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Our Ref: LS/10/RLR/CON/2013/PRO2(1)/MWC/sr/ln
Your Ref: To be advised

10 October 2013

Paul Chan
Assistant Registrar
Supreme Court
1 Supreme Court Lane
Singapore 178879

BY EMAIL [Paul_Chan@supcourt.gov.sg] & POST

Dear Mr Chan

FEEDBACK ON MENTAL CAPACITY ACT ("MCA") COURT PROCESS

1 We understand from our representative, Ms Kee Lay Lian, that the Working Group for the Establishment of an Administrative Tribunal under the MCA seeks feedback from members of the Bar on the MCA court process.

2 The request for feedback was referred to the Probate Practice Committee (the "Committee") and the wider bar.

3 Please find the Committee's feedback set out in Annex A for the Working Group's consideration.

4 There were no further comments from the wider bar.

5 The Council of the Law Society has considered the feedback provided and shares the views of the Committee.

Yours faithfully

Michelle Woodworth Cordeiro
Director, Representation and Law Reform Department

Encl.

ANNEX A

VIEWS OF THE PROBATE PRACTICE COMMITTEE

(A) Contested MCA Matters

i) A member was of the view that a jurisdictional limit should be in place for contested MCA applications, similar to family and probate matters. Further, where the value of the estate exceeds the jurisdictional limit, the member proposed for the matter to be dealt with in the High Court as it is administratively and logistically better equipped to deal with such cases. The member impressed that an incapacitated person ("P") should be allowed to communicate their "past and present wishes and feelings" and "beliefs and values" to the court, as stipulated in section 6(7) of the MCA, without such circumstances evolving into a cross-examination to show that he or she lacked mental capacity. Assessment of mental capacity should be based on medical evidence, not cross-examination by counsel or assessed by a Judge, as held *in Tang Choon Keng Realty (Pte) Ltd* v *Tang Wee Cheng* [1991] (see Annex B).

ii) A member was of the view that the court should appoint a psychiatrist or specialist to attend such hearings to assist the Judge to make findings of fact of the mental capacity of a person or in the event conflicting medical reports are submitted. Such an approach would allow interim orders to be made quickly, if at all. However, another member pointed out the difficulties in assessing and commenting on the medical opinion of another (as encountered in medical negligence cases).

(B) Psychiatrist's Affidavit

i) Some members of the Committee proposed abolishing the requirement of a psychiatrist's Affidavit as such Affidavits delay and inflate the cost of proceedings at P's expense.

ii) A member was of the view that attaching a psychiatrist's medical report to the supporting Affidavit by P would suffice and an additional psychiatrist's affidavit would not be necessary. In instances where the medical report is not sufficient, the court can then ask for an Affidavit to be submitted instead.

iii) Members also noted that psychiatrists in most public sector hospitals (such as Singapore General Hospital and Tan Tock Seng Hospital) require law firms to provide Commissioners of Oath to attest their Affidavits. The costs associated with such an arrangement are regrettably charged to P. However, some public sector hospitals (such as Changi General Hospital) attest such Affidavits via their own Commissioners of Oath, which enable P to benefit from time and cost-savings. Members were of the view that such disparity in practices amongst public sector hospitals should not exist.

(C) Medical Reports

iv) Members also acknowledged that medical reports are often inadequate and fail to address specific requirements of the MCA such as stating that P lacks requisite mental capacity.

v) Further, a member observed that the validity of a medical report is limited to 6 months and the same is required by the Court at the time of the MCA

application. However, in view that P may still need to undergo further medical examinations, some discretion from the Court is requested in this regard.

vi) Members also noted that the untimely issuance of medical reports by doctors is often one of the main factors protracting MCA applications.

(D) Consent

i) A member proposed that Consents signed by relevant persons need not be sworn before a Commissioner of Oath or Notary Public due to delays and costs incurred in procuring the same.

(E) Scope of Paragraph 116G of the Subordinate Courts Practice Directions

i) A member suggested limiting the ambit of "*relevant persons*" in paragraph 116G of the Subordinate Courts Practice Directions.

ii) Pursuant to Order 99, Rule 5 of the Rules of Court, the Plaintiff is required to serve the application, together with each Affidavit or other documents filed in support of the application, on each person named as a Defendant in the proceedings and each relevant person.

116G. Relevant persons –

(1) P's immediate family members, by virtue of their relationship to P, are likely to have an interest in being notified that an application has been made to the Court concerning P. 'Relevant persons' for the purposes of Order 99, Rule 5 of the Rules of Court will therefore include the following immediate family members:-
(a) P's spouse;
(b) P's children (aged 21 and above);
(c) P's parents or guardian;
(d) P's brother or sister (aged 21 and above); and
(e) P's grandparents or grandchildren (aged 21 and above).

(5) Apart from immediate family members, other relevant persons who are likely to have an interest in the application concerning P and who should be served the application, the supporting affidavits and the Notice to Relevant Person in Form 39E of Appendix B include:-
(a) any other relatives or friends who have a close relationship with P;
(b) any person who has a legal duty to support P;
(c) any person who will benefit from P's estate; and
(d) any person who is responsible for P's care (this includes any organisation which provides residential accommodation to P).
If there is no such person to the best of the plaintiff's or applicant's knowledge, he is to state this in his supporting affidavit.

iii) The member is of the view that the scope of the relevant persons as set out above is extremely broad as it is unnecessary to go beyond the immediate next-of-kin for most cases. The member suggested that perhaps relevant persons may include the persons who would be beneficiaries under the Intestate Succession Act, as if P had died intestate.

iv) The member advised that having to trace relatives of P who have little or no association with P's care and condition often delays and inflates the cost of

proceedings and causes distress and inconvenience to the relatives, without any corresponding benefit to the cause of justice.

(F) <u>Delay in Court Proceedings</u>

i) Members expressed that the speed of court proceedings for MCA matters is crucial, particularly when P's demise is imminent. Members raised that they often encounter instances where P's demise occurs before the MCA Order is granted due to delays in fulfilling the requirements imposed by the Court.

ii) Members are of the view that the court should aim to be time and cost-efficient and consider dispensing with requirements that are not critical, as raised in paragraphs A – E above.

ANNEX B

REFERENCE MATERIALS

Tang Choon Keng Realty (Pte) Ltd and others
v
Tang Wee Cheng

[1991] SGHC 74

High Court — Suit No 147 of 1991
Chan Sek Keong J
1 June 1991

Civil Procedure — Affidavits — Application to cross-examine defendant on affidavit to prove mental incompetency — Real purpose to test veracity of defendant — Whether application should be allowed at interlocutory proceedings — Whether court competent to make decision on mental competency of person

Civil Procedure — Injunctions — Application to discharge interim injunction to restrain presentation of petitions under ss 216 and 254 Companies Act (Cap 50, 1990 Rev Ed) — Whether member of company may be so restrained — Whether petitions bound to fail — Factors for consideration

Companies — Members — Rights — Member's right to present winding-up petition — Sufficient ground to wind up company — Whether member may be restrained from presenting petition

Companies — Oppression — Petition for relief from oppression — Discretion of court to grant relief unfettered — Purpose for which discretion exercised — Winding-up order granted as last resort — Section 216 Companies Act (Cap 50, 1990 Rev Ed)

Companies — Winding up — Injunction to restrain petition — Discretion of court — When discretion exercised to grant injunction — Sole or predominant object of petitioner in presenting petition — Whether petition bound to fail — Whether petitioner genuinely desires remedies obtainable

Companies — Winding up — Petition — Sections 216 and 254 petitions — Whether an abuse of process of court to present both

Facts

The defendant and the second and third plaintiffs were brothers. They were shareholders and directors in the first plaintiff, the family company. The defendant held 47.06% of the shares in the first plaintiff and the second and third plaintiffs each held 25.47%.

The first plaintiff owned a complex called "House of Tang" consisting of a department store and a hotel. The department store was run by a publicly listed company, CKT, managed by the second and third plaintiffs, and the hotel was run by a family company, DH, managed by the defendant, who owned 91.5% of the shares in DH. The first plaintiff rented out the respective premises to each of the companies. In 1986, CKT proposed to buy the department store premises from the first plaintiff in exchange for newly issued shares in CKT. Subsequently, the defendant wanted to buy the hotel premises on the same basis. In April 1988, the first plaintiff agreed to grant CKT an option to buy the

department store premises. The defendant did not object to this in the expectation that DH would be permitted to purchase the hotel premises on similar terms. In June 1988, a proposal for the sale of the hotel premises was presented to TCKR. The second plaintiff rejected it and the second and third plaintiffs exercised their majority votes in the first plaintiff to resolve not to sell the hotel at the price proposed. In April 1990 the first plaintiff decided not to sell the hotel at any price. In September 1990, the defendant proposed that the hotel premises and business be sold in the open market and the proceeds divided between DH and the first plaintiff. The first plaintiff's share could then be divided between its shareholders. This too was rejected.

In January 1991, the defendant's solicitors wrote to the first plaintiff informing them that if they did not come up with constructive proposals to resolve the conflict between the parties, the defendant would proceed to petition for the winding up of the first plaintiff, under s 216 and/or s 254 of the Companies Act (Cap 50, 1990 Rev Ed). The first plaintiff applied for and obtained an interim injunction to prevent the defendant from presenting the petitions. The plaintiffs further obtained an order from the assistant registrar to cross-examine the defendant with a view to establishing his mental incompetency, to show that he was unable to understand the contents and the nature of the draft petitions as affirmed by his affidavit. The defendant applied to discharge the injunction and appealed against the order of the assistant registrar. The basis of the defendant's proposed petitions was that, given the attitude of the second and third defendants, the defendant would not be able to realise any reasonable benefit from the commitment of his resources and efforts to the hotel business, and could get no benefit from his holdings in the first plaintiff as the company did not pay any dividends. It was also implicit in the arrangement of the family businesses that DH would be treated in such a way as to enable it to become viable. The actions by the first plaintiff were contrary to this and amounted to oppression against him.

The first plaintiff argued that the presentation of the petitions would cause irreparable damage to itself as it would constitute an event of default permitting its bankers to recall all loan facilities, affect the disposition of the store premises, cause a loss of investor confidence in CKT thereby affecting the first plaintiff's shareholding in CKT, and impede the first plaintiff in carrying on its business. They argued that the defendant's allegations in his proposed petitions could not be substantiated; that the defendant was merely a disgruntled shareholder who mistakenly thought he should be given the family hotel business and was resorting to legal action to force the other family members to give in to him, and as such it constituted an abuse of the process of the court; and that the defendant could seek his real remedy by bringing an action against the first plaintiff or the other directors rather than winding up the company.

