EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0024
(On appeal from the Commercial Division)

In the Matter of Union Zone Management Limited

And in the matter of the BVI Business Companies Act, 2004 (as amended)

And in the matter of the Insolvency Act, 2003

BETWEEN:

[1] WANG ZHONGYONG
[2] LIN HUI
[3] ZHU YAQING
[4] GONG YUDA
[5] GAO YUNTAI
[6] LU YIMIN
[7] ZHU MINGXING
[8] QIU JIAJUN

Appellants

and

[1] UNION ZONE MANAGEMENT LIMITED
[2] JIN XIAOYONG
[3] WEN LIMING
[4] MA GUOMEI

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Mathew Collins, QC, with him, Mr. Ray Ng and
Ms. Claire-Louise, Whiley for the Appellants
Mr. James Thom, QC, with him, Mr. David Fisher and
Mr. Renee Butcher for the Second, Third and Fourth Respondents

2014: May 1;
2015: January 12.

Commercial appeal – Winding up of company – Appointment of liquidators of a company on just and equitable ground – Whether common intention or understanding among shareholders leading to quasi-partnership was formed – Whether sole or main purpose of company failed – Section 162 of the Insolvency Act, 2003 – Section 184I of the BVI Business Companies Act, 2004

Jin Biao, the father of the second respondent, Jin Xiaoyong, held the majority interest in two companies incorporated in the People's Republic of China ("PRC"), namely, Hangzhou Aida Pharmaceutical Co. Ltd ("Hangzhou Aida") and Zhejiang Guobang Pharmaceutical Co. Ltd ("Guobang"). The appellants were minority shareholders and directors in both companies. By 20th May 2004, significant changes occurred in how Hangzhou Aida and Guobang were owned and operated. This followed a decision by Jin Biao to make each of the companies a Wholly Owned Foreign Enterprise by taking their control and management offshore and look for outside investment. The investor sought and obtained was Shanghai Yashang Investment Group or Asia Business Corporation (referred to as "Yashang") and a new structure was put in place in preparation for its investment. This resulted in the incorporation of a company in the Virgin Islands called Best Nation Investments Limited ("Best Nation"), which wholly owned both Hangzhou Aida and Guobang and which was itself a wholly owned subsidiary of another Virgin Islands company, East Crown Group Limited ("East Crown"). East Crown's shares were issued to and held by Jin Xiaoyong (68.29%) (in trust for Jin Biao) and the eighth appellant, Qiu Jiajun (31.71%).

In July 2004, Yashang invested in the structure and acquired 40% of Best Nation. This investment made Yashang an indirect 40% owner of Hangzhou Aida and Guobang. The structure was underpinned by two agreements for the public listing and governing of the Best Nation investments, namely, the Framework Agreement and the Supplementary Agreement. The decision was taken to obtain a listing of Hangzhou Aida on the offshore capital market, which led to Hangzhou Aida being taken out of the Best Nation structure and transferred to the ownership of a Virgin Islands company, Earjoy Group Limited ("Earjoy"). Hangzhou Aida accordingly became wholly owned by Earjoy, which in turn was owned as to 60% by the first respondent, a Virgin Islands incorporated company called Union Zone Management Limited ("Union Zone") and as to 40% by Yashang. Union Zone shares were held by Jin Xiaoyong (68.29%) and by Qiu Jiajun (31.71%). Jin Xiaoyong held the shares for his father Jin Biao and Qiu Jiajun held as nominee for himself and the other appellants. By this time, Jin Biao and the appellants, through Union Zone, held a 60% interest in Earjoy and indirectly, majority interest in Hangzhou Aida ("the Earjoy structure"). In addition, through their ownership of East Crown, Jin Biao and the appellants held 60% of Best Nation and indirectly, controlling interest in Guobang ("the Best Nation structure").

In December 2005, a Nevada registered company, Aida Pharmaceuticals, Inc ("Aida USA"), was selected as the investment company to take Hangzhou Aida public and was inserted into the Earjoy structure between Union Zone and Earjoy. Union Zone held 56.10% of Aida USA (and indirectly majority ownership of Hangzhou Aida), Yashang held 37.4% and the remaining 6.5% was held by public shareholders. Hangzhou Aida continued to be wholly owned by Earjoy, which in turn was wholly owned by Aida USA. Jin Biao died on 14th July 2009. By this time, Union Zone was owned beneficially as to 56.7% by him and as to 43.3% by the appellants. In addition, attempts to take Aida USA had been unsuccessful and after Jin Biao's death, Yashang sold its now 31.296% interest in Aida USA to Tore Biotechnology Co. Ltd ("Tore"), which is owned equally by Ge Xiaohu ("Mr Ge"), and Li Kemin ("Mr Li"). Mr Ge was apparently a friend and occasional business associate of Jin Biao. Also following the death of his father, Jin Xiaoyong, as majority shareholder, had himself appointed as managing director of Hangzhou Aida and apparently, Guobang.

After Tore's acquisition of Yashang's interest in Aida USA, Mr Ge and the appellants took steps to exclude Jin Xiaoyong from the management of Hangzhou Aida and its underlying businesses. This was challenged and apparently resulted in successful legal proceedings being brought by Jin Xiaoyong before the Chinese Courts. Adverse findings had also been made by the Chinese Courts against Mr Ge and the second appellant, Lin Hui and eighth appellant, Qiu Jiajun. Following his reinstatement, Jin Xiaoyong, purportedly in exercise of his majority rights, took steps to and excluded Lin Hui and Qiu Jiajun from the management of Hangzhou Aida; however they continued to participate in the management of Union Zone. By this time, the second through fourth respondents collectively owned the majority (56.7%) of Union Zone and the appellants were minority shareholders (43.3%) of Union Zone, which indirectly controls but does not own Hangzhou.

By claim form filed on 13th October 2011 and amended statement of claim dated 27th July 2012, the appellants, as shareholders of Union Zone, applied under section 184I of the BVI Business Companies Act, 2004 ("Business Companies Act") for relief on the basis that the affairs of Union Zone were being conducted in a manner prejudicial to them in their capacity as members of Union Zone. They sought various orders pursuant to section 184I including an order to appoint liquidators of Union Zone on the basis that it was just and equitable to do so and alternatively, that the appellants buy out the shares of the second through fourth respondents. The appellants also independently applied under section 159(1) of the Insolvency Act, 2003 ("Insolvency Act") for the appointment of liquidators of Union Zone on the just and equitable ground pursuant to section 162(1)(b) of the Insolvency Act.

The appellants' pleaded case for a just and equitable winding up of Union Zone was based on: (1) a common intention or understanding leading to the existence of a quasi-partnership between Jin Biao and the appellants, which common intention continued after Jin Xiaoyong joined the management of Union Zone and its subsidiaries after his father's death, and which they allege was breached when the appellants were excluded from all aspects of the management of Union Zone and its subsidiaries and (2) the sole purpose for which Union Zone was incorporated was to obtain a public listing, and this had failed. Following the trial, the learned trial judge rejected both limbs of the appellants' claims for

winding up on the just and equitable ground. The appellants were aggrieved by the trial judge's decision and appealed his decision, but relying only on section 162 of the Insolvency Act and alleging in part that the business of Hangzhou was in disarray, a fact not pleaded in their claim.

