal of Mr Lau as a director of BGL, Mr Chu ensured that the ship received from BGL for Mr Lau's share should not be available for Mr Lau, or even be under the control of PBM as it was transferred to Lohas without consultation with Mr Lau. So, as I see it, this case is additionally one of exclusion from management and not just deadlock. Put another way, deadlock is the symptom and consequence of a more fundamental malaise, namely that of exclusion by Mr Chu of Mr Lau from management participation.

86. There are, however, some points which I would like to make about deadlock, to which I now turn.

*Different meanings attached to deadlock and the relationship of deadlock to the just and equitable jurisdiction*

87. The judge described the principal issue as being whether the affairs of OSL were so deadlocked as to justify an order on the just and equitable ground for the liquidation of that company (para 25). By contrast, the Court of Appeal were using a different approach to deadlock. They treated deadlock as the absence of provisions of the memorandum and articles of OSL to provide a means of resolving the differences of opinion between Mr Chu and Mr Lau. They found that that test was not satisfied because there was a means of dealing with the differences between the parties. In particular Mr Lau could sell and transfer his shares to a third party.

88. The judgment of the Board in the present case does not seek to provide any definition of deadlock based on the authorities or to analyse the lower courts' difference of view. In its earlier decision in *Ng Eng Hiam v Ng Kee Wei* (1965) 31 MLJ 238, an appeal from the Supreme Court of the Federation of Malaya, the Board gave the term a narrow meaning, as the Court of Appeal did in this case, and held that "deadlock" meant that there had to be complete deadlock in the management of the company. This would cover the case where the constitution of the company did not provide any means for resolving the deadlock, as where there were only two directors who were also 50:50 shareholders, and there was disagreement between them and neither of them was entitled to a casting vote. This was the case in *Ng Eng Hiam*. So, if one of the directors has executive powers, for example as a managing director, and the acts complained of could be carried out by him under those powers, disagreement between him and his fellow director would not give rise to deadlock. In *Ng Eng Hiam* the trial judge had refused to make a winding up order on the basis that the company's business was profitable and could still be carried on. Lord Donovan, giving the advice of the Board, held that:

> "The question whether such a deadlock exists as makes it just and equitable to wind the company up is a question predominantly of fact in each case. The principle is clear that if the court is satisfied that complete deadlock exists in the management of a company the jurisdiction will be exercised. See Buckley on Companies 13th Edition page 456. It may be that the jurisdiction will be more readily exercised where (as is alleged to be the case here) although the business is carried on by means of a private limited company, the case is one not unlike a partnership." (page 240)

89. Thus, in companies which are quasi-partnerships, deadlock may be one of the elements which show that the respondent director is acting in breach of some equitable obligation owed by him to his fellow shareholders. It is, therefore, important not to get carried away by the word "deadlock" itself: Lord Wilberforce made it clear that the

words “just and equitable” are perfectly general and are not to be cut down by reference to previous cases in which a winding up order has been made. Deadlock today can more meaningfully be seen as illustrating the general principles established in *Ebrahimi*.

90. The appellants also rely on *Loch v John Blackwood Ltd* [1924] AC 783. There was no deadlock in this case, Lord Wilberforce cited it in *Ebrahimi* and it shows the breadth of the jurisdiction. In that case, the Board dismissed an appeal against the making of a winding up order on the just and equitable ground on the basis that there was a lack of probity and a justifiable lack of confidence. There was no finding that the company was a quasi-partnership company nor was there any deadlock in the sense given in *Ng Eng Hiam*.

91. In my judgment, in the interests of clarity, the use of the term “deadlock” to describe a category of case in which the court may decide to exercise its just and equitable jurisdiction should be reserved for cases in which there is complete deadlock at the level of management and that is the only matter on which the party is seeking a just and equitable order. Most cases involving quasi-partnership companies will be found to involve much more than that.