Held, allowing the application and appeal:

(1) The plaintiffs had not established a *prima facie* case that the oppression petition was bound to fail. There were conflicting views between the plaintiffs and the defendant in respect of whether the second and third plaintiffs' course of conduct was in disregard of the interests of the defendant as a member of the first plaintiff. These conflicts could not be resolved by simply looking at the

affidavit evidence as their resolution depended on ascertaining the intention of the second and third plaintiffs. The parties' allegations, cumulatively with the other complaints, posed issues of law and fact which could not be decided without hearing oral evidence: at [26] and [27].

(2) A petitioner could rely on the grounds in either s 254(1)(*f*) or s 254(1)(*i*) to support his winding-up petition if the allegations supported either or both of them. There was no basis for finding that the winding-up petition was bound to fail on the affidavit evidence before the court. The merits of the defendant's position should not and could not be tried in an interlocutory application: at [28] and [30].

(3) A member's right to present a winding-up petition against his company could not be restrained even if his complaint was sufficient to found another action for which another remedy was available, so long as the complaint, if substantiated, was also a sufficient ground to wind up a company. The position of a member was *a fortiori* in the case of a s 216 (oppression) petition, which did not subject the company to statutory disabilities, and hence was not likely to cause damage to the company: at [39] and [40].

(4) Even if a petitioner had sufficient grounds to found an oppression petition and/or a winding up, there was an abuse of the process of the court if he did not really want any of the remedies that may be granted to him. Conversely, there was no abuse of the process of the court if he genuinely desired the remedies that the law would grant to him if he sued and succeeded and if he genuinely wished to use the proceedings to obtain those remedies: at [51].

(5) The two petitions covered different types of complaints and the petitioner was entitled to different remedies, except for the common remedy of winding up. A petitioner who proved his case in a winding-up petition was entitled to a winding-up order *ex debito justitiae*, whereas a petitioner in a s 216 (oppression) petition had no such right as the court had a discretion not to grant such a remedy. An oppression petition may not be adequate to remedy wrongs which supported a winding-up petition. It was thus not necessary for the plaintiffs to set the condition that the defendant should undertake not to ask to wind up the first plaintiff in the oppression petition: at [55] and [56].

(6) In an action tried on affidavits, the onus was on the plaintiff to show why a defendant should be cross-examined. In an interlocutory injunction, however, the burden was on the deponent to show why he should not be cross-examined. The plaintiffs were seeking to show that the defendant understood sufficiently but not enough to understand the contents and nature of the action. The court had no expertise to judge that kind of understanding, without the aid of expert witnesses. The person who challenged the mental competency of a particular person must produce the evidence to prove that he was mentally incompetent. It was not for him to put the witness in the box to prove that he was mentally incompetent: at [64] and [65].

(7) The real purpose of cross-examining the defendant was to test his veracity and not his mental capacity. But at this stage of the proceedings a party should not be cross-examined on that basis because that would actually go into the merits of the case: at [66].

[Observation: If it could be shown that the member did not genuinely seek the remedy that was available under the law but was using the process of the court for a collateral object, then the court might exercise its discretion to grant an injunction to restrain the presentation of or to stay a winding-up petition or an oppression petition. The burden of proving that that was the sole or predominant object of the petitioner was on the company and the burden was a heavy one to discharge in such an application at the interlocutory stage, whether *ex parte* or *inter partes*: at [41].

The court's discretion under s 216 was unfettered. It should be exercised for the purpose for which s 216 was enacted, which was to enable a minority shareholder to avoid having to wind up the company, if possible. The section should be given a purposive interpretation to achieve its object. A winding-up order should only be granted as a last resort in an oppression petition, and a court should not make such an order where there were sufficient alternate remedies to right the wrong done to the petitioner: at [58], [60] and [61].]

Case(s) referred to

Ah Yee Contractors (Pte) Ltd, Re [1987] SLR(R) 396; [1987] SLR 383 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Bellador Silk, Ltd, Re [1965] 1 All ER 667 (refd)

Bryanston Finance Ltd v de Vries (No 2) [1976] Ch 63 (folld)

Cadiz Waterworks Co v Barnett (1874) LR 19 Eq 182 (refd)

Charles Forte Investments Ltd v Amanda [1964] Ch 240 (folld)

Chong Lee Leong Seng Co (Pte) Ltd, Re [1989] 2 SLR(R) 9; [1989] SLR 685, HC (refd)

Company, In re *A* [1894] 2 Ch 349 (refd)

Company, Re *A* [1983] BCLC 492 (refd)

Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd (1977) 13 ALR 561; (1977) 2 ACLR 307 (refd)

Cuthbert Cooper and Sons, Ltd, In re [1937] Ch 392 (refd)

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (folld)

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation (1976) 2 ACLR 349 (distd)

Goldsmith v Sperrings Ltd [1977] 1 WLR 478 (refd)

Great Eastern Hotel (Pte) Ltd, Re [1988] 2 SLR(R) 276; [1988] SLR 841 (refd)

H R Harmer, Ltd, Re [1958] 3 All ER 689; [1959] 1 WLR 62 (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re [1978] 2 MLJ 227 (folld)

Kuah Kok Kim v Chong Lee Leng Seng Co (Pte) Ltd [1991] 1 SLR(R) 795; [1991] SLR 122, CA (refd)

Lundie Brothers, Ltd, Re [1965] 2 All ER 692; [1965] 1 WLR 1051 (refd)

Mann v Goldstein [1968] 1 WLR 1091 (refd)

Mincom Pty Ltd v Murphy [1983] 1 ACLC 749; [1983] 1 Qd R 297 (distd)

Niger Merchants Co v Capper (1881) 18 Ch D 557n (refd)

Posgate & Denby (Agencies) Ltd, Re [1987] BCLC 8; [1987] PCC 1 (refd)

QIW Retailers Ltd v Felview Pty Ltd (1989) 7 ACLC 510 (refd)

Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)

Tench v Tench Bros, Ltd [1930] 49 NZLR 403 (refd)

Ward v Corlon Sanderson & Ward Ltd [1986] PCC 57 (distd)

Weedmans Ltd, Re [1974] Qd R 377 (folld)

Legislation referred to

Companies Act (Cap 50, 1990 Rev Ed) s 216 (consd);
s 254

Wong Meng Meng (Dilhan Pillay with him) (Shook Lin & Bok) for the applicant/ defendant;
Engelin Teh (Quek Peck Hong with her) (Colin Ng & Partners) for the respondents/ plaintiffs.

1 June 1991 Judgment reserved.

Chan Sek Keong J:

1 This is an application by the defendant ("TWC") to discharge an interim injunction obtained *ex parte* by the plaintiffs, restraining him until judgment or further order from presenting any petition in the form of two draft petitions annexed to the *ex parte* application or any other petitions for the winding up of the first plaintiff ("TCKR") on any of the grounds therein referred to. The two draft petitions are: (a) a petition ("the oppression petition") under s 216 of the Companies Act (Cap 50, 1990 Ed) ("the Act"); and (b) a petition ("the winding-up petition") under s 254 of the Act.

2 TWC is the eldest son of Tang Choon Keng ("TCK") and the second and third plaintiffs ("TWS" and "TWK") are the two younger sons. They are shareholders and directors of TCKR, the family company. The immediate background to the application before me is as follows. On 3 January 1991, TWC's solicitors wrote to the plaintiffs a letter in which they: (a) referred generally to the conflicts between TWC, his company called Dynasty Hotel (Pte) Ltd ("DH") and the plaintiffs; (b) enclosed the two draft petitions which TWC intended to file in order to resolve the conflicts; (c) gave the plaintiffs two weeks to come up with constructive proposals to resolve the conflicts. On 9 January 1991, the plaintiffs' solicitors replied that the second plaintiff was not in Singapore and would be back on 28 January 1991. They did not request TWC for time for the plaintiffs to consider whether they would like to make any proposals. On 19 January 1991, the plaintiffs commenced this action claiming: (a) a declaration that the filing of the said petitions would be an abuse of process of the court, and (b) an injunction to restrain TWC from presenting them. They immediately applied for and obtained, *ex parte*, the interim injunction, the subject matter of the application before me.

The draft petitions of TWC

3 The contents of the two draft petitions are the same, except for the remedies that are being sought. In summary, they state as follows:

(a) TCKR was incorporated on 23 May 1958 with the object, *inter alia*, of acquiring and developing properties; between 1960 and 1971, TCKR acquired a number of properties adjoining Orchard Road.

(b) On 4 March 1961, CK Tang (Pte) Ltd ("CKT") was incorporated to carry on the business of the family department store.

(c) The original directors of TCKR were TCK, TSK (TCK's wife) and TWC; TWS became a director in September 1976 and TWK became a director in January 1979.

(d) During 1968–1978, TCKR, by TWC, conceived a plan to redevelop the properties into a complex called "House of Tang" consisting of a department store and a luxury hotel to be called "Dynasty Hotel", and when completed, the store would be operated by CKT and the hotel by DH (which was incorporated on 5 August 1978) as a wholly-owned subsidiary of TCKR but was to be capable of becoming a public company in the future.

(e) In 1980, TWC ceased to be the managing director of CKT in order to devote his efforts to the development of the "House of Tang", and when completed, to the management of the hotel through DH; the said development was completed in March 1982.

(f) TCKR, by an agreement for lease dated 25 January 1979, agreed to let the new store premises which has an area of about 150,000sq ft, to CKT at the monthly rent per square foot of $2 for rent and $0.45 for service charge, which TWC says was low even in January 1979.

(g) TCKR, to be able to service its bank loans, needed a monthly rental of $1.133m, after taking into account the rent from CKT; consultants advised that DH could only afford to pay $558,330 per month to break even; however, as both CKT and DH were family companies, it was agreed that DH would pay rent at $818,000 per month, even though DH would incur a loss of $8.246m for the first three years of operation; TWC says that this was agreed on the understanding that TCKR would help out DH as much as possible on finances, and would in all respects have regard to the fact that DH was part of the family enterprise.