Held: dismissing the appeal and awarding costs to the respondents at two-thirds of the costs in the court below, that:

1. As a matter of principle and rules of pleading, a party is confined to their pleaded factual grounds for the basis of a just and equitable winding up and it is those matters pleaded which are open to be considered by a court. However, although a party seeking the winding up of a company on the just and equitable ground may not have specifically pleaded the state of affairs of a company, this ought not to be completely ignored by a court. The important consideration for a court is the cumulative effect of matters specifically pleaded. In this appeal, although the appellants did not allege mismanagement and resulting disarray in the business of Hangzhou Aida as a pleaded basis for a just and equitable winding up of Union Zone, it was still open to this Court to consider these allegations as part of the cumulative effect of what was specifically pleaded.

   In re Fildes Bros. Ltd [1970] 1 WLR 592 at 593 applied; **Ebrahimi v Westbourne Galleries Ltd and Others** [1973] AC 360 applied.

2. Just and equitable provisions for winding up a company enable a court to subject the exercise of legal rights to equitable considerations which make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. There are a plethora of circumstances to which the equitable considerations may be applied. A court must look to the common law for the types of circumstances which have been found to give rise to the application of the just and equitable ground when considering the winding up of a company and exercising its discretionary powers and remedies under sections 162 and 167 of the Insolvency Act. However, a court must be cautious to apply equitable principles of fairness to commercial transactions or relations. It is not the role of the court to impose its particular concept of what is fair on the parties and their transactions. The concept must be applied judicially having regard to the particular context which the judge has to address and based on rational principles.

   Ebrahimi v Westbourne Galleries Ltd and Others [1973] AC 360 applied; **O'Neill and another v Phillips and others** [1999] 1 WLR 1092 applied.

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3. The fact that a company is a small or private company is not enough to engage equitable considerations. The superimposition of equitable considerations would require something more; this may include an association formed or continued on the basis of a personal relationship; an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business or restriction upon the transfer of the members' interest in the company. In this appeal, the trial judge was right to find that on the facts of the case there was no

common superimposed understating between the original parties for mutual participation in the business affairs of Union Zone and any arrangement between the parties could not have survived the absorption of Hangzhou Aida into the Best Nation structure.

Ebrahimi v Westbourne Galleries Ltd and Others [1973] AC 360 applied

4. The allegation that the business affairs of a company are in disarray does not of itself lead to a winding up order on the just and equitable ground. Further, in this appeal, although Hangzhou Aida's business may be inactive for whatever reasons, the businesses of some of its underlying companies are still active. Accordingly, such a consideration weighs against any claim that it would be just and equitable to wind up Union Zone. As such the learned judge was correct to reject this basis for winding up Union Zone.

5. An allegation of frustration of purpose if proved would normally be a ground for winding up a company on the just and equitable ground. However, in this appeal, the appellants' claim that the sole purpose of Union Zone was to obtain a public listing and that such purpose was frustrated or failed could not be supported by the facts of the case. The decision to create the new corporate structure involved not only the possible public listing, but also the sourcing of a major cash investment from a third party into the companies and their business. Further, the admitted failure to achieve a public listing was a failure of one of the purposes for Aida USA and the Earjoy structure. The learned trial judge was accordingly correct in his finding that this was not the sole or main purpose of Union Zone and accordingly, in his rejection of this ground.

6. The principle that the affairs of a company can include the affairs of a subsidiary and that a court has the power to make an order regulating the future management of the affairs of the holding company where it is the affairs of the wholly owned subsidiary that have been conducted in an unfairly prejudicial manner, is only applicable in a situations involving a holding company and its subsidiary. Union Zone is not a holding company of Hangzhou Aida, but rather the majority shareholder of Aida USA which indirectly is the holding company, of Hangzhou Aida. Further, this does not relate to the Best Nation structure under which Guobang is directly owned and there is no misconduct alleged at the level of Union Zone itself. The learned trial judge accordingly rightly rejected this basis for winding up Union Zone on the just and equitable ground.

Rackind and others v Gross and others [2005] 1 WLR 3505 applied.

JUDGMENT

[1] **FARARA JA [AG.]:** This is an appeal from the decision of Bannister J [Ag.] delivered 16th October 2013, after a trial lasting some five days, whereby he dismissed the appellants' claims made in the claim form filed 13th October 2011 and the amended statement of claim dated 27th July 2012 ("the claim"). By the claim, the appellants, as shareholders of the first respondent, Union Zone Management Limited ("Union Zone"), a company incorporated under the laws of the Virgin Islands on 28th July 2004, sought various orders pursuant to section 184I of the **BVI Business Companies Act**, 2004 ("Business Companies Act")[1] and an order pursuant to section 162(1)(b) of the **Insolvency Act**, 2003 ("Insolvency Act")[2] appointing liquidators of Union Zone on the just and equitable ground.

[2] In the Commercial Court, the appellants applied under section 184I of the **Business Companies Act** for relief on the basis that the affairs of Union Zone were being conducted in a manner prejudicial to them in their capacity as members of Union Zone ("the unfair prejudice claim"). This included an order that liquidators be appointed of Union Zone on the basis that it would be just and equitable to do so and, alternatively, that the claimants buy out the shares of the second through fourth respondents, the majority shareholders of Union Zone. The appellants also applied independently under section 159(1) of the **Insolvency Act** for the appointment of liquidators of Union Zone on the just and equitable ground pursuant to section 162(1) of the said Act. Both limbs of their claim were rejected by the learned judge in a well-reasoned judgment.

[3] Before us, the appellants relied only on the just and equitable ground for appointment of liquidators pursuant to section 162(1)(b) of the **Insolvency Act**. In oral argument, Mr. Collins, QC, who appeared for the appellants, confirmed that the appellants' case before us is based "only" on section 162.[3] Further, in

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[1] Act No. 16 of 2004 amended by 26/2005, Laws of the Virgin Islands.
[2] Act No. 5 of 2003, Laws of the Virgin Islands.
[3] Transcript of Appeal Proceedings, pp. 122 I, 11 to 25 and 123 L 1 to 2.

answering a question from the Court, as to whether there was any option available to the Court other than winding up on the basis of just and equitable, Mr. Collins, QC, stated:-

> "The short answer to that is that I haven't, on that basis, I can't because the judge has found that I haven't got a common intention and understanding, the breach of which would entitle me to relief under [section] 184[I]…"

[4] Indeed, the learned judge expressly did not find, on the facts as accepted by him, the common intention or understanding pleaded by the appellants in their amended statement of claim. At paragraph 28 of his judgment, having reviewed the evidence of the various witnesses on this issue, the judge concluded:-

> "In my judgment, upon the evidence which has been offered in this case, the shareholders in Union Zone were never bound together by an agreement or understanding other than that set out in Union Zone's Articles of Association."

[5] And at paragraph 29 the learned judge continued:

> "It follows from that conclusion that there was no understanding (of the general nature pleaded) to which Jin Xiaoyong can have agreed to become a party when he became a director of Hangzhou Aida in September 2009. It further follows that his exclusion of Qiu Jiajun and Lin Hui from the management of Hangzhou Aida in 2010 infringed or disappointed no rights, entitlements or legitimate expectations of any of the Claimants as members of Union Zone."

[6] In relying only on section 162(1)(b) of the **Insolvency Act**, Mr. Collins, QC, conceded in oral argument, that the appellants would have great difficulty successfully appealing against what are essentially findings of fact by the learned judge as to no common intention or understanding. However, the appellants contend that they 'get home' on their case for a just and equitable winding up of Union Zone under section 162(1)(b), on the basis of the facts which the judge actually found.

