**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS, FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal Nos: 7 & 8 of 2019**
**(On Appeal from FSD 195 of 2018)**

**IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)**
**AND IN THE MATTER OF CHINA CVS (CAYMAN ISLANDS) HOLDING CORP.**

**BETWEEN:**

**FAMILYMART CHINA HOLDING CO. LTD.**

**Appellant/Respondent**

**and**

**TING CHUAN (CAYMAN ISLANDS) HOLDING CORPORATION**

**Respondent/Appellant**

| | |
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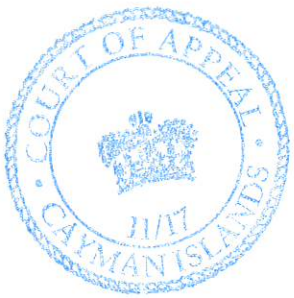
| **Before:** | **The Rt Hon Sir Bernard Rix, Justice of Appeal**<br>**The Hon John Martin, Justice of Appeal**<br>**The Rt Hon Sir Alan Moses, Justice of Appeal** |
| **Appearances:** | **Mr. Tom Lowe Q.C. instructed by Mr. Marc Kish and Ms. Gemma Lardner of Ogier for FamilyMart China Holding Co. Ltd.**<br><br>**Mr. Mac Imrie, Mr. Paul Smith and Mr. Ryan Hallett of Maples & Calder for Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan")** |
| **Heard:** | **14th and 15th November 2019** |
| **Draft circulated:** | **31 March 2020** |
| **Judgment delivered:** | **23 April 2020** |




**JUDGMENT**

**Moses JA**

*Background*

1. China CVS (Cayman Islands) Holding Corp ("the Company") is a Cayman Islands holding company operating, through nine subsidiaries, a successful nationwide convenience store

business in the People's Republic of China ("PRC"). It operates about 2,400 "FamilyMart" convenience stores and asserts that it is the market leader in the PRC premium foreign brand convenience store market. It has two shareholders: Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan"), the Majority Shareholder, as to 59.65% and FamilyMart China Holding Co. Ltd ("FMCH"), the Minority Shareholder, as to 40.35%. The Company has seven directors, four Majority Directors appointed by Ting Chuan, and three Minority Directors appointed by FMCH. On 11 May 2011 Ting Chuan and FMCH entered into a shareholders agreement which contained an arbitration clause.

2. These appeals have been triggered by a winding up Petition presented by FMCH on 12 October 2018 on the just and equitable basis. On 25 February 2019 the Hon. Justice Kawaley dismissed Ting Chuan's application to strike out the Petition but ordered certain passages of the Petition to be struck out. He criticised the Petition for inadequacies in drafting and gave permission to amend. Ting Chuan appeals, with leave, against that order and continues to seek to strike out the Petition in its entirety.

3. Kawaley J also ordered that the Petition be stayed pursuant to section 4 of the ***Foreign Arbitral Awards Enforcement Law*** (1997 Revision) ("***FAAEL***") until the complaints in the Petition had been arbitrated. FMCH appeals, with leave, against that Order.

4. These appeals, accordingly, require scrutiny of the nature of the Petition and of the tension between the exclusive jurisdiction of the court to determine whether a company should be wound up, pursuant to s.92(e) of the ***Companies Law*** (2018 Revision) (the "***Law***") and the contractual obligation to arbitrate disputes arising between the shareholders, reinforced by the statutory provisions of the ***FAAEL*** and s.95(2) of the ***Law***.

5. It is worthwhile starting with the Petition's description of FMCH and Ting Chuan's joint development of the convenience store business. This provides an important context in which to consider the question of the potential overlap between the court's jurisdiction and the submission to arbitration.

*The Petition*

6. The Petition relates the origin and purpose of the formation of the Company. It was incorporated as a Cayman Islands Exempted Limited Liability Company on 17 February 2003, as a joint venture vehicle, to conduct the convenience store business in the PRC. The FM Parties, as defined in the Petition, had long-time experience in operating convenience stores in Asia. Ting Hsin and Ting Chuan are companies within a group founded by the Wei family and described in the Petition as the "Ting Hsin Group", which includes entities related to or associated with Ting Chuan or Ting Hsin. Although members of the Ting Hsin Group had experience in the food industry, they lacked the specific expertise in convenience stores, which they wished to develop in the PRC. Discussions, therefore, took place with a view to using a combination of the FamilyMart brand and expertise and the Ting Hsin Group infrastructure.

7. The Petition describes the formation of the "Foundational Agreements" pursuant to which the Company was formed and licensed to operate the FamilyMart brand in return for a royalty of 1% on all revenues, through subsidiaries in the PRC (24-27)[1].

8. For the purposes of these appeals, it is necessary to focus on the history and progress of the joint venture between 2003 and 2012 as described in the Petition. It is important to note that in addition to the written Formation Agreement and sub-license of the FamilyMart trademark, the convenience business was developed pursuant to what the Petition describes as an "agreed understanding", called the "Understanding", between the FM Parties and Ting Hsin for the expansion, through cooperation, of the Company's business (29). The nature of what was understood back in 2003 and thereafter is set out in the Petition.

[1] (The numbers in this part of the judgment refer to paragraphs in the Petition. I should emphasise that the facts which I identify in the Petition are, at this stage, no more than assertions which remain to be established.)

9. Ting Hsin would use its resources in the PRC to provide infrastructure, such as the provision of food factories, logistics and information processing either through third parties or, later, through its own subsidiaries. But:

> "*Any such contracting of infrastructure services would be transparent and disclosed by Ting Hsin to the FM Parties and then only on the footing that the terms were fair and equitable*" (29(a)).

10. The FM Parties would provide their experience in the convenience store business, sending out staff to assume the role of department heads with a view to subsequently transferring such roles to Ting Hsin's own staff.

11. The original Foundational Agreements were amended from time to time and are currently governed by a Framework Agreement of 11 May 2011, sub-licence and trademark agreements and, importantly, a Shareholders Agreement (SHA) dated 11 May 2011. The amended and restated SHA contained an entire agreement clause (Clause 20.2) and a clause in which disputes in connection with or arising out of the agreement would be submitted to arbitration (Clause 20.3). It will be necessary to return to the SHA which is relevant to a number of issues arising in these appeals. The Understanding, it is alleged, was not superseded by any subsequent written agreements and applied once Ting Hsin transferred its shares to Ting Chuan in 2006 (29(c)).

12. The Petition goes on to describe the formation of operating subsidiaries, managed entirely at the direction of the Company's management; the role of the operating subsidiaries' directors is described as being only formal (34-40).

13. The Petition then describes what it identifies as "Disclosed Related Party Dealings" (41-46). Supplies and infrastructure were provided primarily, at first, by third parties but subsequently, between 2005-2012 by companies formed by the Ting Hsin Group, which either the Majority Directors or the Group controlled and whose shares they owned directly or indirectly (42). At the direction of the Company the Operating Subsidiaries entered into relationships with such companies for food supplies and logistical services. But FMCH

acknowledges that it knew and accepted the principle of these disclosed related parties and related party transactions on the basis that:-

a. the terms were *"fair and competitive"*;

b. *"...there would be ongoing full and frank disclosure..."*;

c. *"there were appropriate mechanisms to monitor the Related Party Transactions..."* (45).

14. The Petition alleges that FMCH believed that the conditions pursuant to the Understanding with the Ting Hsin Group were satisfied between 2004 and 2012. The Understanding, which was the basis on which it acquiesced in related party dealings, was fulfilled, as it believed, through the scrutiny by an FM employee as general manager of the Company, regular management meetings, quarterly Board Meetings and without restriction on sharing information. (46)

15. However, so the Petition alleges, this changed in April 2012 (47-53). The general manager was demoted and later in 2012 returned to Taiwan, leaving management in the hands of Ting Hsin Group personnel. No-one from the FMCH side was able to obtain full information, the Company's financial reporting changed, and:

> *"As a result, the identities of related parties have not been disclosed in any of the audited financial statements from the 2013 financial year onwards and the Petitioner had no way of knowing which of the Company's suppliers and contractual counterparties were related entities."* (53).

16. The Petition (57-70) describes the deterioration and breakdown of the relationship between the Ting Hsin Group and FMCH since 2012. Communication between the Majority and Minority Directors diminished, and there were no Board Meetings between August 2014 and December 2017. In January and February 2017 Mr Wei, of the Ting Hsin Group, suggested a divorce on the grounds that the parties had lost trust and confidence in each other and the FMCH trademark and convenience store know-how was no longer needed; he sought to reduce the royalty rate and, thereafter, royalty obligations were not met for 12

months and monthly reports were not provided for a year (65-66). This deterioration culminated in an Inspectorship Application pursuant to section 64 of the ***Law*** in May 2018.

17. Following this application, at a Board Meeting on 12 June 2018, the Majority Directors supplied to the Minority Directors material which included a Summary of CCH Related party transactions from 2012-2017 (the "Related Party Schedule") (75). The Petition asserts that this Schedule identified five Related Parties whose identity had not been previously disclosed by the Ting Hsin Group or the Majority Directors (76). It was admitted, in an affirmation on behalf of the Company in the Inspectorship Application that the Company had engaged in business with these "Undisclosed Related Parties" (77) and as part of further evidence given for the purpose of those proceedings, two further hitherto undisclosed related parties were revealed (78).

18. FMCH, in its oral submissions in these appeals, singled out one of the undisclosed related parties known as Shanghai Nexus (76(d)) by way of example of the profits and opportunity of profits diverted by the Ting Hsin Group from the Company and its Operating Subsidiaries (94). Shanghai Nexus used FM stores for its Maxxipoint Scheme through which consumers can earn points through consumption at any member store and which can then be used for purchase at a discount. Almost all the members of the Maxxipoint Scheme are Related Parties or entities related to the Majority Directors which profit from their membership; Shanghai Nexus's revenue fundamentally depends on the commissions paid to it by the Company or its Operating Subsidiaries. The use of the Maxxipoint Scheme at FM Stores has been enormous (over 99% of the 4.6 billion points have been used at FM stores). Thus, as the Petition alleges, Shanghai Nexus and its beneficial owners have been able to use the Company's business to set up this apparently highly successful points card system business.