(h) On 3 February 1982, TCKR and DH signed an agreement for a 25-year lease for the total premises, at a monthly sum of $818,000 for the first five years (being $618,500 for rent and $200,000 for furniture, fittings and fixtures as listed in the schedule to the draft lease), thereafter to be revised to reflect the market rent, regard being had to

the cost to TCKR of refurbishing and renewing the scheduled furniture, fittings and fixtures set out in the schedule to the draft lease (which has yet to be executed).

(i) On 10 March 1982, DH increased its share capital from $2 to $7,650,002 which was as follows: (i) TWC – 7,000,001 (91.5%); (ii) TWS – 400,001 (5.2%), and (iii) TWK – 250,000 (3.3%); as required by TCKR, TWS and TWK were each granted an option to subscribe for further shares in DH up to 15% of is [its] issued capital, exercisable before 19 December 1985 or upon the earlier approval of the public listing of DH's shares.

(j) On 18 March 1982, TCK transferred certain shares held by him in TCKR to TWS and TWK, as a result of which they, in combination, became the majority shareholders of TCKR; since then the shares in TCKR were held as follows: (i) TCK – 20 (0.04%); (ii) TWC – 24,000 (47.06%); (iii) TWS – 12,900 (25.47%); (iv) TWK – 12,900 (25.47%); and (v) estate of TSK – 1,000 (1.96%), held beneficially for TWS and TWK equally.

(k) It was inherent in the above arrangements that: (i) one member of the Tang family, *viz* TWC, would assume almost the entire financial responsibility for, and to commit his efforts and resources to, a new and risky business, *viz* DH; (ii) TWC could realise benefit from his commitment only if DH would be floated as a public company within a reasonable time, and/or enabled to make and retain profits by its hotel operations; (iii) these results were achievable only if TCKR enabled DH to own the hotel or have a long and secure lease on such terms as to enable DH to remain profitable; and/or TCKR could not and did not take from DH the major part of its operating profit by way of rent and charges, and assisted or did not hinder DH in the operation of the hotel; (iv) each member of the family would manage TCKR so as to protect and advance the interest of each other; (v) DH would be treated as a family business and not purely as an outsider tenant.

(l) On 19 March 1984, TWC suffered a serious stroke which continues to incapacitate him from speaking; he was able to and did attend board meetings from April 1985 to 20 June 1990 with one or both of his sons as his spokesman or spokesmen.

(m) Since TWC's stroke, TWS, who has been acting as the principal executive director of TCKR, together with TWK, have exercised and continue to exercise their powers as directors in a manner oppressive to TWC; and TCKR has acted and threatens to act in a manner which unfairly discriminates against and is prejudicial to TWC.

(n) The acts which are oppressive and/or unjust and inequitable are as follows:

(i) on 26 March 1990, TWS and TWK proposed to TWC that they should cease to be directors of DH, and that TWC should cease to be a director of CKT and of TCKR;

(ii) on 18 May 1990, TWK wrote to TWC, expressing the view that TWC was unable to understand or comprehend business affairs;

(iii) on 20 June 1990, at a board meeting of TCKR, TWS caused the other directors, by a majority, to decide to exclude TWC's sons from attending the meeting to assist TWC, and thereby effectively denied TWC the right to participate in the meeting, whereupon TWC left the meeting;

(iv) shortly after TWC's stroke, TCKR, by TWS, demanded from DH arrears of rental of $5.5m and sought to charge compound interest of 1% per month on such arrears and also threatened to take legal proceedings;

(v) between February and September 1985, it was agreed that (i) the said arrears would be treated as a term loan with interest, and (ii) from 1 January 1985 to 31 December 1987, later extended to 31 December 1988, the rent payable by DH would be $400,000 per month plus 4% of gross revenue, subject to a minimum of $500,000 per month, which was the market rent;

(vi) as TCKR made no decision on the rent in 1989 up to June 1990, DH continued to pay the same rent as before; in April 1990, DH prepared its unaudited annual accounts for 1989 which, on that basis, showed a profit of just over $3m; copies of the accounts were given to TWS and TWK as directors of DH and also to DH's bankers; on 12 July 1990, TCKR informed DH of its decision to charge DH rent at $818,500 with effect from 1 January 1989, and on 31 August 1990 sought to justify the charge on the ground that it was the market rent, which TWC denies for each of the review periods;

(vii) although DH has paid and continues to pay $200,000 per month for furniture, *etc* TCKR has failed to refurbish and renew the same, and has left DH to bear this cost;

(viii) TCKR continued to charge CKT rent at $2 per square feet for three terms expiring in March 1982, 1985 and 1988, which was below the market rent, and an increased rental would have benefited TCKR and also enabled it to service its loans without so much reliance upon DH;

(ix) TCKR had agreed with DH on 11 January 1983 that in consideration of DH providing certain services to CKT, TCKR would pass on to DH the service charge of $67,500 per month

then payable by CKT, and also any future increased service charge; TCKR increased CKT's service charge to $150,000 per month from 1 April 1985 but failed to pass on the increase to DH;

(x) TCKR also sought to impose a service charge on DH when DH was under no obligation to pay any service charge to TCKR;

(xi) from time to time in 1990, DH sought TCKR's assistance in obtaining governmental approval for alterations to and/or change of use of part of the hotel premises, but TCKR failed to do so in a manner which it ought to have done, having regard to the relationship between DH and TCKR, but on the contrary, has acted unreasonably and/or has had regard only or predominantly to the wishes of CKT;

(xii) in the circumstances, TCKR has treated DH as a landlord might treat an outside tenant and has paid no regard to the position of TWC or his reasonable rights or expectations;

(xiii) TWS and TWK have always treated DH as being TWC's share of the family business, and have left it to him to provide the funds for and to assume liability for DH's borrowings as follows: (A) they had on 4 December 1984 refused to take up their options to subscribe for more shares in DH when DH needed funds at a crucial stage of its business; (B) TCKR agreed to guarantee DH's overdraft account, but TWS and TWK required TWC to indemnify them against any decrease in the value of their shares in TCKR and also any losses arising from their personal guarantees given by them to the bank; (C) although DH's accumulated losses up to 31 December 1984 were $10.702m (on a paid-up capital of $5.355m), TWS and TWK, although having approved the resolution on 2 October 1985, were unwilling to pay the final 30% call on their shares, and further on 28 January 1986 were unwilling to subscribe for new shares in DH; (D) they sought the release of their guarantees from DH's bankers without informing TWC and DH; and (E) they declined on 26 July 1990 to join with TWC in signing the letter of support for DH to enable the auditors to approve the accounts on a "going concern" basis;

(xiv) from 1986 onwards, TWS, TWK and CKT made proposals for the sale of TCKR's store premises to CKT in exchange for new shares in CKT; from May 1987 onwards, TWC's son, KT, told TWS that DH wished to buy the hotel on the same basis as CKT and TWS gave KT to understand that he would agree, and KT repeated his request in a letter dated 21 April 1988; at TCKR's board meeting on 23 April 1988, TCKR gave an option

("the option") to CKT to buy the store, and also received KT's letter of 21 April 1988 without dissent; between 23 April 1988 and 24 May 1988, the sale of the hotel was further discussed and TWS's attitude remained that TCKR would sell;

(xv) the terms of the option were highly favourable to CKT; the price was based on the lower of two valuations, which was also below the market price; the option period was until 30 November 1988, and completion would not take place until 31 August 1990 at the earliest;

(xvi) furthermore, after CKT exercised the option on 24 August 1988, the scheme that was implemented to finance the purchase was highly disadvantageous to TCKR and TWC in that: (A) CKT was to issue new shares which carried transferable subscription rights ("TSRs") exercisable in 1990 at a fixed price of $2.25; (B) TCKR was required to exercise its TSRs whatever the price of CKT shares would then be; (C) TCKR had to increase its borrowings to enable it to take up the new shares and TSRs at a cost of $20,722,500; (D) TWS and TWK, but not TWC, sought to take up only 50% of their TSRs and to oblige TCKR to take up the balance;

(xvii) TWC acceded to the said scheme on the understanding and expectation that TWS and TWK were willing for TCKR to sell the hotel to DH on a similar basis, and without realising the extent to which the store was sold below market value;

(xviii) on 21 June 1988, TCKR by TWS stated it had no objection to selling the hotel to DH provided control remained within the family and subject to consideration of any proposals from DH; in September 1988, TWC's sons proposed that TCKR give an option to DH similar to the option to buy the hotel at $95m (which was above a valuation obtained by TCKR in connection with the option); TWS rejected the proposal, and refused to name the price; on 16 May 1989, TWS and TWK exercised their majority votes in TCKR not to sell the hotel to DH at the price of $95.5m;

(xix) on 4 April 1990, TWC proposed to TWK that the hotel be sold to DH at a fair price to be determined by valuation and that TCKR should have the right to receive shares in DH and have the right to prevent the sale of the hotel outside the family and invited comments and counter-proposals; TCKR decided not to sell at any price;

(xx) by reason of the aforesaid matters and the attitude of TWS and TWK, TWC would not be able to realise any reasonable benefit from the commitment of his resources and his family's

efforts to the hotel business or from his shareholdings in TCKR; to resolve the situation, TWC on 1 September 1990 proposed the hotel business and property be sold in the open market, the proceeds to be divided between TCKR and DH in proportions to be agreed or determined by an independent outsider, and the assets of TCKR be distributed to the shareholders or to TWC according to his share; TWS and TWK have refused to consider these proposals;

(xxi) by reason of the matters aforesaid, TWC has been, is being and will be disadvantaged in that: (A) although he has 47% share in TCKR which has a net worth of at least $300m, he receives no real benefit therefrom since TCKR pays no dividend and he is not able to realise a profit from and/or capital gain on the hotel; and (B) he cannot get benefit from his commitment to DH which cannot become a public company and his investment in DH cannot be realised to advantage and/or he cannot realise a commensurate yield from DH.

4 On the basis of the above allegations, TWC says that he is entitled to present the oppression petition to end the acts of oppression against him and also the winding-up petition to wind up TCKR. He says that as a shareholder he has a statutory right to present both petitions and that the plaintiffs have no justification to prevent him from so doing.