[7] Specifically at paragraph 25, the learned judge, in considering whether the appellants (the claimants in the court below) had satisfied him as to the existence of a quasi-partnership between the shareholders of Union Zone and its

subsidiaries, goes on to state that what certain of the appellants had described in their evidence as prevailing when the second respondent's father, Jin Biao, was alive and involved in the companies and their businesses:

> "was a golden age of managerial harmony in Hangzhou Aida and Guobang under the benevolent direction of Jin Biao as *primus inter pares*, itself falling short of any understanding upon the basis of which they, or any other of the Claimants, acquired their shares in either of those companies, or tending to establish that those companies were run on the basis of some overriding understanding in the nature of a quasi partnership."

[8] In seeking to persuade the Court as to his clients' case for a just and equitable winding up of Union Zone under section 162(1)(b) of the **Insolvency Act**, Mr. Collins, QC, places heavy reliance on three elements or factual matters in order to ground such a conclusion. However, before getting there, I must briefly address the salient background facts and relevant corporate history leading to the then current Union Zone structure, and address the pleading point raised by Mr. Thom, QC, learned counsel for the second to fourth respondents.

Background

[9] The relevant factual background, including the corporate history and structures which existed at various points in time, are accurately and succinctly described and encapsulated by the learned judge in his judgment. These matters were not the subject of any dispute before us. Accordingly, for the purpose of this judgment, we adopt the descriptions and chronology of events as summarised by the learned judge, particularly at paragraphs 9 through 17 of his judgment. I will at times refer specifically to certain of the relevant background facts when dealing with specific issues raised in the appeal.

The Corporate Structures and Businesses

[10] The initial corporate structure comprised two companies incorporated in the Peoples Republic of China ("PRC"), namely, Hangzhou Aida Pharmaceutical Co. Ltd ("Hangzhou Aida"') and Zhejiang Guobang Pharmaceutical Co. Ltd ("Guobang"). Each of these two companies wholly owned certain PRC subsidiary

companies which, in turn, operated separately, certain successful pharmaceutical and other businesses in the PRC. Jin Biao, the father of the second respondent, was the *primus inter pares*, the first among equals, although in some important legal respects he was not 'equal' with his fellow shareholders. He held the majority interest in both Hangzhou Aida and Guobang, and the appellants, who were minority shareholders and directors, participated with Jin Biao in reaching consensual decisions regarding both sets of companies and their businesses. This is what the learned judge characterised as 'the golden age of managerial harmony'.[4]

[11] By 20th May 2004, major changes had occurred in the manner in which Hangzhou Aida and Guobang were owned and operated. Following a decision by Jin Biao to make each of these companies 'a Wholly Foreign Owned Enterprise' by taking their control and management offshore, and to attract and include outside investment, a new structure of companies was put in place to take-over both Hangzhou Aida and Guobang. This structure has been referred to as 'the Best Nation structure' and saw the incorporation of a BVI company, Best Nation Investments Limited ("Best Nation"), which was a wholly owned subsidiary of another BVI company, East Crown Group Limited ("East Crown"). Initially, shares in East Crown were allotted as to 68.29% to the second respondent, Jin Xiaoyong (in trust for his father Jin Biao) and 31.71% to the eighth appellant, Qiu Jiajun. East Crown wholly owned Best Nation, which in turn wholly owned both Hangzhou Aida and Guobang.[5]

[12] The outside investor sourced was Shanghai Yashang Investment Group or Asia Business Corporation (referred to as "Yashang"). Its investment was made in July 2004 in exchange, inter alia, for 40% of Best Nation, thereby making Yashang an indirect 40% owner of Hangzhou Aida and Guobang, and their respective underlying businesses. East Crown then owned 60% of Best Nation. East Crown was still owned as to 68.29% by the second respondent, Jin Xiaoyong (in trust for

[4] Judgment, Record of Appeal, Core Bundle, Tab 2 at para. 25.
[5] See Schedule 1, Group Chart on 20th May 2004, Record of Appeal, Bundle B, p. 136.

Jin Biao) and 31.71% as to the eighth appellant in his own right.[6] The same structure was made applicable to the ownership of Guobang.

[13] Underpinning this structure and in preparation for obtaining a public listing, two agreements were entered into. The first, the Framework Agreement,[7] was entered into on 13th February 2004 and the second, the Supplementary Agreement[8], was executed on some date in 2004. Importantly, the Framework Agreement, made between Dragonlink Asia Limited (a Yashang entity), Best Nation and East Crown, sets out the understandings and agreements reached to: (1) increase the registered capital of Best Nation by the cash investment from Yashang; (2) jointly procure the earliest listing of Best Nation on the offshore capital market by a reverse takeover and facilitate the further financing of Best Nation; and (3) seek to establish a jointly cooperative relationship and procure the further development of the core business of Best Nation and its subsidiaries.

[14] It is expressly provided in clause 3.5 of the Framework Agreement that once the capital increase had been accomplished, the board of Best Nation shall be restructured, as well as the boards of Hangzhou Aida and Guobang, in proportion of the agreed 60/40 ownership of Best Nation, so that each of East Crown and Yashang will be able to appoint 3 and 2 directors respectively on the board of each of these companies. In short, the Framework Agreement provided not only for the investment by Yashang in Best Nation, but directly and indirectly in the entire Best Nation structure, down to and including Hangzhou Aida and Guobang, once Yashang had concluded the purchase of a 40% interest in Best Nation. It is common ground that Yashang made the contemplated or agreed investment in Best Nation and was issued 40% of its shares. It is also common ground that Yashang made appointments to the boards of Best Nation and Hangzhou Aida and Guobang respectively, as contemplated by and in exercise of its rights under the Framework Agreement and the Supplementary Agreement.

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[6] See Schedule 1A, Group Chart on 29th July 2004, Record of Appeal Bundle B, p. 137.
[7] See Record of Appeal, Bundle C Tab 1, pp. 1 to 15.
[8] See Record of Appeal Bundle C Tab 2 pp. 16 to 26.

[15] By clause 4.1 of the Framework Agreement, the efforts to obtain or achieve a listing of Best Nation on the offshore market by reverse takeover was stated as joint, which all parties were obligated to 'fully support'. However, clause 4.3 makes it clear that the 'specific arrangement' for this listing was the responsibility of Yashang, with Best Nation and East Crown providing 'assistance and cooperation'. The target period for achieving the public listing was 'within the year 2004'. This may have been a rather ambitious and perhaps unrealistic goal. However, by clause 4.2 it was agreed that if the parties fail to achieve the public listing of Best Nation within 2 years of execution of the Framework Agreement, any of Best Nation and East Crown or an investor designated by either of them, may buy back the 40% shares issued to Yashang in Best Nation.

[16] It is common ground that the decision was taken to only obtain a listing of Hangzhou Aida on the offshore capital market. Accordingly, this led to Hangzhou Aida being taken out of the Best Nation structure and transferred to the ownership of a BVI company called Earjoy Group Limited ("Earjoy"), leaving Guobang in the Best Nation structure, still owned in the proportions of 60% to East Crown and 40% to Yashang. Accordingly, Hangzhou Aida became wholly owned by Earjoy, which in turn was owned as to 60% by Union Zone and 40% by Yashang (8% held through its BVI company, Winsummit China Growing Holdings Ltd ("Winsummit"), 20% through another BVI company Pan Asia Strategy Investment Co. Ltd ("Panasia") and the remaining 12% held by various individuals nominated by the ABC Group)[9] Thus, as of 20th May 2005, Jin Biao and the appellants, through Union Zone, held a 60% interest in Earjoy and, indirectly, majority interest in Hangzhou Aida ("the Earjoy structure"). Likewise, through their ownership of East Crown, Jin Biao and the appellants held 60% of Best Nation and, indirectly, the controlling interest in Guobang (the Best Nation structure).