19. The Petition alleges that there was no or no full disclosure of the association with Shanghai Nexus, the nature of its dealings with the Company or the Operating Subsidiaries or the

profits which were earned (95). The Petition sets out a summary of Related Party transactions between 2012 to 2017 but cannot say what the value of the benefits from the transactions were or the economic cost to the Company or its Operating Subsidiaries (102-107); but it states that the percentages of goods procured from Related Parties to costs of sales for the Company was between 104.96% to 120.98% (106).

20. The Petition identifies the duties the Directors owed the Company as:

> "*32* *(a)* *a duty not to put themselves in a position where their interests were in potential conflict with the interests of the Company;*
>
> *(b)* *a duty not directly or indirectly to seek to make a profit out of their position or enable persons or companies related to them to do so without making full and frank disclosure thereof to the Company;*
>
> *(c)* *a duty not to deal with the Company themselves directly or to do so with companies or other entities with whom they were closely associated; and*
>
> *(d)* *a duty to act bona fide in the best interests of the Company.*
>
> *33* *.... the Majority Directors owed a duty to not cause the Company or the Operating Subsidiaries to enter into transactions with corporate entities, which were members of, affiliated with, or related to the Ting Hsin Group or with which the Majority Directors have close association ("Related Parties") without making full and frank disclosure to the company and/or Petitioner..."*

21. The duties which the Petition advances are derived from a series of uncontroversial authorities which establish the strict rule against self-dealing and the importance of full and frank disclosure before it can be shown that fully informed consent had been given to such dealing. In ***Aberdeen Railway v Blaikie***[2] Lord Cranworth said:

> *"And it is a rule of universal application, that no-one* [who is an agent with fiduciary duties to his principal] *shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question*

[2] (1854) 1 Macq 461

*is allowed to be raised as to fairness or unfairness of the contract...*" (471).

22. A conflict of indirect interests will be sufficient to breach that principle. Just as the court will not entertain any enquiry as to whether the trustee did not take any advantage of the conflict, it was similarly irrelevant to ask whether there had been any loss.

23. To avoid being in breach the fiduciary must show that he gave full and frank disclosure of all material facts and that thereafter his principal gave his fully informed consent. A company director must make full disclosure of all material facts to all the shareholders. The shareholders must approve or acquiesce in the conflict of duty or the profit the fiduciary is seeking to make (***Gwembe Valley Development Co Ltd...v Koshy (No.3)***[3]). Disclosure of all material facts requires more than piecemeal or informal disclosure and proof of knowledge by a fellow board member is not sufficient.

24. Full disclosure requirements include the extent of a director's interest including the source and scale of the profit made from his position.

25. The Petition relies on the Majority Directors' breaches of their strict obligations in relation to the "Disclosed Related Parties":

> "*54. In breach of their duties to the Company, to the extent of ongoing trading with Disclosed Related Parties the Majority Directors have not made full and frank disclosure to the Petitioner of the details of such ongoing Related Party Transactions with the Company and/or the Operating Subsidiaries and by failing to do so allowed themselves to be placed in a situation of conflict and/or engaged in self-dealing through Related Parties and/or directly or indirectly made profits from Related Party Transactions with Disclosed Related Parties and/or caused the Company or the Operating Subsidiaries to enter into Related Party Transactions with Disclosed Related Parties*" (a similar allegation is made at 79).

26. In relation to Undisclosed Related Parties the Petition alleges:-

> *"81. In breach of their duties to the Company, the Majority Directors have over a considerable period of time allowed themselves to be*

[3] [2003] EWCA Civ 1048, [2003] BCLC 131 at 151

*placed into a situation of conflict and/or directly or indirectly made profits from Related Party Transactions with the Undisclosed Related Parties and/or caused the Company or the Operating Subsidiaries to enter into Related Party Transactions with the Undisclosed Related Parties without making full and frank disclosure of the details of such Related Party Transactions to the Company and/or the Petitioner*".

27. The Petition then makes secondary allegations against Ting Chuan and Ting Hsin, which follow from the primary allegations made against the fiduciaries, the Majority Directors:

> "*55. Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the Majority Directors to act in breach of duty as aforesaid and/or allowed the Majority Directors and/or members of the Ting Hsin Group to profit from such breaches of duty and in doing so also acted in breach of the Understanding*".

28. The Petition makes a similar allegation at 80 and 82:-

> "*Ting Chuan and/or Ting Hsin have caused, permitted and procured the Majority Directors to act in breach of duty as aforesaid and/or allowed the Majority Directors and/or members of the Ting Hsin Group to profit from such breaches of duty and in doing so also acted in breach of the Understanding.*"

29. The basis on which the just and equitable winding up is sought is two-fold: first that the Petitioner had a justifiable lack of confidence arising from the lack of probity in the conduct of the Company's affairs and second, on the grounds of a breakdown in the fundamental relationship between the shareholders and the breach of the underlying understanding which had governed that relationship.

30. Lack of probity is well established as a basis for a just and equitable winding up:

> "*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... wherever a lack of confidence is rested on the 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.*"(***Loch v John Blackwood Ltd***[4].)

[4] [1924] AC 783 at 788

31. The lack of probity complaints are based on the allegations of breaches of fiduciary duties by the Majority Directors to which I have already referred.

32. The distinct second ground forming the basis of the Petition is that there has been a breakdown of trust and confidence. This second ground is, as I shall explain, founded on the description in the Petition of the understanding which had existed between the parties in the period from the start of the joint venture until 2012.

33. A just and equitable petition may be based on the irretrievable breakdown of a relationship of trust and confidence, in circumstances where equity recognises that such a relationship is not encompassed in the company structure defined by the relevant Companies Act and by the Articles of Association. The *locus classicus* of equity's recognition that it may be necessary to look beyond the legal structure of a company is the speech of Lord Wilberforce in ***Ebrahimi v Westbourne Galleries Ltd***[5], a case which included a petition that the company should be wound up on a just and equitable basis:

> *"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*" (p.379)

34. In ***CVC/Opportunity Equity Partners Limited v Demarco Almeida***[6] Lord Millett explained :

> *"[36] Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as "quasi-partnership companies". Their essential feature is that the legal, corporate and employment relationships do not tell the whole story, and that behind them there is a relationship of trust and confidence similar to that obtaining between partners, which makes it unjust and inequitable for the majority to insist on its strict legal rights."*

[5] [1973] AC 360
[6] [2002] CILR 77

35. To establish this basis for a just and equitable winding up, the petitioner has no need to rely upon a contract, it is sufficient to establish mutual understanding. In ***In re Fildes Bros Ltd***[7] a contributory sought to wind-up his brother's retail company, on just and equitable grounds on the basis that he had been unfairly shut out of that business. He failed but Megarry J said:

> "*It cannot be just and equitable to allow one party to come to the court and require the court to make an order which disregards his contractual obligations. The same, I think, must apply to a settled and accepted course of conduct between the parties, whether or not cast into the mould of contract.* [596H]"

36. In ***In Re Estate of Kam Kwan Singh***[8] Lord Millett added (46):

> "*In terms of what may constitute considerations of the personal character involving mutual confidence, this may come in the form of mutual understandings between members of a company or what may have been an accepted course of conduct between the parties "whether or not cast into the mould of a contract". Much of course depends on the facts and background of each case*".

37. Even where parties to a commercial joint venture agreement include an entire agreement clause, as in the instant case, an obligation to act in good faith may be imposed. (see ***Ross River v Waveley Commercial***[9] and ***Sheikh Tahnoon Al Nehayan v Kent***[10]).

38. The Petition seeks to establish and portray the relationship between the Majority and Minority Shareholders and its breakdown by describing the understanding which operated throughout the period, from the formation of the joint venture vehicle Company, that is, from 2003 to 2012, when it is said that Ting Chuan departed from it. This is an important foundation of the claim that the Company should be wound up.

*The Judge's Views on the Petition*

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[7] [1970] 1 WLR 592
[8] [2015] HKEC 2370
[9] [2014] 1 BCLC 545
[10] [2018] EWHC 333

39. Kawaley J did not strike out the Petition but took the view that it was a badly drafted document, lacking in particularity and unclear (see eg [17] and [26]). He concluded that the reason it was drafted in this way was to side-step the arbitration provision within the SHA [17] and [26]. This "tactical pleading" depended on advancing a claim based on an "Understanding". He said that "the Petitioner avers that there was also a legally enforceable "Understanding" [10]. He struck out those paragraphs which relied on the "Understanding" (although, Ting Chuan rightly points out that he failed, but to be consistent, ought also, to have struck out paragraph 55 of the Petition).

40. The judge seems, throughout his judgment, to have sought to identify causes of action. At paragraph 15, in which he considered the allegation of justifiable loss of confidence, he says:

> *"It was argued that the Petition failed to disclose a reasonable cause of action because it did not allege any actual diversion of profits. Paragraphs 109 and 110 of the Petition do support the alleged loss of trust and confidence solely by reference to a breach of the Understanding. However, the primary plea (Petition, paragraph 108) does not."*

41. The judge asked whether the Petition disclosed a reasonable cause of action [26] and [27] and, later, when considering the question of appropriate alternative remedies [58]; in relation to whether to grant a stay based on the parties' agreement to arbitrate (see e.g. [67]) he refers to "the relevant contractual disputes". It is this supposed need to identify a cause of action which appears to have coloured his view as to the Petition's reliance on the "Understanding".

42. He took the view that the SHA "expressly superseded any previous understandings between the parties" [27]. In reliance on s.20.2:

> *"without prejudice to any other provisions under this Agreement, this Agreement..., upon the Effective Date, constitute[sic] the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the Parties with respect to the subject matters hereof"*

43. He described this as the "clearest 'slam-dunk' point. Any contractual claim can only, it is plain and obvious, be brought based on the SHA. The purpose of the SHA was to govern the parties' relationship in the joint venture which was given legal life by the creation of the Company" [19]. The judge also relied upon the definition of the business in section 1.1 and section 3.2 which he thought arguably contains a distillation of the core principles underpinning what is pleaded in more particularised form as the Understanding [21] and referred to the requirement of compliance under section 9.1 of the SHA. He concluded:-

> *"Mr Lowe QC had no credible answer to the submission that the "Understanding" averments, especially to the extent that they were relied upon as freestanding legal complaints, were unsustainable in light of the SHA."* [24]

44. The judge's analysis of the Petition did refer to its description of the duties of the Majority Directors [Petition 33] but appears to have accepted Ting Chuan's argument that there were two limbs to the Petition, first an alleged breach of a legally enforceable Understanding [11] and second that the crucial plea was:

> *"55. Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the Majority Directors to act in breach of duty as aforesaid and/or allowed the Majority Directors and/or members of the Ting Hsin Group to profit from such breaches of duty and in doing so also acted in breach of the Understanding."*

45. The judge makes a passing mention of the Petition's reference to a justifiable loss of confidence in the management such that the relationship between the Majority and Minority Shareholders has irretrievably broken down [15].