Interlocutory injunction

5 In support of their application for the interim injunction, the plaintiffs filed the affidavit of TWK in which he proceeded in the first 75 paragraphs to relate a brief history of the family companies and an account of the alleged disputes between TCKR/the majority shareholders and TWC and his family. In para 76 of his affidavit, TWK summed up as follows: "The facts as set out in both draft petitions and in so far as they are supported by documentary evidence are not in dispute, save only that they should be correctly seen in the context of the existing circumstances." TWK then proceeded in the next 32 paragraphs to explain, with the assistance of documentary evidence, why TWC's allegations of "unfair, unjust or oppressive treatment ... are ludicrous".

6 In para 112, he said that whilst the granting of an injunction would not in any way be detrimental to TWC, it would go a long way to avoiding the irreparable damage that would be caused to TCKR if the petitions were filed. The irreparable damage was identified as follows:

(a) TCKR's $50m note issuing facility with a $30m standby revolving credit facility and $15m overdraft facility would be affected by the winding-up petition;

(b) the completion of the sale of the store, to be completed in mid-1991 would be affected as a disposition;

(c) there would occur an event of default permitting TCKR's bankers to recall all loan facilities;

(d) it would be detrimental to TCKR's shareholdings in CKT as there could be a loss of investor confidence;

(e) TCKR would need a validation order from the court to pay salaries, *etc* and the consequences would be immeasurable;

(f) the guarantors to TCKR's loan facilities would also be affected.

7 In para 113, TWK said that in view of his previous statements, the *bona fides* of TWC was seriously in doubt and "*his petitions, if allowed to be filed, is bound to fail in any case*" whereas the filing thereof would cause irreparable harm to TCKR.

8 I have emphasised the sentence quoted above as it constitutes the starting point for an examination of the law on the use and abuse of interlocutory injunctions to restrain shareholders from presenting petitions under s 216 and/or s 254 of the Act, and the burden and standard of proof required at the *ex parte* hearing for such an injunction and at the *inter partes* hearing for its discharge or continuation, as the case may be. The leading cases in England are *Charles Forte Investments Ltd v Amanda* [1964] Ch 240, *Bryanston Finance Ltd v de Vries (No 2)* [1976] Ch 63, and *Ward v Corlon Sanderson & Ward Ltd* [1986] PCC 57. Other relevant decisions from New Zealand and Australia were also cited to me.

General considerations

9 Before I examine these decisions, I should like to make the following preliminary observations in order to put the problem in its proper perspective:

(a) as Buckley LJ said (at 78D) in *Bryanston Finance*: "The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute";

(b) the court's jurisdiction to grant an injunction to restrain a shareholder from filing such a petition, as Stephenson LJ said (at 79D) in *Bryanston Finance*, "is a facet of its inherent jurisdiction to prevent an abuse of its process";

(c) "the procedure by way of writ claiming an injunction to restrain presentation of a petition followed immediately by a motion expressed to claim an interlocutory injunction in the same terms appears clumsy and inapposite" (*per* Sir John Pennycuick (at 81F) in *Bryanston Finance*);

(d) taking the instant case as an example, if the court continues the interim injunction obtained by the plaintiffs until trial, it should, in principle, remain an interim injunction;

(e) if, at the hearing a permanent injunction is granted, no injustice will have been done to TWC; but, if the court refuses to grant the injunction, TWC will still have to file his petition/s, and TCKR and/or TWS and TWK may or may not be able to oppose the petition/s, depending on whether issue estoppel operates and that may depend on the reasons given for the refusal;

(f) moreover, the plaintiffs will be entitled to appeal against a refusal to grant a permanent injunction, and, given the circumstances of the case, are likely to do so; in any case, the right of appeal exists;

(g) consequently, no aggrieved shareholder, unless he has financial resources and also the will, may be in a position to obtain any remedy from the court for any wrong that a company may have done to him, and if he has, it may take him a long time to obtain his remedy;

(h) in these circumstances, the following public policy considerations need to be considered: (i) should litigation of this nature be extended or prolonged in this way? (ii) should the court put itself in a position to hear a dispute twice when it can do so once? (iii) should a minority shareholder, who may not have the same financial resources as the company, be denied equal access to the court by the company resorting to a pre-emptive strike of this nature? (iv) should potential or actual irreparable loss to a company and its related companies be a countervailing factor against the right of a shareholder to protect his rights as a member? (v) how should the court balance the two conflicting interests?

The law

10 Many of the considerations I have mentioned above have been answered by the Court of Appeal in *Bryanston Finance* ([8] *supra*). However, as that decision was preceded by *Tench v Tench Bros, Ltd* [1930] 49 NZLR 403 and *Charles Forte* ([8] *supra*), I should like to examine these decisions first.

11 In *Tench v Tench Bros, Ltd*, the appellant and his three brothers, who were partners, converted the partnership into a limited company, each holding office as director. Subsequently, it was alleged that the three brothers concurred in the alteration of the articles in order that they might remove the appellant as a director and from a share in the control of the business. Upon the appellant's removal and the failure of negotiations for the sale of his shares, he presented a petition praying that the company be wound up upon the ground that it was "just and equitable" that an order for winding up be made. The company obtained a stay of the petition on the

ground there was an abuse of process as the petition was not filed in good faith for the legitimate purpose of obtaining a winding-up order but for the purpose of bringing pressure on the remaining directors to purchase the appellant's shares. On appeal, the Court of Appeal (consisting of five judges) allowed the appeal on the ground that the merits of the petition should be tried in the normal way. Myers CJ held that it was not possible for the court to decide merely on Tench's allegations that the presentation of the petition was an abuse of process of the court. Smith J, in his judgment, said (at 410): "The first question for decision is whether the petitioner's claim is so bad in law that it cannot possibly succeed on any view of the circumstances." On the allegation of abuse of process of the court, he said that the jurisdiction should be sparingly used. Kennedy J also said (at 415) that "The allegations of facts raise a case which ... should be decided on the merits."

12 In *Charles Forte* ([8] *supra*), Amanda, the defendant, became a shareholder of CF, a private company, when he was employed by CF. After he left CF, he executed transfers of his shares, some to third parties and some to his own nominee company. The directors of CF, in exercise of their absolute discretion under the articles, refused to register the transfers and also refused to give any reasons for their refusal. Amanda wrote a letter threatening to present a winding-up petition if CF refused to register the transfer of those shares sold to third parties. CF obtained, *ex parte*, an interim injunction. Pennycuick J refused to continue the injunction. On appeal, the Court of Appeal (Willmer LJ, Danckwerts LJ and Cross J) dismissed the appeal on three grounds: (a) that Amanda's letter was an attempt to put pressure on the board, and as its presentation might cause irreparable harm to CF and also innocent shareholders of a public company controlled by CF, it was a case where the court would exercise its inherent jurisdiction to strike out the petition, provided that CF could establish that the petition *was bound to fail* and therefore an abuse of the process of the court; (b) that as the directors had an absolute and uncontrolled discretion not to register the transfers, the petition was bound to fail, unless the directors had acted in bad faith, and there was no possible chance that Amanda could make good his allegations in that respect; (c) that even if Amanda's allegations could be substantiated, the winding-up petition was misconceived as there were alternative and more suitable remedies, namely, an action for rectification of the register, applying *In re Cuthbert Cooper and Sons, Ltd* [1937] Ch 392, which the court held was binding on them.

13 In *Bryanston Finance* ([8] *supra*), the defendant, DV, held 62 out of over seven million shares in BF. He had a personal animosity against BF's chairman and was dissatisfied with the answers he received to certain questions he had asked concerning BF's loans to the chairman. He wrote two letters to the chairman, seeking further information and threatened to wind up BF if he received no reply. The company issued a writ and obtained

an interim injunction restraining DV from filing a winding-up petition on the ground of failure to answer or any ground connected therewith. DV filed two affidavits alleging fraud, misfeasance and impropriety on the part of BV. Following a takeover offer of the minority shares in BF, DV moved to discharge the injunction and filed two other affidavits containing allegations against BF; the motion was dismissed. BF then issued a second writ and obtained another interim injunction restraining DV from filing any petition to wind up BF on any of the four affidavits filed by DV.

14 DV appealed against the judge's refusal to discharge the first injunction and the granting of the second injunction. The Court of Appeal dismissed the first appeal. The court allowed the second appeal on the following grounds:

(a) that the smallness of a shareholding was not of itself a bar to the presentation of a petition; and if DV proved that he had sufficient grounds for the presentation of a petition, it was immaterial that he was actuated by malice and intended to present it because of his enmity against the chairman;

(b) that the investigation of BF's affairs by inspectors appointed by the Department of Trade and Industry was not a sufficient protection of DV's interest to constitute an alternative remedy;

(c) that the question of granting an interlocutory injunction could not be determined on the balance of convenience and that it was for BF to prove a *prima facie* case that a proposed petition would fail and be an abuse of the process of court; that since the judge had found that some of the allegations in DV's affidavits, if substantiated, could lead to a winding-up order, and BF conceded for the purposes of the motion that DV might establish that a petition presented on some of those grounds would not be an abuse of process, BF had failed to show that there was an abuse of process of the court.

15 On the burden of proof, Buckley LJ said (at 76G–77C):

> If it be asked what legal right the plaintiff company relies on in the second action from a violation of which the plaintiff company is seeking temporary protection pending the trial of the action, the answer must be, it seems to me, the right not to be involved in litigation which would constitute an abuse of the process of the court. But the plaintiff company cannot assert such a right in respect of any particular anticipated litigation without demonstrating that, at least prima facie, that litigation would be an abuse.
>
> If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise I do not think it can. If it were demonstrated that such a petition would

> be bound to fail, it could be said that to present it, or after presentation to seek to prosecute it, would constitute an abuse: *Charles Forte Investments Ltd v Amanda* [1964] Ch 240. Two difficulties face the plaintiff company here. First, the judge, rightly in my opinion, said that it was clear that some, if not all, of the allegations mentioned in his eight heads, if they were to be substantiated, could lead to a winding-up order. Secondly, Mr Bateson conceded before the judge, as he told us, that the defendant might succeed in establishing that the presentation of a petition on grounds asserted in the four affidavits would not be an abuse of the process of the court.