[17] These two separate corporate structures are accurately summarized in the judgment. However, as was pointed out by Mr. Thom, QC, learned counsel for the second through fourth respondents, during his submissions, the corporate charts

[9] See Schedule 2, Group Chart on 20th May 2005, Record of Appeal, Bundle B p.138.

listed as Schedule 1 and Schedule 1A,[10] inadvertently omit to include, in addition to the ownership of Hangzhou Aida by Best Nation, its 100% ownership of Guobang at the relevant time. As regards the appellants and the respondents, their interests, as shown on the charts, are held in the top tier of both structures, with the investor Yashang at the second tier. Prior to the death of Jin Biao unexpectedly on 14th July 2009, he held either directly or beneficially 56.7% of Union Zone and the appellants 43.3%.

[18] By December 2005, the parties had selected as the investment company to take Hangzhou Aida public, a Nevada registered corporation, Aida Pharmaceuticals, Inc ("Aida USA") which was inserted into the Earjoy structure between Union Zone and Earjoy. Hangzhou Aida remained wholly owned by Earjoy, which was in turn wholly owned by Aida USA. Union Zone now held 56.10% of Aida USA and indirectly majority ownership of Hangzhou Aida. The other 43.9% interest in Aida USA was held as to 37.4% by Yashang and 6.5% by public shareholders. Union Zone continued to be owned by Jin Biao and the second appellant in the same proportions as before.[11]

[19] This structure continued in place until the death of Jin Biao on 14th July 2009. By this date, Union Zone's ownership of Aida USA (and hence Hangzhou Aida) had been reduced to 51.94%, with Yashang owning 31.296%, and the interest of public shareholders rising to 16.764%. Union Zone itself was owned beneficially by Jin Biao as to 56.1% and by the appellants as to 43.3%.[12]

[20] As of the date of trial, the appellants were minority shareholders (43.3%) in Union Zone which indirectly controls Hangzhou Aida. As the learned judge put it at paragraph 2, of his judgment, the appellants (second through to fifth claimants in the court below) are 'minority shareholders in a company, Union Zone, which indirectly controls, although it does not own, Hangzhou Aida and its mainland PRC subsidiaries.'

[10] Record of Appeal, Bundle B pp 136 to 137.
[11] See Schedule 3, Group Chart on December 2005, Record of Appeal, Bundle B p. 139.
[12] See Schedule 4, Group Chart on 14th July 2009, Bundle B, p.140.

[21] The other shareholders of Union Zone as at the date of trial were the second through fourth respondents who, collectively, own the majority (56.7%) of the company. Union Zone, which took no part in the proceedings below or in this appeal, owns 51.94% shareholding in Aida USA, which through its ownership of Earjoy, indirectly owns Hangzhou Aida.[13]

[22] The other shareholders of Aida USA are Tore Biotechnology Co. Ltd ('Tore'), a company registered in the BVI holding 31.296%, and various unidentified members of the public who collectively own the remaining 16.764%. Tore was not a founding shareholder of Aida USA. It purchased 31.296% of the shares in Aida USA from Yashang after attempts to take the company public had been unsuccessful.

[23] On the Guobang side, it also owns indirectly, veterinary pharmaceutical businesses in the PRC. Guobang and its businesses are part of the Best Nation structure.

The Framework Agreement and the Supplementary Agreement

[24] Both agreements were entered into in 2004. I have already addressed certain provisions in the Framework Agreement which made provision for increasing the capital of Best Nation and the 'joint efforts' to accomplish or achieve the offshore listing of Best Nation and hence Hangzhou Aida. These efforts, led by Yashang as the new investor, eventually obtained a listing for Best Nation, through Aida USA, in a limited offshore or public market, apparently not what was envisioned by Jin Biao when the decision to take the ownership of Hangzhou Aida offshore was made in 2004.

[25] The Supplementary Agreement was entered into between East Crown (the then 100% owner of Best Nation) and Winsummit, a Yashang company. This was prior to Hangzhou Aida being transferred to the ownership of Earjoy. It provided, in brief, for the 'operational issues of capital increase' of Best Nation, as

[13] See Schedule 5, AIDA Group Corporate Chart as at the date hereof, Bundle B, p.141.

contemplated by the Framework Agreement. It confirmed that the conditions for the capital increase provided for in the Framework Agreement had been 'largely satisfied'[14] and hence Yashang will hold its 40% shareholding in Best Nation.

[26] The Supplementary Agreement also provided, inter alia, for the restructuring of the board of Best Nation upon the capital increase being accomplished, and for Yashang having the right to appoint directors to the board of Best Nation in proportion to its shareholding.[15] This meant essentially, that East Crown would have the right to appoint 3 of 5 and Yashang 2 of 5 directors to the board of Best Nation and, most importantly, for the restructuring of the boards of Hangzhou Aida and Guobang to reflect an identical proportion of directors appointed by each of East Crown and Yashang. It also provided for the respective articles of association of each of these companies to be amended to reflect this agreement.[16] Also of importance, is the right granted to Yashang to supervise the business operations of Hangzhou Aida and Guobang.[17] Finally, by clause 10, Yashang undertook 'to continuously and proactively promote the earliest listing and refinancing of BEST NATION on offshore capital market by a reverse takeover…'.

[27] The two agreements provided the legal framework for and were an integral part of, a 'watershed' period in the history of these two companies, Hangzhou Aida and Guobang, and their respective businesses. They represented a major shift in the way in which both companies were being owned indirectly and managed. Both agreements provided the framework and terms under which these important changes were to occur and the rights of each party, namely, East Crown and Yashang, under the new ownership structures applicable to both businesses.

[28] When Hangzhou Aida was taken out of the Best Nation structure and transferred to the ownership of Earjoy in May 2005, no new agreements were entered into. However, it is accepted, as the learned judge did at paragraph 14 of his judgment,

[14] Supplementary Agreement, Record of Appeal, Bundle C ,Tab 2 at clause 1.
[15] Ibid, clause 6.
[16] Ibid, clause 6.
[17] Ibid, clause 8 and 9.

that the Best Nation arrangements were intended to and did apply to the Earjoy group, including Union Zone.

Steps taken Post Death of Jin Biao

[29] As the learned judge surmised at paragraph 17 of his judgment, after the death of Jin Biao (no public listing having been achieved), Yashang sold its 31.296% interest in Aida USA to Tore, which is owned equally by Ge Xiaohu ("Mr. Ge") and Li Kemin ("Mr. Li"). Apparently, Mr. Ge was a friend and occasional business associate of Jin Biao during his lifetime. Also, following the death of his father, the second respondent, Jin Xiaoyong, as majority shareholder, had himself appointed managing director of Hangzhou Aida and, apparently, Guobang.

[30] The evidence also discloses that after the death of Jin Biao and the acquisition by Tore of Yashang's 31.296% shareholding in Aida USA, Mr. Ge and the appellants took certain steps to exclude Jin Xiaoyong, the second respondent, from the management of Hangzhou Aida and its underlying businesses. As the learned judge found, Mr. Ge funded the proceedings brought in the court below, although this is not material to the issue to be determined.[18] Perhaps more importantly, the appellants, acting in concert with Mr. Ge, excluded the second respondent from the management of Hangzhou Aida and appointed Mr. Ge as its chairman or legal representative. This was challenged and apparently resulted in successful legal proceedings being brought by the second respondent before the Chinese Courts for his reinstatement.[19]

[31] In this regard, Mr. Thom, QC, has provided us, as an annexure to the second to fourth respondents' skeleton arguments, with a translation of a copy of the reconsideration decision of the Zhejiang Administration for Industry and Commerce,[20] upholding the decision of the Industry and Commerce Bureau of

[18] Judgment, Record of Appeal, Core Bundle, Tab 2 at para. 17.
[19] Ibid, para. 6.
[20] See Zhejiang Administration for Industry and Commerce Reconsideration Decision ZGSF [2012] No. 3, Supplementary Core Bundle, Tab 1, pp. 1 to 10.