46. In his view the allegations of breach of fiduciary duty depended on the allegations in the Petition that Ting Chuan caused the Majority Directors to breach their duties:

> *"[25] In my judgment, it is impossible to fairly read the Petition as advancing a breach of fiduciary duty claim against non-party directors. Rather, as already noted above (paragraph 13), the case against Ting Chuan was that it caused or procured the Majority Directors to breach their fiduciary duties.*

> *[26] Ting Chuan's counsel did not appear to me to go so far as to submit that such a claim was legally unsustainable as against Ting Chuan. His submissions on alternative remedies helped to demonstrate that the pleading at worst lacked particularity. Was the claim advanced an equitable or tortious one? Had the Petitioner not been so keen to sidestep the arbitration stay implications of the SHA, a breach of contract claim would have been quite straightforward. More elaborate would be a tortious claim for procuring a breach of the same contract. In my judgment, this claim does disclose a reasonable cause of action but is defective for want of particularity."*

47. The judge concluded that:

> *"[27] Those portions of the Petition which assert a breach of the Understanding are unsustainable because the SHA expressly superseded any previous understandings between the parties.... If the Petition otherwise proceeds, I would nevertheless grant the Petitioner leave to apply to amend, if so advised, to rely on similar averments by way of a contractual claim.*
>
> *[28] The breach of fiduciary plea does disclose a reasonable cause of action. To the extent that it lacks particularity, and in my judgment it is unclear precisely what the legal basis of the claim is, I would grant leave to cure this defect by way of an application for leave to amend."*

48. The judge then went on to consider whether there was a sufficient evidential foundation to support a finding that a justifiable loss of confidence had occurred. He concluded that the contention was not an abuse of process [38]. He then considered arguments in relation to the application for an Inspection and whether the Petition was being prosecuted for a collateral purpose, questions which do not arise in these appeals.

*Was the judge's striking out and criticism of the Petition justified?*

49. The judge focussed on what he described as "the crucial plea" in paragraph 55 (quoted above at [27]), and in the similar pleas at paragraphs 80 and 82 in the Petition, that is on the allegations against the Majority Shareholders of procuring breaches by the Directors whom they had appointed. This led to a striking omission of any reference to the pleas

which preceded the allegations against those shareholders. The judge makes no reference whatsoever to the specific paragraphs alleging breaches of the duties owed by the Majority Directors themselves at paragraphs 54 and 79 (in relation to Disclosed Related Parties) and in 81 (in relation to Undisclosed Related Parties). Nor, does he make any reference to the allegation at paragraph 108(e) that the loss of trust and confidence in the conduct and management of the Company's affairs was justified by "[t]he persistent and repeated breaches of duty over extended periods of time by the Majority Directors".

50. The judge appears to have thought, as submitted by Counsel for Ting Chuan, that he needed to identify a cause of action, the breach of which would form the basis of the winding up. It was this view which led him to place such reliance on the allegations of procurement by the Majority Shareholders and to regard the references to breaches of the Understanding as being allegations of breaches of contract.

51. This approach betrays a significant misunderstanding and mis-characterisation of the Petition and its two bases. Neither of those two bases are a cause of action, rather, they are a description of the foundations on which the Petition relies in support of its assertions that the Company should be wound up on the just and equitable ground, namely loss of confidence on the ground of lack of probity and a breakdown in the fundamental relationship between the main shareholders. These pleadings amounted to no more nor less than those which a petition for winding up is required to disclose: "a concise statement of the grounds upon which the Petitioner claims to be entitled to a winding up order" (***Companies Law*** (2016 Revision) (As amended) ***Companies Winding Up Rules 2018***) (***CWR*** Form No 2 paragraph 4).

52. The judge's failure to make any reference to the allegations of lack of probity on the part of the Majority Directors demonstrates that he overlooked this fundamental ground for the just and equitable winding up of the Company. Apart from recording the Petition's reference at [33] to the duties owed by the Majority Directors [Judgment 12], the judge

made no reference to the paragraphs in the Petition at [54], [79], [81] and [108]. All of these paragraphs amply set out that the winding up was sought on the basis of the Majority Directors' breaches of obligations of full and frank advance disclosure and their failure to observe the rules against conflict, profit and self-dealing. In my view there was no justification for criticising those pleadings as inadequate or requiring, at the stage of presentation of the Petition, further particularity.

53. The persistent quest for a cause of action also led the judge to misunderstand and mis-characterise the references to the "Understanding". In light of the advantage the Ting Chuan Group took of this pleading, it is, perhaps, unfortunate that the Petitioner chose to refer to the shared understanding on which the parties pursued their joint venture as the "Understanding". The use of the inverted commas, a capital letter and references to a breach of the Understanding (e.g.[55] [81], [82]) may all have affirmed the judge's view that it was alleged that the Majority Shareholders had broken some form of contractual obligation.

54. This was not what the Petition alleged. The Petition's references to the Understanding which operated from the outset of the joint venture up to 2012 explained, and highlighted, by way of contrast, the absence of disclosure in the period which followed. As Mr Lowe QC, on behalf of FMCH, submitted, it was Ting Chuan which needed to rely on this Understanding and practice not FMCH. Absent such course of conduct up to 2012, the Majority Directors would have been in breach of their fiduciary obligations much earlier, if not from the outset.

55. The references to the Understanding between the parties also, importantly, formed the basis for the second ground on which the winding up Petition was sought, the ***Westbourne Galleries*** basis. The breakdown of the relationship of trust and confidence which forms the second basis on which the winding up is sought is founded on and demonstrated by the

alleged fact that Ting Chuan and the Majority Directors ceased to follow or to operate the Understanding which had, up to 2012, been applied by the parties.

56. It is of significance that this Understanding is said to have been consistently honoured into 2012, subsequent to the legal agreements, including the entire agreement clause within the SHA, which had been made the year before in 2011. That, at least at the stage of averment, is a clear signal that it is not being alleged that there was a contractual breach.

57. In those circumstances, I take the view that the judge erred in regarding the allegations against the Majority Shareholders as "crucial" or in describing the drafting as being an attempt to sidestep the effect of the arbitration agreement within the SHA. The allegations against those shareholders followed and were dependent on the "crucial" allegations made against the directors for breaches of their obligations and founded the assertions of loss of confidence and breakdown of trust on which the Petition's claim that the Company should be wound up depended.

58. Ting Chuan relied, in its appeal against the judge's refusal to strike out the Petition in its entirety, upon what is contended to have been modifications to the directors' duties made in Regulations 107 and 108 of the Articles of Association. Regulation 107 provides (the numbering is supplied by FMCH in its written submission):

> *"(1) no person shall be disqualified from the office of Director...or*
>
> *(2) prevented by any such office from contracting either as vendor, purchaser or otherwise;*
>
> *(3) nor shall any such contract or any contract or transaction entered into by or on behalf of the Company in which any Director... so contracting shall be in any way interested be or be liable to be avoided;*
>
> *(4) nor shall any Director... so contracting or being so interested be liable to account to the Company for any profit realised by any such contract or transaction by reason of such Director holding office or of the fiduciary relation thereby established;*
>
> *(5) A Director... shall be at liberty to vote in respect of any contract or transaction in which he is interested provided that the nature of the*

> *interest of any Director... in any such contract or transaction shall be disclosed by him at or prior to its consideration and any vote thereon."*
>
> (108 relates to the right of directors to give general and not specific notice of related transactions before a vote is taken).

59. The Judge made no reference to these provisions. Their construction does not permit of any modification of the rules of disclosure and self-dealing. They are nowhere near specific enough to have the dramatic consequence of modifying the fundamental obligations of a director. As Mummery LJ said in relation to an article which provided that "no director... shall be disqualified by his office from contracting with the company":

> "*the relaxation in art 89 of the strict doctrines of equity against unauthorised self-dealing and secret profits, applicable to as fiduciaries, is made on the basis of compliance with the director's duty of disclosure under art 88, even though not expressed to be conditional on it.*" (See ***Gwembe Valley*** (supra) and Mummery LJ's reliance on ***Movitex v Bulfield***[11] to support the proposition that modification of the duties in relation to self-dealing are subject to the obligation of full disclosure). [51]

60. In oral argument, counsel for Ting Chuan invited this court to assess the weight of the evidence, an attempt which had not succeeded before Kawaley J. He pointed out that it was the executive management of the Operating Subsidiaries which conducted the business, with one each for the regions in the PRC where the convenience store business operates. However, the Petition sufficiently pleads that the 100% owned subsidiaries were managed by the Company's management, not by their own directors (see Petition [39], [40] and [43]. The conduct of the affairs of a subsidiary is a proper basis of complaint against a parent. The management and affairs of a company include the management and affairs of its wholly owned subsidiaries over which it has control (see ***Rackind v Gross***[12] and in the Grand Court ***In the Matter of Fortuna Development Corporation***[13] both of

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[11] [1988] BCLC 104
[12] [2004] EWCA Civ 815 [2005] 1 WLR 3505 at [26]
[13] [2004-5 CILR 197]

which were founded on Phillimore J's judgment in ***R v Board of Trade, Ex p St Martins Preserving Co Ltd***[14]).

61. Mr Imrie, for Ting Chuan, made submissions as to the unlikelihood of FMCH being unaware of the relationship between those companies which provided logistical, provisioning and logistical services and the subsidiaries and the lack of any reason or motive behind any possible concealment, particularly in respect of the tiny proportion of transaction amounts attributable to the only two allegedly undisclosed companies trading with the subsidiaries, Shanghai Huanxuan and Shanghai Xianyicai (see First Affirmation of Shuji Ogawa (paras 31 and 33)).