16 On the public policy considerations which I earlier referred to, Buckley LJ said (at 78B-F):

> The judge thought that there was certainly a case to be tried in the second action: that is to say, he thought that if that action was brought to trial the plaintiff company might win it. Even if this be assumed, I do not think that the company has, in the particular circumstances of this action and having regard to its particular character, yet established prima facie that it has the legal right which it is attempting to protect pending the trial. If the injunction is discharged, it is highly unlikely that the second action will ever be tried. It would be too late. If the injunction is maintained, the plaintiff company has in effect already obtained the whole relief sought in the action. In these circumstances, ought the defendant to be restrained?
>
> It has long been recognised that the jurisdiction of the court to stay an action in limine as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same considerations must apply to a quia timet injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognise that the presentation of a petition may do great damage to a company's business and reputation, though I think that the potential damage in the present case may have been rather exaggerated. The restraint of a petition may also gravely effect the would-be petitioner and not only him but also others, whether creditors or contributories. If the presentation of the petition is prevented the commencement of the winding up will be postponed until such time as a petition is presented or a winding up resolution is passed. This is capable of far-reaching effects.

17 On the issue whether the guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 were applicable, Stephenson LJ said (at 79A–E and 80A–D):

> I agree with the judgment of Buckley LJ and add my own explanation why I think that the order in the second action was wrong. There, in my opinion, Oliver J attempted to do an impossible thing: to decide on

the balance of convenience whether there is an abuse of the process of the court. He was persuaded to confuse two distinct things: (1) the court's jurisdiction to prevent a would-be litigant from abusing its process; (2) the court's jurisdiction to help a would-be litigant by preventing another from taking some action which is alleged to be in violation of the litigant's legal right until the court has decided whether he has that right and whether it has been or will be violated. Completely different considerations apply to the two cases. In the first it is for the plaintiff to prove that the defendant's exercise of his right to bring legal proceedings is in fact an abuse of process. In the second it is for the plaintiff to prove that there is a serious issue to be tried in his action, not the defendant's, and that it is convenient that the court should intervene to restrain the defendant before it is tried.

It is the practice for a company which objects to a shareholder's improperly presenting a petition to wind it up to move for an injunction to restrain him: the court's jurisdiction to do so is a facet of its inherent jurisdiction to prevent an abuse of its process: *Charles Forte Investments Ltd v Amanda* [1964] Ch 240 and *Mann v Goldstein* [1968] 1 WLR 1091, 1093–1094. But the method of applying does not transform the substance of the proceeding or the nature of what the applicant has to prove. If he applied to strike out the petition under the inherent jurisdiction or under RSC Ord 18 r 9(1)(*d*) and (3), he would not be able to rely on anything said by the House of Lords in the *American Cyanamid* case [1975] AC 396 or on the balance of convenience. Nor can he do so because considerations of the irretrievable damage to a company from advertising a baseless petition have led to the practice of applying for an injunction to restrain a would-be petitioner from presenting it.

...

This is not

> an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right,

but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ quoted do not apply to such an application as this. Their Lordships do not seem to have had this sort of injunction in mind and they cannot have overruled *Forte*'s case [1964] Ch 240 by implication. *Forte*'s case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail — or perhaps that there is a suitable alternative remedy to a petition — the defendant cannot be restrained, even temporarily, from presenting it. The judge has found that it might succeed. Some of the defendant's allegations, if substantiated, could lead the Companies Court to the conclusion that it is just and equitable to wind up the plaintiff company. He did not, and could not, find that there was no evidence to substantiate them. He was prevented from giving the proper effect to that finding by mistakenly

> applying the *American Cyanamid* case. So he decided this case on the wrong basis. If he thought that investigation by the Department of Trade and Industry was a suitable alternative remedy I respectfully disagree.

18 In *Ward v Corlon Sanderson & Ward* ([8] *supra*), the Court of Appeal held that the "*prima facie* bound to fail test" laid down in *Bryanston Finance* applied also at the *ex parte* hearing for such an injunction. Counsel for TWC cited this decision in support of his submission that on this test the *ex parte* application should not have been granted as it was bound to fail. As the application has been argued *inter partes* before me, this submission is not relevant.

Plaintiffs' evidence and submissions

19 I consider first the submissions of counsel for the plaintiffs as the burden is on the plaintiffs to satisfy this court that *prima facie* both or one of the intended petitions must fail. Counsel's submissions on the facts are based substantially on the affidavit evidence of TWK. Counsel has taken me through each of the 114 paragraphs of his first affidavit and has also referred me to a number of documents exhibited in this affidavit and his second affidavit. In summary, what TWK said in his affidavit was as follows:

(a) TWC fell out with TCK in 1980 and resigned as managing director of CKT of his own free will; as a result TCK, TWS, TWK and TWH were left to run CKT;

(b) after leaving CKT, TWC managed DH; he did not want any interference from TCK and continually pressed for the independence of DH, and so in March 1982, TCKR relinquished its beneficial interest in DH to TWC and TCK ceased to have any interest in DH;

(c) CKT's rental was agreed before the House of Tang complex was completed; the store was rented and charged on the basis of a bare store;

(d) in December 1980, TCKR obtained a valuation of a fair rent to be paid by DH for a 20- to 25-year lease showing a rent of $10.225m pa, and an additional $3.194m for furniture, fittings and equipment;

(e) TWC agreed to the rent of $818,500 after obtaining his own valuation which stated that at that rent DH would break even in three years;

(f) TCKR, TWS and TWK provided financial assistance to DH in giving security for DH's loans;

(g) TWC and his family have been living in TCKR's rent-controlled bungalow at Chatsworth Park paying $228 per month;

(h) DH is in arrears of rental amounting to $10,408,426 for the hotel and of charges amounting to $2,044,035 for the car park; DH has made a counterclaim which TCKR disputes;

(i) there are several unresolved issues between TCKR and DH in respect of rental payable for 1989 and 1990 and DH's liability for service charge;

(j) DH desires to buy the hotel premises but TCKR has no desire to sell and that TCK did not wish to see "it" divided;

(k) TWC is intent on owning the hotel at all cost, including the winding up of TCKR, and that the main objective of the threat to file the two petitions is to procure the sale of the hotel to him;

(l) DH has not been treated as an outsider by TCKR as it has granted concessions to DH, *eg* (i) by reducing the rent from $818,500 to $400,000 plus 4% of monthly gross revenue, subject to a minimum of $500,000; (ii) by giving time to DH to pay its arrears at an interest rate of OUB's prime rate plus ¾%; (iii) by extending the repayment date by another year;

(m) there is a genuine dispute between TCKR and DH on what was agreed for the rental in 1989; also TCKR is not bound by the draft lease, and in any case, DH has never asked TCKR to refurbish the hotel;

(n) there is a dispute as to (i) the right of the management corporation to charge DH for service charge, and (ii) DH's liability to reimburse TCKR for its contribution to a sinking fund;

(o) TCKR co-operated with DH in giving consent and assistance in obtaining permission for alteration and change of use;

(p) TCKR's decision not to allow TWC's sons to attend the board meeting of 20 June 1990 has been seized upon by TWC as an attempt to drive him off the board;

(q) TWS and TWK did not cause the store premises to be sold to CKT at extremely favourable terms; the sale took place at a time when TCKR was heavily indebted: in 1982 – $84.2m (interest charged at $1.5m per month); 1983 – $89m; 1984 – $85.5m; 1985 – $72m; 1986 – $68.1m (after certain investments were realised; 1987 – $63m;

(r) in selling the store, TCKR adopted a policy that between themselves and CKT, the public-listed company should be favoured above that of the private family company; a long completion date was given because strata titles were only expected in mid-1990.

20 The above statements, together with the statements relating to irreparable damage to TCKR which I mentioned earlier, form substantially

the case for the plaintiffs. Counsel for the plaintiffs submits that each of TWC's petitions is bound to fail as TWK's statements prove that TWC's allegations cannot be substantiated. She submits that what has happened between TWC and TCK, and later between TWC and his brothers happened because of certain actions taken by TWC himself and that he is where he is, or DH is where it is, because of TWC's own actions, and not by reason of anything done by TCK or TCKR or TWS or TWK. It is also argued that TWC is merely a disgruntled shareholder who mistakenly thinks that he should be given the hotel business of the Tang family, and having failed to get it, has resorted to legal action to force the plaintiffs to give up that business to him. TWC's object in filing the petition is plainly to pressurise the plaintiffs to sell the hotel premises to him, and that is an abuse of the process of the court. To recapitulate, all that TWC has shown in his affidavit are: (a) disagreements between the parties on policy matters within the Tang family companies; (b) absence of any harm done to TWC by any of the decisions of TCKR or TWS or TWK; (c) acquiescence of TWC in every decision of TCKR; (d) his own misconduct; and (e) his desire to get his own way.

21 TWC has filed an affidavit affirming the contents of the draft petitions, and at the same time (a) denying the interpretation of the events given by TWK, (b) asserting that the filing of the petitions is not a ploy to force the plaintiffs to sell the hotel premises to him as the plaintiffs did write to him on a possible sale and that the subsequent refusal to sell the hotel makes it impossible to resolve the oppression against him.

Are the petitions bound to fail?

22 Counsel for the plaintiffs has contended that the court has to look into the merits of TWC's allegations before it can decide whether the petitions are bound to fail. If, by this submission, counsel means to say that I simply have to read the affidavits filed herein to decide the merits on the basis of the sworn statements and the documentary evidence and the interpretations to be put on such evidence, in so far as they are undisputed, I agree. But I cannot go beyond that. The court is not required to and should not inquire into the merits of the petitions as if it were holding a trial. That is the principle established in *Bryanston Finance* ([8] *supra*) for the reasons given therein.

23 I should mention that the plaintiffs did make an audacious attempt to have the merits of the intended petitions tried before me in an ingenious way. They obtained an order from the assistant registrar to cross-examine TWC on his allegations in the petitions with a view to proving that he is mentally incompetent and that the [he] does not understand the matters he has deposed to in his affidavit, and thereby also to prove that his allegations are untrue. I allowed an appeal by TWC against the said order for the reasons set out in the appendix to this judgment.

24 Counsel for the plaintiffs took me through every one of the complaints of TWC and, on the basis of the documentary evidence, has argued that every single one of them cannot be sustained, and therefore the petitions are bound to fail. TWK has, however, admitted that may [many] of the events, actions and decisions complained of are not in dispute but that they cannot bear the interpretations put upon them by TWC, and that TWC has misconstrued or exaggerated their significance or implications. I am now asked to accept counsel's submission on TWK's interpretation of the events and decide that TWC's case, on the undisputed facts, is so bad that it ought not to be allowed to proceed at all. I do not accept it.