Hangzhou as being 'correct with legal procedures … and appropriate Penalty.'[21] In doing so, the tribunal made certain adverse findings as to submission of false materials, fabrication of loss of Business Licence and fraud against Mr. Ge and the second and eighth appellants. The latter are the same two persons who were subsequently excluded by the second respondent from the management of Hangzhou Aida, which act the appellants rely upon in these proceedings as constituting, inter alia, a breach of the alleged common understanding regarding the management of Union Zone and accordingly, a basis for the Court to make an order for the just and equitable winding up of Union Zone.

[32] Following his reinstatement, the second respondent, purportedly in exercise of his majority rights, took steps to and has excluded the second and eighth appellants, namely, Lin Hui and Qiu Jiajun, from the management of Hangzhou Aida. These facts were admitted by counsel for the second to fourth respondents, Mr. Thom, QC, during oral argument before us.[22] However, they continued to participate in the management of Union Zone.

The Pleading Point

[33] Before us, the appellants sought to rely, in support of their arguments for a reversal of the judge's decision not to appoint a liquidator of Union Zone, on the just and equitable ground, that the business of Hangzhou Aida is in 'disarray'.[23] This is also mentioned at paragraph 4.9 of the skeleton argument of the appellants where they seek to lay the cause of this state of affairs directly at the feet of the second respondent. They contend that he had not taken the steps necessary to restart the business, which is not producing anything. The learned judge at paragraph 32 of his judgment remarked:

> "The Claimants retain their shares in Union Zone and the fact that Hangzhou Aida is not presently producing is not, in my view, a ground for winding up Union Zone in circumstances where Jin Xiaoyong gave evidence, which I have no reason to reject, that he intends to restart production in due course using a new supplier."

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[21] Ibid, p. 8.
[22] Transcript of Appeal Proceedings, pp. 131 L, 10 to 12.
[23] Skeleton Argument of the Appellants, Core Bundle, p.125 at para. 3.4(iv).

[34] At paragraph 16 of their skeleton argument, the second to fourth respondents take a pleading point. They say that the appellants cannot rely on factual grounds for a just and equitable appointment of liquidators that were not part of their pleaded case in the court below. Of course, as a matter of principle, this is correct. One such matter is the appellants' reliance on the inactivity of the business of Hangzhou Aida and the alleged conduct of the second respondent in failing to bring about its restoration. In support of this pleading point, the second to fourth respondents recount that while initially, extensive allegations of misconduct on the part of the second respondent had been pleaded at paragraphs 13 to 33 in the original statement of claim, these were subsequently abandoned when extensive amendments to this pleading were made in July 2012.[24] Accordingly, their argument goes, the appellants are precluded from relying on allegations regarding Hangzhou Aida being in disarray as a result of its business being inactive, and the alleged inability or failure of the second respondent to bring about its restoration.

[35] Mr. Thom, QC, in his written and oral submissions before us,[25] argued that the appellants' pleaded case below for a just and equitable winding up of Union Zone rested on two basis, namely, (i) the existence of a common understanding and quasi-partnership regarding the management of Hangzhou Aida and Guobang, which common understanding was said to have been breached by the second respondent when he took charge following the death of his father Jin Biao; and (ii) the sole purpose for which Union Zone had been incorporated, namely, to achieve a public listing, had failed.[26]

[36] As regards the pleaded case at paragraph 6 of the amended statement of claim of a common intention or understanding leading to the existence of a quasi-partnership among the original investors in Hangzhou Aida and Guobang,

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[24] See Skeleton Argument of the Respondents, Record of Appeal, Supplementary Core Bundle, Tab 2, at para. 16.
[25] Transcript of Appeal Proceedings, pp. 127 et sequi.
[26] See Skeleton Argument of the Respondents, Record of Appeal, Supplementary Core Bundle, Tab 2, at para. 14.

Mr. Thom, QC, drew our attention specifically to the answers given by the appellants to the respondents' request for further and better particulars.[27] I set out in full below the answers given by the appellants to the questions posed, that is, the date on which the alleged understanding was formed, whether it was oral or in writing and, if oral, whether it was formed at a meeting, over the telephone or by other mode(s), and who were present at such meeting:

> "Answer:
> The understanding was formed:
> 1. at a series of meetings between C8, the Deceased and Shanghai Yashang Investment Group, starting at the beginning of 2003. At these meetings C8 and the Deceased represented the interests of C1-C7;
>
> 2. at a series of subsequent meetings between C1-C8 and the Deceased throughout 2003 and early 2004 culminating in the creation of the Best Nations Structure, and execution of the Framework Agreement dated 13 February 2004 and the Supplemental Agreement signed shortly thereafter;
>
> 3. a series of meetings between C1-C8, the Deceased [and D2] throughout 2004 and early 2005 culminating with the creation of the Earjoy Structure, and the execution of the Confirmation of Stock Right and Proportion of Stock right dated 22 February 2005."

[37] By contrast, Mr. Collins, QC, at paragraph 3.4 of the appellants' skeleton argument, states that his clients' case was that, 'in all the circumstances' a winding up order on the just and equitable ground ought to be made. Specifically, he states, the circumstances on which they relied for such an order were: (1) exclusion from Union Zone; (2) exclusion in breach of a common intention and understanding giving rise to a legitimate expectation; (3) failure to achieve a public listing, being the sole purpose of Union Zone; and (4) Hangzhou Aida's business being in disarray.

[38] The pleading point made by the respondents, as I understand it, is that the appellants are to be confined to their case as pleaded and to the answers given in response to the respondents' request for further and better particulars in the

[27] See Answers to the Request, Record of Appeal, Bundle A, Tab 6 pp.99 to100.

proceedings in the court below as to the alleged 'common intention'. They contend that this was the case they came to meet. It did not include any reliance on the inactivity of the business of Hangzhou Aida or the alleged inability or ineptitude of the second respondent to properly manage Hangzhou Aida and to bring about the restoration of its business. Likewise, it was not the appellants' pleaded case that the second respondent 'conspired' to starve the business of Hangzhou Aida of essential chemicals for its production process,[28] a matter which Mr. Collins, QC, expressly did not rely on before us.

[39] In this regard, it is to be observed that the learned judge in his judgment identified two pleaded grounds as the basis for an order winding up Union Zone. In relation to the section 184I of the **Business Companies Act** unfair prejudice ground, the pleaded case was the existence of a common intention or understanding among the shareholders as to the management of Union Zone and Hangzhou Aida, giving rise to the existence of a quasi-partnership at the level of both companies, and a breach of the terms of that common understanding by the second respondent when he used his majority position to exclude the appellants from all aspects of the group's business. Secondly, as regards the application under section 162 of the **Insolvency Act** for a winding up on the just and equitable ground, the appellants' pleaded case was that the sole purpose for which Union Zone was incorporated was to provide an investment platform in Aida USA for its eventual public listing, which purpose has failed or became impossible to achieve.[29] Additionally, as observed above, the learned judge went on to consider, and to reject, at paragraph 32, as a basis for a finding of just and equitable winding up of Union Zone, any argument based on the appellants being excluded from participation in the management of Hangzhou Aida or Union Zone or of Hangzhou Aida being in 'disarray' or its business being currently inactive.