62. He argued that the evidence relied upon comes from Mr Ogawa, a director of FMCH, who has no personal knowledge of how the business was conducted at the time in respect of which complaint is made. He sets out details as to how the format of the weekly operation and management meetings changed. But this evidence is based on what he has been told by Mr Jin-Tin Pan, a director who was appointed back in February 2003 but who has not, as yet, made an affirmation.

63. None of these submissions came, in my judgment, anywhere near justifying striking out the Petition. There was and is no basis for consideration of these appeals other than on the basis that the facts asserted are true. Whether the evidence is adequate and whether it justifies winding up on the just and equitable ground is a matter for the hearing of the Petition, subject to the question of arbitration.

64. In the circumstances, in my judgment the judge was wrong to criticise the way the Petition was drafted and was wrong to strike out those paragraphs of the Petition which referred to the "Understanding", i.e. those identified by the judge as paragraphs 29-31 and paragraphs 80, 82, 109 and 110 (see Judgment [27]). I shall consider the consequences of that

[14] [1965] 1 QB 603

conclusion in relation to the orders made by the judge when I have considered the other issues.

*Arbitration*

65. The thrust of these appeals was directed to the issue of the conflict between the exclusive jurisdiction of the court to determine whether it was just and equitable to wind up the Company and the provision within the SHA under which the parties agreed that all disputes in connection with or arising out of that agreement should be submitted for arbitration. (Clause 20.3(b)). The judge rejected FMCH's contention that the Grand Court had exclusive jurisdiction to decide whether the Company should be wound up under s.92 (e) of the ***Law***. He took the view that the underlying disputes came within the scope of the arbitration clause within the SHA and could be determined separately by the arbitrator, or, as it was put, 'hived off', in accordance with the *obiter* suggestion of Patten LJ in ***Fulham Football Club (1987) Ltd v Richards***[15]. He ruled that Ting Chuan was entitled to a mandatory stay under s.4 of ***FAAEL***. Ting Chuan contend that if a mandatory stay could not be made under s.4 then it should be ordered under s.95(2) of the ***Law***.

66. The Amended and Restated Shareholders Agreement between the Majority and Minority Shareholders was dated 11 May 2011. Neither the Majority Directors nor the Company were parties. By clause 20.3(b):

> "*... If the parties cannot come to an amicable settlement within twenty (20) days of the onset of any dispute, any and all disputes in connection with or arising out of this Agreement [shall be] submitted for arbitration in accordance with and finally settled under the Rules of Arbitration of the International Chamber of Commerce in effect at the time of the arbitration, except as may be modified herein or by mutual agreement of the Parties. The arbitration shall be confidential and conducted in the Chinese language. The Parties agree that the arbitration shall take place in Beijing, PRC. The award of the arbitration tribunal shall be final and binding upon the disputing Parties...* "

[15] [2011] EWCA Civ 855; [2012] Ch 333

67. Although FMCH initially contended that the dispute between FMCH and Ting Chuan did not fall within the scope of the arbitration clause, it abandoned that contention during the course of the hearing before this court. There are two statutory ways in which the arbitration agreement might be enforced and the Petition might be stayed: first, under the mandatory provision of s.4 of the ***FAAEL***, and second under the mandatory provision of s.95(2) of the ***Law***, which would also permit the court to adjourn the hearing of the Petition until after the arbitration. Third, the court might stay the Petition until after the hearing of the arbitration as a matter of case management in the exercise of its inherent discretionary powers.

68. If the issues raised in the Petition are not arbitrable, that is if the issues are not susceptible to arbitration, then it was agreed that a stay could not be enforced either under s.4 or s.95(2). It is, therefore, convenient to consider the question of arbitrability at the outset.

*Arbitrability*

69. FMCH's primary submission was that the court has exclusive jurisdiction, under s.92 of the ***Law***, to decide whether a company should be wound up on just and equitable grounds. The authorities on which the rival contentions focussed all start with the proposition that only the court can decide whether it is just and equitable to make a winding up order. The issue of arbitrability comes down to the question whether the underlying disputes are themselves susceptible to arbitration and should, in accordance with the SHA, be submitted to arbitration before the Court exercises its jurisdiction to decide whether it is just and equitable to make a winding up order, as Ting Chuan contend.

70. The key authority at the heart of this dispute is ***Fulham Football Club (1987) Ltd v Richards***. It concerned a complaint that the chairman of the Premier League, in breach of his fiduciary obligations, had preferred the interests of a member of the league, Portsmouth, over those of Fulham in arranging the transfer of the centre forward, Peter Crouch, to Tottenham. The FAPL rules contained an agreement to arbitrate. Fulham failed in its

appeal against the judge's decision to stay the petition. The Court of Appeal took the view that an arbitrator could decide the claims of unfair prejudice, raised in a petition under UK Companies Law s.994. Patten LJ identified the nature of the dispute:

> *"The dispute between the parties and therefore the subject matter of the arbitration is the allegation of unfair prejudice... In terms of relief, it is, I think, common ground that the arbitrators could make an order against Sir David preventing him from acting as an agent of any club in the future and could also order him to resign as chairman. What they could not do is to wind up the FAPL or make orders regulating the affairs of the company which bind other shareholders who are not parties to the arbitration agreement. But no orders of that kind are sought in this case and, even if they were, they would not, in my view, form part of the "matter" to be referred to arbitration. The inability, however, of an arbitral tribunal to wind up the company or make third-party orders in the context of a complaint of unfair prejudice is relied on in support of an argument that claims where that or comparable relief could be sought in court proceedings and might be granted lie beyond what the law will permit the parties to submit to arbitration."*[33]

71. In this passage, it is possible to observe an early statement of a central theme of Patten LJ's judgment, a distinction between a petition on the grounds of unfair prejudice pursuant to section 994 of the UK Companies Law Act 1996 and the relief which may be ordered in consequence of a s.994 petition under s.996 and a petition that a company be wound up on just and equitable grounds under s.122(1)(g) of the UK Insolvency Act 1986. As this court has regularly emphasised, a petition on the ground of unfair prejudice is not available under Cayman Islands' Companies Law. Under Cayman Islands Law, the court can only consider reliefs as alternatives to winding up once the court has determined whether the company should be wound up on just and equitable grounds (s.92(e) the ***Law***. In a case like ***Fulham***, once the court had reached the conclusion that the petition under section 994 and the underlying dispute did not involve making a winding up order, there was no reason not to submit the issue to arbitration. Patten LJ put the issue in this way:

> *"As Mustill & Boyd point out, it does not follow from the inability of an arbitrator to make a winding up order affecting third parties that it should be impossible for the members of the company, for example, to agree to submit disputes inter se as shareholders to a process of arbitration. It is necessary to consider in relation to matters in dispute in each case*

*whether they engage third-party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process."*[40]

72. Patten LJ continued by considering Commonwealth cases in relation to arbitrability and in particular Warren J's decision in ***A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd***[16]. That case concerned an unfair prejudice petition. There was an arbitration agreement which purported to contain an express agreement to submit to arbitration disputes touching the winding up of the company. Patten LJ described Warren J's analysis of what she identified as a fundamental principle of corporation law as uncontroversial and set it out in full:

> *"[72] "13. The application to stay the winding up application on the basis of an arbitration agreement between the joint-venture parties raises a fundamental principle of corporations law.... The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the company. Such matters cannot and ought not be subject to private contractual arrangements"*
>
> *"18. The arbitration clause in the joint venture agreement is null and void in so far is it purports to subject the parties to an arbitration with respect to the dissolution or winding up of the company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company".....*
>
> *"[76] Warren J was, I think, right to regard the arbitration clause she had to consider as unenforceable insofar as it included within the scope of the reference the question whether the company should be wound up. Such an order lies within the exclusive jurisdiction of the court and the discretion as to whether or not to make that order is for the court, not the arbitrator to exercise. But I part company with her if and insofar as she suggests at para.18 of her judgment that there can be no resort to arbitration in respect of the dispute between shareholders or the company which forms the grounds upon which such relief may be sought.*
>
> *[77] The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA rules would have the power to grant the specific relief sought by Fulham in its section 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the*

[16] [1999] VSC 170

*determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction.. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL rules in relation to the transfer of a Premier League player.*

*[78] Judge Weeks QC was therefore wrong in my view to extend the reasoning of Warren J in A Best Floor...to a petition under what was then section 459. The statutory provisions about unfair prejudice contained in section 994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding up of the company and there is nothing in the scheme of these provisions, which in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted.*"

73. Since the petition under section 994 did not and could not invoke the power of the court to wind up the company, ***Fulham***, in its resistance to a stay, was compelled to argue that even a section 994 petition attracts a degree of state intervention and public interest which make it inappropriate for disposal by anything other than judicial process. Patten LJ rejected this argument; his decision turned not on the fact that the relief sought might affect third parties but on the nature of the statutory scheme under s.994. [50].

74. He contrasted a petition under section 994 with winding up under s.122(1)(g) of the UK Insolvency Act on the just and equitable ground which was a measure of last resort, and an exceptional remedy in the context of disputes between shareholders [56]. Section 994 was not a class remedy, it was designed to resolve issues of unfair prejudice without winding up the company [58]. He pointed out that following the introduction of what became section 994, there was no need to establish that an order to wind up the company

would be justified (see his citation of Lord Hoffmann in ***In Re a Company no 00-709 of 1992***[17]).

75. That an unfair prejudice petition does not involve making a winding up order lies at the heart of his decision [76] and [77].