Section 216 – oppression and injustice

25 I have dealt shortly with counsel's submission that the petitions must fail for lack of evidence. I will not consider the other submission that TWC's allegations, if substantiated, is also incapable of succeeding under s 216. She has referred to the following cases: *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227; *Re Great Eastern Hotel (Pte) Ltd* [1988] 2 SLR(R) 276; *Re H R Harmer Ltd* [1958] 3 All ER 689; [1959] 1 WLR 62; *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8; [1987] PCC 1; *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 13 ALR 561; (1977) 2 ACLR 307; and *Re Lundie Brothers, Ltd* [1965] 2 All ER 692; [1965] 1 WLR 1051. In *Re Kong Thai Sawmill*, Lord Wilberforce, who delivered the judgment of the Privy Council, with reference to the corresponding provision in the Malaysian Companies Act 1965, said (at 229):

> There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.
>
> Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision

> upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* 1952 SC 49): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale* 1925 SC 311, 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.
>
> Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002, 1011–2.

26 Having regard to the above observations on the ambit of s 216, I am of the view that the plaintiffs have not established a *prima facie* case that the oppression petition is bound to fail. TWC has made several complaints in the petition. The gravamen of TWC's general complaint is that TWS' and TWK's actions and decisions as directors/shareholders of TCKR demonstrate a course of conduct which was oppressive, *ie* "burdensome, harsh and wrongful", or in disregard of the interests of TWC as a member of TCKR. He says that as a member of the Tang family, and having regard to the arrangement whereby the two family businesses were developed separately, it is inherent or implicit in such arrangement that the financial resources of the family have to be used and applied for the benefit of all the members thereof, with fairness and some degree of equality and without discrimination. The plaintiffs have adduced documentary evidence to show

that TWC could not have any such expectations as he initiated and caused the division after he had some misunderstanding with TCK. As against that, there is also evidence to suggest that TCK did decide that the two businesses should be carried on separately by the two branches of the family, by allowing TWC to take over the risk of running the hotel business through DH, and vesting shareholder/board control of TCKR, and thereby CKT as well, in TWS/TWK. The sale of the store premises to CKT and the favourable terms of the sale, when contrasted with the refusal to consider the sale of the hotel premises, requires further examination as it may prove discrimination of a kind capable of being oppressive or unjust in the larger context of the family relationship, having regard to the risk carried by TWC and the financial resources put in by him.

27 Then, there are allegations of other acts of TWS and TWK, all of which are denied, which TWC says, were designed to impede TWC from carrying on a viable hotel business, *eg* (a) treating DH as if it were an outside tenant and not a family member by, for example, imposing a commercial rate of interest (of ¾% above OUB prime) on the arrears of rent payable by DH, (b) increasing DH's rent retrospectively, (c) failing to pass on the increased service charge to DH, and (d) delaying DH's improvement plans. The most serious of the specific complaints appears to be the exclusion of TWC from participating in the management of the affairs of TCKR. In this regard, counsel for the plaintiffs has argued, strenuously, that TWC has not been removed as a director, that he has been invited to attend board meetings with his son, KT, after 20 June 1990, but TWC has refused to attend. This conflict of views cannot be resolved by simply looking at the affidavit evidence as its resolution depends on ascertaining the intention of TWS and TWK when they disallowed TWC's sons from attending the 20 June 1990 board meeting with TWC. With his known disabilities, TWC's participation at board meetings without his sons is neither useful nor meaningful, contrary to what TWK says. These allegations, cumulatively with the other complaints, are capable of being construed as a departure from the standards of fair dealing amongst the brothers in relation to their relative expectations of their entitlement to their inheritance of the family assets. The court cannot decide these issues of law and fact without hearing oral evidence.

Sections 254(1)(*f*) and 254(1)(*i*)

28 Section 254(1)(*f*) provides that the court may order the winding up of a company if "the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner which appears to be unjust and unfair to other members". Section 254(1)(*i*) is the "just and equitable" ground. The winding-up petition does not specify whether TWC is relying on both paras (*f*) and (*i*). He is entitled to rely on either or both of them, if the allegations support either or both of them.

29 The law on the "just and equitable" ground is established. The following authorities were cited to me: *Tench v Tench Bros, Ltd* ([10] *supra*), *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, *Tay Bok Choon*'s case [1987] 1 MLJ 433, *Re Lundie Bros* ([25] *supra*), *Re Ah Yee Contractors (Pte) Ltd* [1987] SLR(R) 396. The ingredients of this ground and the considerations that are relevant are set out in the speech of Lord Wilberforce in *Westbourne Galleries* as follows (at 379A–380B):

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

> words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

30 Counsel for the plaintiffs has argued that there is nothing in the winding-up petition which can support this ground, and that the decisions concerning partnerships which became companies are not relevant, as TCKR was not a partnership at inception. I do not think this argument is sustainable in law having regard to the observations of Lord Wilberforce. The relationship between members of a family company is even more personal, even if the level of mutual confidence that is necessary may not be more, than in a relationship between partners. In my view, whether there are equitable considerations which may justify the same or different treatment of family members of a company who have lost mutual trust and confidence in each other is also an argument which is best left to a more mature consideration when all the facts are before the court. There is no basis for finding that the winding-up petition is bound to fail on the affidavit evidence before me. The merits of TWC's petition, like Tench's petition, should not and cannot be tried in an interlocutory application.

Alternative remedies

31 Counsel for the plaintiffs has also argued that even if the petitions are not bound to fail in law or on the affidavit evidence, TWC, by bringing an action against TCKR or the other directors, is able to obtain his real remedy, if he establishes his case, without risk of inflicting possibly irreparable damage on TCKR or other innocent shareholders in CKT. The authority she relies on for this proposition is *Charles Forte* ([8] *supra*) and two Australian decisions, *viz Fortuna Holdings Pty v Deputy Federal Commissioner of Taxation* (1976) 2 ACLR 349 and *Mincom Pty Ltd v Murphy* [1983] ACLC 749; [1983] 1 Qd R 297. In *Charles Forte*, the shareholder's complaint was that the directors had wrongfully refused to register some transfers of his shares in the company. If the directors had acted unlawfully, *ie* exercised their discretion in bad faith, the shareholder

had a separate action for rectification of the register. That was his real grievance and the court held that that was the proper alternative remedy.

32 In *Mincom*, a case under the Companies (Queensland) Code, the aggrieved member also had the alternative remedy of selling his shares in accordance with the procedure set out in the articles. Although he expressed a desire to sell his shares, he decided to petition to wind up the company, either under s 320 (for oppression) or ss 364(1)(f) and 364(1)(j) (which corresponds to ss 254(1)(*f*) and 254(1)(*j*)). Williams J granted an injunction to the company to restrain Murphy from filing the said petition on the ground that the available procedure for the sale of Murphy's shares had not been followed and should have been followed, but that if that procedure did not provide a satisfactory result, it might well be that Murphy would need a petition under s 320. He also found that the object of Murphy in wanting to present his petition was as follows:

> I have come to the conclusion that Murphy no longer wishes to remain a shareholder in the company and that he is asking his fellow shareholders to pay what would appear to be an unreasonably high price for his interest in the group.

33 Williams J then held that Murphy was unlikely to succeed under ss 364(1)(f) or 364(1)(j) as he had an alternative remedy which must be pursued, which was the sale of his shares under the articles.

34 In my view, *Mincom*, properly understood, does not support the argument of counsel on this point. Section 367(4) of the Code expressly provided that the court should not make a winding-up order if there was an alternative remedy available. There is no such statutory power given to a Singapore court. Counsel for TWC has argued that the existence of an alternative remedy is not a sufficient ground to restrain a shareholder from petitioning to wind up a company so long as the grounds are sufficient to do so, either under s 216 or s 254. He submits that *Charles Forte* ([8] *supra*) has been overruled or disapproved in so far as it purported to decide to the contrary. He relies on the judgment of Lord Cross in *Westbourne Galleries* ([29] *supra*) in which he said that *In re Cuthbert Cooper* ([12] *supra*) was wrongly decided and that he and Danckwerts LJ were wrong in applying that decision in *Charles Forte*.

35 Having read the judgment of Lord Cross carefully, I do not think that he purported to lay down a principle as wide as that contended for by counsel for TWC. All that Lord Cross said was that *Cuthbert Cooper* was wrongly decided as the judge took too narrow a view of the "just and equitable" provision by applying the common law to the dispute. In *Bryanston Finance* ([8] *supra*), Stephenson LJ was sufficiently doubtful as to the correct position when he said (at 80B): "*Forte*'s case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail – or *perhaps* that there is no suitable alternative remedy to a petition – the

defendant cannot be restrained, even temporarily, from presenting it." [Emphasis added.] However, in *Tench v Tench Bros, Ltd* ([10] *supra*), Smith J said (at 411) that it was not at all clear that because the petitioner had an alternative remedy, *ie* an action to quash the alteration of the articles to remove him as a director, he could not proceed on the "just and equitable" ground to wind up the private company. The authorities are not at one on the point in dispute, at least in relation to a petition to wind up a company.

36 In *Fortuna Holdings* ([31] *supra*), McGarvie J, after a review of the English and Australian authorities, was able to reduce the decisions into a single principle with two branches. He said (at 359):

> The authorities which have been discussed illustrate the distinction between the application of the first and second branches of the principle.
>
> The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding-up order, the petition is incapable of success as a matter of law. If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.
>
> The second branch applies to cases where there is more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding-up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.

37 Although the analysis of McGarvie J is a valuable exposition of the law in Australia, it has to be remembered that Victoria had a statutory provision (s 225(3)) which gave the court a discretion not to grant a winding-up order if an alternative remedy is available. I should further add that there is a similar provision in the 1948 Companies Act of the United Kingdom, but that Singapore does not have this provision in the Act. For this reason, the use of the words "unlikely to succeed" by McGarvie J in the last sentence in the above passage has to be understood in that context.