[40] I agree with Mr. Thom, QC, that, as a matter of principle and rules of pleading, the appellants cannot seek to expand upon their pleaded factual grounds or basis for

[28] Transcript of Appeal Proceedings, pp. 133, 1 to 4.
[29] See judgment at paras. 6 and 7.

a just and equitable winding up of Union Zone.[30] In this regard, I find that the matters pleaded, whether under the unfair prejudice ground or the just and equitable ground, are open to be considered by the Court when determining whether it is just and equitable to wind up Union Zone under section 162 of the **Insolvency Act**.

[41] I also agree that the appellants are confined to the specifics of the common intention or understanding pleaded, and as further particularized in their answers to the requests for further and better particulars. The appellants' pleaded case for a just and equitable winding up of Union Zone is to be found in paragraphs 6,7,8, 12 and 13 of the amended statement of claim. From these paragraphs, one discerns two clear pleaded grounds for the relief sought. The appellants based their case on (1) a common intention or understanding leading to the existence of a quasi-partnership, which common intention continued after the second respondent joined in the management of Union Zone and its subsidiaries after his father's death, and which was breached when the appellants were excluded from all aspect of the management of Union Zone and its subsidiaries (paragraphs 6, 7, 9, 12 and 13); and (2) the sole purpose for which Union Zone was incorporated, namely, to obtain a public listing had failed (paragraph 8).

[42] Nowhere is the alleged mismanagement of and resulting 'disarray' in the business of Hangzhou Aida pleaded as a basis for a just and equitable winding up of Union Zone. As regards paragraphs 6 and 7, the allegation of common intention is based on (i) an entitlement to share in the management of the companies; (ii) an entitlement to be consulted on all major developments in or business decisions of the companies; and (iii) an understanding that the companies would not undertake any substantial business or commercial activities to which the appellants had not consented.

[43] However, while the matter of the business inactivity of Hangzhou Aida was not specifically pleaded by the appellants as a basis for a winding up order on the just

[30] See In re Fildes Bros. Ltd [1970] 1 WLR 592 at 593.

and equitable ground, I do not agree that this 'state of affairs' ought to be completely ignored. The important consideration, as I see it is, what is the cumulative effect of the matters specifically pleaded, and as found by the learned judge, taking into account that the business of Hangzhou Aida is not currently operational.

[44] I am somewhat fortified in this approach by the dicta of Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd and Others**,[31] where, having recounted the historical development of the 'just and equitable' ground for winding up companies over the first 50 years, the Law Lord went on to roundly reject two other restrictive interpretations as follows:

> "First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words remain general and not be reduced to the sum of particular instances. Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders."

The Issues for Determination in this Appeal

[45] The issues for determination are:

(1) Whether there was a common intention or understanding between Jin Biao and the appellants, with regard to the management and decision-making in Hangzhou Aida and Guobang, of the type pleaded by the appellants such as to give rise to the existence of a quasi-partnership in Hangzhou Aida and Guobang.

(2) If the answer to (1) is yes, whether that common intention and understanding survived and persisted after the decision was made by Jin Biao (with the concurrence of the appellants) to take the ownership of

[31] [1973] AC 360 at pp 374H to 375A.

Hangzhou Aida and Guobang offshore, to find a new investor in the business and to obtain a public listing and, in furtherance or implementation of that decision, a new corporate structure was put in place involving the incorporation of Earjoy and Union Zone and Aida USA, the issuance of shares in Aida USA to Yashang, the investment of 32 million RMB by Yashang in Hangzhou Aida and Guobang as contemplated by the Framework Agreement and the exercise by Yashang of its rights under the Supplementary Agreement to appoint its proportionate share of directors in Aida USA, Hangzhou Aida and Guobang.

(3) Whether the appellants have been excluded from participation, as minority shareholders, in the management of Union Zone, such as to amount to a breach of that common intention or understanding by virtue of the exclusion of the second and eighth appellants from participation in the management of Hangzhou Aida and Guobang, as a result of steps taken by the second respondent representing the de facto majority shareholder.

(4) Whether the achievement of a public listing was the sole purpose of Union Zone and, if so, whether the admitted failure to achieve this purpose warrants the just and equitable winding up of Union Zone.

(5) What effect, if any, should or ought to be given to the fact that Hangzhou Aida's business has become inactive under the management of the second respondent and whether this singly, or cumulatively with other factors, warrants the just and equitable winding up of Union Zone.

The Law on Just and Equitable Winding Up

[46] Section 162 of the **Insolvency Act** states *in pari materia*:

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

(b) the Court is of the opinion that it is just and equitable that a liquidator be appointed; or
(c) …"

[47] The **Insolvency Act** contains no guidance as to what constitutes 'just and equitable' for the purpose of an order appointing liquidators of a company. There is nothing unusual about this. Equitable principles can only be stated in general terms, as they are to be applied to the varying and particular circumstances of each case.[32] It would be impossible to conceive of the plethora of circumstances, and most undesirable to limit the categories, to which these equitable principles may be applied. A court must look to the common law for the types of circumstances which have been found to give rise to the application of the 'just and equitable' principle, as it relates to the winding up of companies, when exercising its discretionary powers and remedies under sections 162 and 167 of the **Insolvency Act**.

[48] In this regard, several categories giving rise to the application of the just and equitable principle have emerged from the cases. These include expulsion or exclusion from the management of the company in circumstances of a quasi-partnership, loss of substratum and deadlock. The various categories are by no means exhaustive of the circumstances in which these equitable principles are to be applied. Furthermore, in the exercise of the court's statutory powers, it is important to keep in mind the range of powers and remedies available to a court under section 167(1), including but not limited to appointing a liquidator. In particular, a court may dismiss an application for appointment of liquidators over a company, even where a ground upon which the court could appoint a liquidator has been proved to its satisfaction (section 167(1)(b)).

[49] As to the 'just and equitable' ground for winding up a company, the *locus clasicus* decisions, both of the House of Lords, are: **In re Westbourne Galleries Ltd** and **O'Neill and another v Phillips and others**.[33] In the former, Lord Wilberforce

[32] See Hollington on Shareholders' Rights 7th Ed para 3-04.
[33] [1999] 1 WLR 1092.

instructively explained the juxtaposition and interplay between the strict rights of shareholders as set out in the **Companies Act 1948** and the articles of the company, and the application of equitable principles to the personal rights, expectations and obligations of its members inter se. At page 379B to D, the learned Law Lord opined as follows:

> "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."

[50] This statement of principle finds its parallel in the speech of Lord Hoffman in **O'Neill v Phillips**, a case dealing with unfair prejudice. At pages 1098H to 1099A he puts it this way:

> "The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

[51] In this oft cited passage from the speech of Lord Wilberforce in **In re Westbourne Galleries Ltd**,[34] he concluded that 'something more' was required in order to engage equitable principles:

> "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 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."

[52] The relationship and rights of shareholders of a company *inter se*, is a contractual one as set out in the articles of association of the company and any applicable and enforceable shareholders' agreement, supplemented by relevant statutory provisions.[35] It is a fundamental principle of company law that the majority rules. This means that the will of the majority, as expressed by and through the exercise of their voting power in general meeting, or by any other method of voting sanctioned by the articles, but subject to such constraints or limitations on voting as may be prescribed under any applicable shareholders' agreement, will generally prevail. This is the legal position in which any minority find themselves.[36] The principle of 'majority rule' is subject to certain exceptions or limitations recognised by statute, for example, where the act or decision of the majority is ultra vires or amounts to an oppression of the minority or unfairly prejudices the

[34] At p. 379E to G.
[35] See Hollington on Shareholders' Rights 17th Edition, at para. 2-08.
[36] Ibid, para. 2-11.

minority or the decision or action of the majority is found to be unjust and inequitable.[37]

[53] The breakdown in the relationship between shareholders is not, in of itself, justification for winding up a company.[38] For such a state of affairs to rise to the level of a just and equitable winding up of the company, it must represent or lead to deadlock on the board or between the shareholders in general meeting, or a breach of some underlying agreement, express or implied, between the shareholders as to their rights inter se or the extent to which they are to participate in the management and decision-making of the company, or some unauthorized change in the type of business or activity for which the company was incorporated in the first place.