92. In short, in quasi-partnership companies, deadlock often covers some of the same territory as failure to observe the equitable obligations which are not written into the articles but which are owed by one quasi-partner to another. A quasi-partnership is not a commercial transaction in which, to borrow the words of Judge Learned Hand, “it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves” (*James Baird Co v Gimbel Bros Inc* 64 F 2d 344, 346 (2d Circuit 1933). The implication of equitable obligations in a quasi-partnership is the way in which the courts secure that justice is done between quasi-partners who have not taken every contractual protection that they might have done to prevent the misuse of corporate powers. The contest between law and equity in this type of situation has been fought over many years and is graphically illustrated by the contest between Shylock and Portia in Shakespeare’s *The Merchant of Venice.*

*Position in relation to BGL*

93. Needless to say, Mr Lau did not accept that he should be excluded from the management of the businesses. So, the situation developed in which the parties were unable to agree about OSL’s business and in that sense, which is not the sense in which the Board used the term in *Ng Eng Hiam,* there was deadlock. It is nothing to the point that the BGL group were not subsidiaries of OSL. The indirect minority holding which OSL held in that company was one of its assets. Therefore, the equitable obligations Mr Chu owed to his quasi-partner Mr Lau affected also his activities in the relation to BGL, again as the judge held. The position is different in relation to the unfair prejudice

remedy which includes the words "the affairs of the company" and "any act or acts of the company" (see section 184I(1) of the Business Companies Act 2004). In those cases, attention has to be paid to whether those statutory words are fulfilled.

*Miscellaneous points*

94. As to the temporal issue, namely whether Mr Lau could rely on matters subsequent to the filing of the application, I agree with Lord Briggs' judgment and specifically with his point that the wording of the section requires the court to be satisfied that it is just and equitable to appoint a liquidator at the date of the hearing. This provides powerful support for the proposition that the parties may file evidence about matters which occur after the date on which the originating application is issued. (In this case, by virtue of the interlocutory order of Wallbank J, the function of the pleadings was also performed by the parties' witness statements).

95. The Court of Appeal did not address the judge's findings on exclusion from participation in management. The judge relied on these as reasons why it was just and equitable to make an order on the just and equitable ground. The appellant has always complained about his exclusion from participation in management. If the Court of Appeal had not been misled into thinking that they could not rely on matters occurring after the commencement of the proceedings, they would in my judgment have had to deal with the impact of the judge's findings on exclusion. If they stood, it is difficult to see how the judge's order could have been set aside.

96. I also agree with what Lord Briggs holds about alternative remedies.

97. Further, given the potential remedies arising from the management by Mr Chu of OSL's businesses and investments, it is not an objection to the appointment of a liquidator on the just and equitable ground that OSL or PBM may now be insolvent.

98. The respondent submits that there could be no deadlock in BGL because he and Mr Lau were only minority shareholders and could always be outvoted by the majority shareholders, but this too misses the point. There is still the question of exclusion from management.

99. The respondent relies on the first sentence of para 53 of the decision of the Eastern Caribbean Court of Appeal in Union Zone, where Farara JA held that a breakdown in the relationship between shareholders is not necessarily a ground for winding up (see para 24 above). It is clear from the whole paragraph that Farara JA was explaining that the applicant for just and equitable relief had to show deadlock or breach

of some agreement about management participation or the failure of the object for which the company was formed. There are two points arising from that.

100. Firstly, Farara JA expressly contemplated the present type of case, namely exclusion from management. Exclusion from management can in an appropriate case be a ground for a just and equitable order in conjunction with or as an alternative to deadlock.

101. Secondly, in so far as Farara JA might be taken to mean that there is a closed list of grounds for just and equitable winding up, this is contrary to *Ebrahimi*. Lord Wilberforce clearly held the phrase "just and equitable" was general and should "not be reduced to the sum of particular instances." (pp 374-375). He also held that the courts may have been too timorous in the past in just and equitable winding up and that it was impossible or undesirable to define the circumstances in which equitable considerations could arise (p 379).

*Conclusion*

102. For these reasons, in addition to those given by Lord Briggs in his judgment I would also humbly advise Her Majesty that this appeal should be allowed.