38 McGarvie J's judgment also deals comprehensively with the relative positions of a creditor (a) whose debt is not disputed, (b) whose debt is disputed, and (c) whose debt, whilst not disputed, is subject to a cross-claim by the company which is equal to or exceeds the debt. He points out that the second branch of the principle has often been applied to creditor's petitions. The only interest of a creditor is to get paid, and if he has no other practical way of obtaining payment, he is entitled to exercise his statutory right to wind up the company. On the other hand, he cannot use the winding-up procedure to determine whether he is a creditor as that is an abuse of the process of the court. He cannot petition unless he is a creditor. Where the company has a cross-claim to match an undisputed debt, the court has a discretion whether or not to restrain or stay the presentation of a petition based on the company's inability to pay the debt. The discretion can only be exercised according to the circumstances of the case.

39 Having considered the authorities, my view of the law in Singapore is that a member's right to present a winding-up petition against his company cannot be restrained even if his complaint is sufficient to found another action for which another remedy is available, so long as the complaint, if substantiated, is also a sufficient ground to wind up a company.

40 I am further of the view that the position of the member is *a fortiori* in the case of a s 216 petition. Such a petition is not a winding-up petition (see *Re Chong Lee Leong Seng Co (Pte) Ltd* [1989] 2 SLR(R) 9) and, for that reason, does not subject the company to the statutory disabilities as in a winding-up petition and which are likely to cause damage to the company. In *Re Kong Thai Sawmill* ([25] *supra*), at 229, Lord Wilberforce observed that if s 216 applied, it was no answer to say that relief might also have been obtained in a minority shareholders' action.

41 However, there is one qualification to the above two propositions that I wish to make, and that is, if it can be shown that the member does not really seek the remedy that is available under the law but is using the process of the court for a collateral object, then the court may exercise its discretion to grant an injunction to restrain the presentation of or to stay a winding-up petition or an oppression petition. But the burden of proving that this is the sole or predominant object of the petitioner is on the company and the burden is a heavy one to discharge in such an application at the interlocutory stage, whether *ex parte* or *inter partes*. The authorities for the qualification I have made are examined in the next section.

42 Finally, I am of the view that the arguments of counsel for the plaintiffs on this point are not to the point. She spent much time demonstrating from the evidence that there was no binding agreement between TCKR and DH and/or TWC to sell the hotel premises to DH and/or TWC. Indeed, there is no such evidence, as that is not TWC's case. TWC has not claimed that he has a contractual right to acquire the hotel

premises. There is therefore no question of an alternative remedy being available to TWC in respect of the hotel premises.

Motive and object

43 In *Bryanston Finance* ([8] *supra*), Buckley LJ held that if a petitioner has sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person cannot render the ground any less sufficient. Counsel for TWC, relying on this statement, submits that even if the motive of TWC in giving notice of his intention to present the two petitions is to pressurise TWS and TWK into agreeing to sell the hotel premises, that is irrelevant so long as he has sufficient grounds. He also relies on a passage in the judgment of Ungoed-Thomas J in *Mann v Goldstein* [1968] 1 WLR 1091 at 1095F–G:

> I come now to the allegation of lack of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, even though with personal hostility or even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide but acting bona fide in accordance with the process. And certainly no authority suggesting otherwise has been brought to my attention.

44 Counsel for the plaintiffs, however, says that that is not TWC's motive but his object. She says that in *Bryanston Finance*, the word "motive" was used to describe the mind of the petitioner, as in "malice" and "antagonism", whereas in the instant case, TWC's object in threatening to present the winding-up petition is to pressurise TWS and TWK in agreeing to sell the hotel premises to him. She relies on the following authorities in support of her submission: *Re A Company* [1983] BCLC 492, *Re Bellador Silk Ltd* [1965] 1 All ER 667, *In re A Company* [1894] 2 Ch 349, *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326, *Niger Merchants Co v Capper* (1881) 18 Ch D 557n, *Cadiz Waterworks Co v Barnett* (1874) LR 19 Eq 182, *Ward v Corlon* ([8] *supra*), *Fortuna Holdings* ([31] *supra*), *Mincom* ([31] *supra*), and *QIW Retailers Ltd v Felview Pty Ltd* (1989) 7 ACLC 510.

45 In my view, this semantic dispute is sterile. Motive is the cause or reason for any action. Object is the goal or end of any action. The greater the probability of the objective being achieved by any action, the greater the motive to start the action in order to achieve the object. The lesser the probability, the weaker the motive. If TWC's purpose in presenting the petitions is simply to wreck TCKR and the family interest in CKT, then his motive is not related to his object. The motive is likely to be hatred of the other members of the family or the desire to seek vengeance for some wrong done to him by those members. If TWC has strong reasons to believe that by threatening to present one or both of the petitions, he will succeed in pressuring TWS and TWK into agreeing to sell the hotel premises to

him, then his belief will feed on his motive. It is then not a question of TWC's hope but informed judgment that TWS and TWK are likely to succumb to the threat.

46 All the decisions on creditors' winding-up petitions based on disputed debts can be explained on this basis. What motivates such a petitioner is the belief that he may achieve his object, which is the payment of his disputed debt. That is an abuse of the process of the court because his real purpose is not to wind up the company but to secure the payment of his disputed debt. It is also an abuse of the process of the court because a winding-up petition or an oppression petition (where the petitioner is also a shareholder) is not intended to be a means of deciding whether there is a debt or not. In *Re A Company* [1983] BCLC 492, Harman J said that *Bryanston Finance* did not intend to overrule the basic law that the only proper purpose for which a winding-up petition could be presented was for the proper administration of the company's assets for the benefit of all in the relevant class. On this basis, he suggested that the question to ask is not, "Does the petitioner genuinely wish to wind up the company?", but, "For what purpose does he wish to wind up the company?"

47 Similarly, in *Bellador Silk* ([44] *supra*), Plowman J held that the petitioner was not entitled to any relief under s 210 of the 1948 Act (corresponding to s 216) although he might have succeeded in winding up the company on the "just and equitable ground", on the ground that he had admitted under cross-examination that his real object was to get repayment of a loan owed by the company to his group of companies, and not any of the reliefs under s 210. Plowman J held that that was an abuse of the process of the court.

48 In *Mincom* ([31] *supra*), Williams J, after referring to *Bellador Silk*, said (at 757):

> However, it must be remembered that frequently there are a multiplicity of motives behind the presentation of a petition; in most, if not all, cases where s 320 is relied upon the company in question will be able to pay its debts and be a 'going concern', so that the request for a winding-up order is made as a last resort and only if the petitioner is not able otherwise to obtain the real relief which he seeks. It must always be a question of degree whether or not one can conclude that a petition has not been presented with the genuine object of obtaining a winding-up order but merely as a lever to exert pressure in order to obtain something to which the petitioner may not otherwise be entitled (say, for example, an inflated price for his shares).

49 Williams J then went on to find, as a fact, that all that Murphy wanted was to obtain a high price for his shares.

50 *QIW* ([44] *supra*) is not a winding-up case, but an action by a company which, having defended successfully the winding-up petition

presented by B, sued B for damages for malicious prosecution and abuse of process. Macrossan J held, on the facts, that there was an abuse of process as the real object of B was not to wind up the company but force the existing board to negotiate with him over his takeover plans. He also decided, following Lord Denning's judgment in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, that the wrongful purpose need not be the sole purpose so long as it is the predominant purpose. He said (at 521–522):

> It is plain that the more obvious cases of abuse will be readily identifiable, but there may be more difficult marginal cases. It might be thought that a case would need to be tolerably plain before it can be labelled an 'abuse'. It appears that a first question which can arise is this: is a remedy given by law for the purpose which is sought to be achieved? Of course, the range of remedies which the law offers is quite narrow and indeed the simple remedy of damages occupies a large part of the field. This clumsiness or lack of refinement in the matter of remedies offered by the law is something which must be taken into consideration.
>
> In the present case, if the real object of B in commencing proceedings was to force the directors of the plaintiff company to negotiate that was not an end which the law would enforce. If to achieve that collateral object B launched winding-up proceedings even if it be assumed that the winding-up order might have been available in the circumstances, that order was nevertheless not something which fundamentally he sought. If his strategy was to bring pressure to bear simply or predominantly to force the directors to negotiate with him over his demands he would be abusing the process of the court.
>
> Accepting that a bona fide plaintiff may be forced to choose among a limited number of available remedies, it may be said that there will be no abuse involved when a plaintiff genuinely desires the objective which the law will grant if he sues and succeeds and if he genuinely wishes to use the proceedings to obtain that objective. But if a test is formulated along any such lines as these, the conduct of B will inevitably be found wanting. His own evidence, including his answers in cross-examination, is not the least damaging aspect for him. This impression is also borne out by a consideration of the evidence of S.
>
> If these questions are put – did B have as his real object a winding-up of the plaintiff company or any other relief which the court might be likely to order on the application which the first defendant made or, on the other hand, was his predominant object to force the existing board of the plaintiff company to negotiate with him over his plans to obtain control or gain influence over the policies of the company – then the questions must be answered adversely to B. It should be concluded that the winding-up application which he caused to be instituted amounted to an abuse of process.

51 The principle applied in these decisions is not affected by anything that has been said or decided in *Bryanston Finance*. Accordingly, I accept

the submission of counsel for the plaintiffs that even if TWC has sufficient grounds to found the oppression petition and/or the winding up, there is an abuse of the process of the court if he does not really want any of the remedies that may be granted to him, or conversely, there is no abuse of the process of the court if he genuinely desires the remedies that the law will grant to him if he sues and succeeds and if he genuinely wishes to use the proceedings to obtain those remedies. As suggested by Harman J, the question is: "For what purpose does TWC wish to present the winding-up petition and/or the oppression petition?"

52 The answer of counsel for the plaintiffs to this question is that it is nothing more than to pressurise TWS and TWK into agreeing to sell the hotel. That may be so, but there is nothing in the evidence before me which supports that answer. The evidence is to the contrary. Paragraph 59 of both petitions prays for the sale of the hotel premises in the open market. Paragraph 60 alleges that TWC will remain disadvantaged in his current position as a minority shareholder who derives no real benefit from his minority membership for the reasons given therein. On the face of the petitions, TWC's object appears to be a desire to realise whatever benefit he has that is now locked in TCKR, by any of the remedies available to him under s 216 and s 254. The case for the plaintiffs to the contrary can only be made good, if at all, by cross-examination of TWC or the production of indisputable evidence.