[54] It is a general principle that courts must be cautious or slow to apply equitable principles of fairness to commercial transactions and relations.[39] Even with the claim of unfair prejudice introduced by section 184I of the **Business Companies Act** (upon which the appellants no longer rely for relief), it is not the role of the court to impose its particular concept of what is fair on the parties and their transactions. The concept must be applied judicially having due regard to the particular context which the judge has to address, and based on rational principles. As Lord Hoffman stated in **O'Neill v. Phillips**: 'The court … has a very wide discretion but does not sit under a palm tree.'[40] As such, what may be considered fair in a commercial matter between businessmen may be considered unfair when dealing with a family owned company.

[55] In this matter, we are not dealing with a family owned or run company or companies. However, we are or were, at the early stage of the group's business endeavours, dealing with a company or companies, namely Hangzhou Aida and Guobang, the management of which the learned judge characterized as a 'golden

[37] Ibid, para. 3-05.
[38] Ibid, para. 2-20(1).
[39] Ibid, para. 3-04.
[40] At p. 1098 D to E, citing Warner J in In re J. E. Case & Son Ltd. [1992] B.C.L.C. 213, 227.

age of managerial harmony' under the benevolent direction of Jin Biao.[41] The learned judge found, however, that this kind of managerial harmony, whereby decisions were usually reached by way of consensus, fell short of any common understanding with regard to the management or operation of these companies akin or amounting to a quasi-partnership. It is against this and other findings of fact as regards the absence of a common intention or understanding rising to the level of a quasi-partnership, findings which essentially remain unchallenged by the appellants, that they seek to convince this Court that the decision of the judge ought to be set aside.

[56] This represents an uphill task for the appellants as was acknowledged by Mr. Collins, QC, before us. Essentially, the appellants contend that there is enough in what the learned judge did find regarding the inter-shareholder relations that existed between the shareholders of Hangzhou Aida and Guobang when Jin Biao was alive, to warrant a finding that it is just and equitable that Union Zone be wound up by the court.

[57] As regards the use of the term 'legitimate expectation' in the context of unfairness or the application of the principle of 'just and equitable' as a ground for the winding up of a company, Lord Hoffman, who himself introduced that terminology borrowed from public law, cautioned against its use.[42] He regarded it as a likely 'mistake' on his part to have used that term. As he put it, in this area of law, a legitimate expectation can only exists as a consequence, but not a cause in itself of the equitable restraint.

Judge's findings on Common Intention and Understanding – Quasi-Partnership

[58] The matter of common intention and quasi-partnership was extensively examined by the learned judge at paragraphs 18 to 30 of his judgment in dealing with the unfair prejudice claim. His principal findings of fact against the existence of a

[41] Judgment, Record of Appeal, Core Bundle, Tab 2 at para. 25.
[42] O'Neill v Phillips at p. 1102E.

common intention or understanding as pleaded, which findings are essentially unchallenged in this appeal, were as follows:

(1) At paragraph 20:

> "I am satisfied that there was, between the original parties, no common superimposed understanding for mutual participation in the business affairs of Union Zone, let alone Union Zone and its subsidiaries. In other words, that there was, to use the language of Lord Wilberforce,(1) [Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379E] no 'something more'. Quite apart from the striking fact that Union Zone's Articles of Association contain none of the provisions commonly to be found in the articles of association of a company formed upon the basis of mutual participation and control, it is clear that whatever arrangements had previously operated to define the relationship between Jin Biao and the Claimants, and I shall come to those in a minute, they cannot have survived the absorption of Hangzhou Aida and Guobang into the Best Nation structure."

With this finding I am entirely in agreement. Once the decision was taken and implemented under the egis of the Framework Agreement and the Supplementary Agreement, to take Hangzhou Aida public, to bring in an outside investor who would make a substantial cash investment in the companies, and who in turn became entitled to appoint 2 out of 5 directors to the boards on Aida USA and its subsidiaries, including Hangzhou Aida and Guobang, leading to the involvement of other public shareholders, any so called 'understandings' or corporate cultural norms which may have been in practice before in the management of these companies and their businesses, cannot be said to have survived into the Best Nation or Earjoy structures.

(2) At paragraph 22:

> "In describing the hiving off of Hangzhou Aida to the new Union Zone/Earjoy structure, Qiu Jiajun [the eighth appellant] says nothing in his witness statement about any discussion taking place as to the relationship between Jin Biao and the Claimants under the new arrangements or as to any special terms upon which each of them was to hold his or her share in Union Zone."

This observation is important, as regards the lack of proof of the appellants' pleaded case for common intention or understanding at paragraph 6 of the

amended statement of claim and the further and better particulars provided on 7th September 2012.

(3) At paragraph 23:

> "In cross examination Qiu Jiajun accepted, first, that there could have been no sort of quasi partnership arrangement at all between the members of the two different companies, Hangzhou Aida and Guobang, before they came together in the Best Nation structure. He also accepted that any partnership going forward can only have been a sub-partnership between the Claimants and Jin Biao, the other partner being Yashang[.] As for the supposed partnership with Jin Xiaoyong, that was expressed to be a 'continuation' of the alleged partnership between the Claimants and his father."

In my judgment, these statements clearly serve to detract from and do not support any finding of the existence of a common understanding of the kind pleaded by the appellants.

(4) At paragraph 25:

> "It was clear to me, and I find, that the evidence given by Qiu Jiajun and Lin Hui in cross examination, and by Zhu Yaqing in cross examination and re-examination and intended to prove the existence of a quasi-partnership in Union Zone and its subsidiaries, was evidence about their relationship with Jin Biao as members and managers of, respectively, Hangzhou Aida and Guobang during his lifetime. While I accept, as Zhu Yaqing told me, that there may not have been a rigid line of demarcation between their involvement in the two companies, what these witnesses were describing was a golden age of managerial harmony in Hangzhou Aida and Guobang under the benevolent direction of Jin Biao as *primus inter pares*, itself falling short of any understanding upon the basis of which they, or any other of the Claimants, acquired their shares in either of those companies, or tending to establish that those companies were run on the basis of some overriding understanding in the nature of a quasi partnership."

The appellants placed much reliance on this passage when submitting that there is enough there on which they can 'hang their hat' for a just and equitable winding up of Union Zone. I will address this further later on.

(5) The learned judge continues at paragraph 25:

> "As for Union Zone, while they may, if they had ever thought about it, have expected that, if ever a management decision had to be taken in Union Zone … the same atmosphere would prevail, that could not amount to

> evidence of an understanding remotely like that pleaded, reached between the Claimants and Jin Biao, covering the parties' relationship with respect to Union Zone and its subsidiaries and upon which they agreed to accept shares in Union Zone when that company acquired, indirectly, a sixty per cent share in Hangzhou Aida from Best Nation."

With this finding I am entirely in agreement. I fail to see how any understanding whereby the appellants would participate in the decision-making in Hangzhou Aida and Guobang with Jin Biao, where the final decision was to be made by the latter, could have survived once Yashang became involved as a shareholder in Aida USA, thereby indirectly holding a minority interest in Hangzhou Aida, with a presence on the board proportionate to such interest.