76. Patten LJ then extended, in *obiter* remarks, that reasoning to a petition on just and equitable grounds in passages on which Ting Chuan and the judge relied:

> *"[83] I have already set out my own reasons for preferring the view that disputes of this kind which do not involve the making of any winding up order are capable of being arbitrated. Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the ACD Tridon case [2002] NSWSC 896, that the same probably goes for a similar dispute which is used to ground a petition under section 122 (1)(g) to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under section 9(4). In much the same way, it would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs to authorise the shareholder to seek such relief from the court under section 994. But such cases are likely to be rare in practice. If the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views would not be canvassed by the arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied.*
>
> *[84] But, as explained earlier in this judgment, these jurisdictional limitations on what an arbitration can achieve are not decisive of the question whether the subject matter of the dispute is arbitrable. They*

[17] [1999] 1 WLR 1092 at [60]

*are no more than the practical consequences of choosing that method of dispute resolution…*"

77. Longmore LJ's judgment, of course, is important in the analysis. He concluded that there was neither an express nor implied prohibition on agreeing to refer an allegation of unfair prejudice to arbitration. He acknowledged that s.994(1) conferred a power on a company member to petition the court but:

> "*..the fact that a statutory power, which a court would not have at common law apart from statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power.*" [96]

78. He then considered whether there was any necessity in the public interest to prohibit reference to arbitration of the question whether a company's affairs are or have been conducted in a manner unfairly prejudicial to the interest of its members [97]. He took the view that this issue was at the heart of the appeal and derived guidance from the principle set out in s.1(b) of the 1996 Act, namely that the parties should be free to agree how the disputes should be resolved subject to such safeguards as are necessary in the public interest.[98]. He continued:

> "*This is a demanding test and I cannot see that it is necessary in the public interest that agreements to refer disputes about the internal management of a company should in general be prohibited; nor can I see any reason why it is necessary to prohibit arbitration agreements to the extent that they, in particular, apply to disputes whether a company's affairs are being, (or have been) conducted in a manner unfairly prejudicial to the interests of its members.*".[99]

79. Longmore LJ dismissed Fulham's arguments as to the effect on the interests of members of the company not parties to the arbitration; the risk that an award might affect such parties did not render it necessary that agreements to refer unfair prejudice allegations should be banned as a matter of public policy [102]. He continued:

> "*[103] It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect see Société Commerciale de Reassurance v Eras International Ltd [1992] 1 Lloyds Rep 570, 610. The inability to give a particular remedy is*

*just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved.*"

80. Rix LJ affirmed Longmore LJ's views as to the primacy to be given to the choice of the parties to resolve their disputes by arbitration subject to such safeguards as are necessary in the public interest.[107]

81. Thus ***Fulham*** decided that because the issues which were submitted to arbitration did not necessarily involve the exercise of the exclusive jurisdiction of the court to make an order winding up the company, the choice the parties had made as to the method of disposal of their dispute should be upheld.

82. ***Fulham*** was considered in ***Salford Estates (No 2) Ltd v Altomart Ltd (No 2)***[18] which concerned the failure of a lessee company to pay in full service and insurance charges. The court accepted that a stay of legal proceedings pursuant to s.9(1) of the Arbitration Act 1996 could not be applied to a winding up petition on the ground that the company was unable to pay its debts, where there remains an undisputed debt above the statutory minimum [26] and [29]. Sir Terence Etherton C said:

> *"34. Plainly, there is no basis for staying the Petition itself; and, if the Petition proceeds, there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proof of debts which supersedes any arbitration agreement.*
>
> *35. Furthermore, it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts."*

83. In deriving no assistance from ***Fulham*** the Chancellor pointed out that in that case no order had been sought to wind up the FAPL:

> *"[37] ... that case, typical of the usual section 994 petition, was essentially a private dispute in relation to the affairs of the solvent company which, therefore, neither engaged any public policy*

[18] [2014] EWCA Civ 1575; [2015] Ch 589

*objective of protecting the public where a company continues to trade despite being unable to pay its debts nor involved a class remedy for the company's creditors.*"

84. However, the Court exercised its discretionary power, under s.122 (1)(f) of the Insolvency Act 1986 to dismiss or stay the petition so as to require the parties to arbitrate the dispute as to the debt [41]. The Chancellor took the view that the court's discretion under section 122(1) should be exercised consistently with the policy embodied within the 1996 Act [39] and [40].

85. Although the headnote in ***Salford Estates*** suggests that ***Fulham*** was distinguished, it seems to me that the two cases follow, in different contexts, the same broad principle that a decision whether to wind up a company is a matter for the exclusive jurisdiction of the court. There was no breach of that principle in ***Fulham***. Both cases demonstrate, in different contexts, how the exclusive jurisdiction of the court is to decide whether a winding up order should be made may be respected. In ***Fulham*** the unfair prejudice petition did not require the court or an arbitrator to answer the question whether the company should be wound up. In ***Salford Estates*** the question whether the disputed debt was owed could be answered, as a discrete issue of historical fact, in arbitration without having to answer the question whether the company should be wound up.

86. ***Fulham*** has also been considered both in the Grand Court and in other common law jurisdictions. In ***Cybernaut Growth Fund***[19], the dispute between partners was not whether the partnership should be wound up but as to who should act as liquidator. That, Jones J held, was not capable of resolution in arbitration because a winding up order is in rem, capable of affecting third parties and appointment of a liquidator is a matter which involves the public interest [7]. Of ***Fulham*** Jones J said:

> "*[11] ...the possible approach suggested by Patten LJ probably only has any practical application in two circumstances. If a winding up petition includes a matter which constitutes a discreet [sic] inter partes claim falling within the scope of an arbitration agreement*

[19] [2014 (2) CILR 413]

> *then it could be hived off for decision by the arbitral tribunal. Alternatively, if the petition includes matters which could properly be tried as preliminary issues then I think that those issues could be determined by an arbitrator rather than the court. However, this is not such a case.*"

87. In ***Re SPhinX Group of Companies***[20] the court was not immediately concerned with a winding up petition but, in the context of an ongoing liquidation, it held that the dispute as to whether to release a reserve held by the liquidators for payment of legal fees was a matter which should be resolved by arbitration in accordance with the arbitration agreement. Field JA took the view that the approach of Jones J to enforcement of the arbitration agreement was 'debatable' but did not think it necessary to overrule his decision. [51]

88. In the Hong Kong High Court in ***Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd and another***[21] Harris J stayed a just and equitable winding up petition in favour of arbitration proceedings. The parties to a joint venture agreed to go their separate ways but fell out over the terms of a replacement licensing agreement. I do not agree with Mr Lowe QC, for FMCH, in his suggestion that the argument between the parties in the instant appeals as to ***Fulham*** was not advanced in ***Quiksilver***. At paragraph 15 Harris J recalled:

> "*The arbitration clause in the present case, clause 14.4, provides that "any controversy arising under or relating to this Agreement shall be determined and settled by arbitration". In my view this is sufficiently wide to allow Quiksilver to seek a determination from an arbitrator that matters have occurred which justify Quiksilver seeking a winding up order. Mr Barlow did not argue otherwise or that for some other reason this is not a determination that an arbitrator could make*".

89. In light of the consideration Harris J gave to counsel's arguments subsequently, I think that sentence means that counsel did not argue that the matters which went to justify a winding up order fell out with the scope of the arbitration agreement. That is no more than the final acceptance by Mr Lowe QC that the matters raised in the Petition were within the scope of

[20] [CICA unreported 11 Nov 2015]
[21] [2014] 4 HKLRD 759

the arbitration clause in the instant appeals; the real issue there as here was whether those issues were susceptible to arbitration.

90. The court rejected Mr Barlow's argument that, like a winding up petition on the grounds of insolvency, a just and equitable petition is the exercise of a class right not susceptible to arbitration. Harris J took the view that where a petition relies on a statutory demand to prove insolvency the creditor is seeking to put the insolvent company into liquidation for the benefit of all its creditors. By way of contrast:

> *"[19] The position in the case of a just and equitable petition issued by a shareholder is different. A shareholder must demonstrate a sufficient interest in the winding up... This being the case, and it would normally be the case in shareholder disputes, the "class" interested in the Petitions is limited to the two shareholders both of whom are parties. It does not, as Mr Barlow argued, effect (sic) persons other than the parties. There is nothing in my view in the nature of the right that Quiksilver seeks to exercise that justifies the conclusion that the right is inalienable and that the underlying dispute between the parties is not arbitrable"...*
>
> *"[21] "The determinative issue arising from the way in which Mr Barlow put Quiksilver's case is whether or not the substantive dispute between the parties is arbitrable. By substantive dispute I mean the commercial disagreement, which they wish to have resolved. This is not the same as the relief that one party seeks."*
>
> *"[22] I have already rejected the objection that because of its nature a just and equitable winding up petition cannot be stayed to arbitration. I have also explained why the fact that the precise relief sought in a petition is not available from an arbitrator is not a critical consideration, although it is relevant. In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement."*
>
> *"[23] In the present case the dispute between the parties concerns the basis upon which the joint venture is to end ... Quiksilver say, although only recently, that Quiksilver Glorious Sun JV and Quiksilver Glorious Sun Licensing should be wound up. These issues can be determined by arbitration. If the arbitrators conclude that Quiksilver is correct an application can then be made to the court for winding-up orders. As Petitions have already been presented this will only require that the stays of the Petitions that I have ordered be lifted. This court will not need to rehear the substantive arguments. In my view it is both permissible for the court to stay the winding-up Petitions pending the outcome of the arbitration. It is also practical and desirable. The arbitration is underway and it is undesirable that two sets of*

*proceedings continue in parallel. The arbitration can address both claims and make an award, which gives the successful party what it wishes, although in the case of Quiksilver an award in its favour will require the stay to be lifted and the Court invited to make a winding-up order. The Court cannot deal with Glorious Sun's claim*".

91. ***Quiksilver*** does seem to me to be an authority which supports Ting Chuan's submission that, where the substance of the dispute is between the shareholders and is within the scope of the arbitration agreement, the disputes should be resolved first by arbitration, even though the court is being asked to stay a just and equitable petition and not one on unfair prejudice grounds. The case cannot simply be dismissed on the basis that the points now taken were not argued. I shall consider, after mentioning two further authorities, whether this court should adopt the approach in ***Quiksilver***.