53 TWC's position is not much different from that of Tench as analysed by Smith J in *Tench v Tench Bros, Ltd* ([10] *supra*), at 411–412, as follows:

> The next question for decision is whether, upon facts, as to which there is no real dispute, the petition is presented for an improper purpose so as to amount to an abuse of the process of the court. The admitted facts are (i) that the petitioner's brothers were under no obligation to buy his shares; (ii) that negotiations for the sale of the shares continued for a long time and that they failed; (iii) that after such failure the petitioner forthwith presented his petition to wind up the company; (iv) that after presentation of the petition the petitioner stated that if the remaining shareholders would purchase the petitioner's shares at a reasonable price the petitioner would be content to withdraw his petition. To hold that these admitted facts amount to putting an improper pressure upon the company would seriously endanger negotiation for the settlement of disputes — even of family disputes, as is the case here. As I have shown, the petitioner's case has a legal foundation, and it would be going, I think, too far to draw the inference that because the petitioner had failed to sell his shares to his brothers, who, upon his allegation, had ejected him from the company, he was therefore using the process of the court for an improper purpose.

Alternative petition?

54 Counsel for the plaintiffs has also argued that it is an abuse of the process of the court for TWC to present the winding-up petition when he can present the oppression petition. This point is of some practical importance in the instant case as the plaintiffs have offered to vary their interim injunction to allow TWC to present the oppression petition provided he does not seek winding up as a remedy. By making this offer, it is clear that the plaintiffs accept the position that an oppression petition is preferable to, it being less damaging than a winding-up petition. I should add that much of the foreseeable damage that TCKR may suffer in winding-up proceedings can be contained by (a) an agreement between the parties to obtain an omnibus validation order to enable TCKR to carry on its existing business and (b) making suitable arrangements with TCKR's bankers; both of which matters TWC has proposed to TWS/TWK. Counsel for the plaintiffs is obliged to advance this argument as the offer has been rejected.

55 However, I do not accept the argument for the reason that the two petitions cover different types of complaints and the petitioner is entitled to different remedies, except for the common remedy of winding up. In *Chong Lee Leong Seng* ([40] *supra*), I expressed the view that a petitioner who proves his case in a winding-up petition is entitled to a winding-up order *ex debito justitiae*, whereas a petitioner in a s 216 petition has no such right as the court has a discretion not to grant such a remedy. It follows that even if TWC is able to prove facts justifying a winding-up order in a winding-up petition, he may not necessarily be granted such an order in an oppression petition. An oppression petition may not be adequate to remedy wrongs which support a winding-up petition: see *Re Lundie Brothers* ([25] *supra*) and *Re Weedmans Ltd* [1974] Qd R 377, at 398D.

56 For the same reason, I do not think that it is necessary for the plaintiffs to set the condition that TWC should undertake not to ask to wind up TCKR in the oppression petition. I have said in *Re Chong Lee Leong Seng* that a winding-up order in s 216 should be regarded as a last resort remedy, but in such unfelicitous language (at [21] and at [18]) that the Court of Appeal (Civil Appeal No 85 of 1989) was moved into expressing disagreement with it [see [1991] 1 SLR(R) 795]. The Court of Appeal, after referring to Lord Wilberforce's statement in *Re Kong Thai Sawmill* ([25] *supra*) that all the reliefs in s 216 ranked equally (which, it should be noted, was a statement made by Lord Wilberforce in response to counsel's statement that the primary remedy in s 216 was winding up), said (at [7]):

> Nor conversely is it correct to say that winding up is granted only if all the other reliefs specified in s 216(2) are found to be inadequate or ineffectual for the purpose of remedying the matters complained of. With respect, we are unable to agree with the view expressed by Chan Sek Keong J that a court in Singapore will not wind up a company on

> the ground of oppression where any of the other reliefs provided in s 216 is a sufficient remedy to bring to an end the matters complained of. Section 216 confers on the court an unfettered discretion, and it would not be right to lay down any general rule which might operate to limit or restrict the exercise of such discretion. Whether a court would or would not grant the remedy of winding up under s 216 depends on the circumstances of the case. There may be and could be circumstances in which relief other than winding up would put an end to the oppression but nonetheless the court considers that winding up is a more appropriate remedy. We accept that, as a matter of practicality, in considering whether to grant such a remedy the court will have to bear in mind the drastic character of winding up, and in this connection we respectfully agree with what Lord Wilberforce said in *Re Kong Thai Sawmill (Miri) Sdn Bhd* with regard to winding up as a remedy.

57 What Lord Wilberforce said was this (at 233):

> Winding up is specifically mentioned in s 181(2)(e) of the Companies Act as a head of relief which the court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the court. In exercising this discretion, the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

58 I do not doubt that the court's discretion under s 216 is unfettered. What is important is how the discretion is to be exercised. My view is that it should be exercised for the purpose for which s 216 was enacted, *ie* "*with a view to bringing to an end or remedying the matters complained of*". If the matters complained of can be remedied by an order other than a winding-up order, there is no reason for the court to wind up the company simply because its discretion is unfettered. In *Cumberland Holdings Ltd* ([25] *supra*), Lord Wilberforce, again delivering the opinion of the Privy Council in an appeal under the corresponding provision in New South Wales, said (at 566):

> Indeed the statutory provisions are widely expressed and effect should be given to them in accordance with their terms whenever the court comes to the conclusion that there has been a lack of fairness, or oppression, or lack of probity on the part of the majority, or of the directors representing the majority. But to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made. An example where this was done under s 222(f) and (h) of the Act [corresponding to s 254(f) and (i)] is *Re Weedmans Ltd.*

59 In *Re Weedmans Ltd* ([55] *supra*), Lucas J ended his judgment thus:

> In my opinion, the actions of the directors show that they acted unfairly and unjustly to other members of the company. The petitioners have in my opinion established a case for the winding up of the company under s 222(1)(f) and it seems to be that no other remedy is available to them.

60 If a court decides to wind up a company in a s 216 petition, it is unlikely that the matters complained of can be remedied in any other way. There is no reason to believe that where a company is a "going concern", an aggrieved minority member would want to wind up the company if the real relief he seeks can be satisfied without a winding up. In other words, unless motivated by spite, he will not ask for a winding-up order except as a last resort: see Lord Cross in *Westbourne Galleries* ([29] *supra*) at 385E–F. Section 216 was enacted to enable a minority shareholder to *avoid* having to wind up the company, if possible. There is no reason why it should not be given a purposive interpretation to achieve its object.

61 Accordingly, I am still of the view that a winding-up order should only be granted as a last resort in an oppression petition, and a court should not (not, be it noted, *may not*) make such an order where there are sufficient alternate remedies to right the wrong done to the petitioner. In my view, the oppression petition is not an or a sufficient alternative remedy to the winding-up petition.

62 For the above reasons, I discharge the *ex parte* interim injunction with costs.

Appendix

Appeal against Registrar's decision (oral judgment)

63 I now give the oral grounds for my decision. If necessary, I will give written grounds.

64 The first point is that in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it. In a case such as the present, the onus is on the plaintiffs to show why the defendant should be cross-examined. But this general rule does not apply in the case of an application for an interlocutory injunction: see *American Cyanamid* ([17] *supra*). In such cases, the burden is on the deponent why he should not be cross-examined. What do the plaintiffs want to cross-examine the defendant for?

65 They want to cross-examine him on his mental capacity to understand the nature and contents of the draft petitions as affirmed by his affidavit. They say that if they are allowed to cross-examine him they might be able to establish that he was unable to understand the contents and the nature thereof and if that were established then, of course, his affidavit is

worthless because it is an affidavit filed without understanding. That obviously is different from saying that the defendant is either telling the truth or not telling the truth because to be able to discern whether he is telling the truth or not he must have the understanding to do so. However, in submission it is now said that, "Well, we are not saying that he lacks mental capacity absolutely in the sense that he does not understand anything. We are saying that he understands sufficiently but not enough to understand the contents and nature of this action or the allegation that he is making." As I have indicated, this court has no expertise whatever to judge that kind of understanding, without the aid of expert witnesses. I think I will be wholly wrong for the court to allow the plaintiffs to embark on this kind of exercise in the hope that the defendant may not be able to demonstrate that he is sane or mentally competent in the present proceedings. It is obvious that the person who makes an allegation against the mental competency of a particular person must produce the evidence to prove that he is mentally incompetent. It is not for him to put the defendant in the box to prove that he is mentally incompetent. I really do not understand this application. That is the first point. I have said that I am not competent to decide by myself whether or not a person is competent to understand the nature and contents of his affidavit.

66 The second point is that obviously, the real purpose of this exercise is to test the veracity of the witness. It is not to test his mental capacity because it is now admitted that he has got some mental capacity. But the principle is that at this stage of the proceedings a party should not be cross-examined on that basis because it will actually go into the merits of the case, *ie* whether or not what he is saying is true on the basis of which he has filed the affidavit. I do not think I need to deal with the other cases cited by counsel for the plaintiffs, but quite clearly, looking at them, I find that they have nothing to do with interlocutory injunctions. They were cases where the cross-examination on the very fact in dispute will determine that fact in dispute. What is the fact in dispute here? It is not the fact of the competency of the defendant. It is whether there was oppression or unfair conduct. That is the point in issue in this case. Here is a collateral attack on the main issue.

67 The third point is that the application in effect is an indirect attack on the authority of the solicitors to take instructions from the defendant. It is of course stated to me very clearly that it is not the intention to impugn the authority of the solicitors in this case. But the authority cited to me, *Richmond*, clearly shows that the court will not allow a party to embark on that kind of exercise. If you have solid evidence that a person is insane and incapable of looking after his affairs, the result of which, of course, is that he cannot even commence the proceeding, then you should put the evidence down and then that evidence has to be tested by the other side.

68 I will end this oral judgment by saying that I am rather disturbed by this kind of application. It gives the impression that a person who may be

suffering from a mental defect but not to the degree that he is totally insane, but or to the extent that he lacks understanding of ordinary daily events and simple things may be found by a judge sitting alone as being incapable of sufficient understanding, and therefore any affidavit he makes cannot be used to start or support an action. To me, it may lead to a deprivation of his rights to sue. Even persons of unsound mind are not deprived of such right, as they may appear by their committee. Here is a case of an attempt to deprive a person in a better mental condition of the right to be heard at all. I do not follow that.

69 So I have come to the conclusion that this application to cross-examine on the basis of which it is put, that is whether or not he understands his affidavit is totally misconceived from the beginning. I allow the appeal with costs here and below. The order of the Registrar is reversed.

Headnoted by Arvin Lee.