92. ***Quiksilver*** was followed by the Federal Court of Australia in ***WDR Delaware Corporation and another v Hydrox Holdings Pty Ltd and another***[22]. The Delaware companies sought to petition on the grounds of oppressive or unfairly prejudicial behaviour. Foster J granted the stay to arbitration on the basis that the substantive dispute was capable of resolution by arbitration. The real controversy between the parties was an *inter partes* dispute involving the way in which the sole shareholders performed their contractual obligations. He rejected the submission that the solution proffered by the English, Singapore and Hong Kong courts was unsatisfactory because it deprives the court of its essential function, leaving it to implement, in a mechanical way, the decision of the arbitrator. [160] He continued:

> "*[161] In substance, the present case is a dispute between the sole shareholders of Hydrox involving the way in which those shareholders performed their contractual and other obligations inter partes. In truth, there is no substantial public interest element in the determination of these parties' disputes...*
>
> *[162] In my judgment, the mere fact that the winding up order is sought does not alter the characterisation of the real controversy between the parties in this proceeding as being an inter partes dispute. Of course, it is for the Court, and the Court alone, to decide whether such facts and propositions of law as may ultimately be presented at the hearing of the plaintiffs' winding up application constitute*

[22] [2016] FCA 1164

*sufficient proof and persuasion entitling the plaintiffs to the declaration and winding up order which they seek... ..*

*[164] With the exception of that part of the present proceeding which involves the court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substance of the controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence".*

93. In ***Hermes One Ltd v Everbread Holdings Ltd***[23], an appeal from the British Virgin Islands, it was common ground that although an arbitrator could not award all the relief sought by the claimant, in particular an order for winding up or the appointment of a liquidator, an arbitrator could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in court of such orders.[7] The controversy in that case was whether a party could insist on a stay within the terms of an arbitration clause only if they themselves had commenced arbitration proceedings in relation to the same dispute. The dispute was resolved by reference to the construction of the arbitration clause within the shareholders agreement and is not relevant to disposal of this appeal. The Board did not query the correctness of the common ground.

*The Arbitrability of the Underlying Issues*

94. It is necessary to start with the proposition that under s.92 of the Law the court's consideration of whether it is just and equitable that a company should be wound up is a threshold question, it is not a question of relief. It is only once the court does decide that it is just and equitable to wind the company up that it may then determine whether a winding up order should be made or whether one of the specified alternatives under s.95(3) should

[23] [2016] UKPC1; [2016] 1 WLR 4098

be adopted. Section 92 was described by this court as the "sole gateway to obtaining the alternative relief set out in s.95(3)" (see ***Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd***[24]). There is, as the court pointed out, no equivalent to the separate remedy given to a member of a company who complains of unfair prejudice under s.994 of the UK Companies Act 2006.

95. ***Tianrui*** explains this statutory scheme:

> *"[14] ....(Section 994 of the UK Companies Act 2006) gives a separate remedy by petition to a member of a company who complains of unfairly prejudicial conduct of the company's affairs. The petition is not a winding up petition, and is not based on the contention that it would be just and equitable to wind up the company. In the Cayman Islands, however, the only mechanism for complaining of unfairly prejudicial conduct of a company's affairs is a winding up petition presented on the just and equitable ground. Such a petition is the sole gateway to obtaining the alternative relief set out in section 95 (3)".* (my emphasis)

96. ***Tianrui*** was not concerned with any attempt to reconcile an agreement to submit to arbitration disputes which are within its scope with the right to petition for winding up on just and equitable grounds. However, it is of significance in its emphasis on the statutory right to petition on that ground and in its rejection of the contention that the petition should be struck out because the Petitioner was not invoking a class remedy. The majority shareholders in that case had suggested that the Petitioner could pursue alternative remedies such as by selling its shares, and claiming damages for conspiracy:

> *"[37] In our view, these assertions epitomise what is wrong with the Company's position. If the actions of the Company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the Company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the Company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred.... It is entitled to have the circumstances investigated in the context of a winding up petition that it is entitled to bring; and if it succeeds in establishing its complaints it is entitled under the statutory scheme to have the*

[24] (CICA 5 April 2019) at [14]

*court consider at the end of the investigation whether the appropriate remedy is winding up or another of the remedies set out in section 95(3) of the Law.*"

97. The court reached no concluded view as to whether the principle that, if a petitioner is not invoking a class remedy the petition may be an abuse, applies in the context of a contributory's petition brought on the just and equitable ground. But it did conclude:

> "*[40] It is, however, clear that the principle, if applicable, does not justify striking out the petition in this case. That is because, as we understand it, the Company has only one class of shares; and the idea that Tianrui cannot petition in respect of acts of the Company promoted by (Majority Shareholders) because it is not seeking a class remedy on behalf of (among others) (the majority shareholders) is self-evidently wrong.*"

98. As ***Tianrui*** teaches, the threshold question for the court is whether the company should be wound up on just and equitable grounds. This question must be determined before any question of the appropriate relief arises. It is a determination that, under the statutory scheme, the court must answer, before it can decide whether an alternative remedy should be ordered. In cases where there is an arbitration agreement the scope of which embraces disputes of fact which are also raised in the petition, the question of a stay to arbitration turns on whether it is possible to submit such disputes to arbitration without trespassing upon the exclusive jurisdiction of the court to make a winding up order.

99. ***Fulham***, it is worth re-iterating, was not a case which involved the need to establish there were grounds for concluding that it was just and equitable to wind up the company. The distinction drawn by Patten LJ, based on Lord Hoffmann and Mummery J's observations (referred to at [60]) was a foundation for his rejection of Fulham's argument. There was no need to prove conduct which would justify winding up the company. ***Fulham*** sought to draw an analogy between petitions on just and equitable grounds and on the ground of unfair prejudice. But its difficulty lay in the feature that unfairness which might justify a remedy under section 994 might not justify an order to wind up a company. ***Fulham*** proceeded on the basis that the determination of the facts and issues by the arbitrator would not trespass upon the exclusive jurisdiction of the court to make a winding up order. To

adopt the wording of Patten LJ the question is whether the determination of the threshold issue, as to whether a winding up order is justified, is to be regarded as "some kind of state intervention in the affairs of the company which only the state can sanction", even though it is not a question of relief.

100. In ***Fulham*** and the cases which have followed it the court's quest has been to respect the parties' choice to submit the disputes within the scope of the agreement to arbitration whilst acknowledging the exclusive jurisdiction of the court to determine whether a winding up order on just and equitable grounds should be made. Patten LJ had been astute in making clear how his conclusion would not trespass on the exclusive jurisdiction of the court. He distinguished between winding up and other reliefs available on making good a petition brought on the grounds of unfair prejudice. In that way it was possible to reconcile the primacy of the arbitration agreement and the exclusive jurisdiction of the court to make a winding up order. In ***Fulham*** once unfair prejudice had been established the way was open to a number of reliefs, which did not involve the exclusive jurisdiction of the court to wind up a company, similar to the case, under the Australian Corporations Act, in ***ACD Triton***. In neither case could it be said that submission to arbitration might trespass upon the exclusive jurisdiction of the court because resolution of the disputes in arbitration did not require any consideration of the particular relief which did invoke the exclusive jurisdiction of the court, namely whether the company should be wound up. The identification of discrete issues for the consideration of the arbitrator, distinct from questions of relief, avoided any clash.

101. The issue with which these appeals must grapple is whether the distinction drawn between the grounds of the petition and the reliefs which may follow can be maintained where the grounds of the petition themselves require the court to decide whether a company should be wound up, not as a matter of relief but as a gateway to relief. How is the boundary between the jurisdiction of the court and the parties' choice of the method of resolving disputes to be drawn where the gateway to relief requires an answer to the statutory

question posed by s.92 (e) of the ***Law***: should the company be wound up on just and equitable grounds?

102. The cases which in common law jurisdictions have followed ***Fulham*** have maintained the exclusive jurisdiction of the court to decide the question whether a company should be wound up by identifying discrete substantive issues relating to the grounds on which the petition is brought rather than the relief which might follow once those grounds are made out. Where the grounds relate to complaints of oppression by majority against minority shareholders, such issues are now well recognised as arbitrable; the courts have regarded the limitations on an arbitral tribunal's jurisdiction to grant relief as irrelevant to the question of arbitrability (see ***Tomolugen Holdings Ltd v Silica Investors Ltd***[25], not cited) in which the Court of Appeal in Singapore remarked that its attention was not drawn to any jurisdiction which regarded such issues as non-arbitrable.

103. But ***Quiksilver*** did concern a just and equitable winding up petition and the judge did reject the contention that the winding up petition could not be stayed to arbitration [22]. Harris J rejected the submission that the right to seek a just and equitable petition was "inalienable", in other words he concluded that the litigation could be stayed to arbitration because the class interested in the petitions was limited to the two shareholders who were parties to the arbitration agreement. [19]. He took the view that the crucial question was to identify the substance of the dispute and to ask whether it was covered by the agreement. In that case the only issue was whether the joint venture should be brought to an end by the sale of one party's shares or by winding up, issues which the judge held could be determined by arbitration.

104. Like ***Quiksilver***, ***Hydrox*** characterised the underlying controversy between the parties as an *inter partes* dispute capable of resolution by an arbitrator. Unlike ***Quiksilver***, but like ***Fulham***, the petition sought relief on the grounds of oppressive conduct and unfair

[25] [2015] SGCA 57 at [94] and [97]

prejudice, in respect of which winding up was only one of ten types of relief [13], although ***Hydrox*** did include a petition on the just and equitable ground [99]. The issues were described by Foster J as being merely the way in which (the sole) shareholders performed their contractual and other obligations *inter partes*. He took the view that there was no substantial public interest element in the determination of these parties' disputes. It was on that basis that he took the view that the issues were capable of arbitration.

105. These appeals must confront the problem which arises where the gateway to relief itself requires determination of the question whether winding up the company on the just and equitable basis is justified. Patten LJ has been interpreted, by the judges who followed him, as limiting the exclusive jurisdiction of the court to the making of a winding up order, by way of relief. Thus when he said, at [83], "disputes of this kind which do not involve the making of any winding up order are capable of being arbitrated" and "The agreement could not arrogate to the arbitrator the question of whether a winding up order *should be made*" (my emphasis) he has been understood to be referring only to the exclusive jurisdiction of the court to wind up a company by way of relief and not to any threshold question.

106. Central to the reasoning in cases such as ***Quiksilver*** and ***Hydrox*** was the feature that the substantive issues did not involve any one other than the disputants themselves; if hived off, the resolution of disputes did not necessarily affect any class and could be resolved prior to any question of relief arising. Similarly, in ***Salford Estates*** the Chancellor described ***Fulham*** as a "private dispute in relation to the affairs of a solvent company which, therefore, neither engaged any public policy objective of protecting the public where a company continues to trade despite being unable to pay its debts nor involved a class remedy for the company's creditors" [37].

107. The rationale of those cases was that an essentially private dispute between shareholders, in which discrete issues can be identified should be resolved, in accordance with their agreement, by arbitration. This rationale is to be contrasted with the approach taken by this

court in ***Tianrui*** in relation to s.92(e) of the ***Law***. This court took the view that the petitioner had a statutory right to bring the Petition, the purpose of which "includes the provision of protection of their members against improper conduct by the company" (***Tianrui*** at [25]). This right can only be taken away in circumstances where it is plain at an early stage that the petition will fail because there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. (***Tianrui*** at [23] following ***Camulos Partners Offshore Ltd v Kathrein and Company***[26]).

108. For the reasons given in relation to Ting Chuan's attempt to strike out the Petition it is not possible to say that the Petition is an abuse on this basis. Thus FMCH's statutory right persists like that of ***Tianrui***, despite the fact that under the statutory scheme, if FMCH establishes that the Company should be wound up, alternative remedies to winding up will be available. As ***Tianrui*** teaches, the fact that the petitioner is not invoking a class remedy does not deprive the petitioner of that right ([37] and [40], cited above). FMCH has a statutory right to invoke the exclusive power of the court to wind up the Company on the grounds of the misconduct of its directors ***Tianrui*** [25].

109. The cases which have followed and developed ***Fulham*** have all depended upon the court's ability to identify discrete, substantive issues which do not invoke the exclusive jurisdiction of the court. Where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult.

*Identifying Discrete Issues Outwith the Exclusive Jurisdiction of the Court*

110. It is necessary, at this stage, to recall the two ways in which the Petition set out the grounds for winding up the Company. As I have already concluded, the grounds on which the

[26] [2010 (1) CILR 303]

Petition relied did not depend on the allegations made against the Majority Shareholders. In particular, a substantial part of the Petition involved allegations of breach of fiduciary duty against the Majority Directors.

111. Ting Chuan submits that that is of no significance; the reality is that the dispute is between the Majority and Minority Shareholders and that that dispute can be hived off to arbitration. It relies on ***In the Matter of Freerider Ltd***[27] in which Foster J declined to allow the company, which was the subject-matter of a just and equitable winding up, actively to participate in proceedings which were in reality a dispute between shareholders:

> "*[45] ... the Company does not have any independent interest in the dispute between its two principal shareholders.... This company is, as I have said, in reality a quasi-partnership... To suggest, in the circumstances of this case, that the company itself has some separate and independent interest in the proceedings is quite artificial and ignores the reality that what is in issue are the allegations of Mr Heinen of wrongs by Mr Le Comte. There is no claim against the company itself except in the most technical and notional sense. The company must, of course, remain as a nominal respondent but it has, in my view, no relevant interest of its own in the proceedings.*"

112. This view, in a different context, is echoed in the approach taken by the judge in the instant case. He accepted Ting Chuan's submission that the arbitral tribunal could properly decide matters which might form the basis of the winding up order, without actually ordering winding up itself, following Patten LJ's obiter remarks in ***Fulham***. But although he seems to have accepted that there is a distinction between a decision as to whether the company should be wound up as a threshold decision and a decision whether a winding up order should be made as a matter of relief, he said:

> "*[67] In the present case, it is not necessary for me to decide whether the arbitration tribunal could or should decide the specific question of whether or not a winding up order is justified on loss of confidence grounds. That question is closely connected to and almost indistinguishable from the Court's statutory jurisdiction to grant relief and it seems doubtful to me that an arbitrator would*

[27] [2009 CILR 604]

> *be competent to decide that issue. In my judgment, the Petitioner's substantive complaints can, subject to that one exception, all quite simply be formulated in contractual terms. I regard "the loss of confidence" pleas as conclusory in character, pleas which are only properly engaged if a foundational claim (e.g. procuring the Majority Directors to breach their obligations under the SHA) is first established. I see no significance in the fact (relied upon by Mr Lowe QC) that neither the Company nor the Majority Directors are party to the SHA. The only genuine dispute is between the minority shareholder and majority shareholder whose relationship in relation to the Company is entirely governed by the SHA."*

113. It can be seen, from this passage how strongly the judge was influenced by his view that the grounds of the Petition could be formulated in contractual terms and by his view that, to survive the striking out application, it should be formulated in terms of a cause of action. It was for that reason he described the loss of confidence plea as "conclusory" and the allegations of procuring the Majority Directors to breach their obligations as "foundational". This was the basis on which he identified the "only genuine dispute'.

114. Yet, in my judgment, it was wrong to regard the allegations against Ting Chuan as "foundational" and to decide that they had to be established first. As I have already recalled, the basis of the claim was twofold, loss of trust and confidence by reason of the breaches by the Majority Directors of their fiduciary obligations and irretrievable breakdown of the relationship between the Majority and Minority Shareholders. The allegations against the Majority Directors are fundamental to FMCH's contention that it is just and equitable to wind up the Company. The plea of loss of trust and confidence (109 of the Petition) is, it is true, a conclusion from the allegations made against the Majority Directors themselves but they are key to justifying the Petition. The judge himself seems to have taken the view that an arbitrator would not be competent to decide whether the winding up order was justified on that ground, but, as I have re-iterated, that was an essential issue raised by the Petition.

115. In order to determine the threshold issue as to whether there are sufficient grounds to justify a winding up on just and equitable grounds, the court must evaluate all the circumstances of the case; it is not "so simple and uncomplicated as an ordinary creditor's winding-up petition" (per Dankwerts LJ in ***In Re Davis Investment (East Ham) Ltd***[28]). The factual questions which the court has to determine are not mere questions of primary fact but require evaluation, both in relation to the gravity and significance of those facts and where responsibility for any breaches of duty or a breakdown of the relationship between the parties lies.

116. The weight to be attached to the events relating to the course of the joint venture on which the Majority and Minority Shareholders embarked, how one set of facts might cast light on others and their significance are all relevant to the threshold issue of whether a just and equitable winding up would be justified. All the primary and secondary facts, i.e. those facts which are a matter of deduction, go to resolution of the statutory threshold question whether it is just and equitable that the Company should be wound up. That being the width of the court's determination, it is difficult, if not impossible to see how discrete issues may be identified and "hived off" to arbitration.

117. The judge thought it was not necessary to decide whether the arbitration tribunal could or should decide the statutory question based on loss of confidence grounds. But it was. The facts which the judge believed could be submitted for determination by an arbitral tribunal were the same facts which would answer the question posed by s.92(e) of the ***Law***. Presentation of the Petition invoked the court's jurisdiction to decide whether the conduct of the Directors and the breakdown of the shareholders' relationship justified winding up the Company. Whether that decision ought to result in the demise of the Company was a matter for the court. It could not decide whether an alternative and less drastic form of

[28] [1961] 1 WLR 1396 at 1399

relief should be ordered unless and until it had first decided that threshold question. All the facts in dispute in the Petition went to that question.

118. The arguments advanced by Ting Chuan in relation to its submissions as to the exercise of the court's discretion (an issue to which I turn below) to stay to arbitration seem to me to reflect one of the essential difficulties in identifying discrete issues which might be "hived off" for determination by an arbitrator. Ting Chuan argues that the existence of the arbitration and the Petition in which relief is sought in respect of the same subject matter "raises the risk of inconsistent decisions" (63.2. written argument 16 October 2019) and "the outcome of each proceeding would also likely have an important effect on the outcome of the other" (63.3 written argument 16 October 2019). So it would.

119. Patten LJ in ***Fulham*** and the judges who have followed that decision have envisaged two stages, first a decision by the arbitrator and then a further decision by the court taking into account the award. Foster J in ***Hydrox*** postulated such a process, regarding it as part of an everyday process of applying evidence ([62] and [64] cited above). The problems of different and conflicting views were recognised in the passage cited by Patten LJ from ***Larsen Oil and Gas Pte Ltd v Petroprod Ltd***[29], in the context of an insolvency winding up:

> "*It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.*"

120. Unless the parties have agreed to be bound by the award of an arbitrator as to the factual disputes which go to the threshold issue of whether the company should be wound up, the process envisaged by Patten LJ and Foster J cannot be achieved, still less is it possible to recognise that process as part of the "every day process of applying the law of evidence". Absent any agreement to be bound by findings of fact which go to that issue, the court

[29] [2011] 3 SLR 414

would be entitled, in the exercise of its exclusive jurisdiction to form a fresh and, if necessary, wholly contrary view of the evidence. This problem of duplication seems to me far from the partial stay of which Robert Goff LJ (as he then was) approved in ***The Tuyuti***[30] or the "the practical consequences of choosing that method of dispute resolution" ***Fulham*** [84].

121. The nature of the issues in this case and their relevance to the statutory question as to whether the Company should be wound up provide a striking contrast to the discrete issue which was submitted to arbitration, despite the winding up petition on the grounds of insolvency in ***Salford.*** The facts which need to be determined in the instant Petition are remote from the discrete issue of the disputed historic debt in that case.

122. In ***Tomolugen*** (see above, not cited) the court took the view that the procedural difficulties following from an award which bound only some of the parties did not render the subject-matter of the dispute non-arbitrable [56]. But that case was not concerned with the problem in the instant appeals of the need to avoid trespass on the exclusive jurisdiction of the court and it recognises that at least some of the parties must be contractually bound by the award of the arbitral tribunal. In my view duplication and possible inconsistency can only be avoided where the parties have agreed that the matters which go to the question whether the company should be wound up on just and equitable grounds should be submitted to arbitration, because they have agreed not to present a petition. It is, therefore, at this stage, necessary to consider whether in the instant case the parties did so agree, particularly in the context of section 95(2) of the ***Law*** which gives statutory recognition to an agreement not to present a petition.

*Section 95(2)*

123. Section 95(2) provides that:

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[30] [1984] 1 QB 838, 848F-849C

> *"the court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not present a petition against the company".*

124. It is established, and was not disputed that an express agreement not to present a winding up petition is lawful and will trigger the mandatory stay or an adjournment under this section (see ***In the Matter of Rhone Holdings LP***[31]). As Rix JA said:

> *"[22] .... Section 95(2) which applies generally, of course, to companies... makes it plain that such a contract or agreement not to present a petition against a company... Is not contrary to public policy but, on the contrary, represents the policy of the law by express enactment because the express terms of section 95(2) give statutory strength to what would otherwise merely be a contractual agreement not to present a petition by stating that the court shall dismiss a petition or adjourn it when the parties have bound themselves contractually not to present such a petition. So such an agreement not to present a petition cannot possibly be contrary to public policy."*
>
> *[23] ...Mr Asif has sought to submit that that language [the reference to an adjournment in section 95(2)] by itself permits the court by its power to adjourn to avoid the dismissal of a winding-up petition which a party is contractually bound not to present. In my judgment, it does no such thing. Allowing adjournment as an alternative to an immediate dismissal is no doubt meant to deal with the sort of situation where a partnership agreement or other agreement between the relevant parties has concluded some such provision as those binding the parties to attempt a settlement either by negotiations between the parties, ....or indeed by arbitration, in circumstances where the factual matters in dispute between the parties which lie behind a potential petition could be dealt with by arbitration. Those sorts of circumstances do not detract in any way, in my judgment, from the underlying message of section 95 (2), which is that where parties have agreed not to present a petition, then they are not permitted to act in breach of that agreement, that the court will uphold that agreement."*

125. Although the wording of the SHA contains no express agreement not to present a winding up petition, Ting Chuan submitted that the express agreement to arbitrate the disputes which, it is now conceded, fell within the scope of clause 20.3 carried with it a negative obligation not to bring proceedings, including a winding up petition on the just and

[31] [2016 (1) CILR 46]

equitable ground. In ***AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC***[32] Lord Mance said:

> "*1.* *An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever form is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum" and later:*
>
> *"The negative aspect is as fundamental as the positive*". [21].

126. Ting Chuan argues that, as a matter of construction, since the underlying issues fall within the scope of the arbitration clause then a negative obligation is to be imposed on FMCH not to commence substantive proceedings, until those issues have been resolved in arbitration. Reliance on the negative obligation which comes with a positive obligation to arbitrate does not, in my view, carry Ting Chuan's argument further. It begs the essential question whether FMCH was contractually bound not to present a winding up Petition, at least before resolution of the underlying disputes in arbitration, an issue which itself raises the question of arbitrability. The existence of the arbitration agreement does not, of itself, tell one anything about whether the underlying disputes are susceptible to arbitration. After all, questions of arbitrability only arise when the issues which are said not to be susceptible to arbitration fall within the scope of the agreement; if they do not, then questions of arbitrability are of no concern and do not arise.

127. Ting Chuan seek to rely on an implied term not to present the Petition, based on Patten LJ's *obiter* observations in ***Fulham*** (cited above) at [83]:

> "*I have already set out my own reasons for preferring the view that disputes of this kind which do not involve the making of any winding up order are capable of being arbitrated... In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made*

[32] [2013] 1 WLR 1889

*out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g).*"

128. To imply an agreement not to present a winding up petition thus depends on being able to identify substantive issues the resolution of which do not trespass beyond the jurisdictional limitations to the arbitral tribunal's power. If such an underlying dispute can be identified then it is possible to recognise the implied agreement postulated by Patten LJ. It does not follow that because one possible remedy is not arbitrable, an underlying dispute, to be determined before any question of relief arises, is not itself arbitrable. But in this case, the question whether grounds exist on which the Company should be wound up is the very question posed by the Petition invoking s.92(e) and has to be answered before any question of alternative relief can arise. It is, as I have already sought to stress, not merely a matter of relief but the gateway to relief, as ***Tianrui*** teaches. The facts and matters which, it is alleged, establish a breach of the Majority Directors' fiduciary duties are threshold issues which go to resolve the question whether the Company should be wound up. But that is a question which the ***Law*** poses for the court, at least unless the parties expressly agree not to present a petition. I do not see how questions as to breaches of the directors' fiduciary duties can be hived off without submitting to arbitration issues which go to the heart of the question it is for the court to resolve.

129. There seems to me a further difficulty which inhibits the implication of an agreement not to present a petition. In the SHA the parties could have expressly chosen to agree not to present a petition against the Company. But they did not do so, despite s.95(2) of the ***Law***. By failing to do so, they must be understood to have acknowledged the court's exclusive jurisdiction to determine whether the facts justify winding up the Company on just and equitable grounds. Moreover, if one is to postulate the process described by Patten LJ at [83], one must, if an agreement is to be implied, suppose that the parties have agreed to submit the dispute as to whether the company should be wound up first to an arbitrator and

then to the court should the findings of the arbitrator substantiate the allegations made in the Petition. It is difficult, to put it at its lowest, to imagine that, as rational businessmen, the parties are by implication to have been taken to agree that any petition should be suspended but that if the arbitrator's findings were favourable to the Petition the same facts and matters should be decided by the court; such a construction runs wholly counter to Lord Hoffmann's approach to construction in ***Fiona Trust v Privalov***[33].

130. I agree, therefore, with FMCH that it is not possible to imply any obligation not to present a winding up petition.

131. Ting Chuan argues, in addition, that there are provisions, besides clause 20.3, which compel the conclusion that the parties had bound themselves contractually not to present a petition. By clause 4.11:

> *"The Parties agree that the matters set forth in Schedule A attached hereto ("Unanimous Board Matters") shall require the Unanimous Board Resolution of the Company."*

132. Among the Unanimous Board Matters is included any liquidation of the Company (Schedule A (xi)). Both this clause, as the heading at IV makes clear and the Schedule relate to decisions of the directors. They do not apply to decisions by shareholders. These are covered by Schedule B which relates to those matters requiring unanimous shareholders' resolution and do not include liquidation. Article XV deals with resolution of deadlock. But it only applies in cases of failure to reach unanimous agreement on either Unanimous Board Matters, as defined, or Unanimous Shareholder Matters, as defined. Since the decision by the Minority Shareholders to petition falls neither within Unanimous Board Matters nor Unanimous Shareholder Matters Article XV has no application.

133. I conclude that the parties did not agree not to present a winding up petition and, accordingly s.95(2) does not apply. There remain questions as to how those conclusions

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[33] [2007] Bus LR 1719 [13]

affect enforcement of the arbitration agreement under s.4 of the ***FAAEL*** or as a matter of discretion.

*Section 4* ***FAAEL***

134. Section 4 of the ***FAAEL*** provides:

> *"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is... inoperative... shall make an order staying the proceedings."*

135. The term 'inoperative', it was agreed, covers the question whether the relevant disputes are susceptible to arbitration. The analogous provision, s.9(4) of the Arbitration Act 1996, is discussed by Patten LJ in ***Fulham*** in which he points out that the wording is taken from the New York Convention (Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)) (at [33] and [35] in ***Fulham***).

136. The section requires not only that the party who commenced proceedings "in respect of any matter agreed to be referred" was a party to the arbitration agreement but also that one of the parties against whom the proceedings were commenced was the "other party to the agreement or any person claiming through or under him". The purpose and structure of s.4 (like s.9 of the Arbitration Act 1996) requires both the person who has commenced the litigation in respect of which a stay is sought and the person seeking the stay to be parties to the arbitration agreement (see Lawrence Collins J in ***City of London v Sancheti***[34]). Neither the directors nor the Company were parties to the SHA; they were not parties to the arbitration agreement.

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[34] [2009] Bus LR 996

137. Since neither the Majority Directors nor the Company were parties to the SHA, in my view it was not permissible to apply the mandatory provisions of section 4 to the Petition in its entirety. To the extent that it was legitimate to stay the allegations against Ting Chuan, section 4 would operate pro tanto (as in ***The Tuyuti***[35]). But for the reasons I have given, since the issues raised by the Petition are not arbitrable, the arbitration agreement so far as it concerns Ting Chuan is inoperative.

*Discretionary Stay*

138. It was not disputed that this court had jurisdiction to grant a stay on discretionary grounds. Nor were the principles, recited in ***Reichhold Norway ASA v Goldman Sachs International***[36], and followed by this court in ***Re Nanfong International Investments Ltd***[37] controversial. Those cases concerned attempts to invoke the inherent powers of the court to manage a case. They re-inforce the principle that there is a heavy burden to establish that a stay will meet the ends of justice, and the prediction that a stay will only be granted in rare and compelling circumstances (***Nanfong*** [19]).

139. Ting Chuan argues that the court should grant a stay on case management grounds, relying in part on the arbitration proceedings it has itself launched on 29 November 2018. Those proceedings are merely an attempt to repeat the very basis on which a stay was sought before Kawaley J, they allege a breach of the SHA (see Notice 29 October 2018) in filing the winding up Petition. They do not lend further weight to the argument that FMCH was contractually bound not to present the Petition. If, as I have concluded there was no such agreement, there does not seem to me to be any space left for the exercise of a case management discretion.

140. In ***Salford***, as I have already observed [82], the disputes related to issues about service charges and insurance rent (Sir Terence Etherton C at [11]). The Chancellor took the view

[35] [1984] 1 QB 838, 848F-849C
[36] [1999] CLC 486
[37] (Unreported, CICA, 14 September 2018)

that there could be no mandatory stay under s.9 of the UK Arbitration Act 1996 by reason of the very fact that the petition was a winding up petition and was to be contrasted with the petition under section 994 in ***Fulham*** [37] and [38]. The policy of the 1996 Act was to exclude the court's jurisdiction to give summary judgment when the parties had agreed to refer any dispute relating to the debt to arbitration [40].

141. The issues in this Petition are founded on allegations of misconduct and loss of confidence which cannot be distilled into discrete issues analogous to the disputed debt in ***Salford.*** The reasoning in ***Salford*** amply illustrates the contrast with the factual evaluation necessary to answer the statutory question posed by the Petition in these appeals as to whether the Company should be wound up. There is no room for the court to exercise its discretion to order a stay.

*Alternative Remedies*

142. Ting Chuan contends that, as a successful, solvent company, it is plain that FMCH does not want and would not want to wind the Company up. In reality it seeks a buyout order which it could obtain by arbitral relief or to proceed against the Majority Directors which could be achieved by the derivative action it has already brought.

143. These contentions have been already answered by this court in ***Tianrui*** in the passage at [37] (supra [95] and [105]) and the conclusions I have reached in relation to striking out the Petition.

144. If, as I have concluded, the issues raised in the Petition are not arbitrable, then FMCH has a statutory right to petition and cannot be compelled to adopt some alternative course of action.

145. For these reasons I would re-instate the Petition as it was drafted and refuse a stay of the Petition. That would mean that FMCH's appeal would be allowed and Ting Chuan's appeal dismissed.

**Martin JA**

I agree.

**Rix JA**

I also agree.