(6) At paragraph 26:

> "If, contrary to my view and to the view of Qiu Jiajun, there ever had been a species of quasi partnership governing the parties' relationship in Hangzhou Aida and Guobang overall, that cannot possibly have persisted into the Union Zone/Earjoy structure. That structure was designed ultimately to exchange any network of private understandings that may previously have existed in Hangzhou Aida and Guobang for public control – indeed, one of the Claimants' complaints is that it failed in that objective."

This passage underscores the 'threshold' or watershed nature of the decision to take Hangzhou Aida and Guobang 'offshore' and to bring in a new investor in the person of Yashang.

(7) At paragraph 28:

> "In my judgment, upon the evidence which has been offered in this case, the shareholders in Union Zone were never bound together by an agreement or understanding other than that set out in Union Zone's Articles of Association."

This primary finding remains essentially unchallenged in this appeal.

(8) At paragraph 29:

> "It follows from that conclusion that there was no understanding (of the general nature pleaded) to which Jin Xiaoyong can have agreed to become a party when he became a director of Hangzhou Aida in

> September 2009. It further follows that his exclusion of Qiu Jiajun and Lin Hui from the management of Hangzhou Aida in 2010 infringed or disappointed no rights, entitlements or legitimate expectations of any of the Claimants as members of Union Zone."

This is the primary finding as regards expulsion. It must be remembered that only two of the appellants were excluded from the management of Hangzhou Aida, namely, the second and eighth appellants, and only after a dispute had arisen as regards the expulsion of the second respondent from the board of this company, which expulsion it seems was found to be illegal under Chinese law, resulting in the reinstatement of the eighth respondent. None of the appellants have been excluded from the board of Union Zone. It is accordingly difficult to see the case for the appellants being made out on the basis of this alleged breach of a common understanding.

Judge's Finding on Alleged Failure of Sole Purpose of Union Zone

[59] It is the case for the appellants that the sole purpose for which Union Zone was established was to enable a public listing to be achieved. It was certainly never the contemplation that Union Zone itself would go public. It was the vehicle through which the appellants and Jin Biao would hold their interest in Earjoy and later Aida USA, as companies incorporated for the express purpose of involving Yashang and owning, indirectly, Hangzhou Aida.

[60] At paragraph 32 of his judgment, the learned judge summarized the position of the appellants on this aspect of their claim. Their counsel had submitted below that the purpose of Union Zone had become frustrated, the minority (appellants) have been excluded and the business of Hangzhou Aida is in disarray. In making his findings on these matters the learned judge states:

> "The minority has not, of course, been excluded from Union Zone (indeed Qiu Jiajun remains a director of Union Zone) and the only persons excluded from Hangzhou Aida are Qiu Jiajun and Lin Hui. It seems to me that Mr Fisher is right when he submits that unless the Claimants can show some reason why it was inequitable for Jin Xiaoyong to have excluded Qiu Jiajun and Lin Hui from Hangzhou Aida, those cannot be grounds for winding up Union Zone."

In my view this is the correct position to take on this issue and I am not persuaded by any arguments to the contrary from Mr. Collins, QC, on behalf of the appellants.

[61] As regards the allegation of Union Zone's business being in disarray, the learned judge states at paragraph 32 of the judgment:

> "The Claimants retain their shares in Union Zone and the fact that Hangzhou Aida is not presently producing is not, in my view, a ground for winding up Union Zone in circumstances where Jin Xiaoy[o]ng gave evidence, which I have no reason to reject, that he intends to restart production in due course using a new supplier."

It is clear that the learned judge was satisfied as to the bona fides of this evidence from the second respondent. This is essentially a business or commercial matter and one which does not, in and of itself, lead to a winding up order on the just and equitable ground. Furthermore, Mr. Collins, QC, for the appellants, in oral argument before us, conceded that 'there are companies below [Hangzhou Aida] that are, in fact, carrying on some other business activity'.[43] It is clear, therefore, that even though Hangzhou Aida's business may be inactive for whatever reason, the businesses of some of its underlying companies are still active. This must weigh against any claim that it would be just and equitable to wind up Union Zone, which owns the majority shares in Aida USA and which, in turn, indirectly, controls Hangzhou Aida and its subsidiaries.

[62] As regard the allegation of impossibility or frustration of purpose, which if proved would normally be a ground for winding up a company on the just and equitable basis, the learned judge found correctly at paragraph 36:

> "In the present case, it was agreed, or must be taken to have been agreed, that Union Zone would hold the Claimants' and Jin Biao's interest in Aida USA and its subsidiaries. The fact that it was hoped that ultimately Union Zone would become the holder of shares in a listed company does not involve the consequence that the Claimants' capital is being employed in a venture which it was agreed should not be undertaken. It is true that the restructuring did not produce the fruits which it was hoped (how realistically may be open to question) that it would, but that goes to

[43] Transcript of Appeal Proceedings, p. 61, 20 to 21. See Also p. 62, 11 to 21.

commercial disappointment, not to violation of an agreement reached between co-venturers."

[63] It is difficult for the appellants' claim to succeed on the basis that the sole purpose of Union Zone was to obtain a public listing and such purpose has been frustrated or failed. Clearly, the 'old' order which existed prior to the decision being taken to take the management of the companies offshore, was not intended to continue once the new corporate structures were in place and the various elements of the decision implemented. The decision involved not only the possible public listing, which may or may not be achieved, as the Framework Agreement itself contemplated and expressly provided for, but sourcing a major cash investment from a third party into the companies and their businesses, and the full participation of such investor in the management and affairs of Aida USA and its subsidiary, Hangzhou Aida. This also applied to Guobang under the Best Nation structure. It therefore cannot be said that achieving a public listing was the sole purpose of Union Zone, and the learned judge was correct in finding that it was not. Furthermore, I agree with the learned judge that the admitted failure to achieve a public listing was simply a failure of one of the purposes for Aida USA and the Earjoy corporate structure. It was neither the sole or main purpose of Union Zone, which was established to hold the interests of Jin Biao (now beneficially owned by the second, third and fourth respondents) and the appellants. Their respective interests continues to be so held and, accordingly, the main purpose for which Union Zone was established has not been frustrated or defeated.

[64] At paragraph 37 of the judgment, the learned judge went one step further in his consideration of the circumstances which may justify a court in making a finding in favour of winding up on the just and equitable ground, absent any finding of a common intention. Relying on a passage from the opinion of Lord Hoffmann in **O'Neill v Phillips**,[44] he characterised this as 'the occurrence of an event which destroys the basis of the parties' association.' In his view, this was not applicable

[44] At pp.1101H to 1102B.

to the instant matter as "[t]he parties' association as members of Union Zone is not grounded upon a state of affairs which no longer exists." With this conclusion I am entirely in agreement. The parties association in Union Zone is grounded on that company being the corporate vehicle through which they hold and continue to hold their interest in Aida USA and indirectly Hangzhou Aida and Guobang.

[65] In the face of these findings of fact by the learned judge, which were open to him on the evidence and the applicable law, and which findings, in the main, the appellants do not seek to challenge in this appeal, recognizing, as they do, the formidable task they would have in doing so, the appellants contend that there is enough in what the judge did find to ground their case for the exercise of the equitable jurisdiction to wind up Union Zone. Specifically, Mr. Collins, QC, on behalf of the appellants, points to the characterization by the learned judge at paragraph 25 that what was described by certain witnesses for the appellants in evidence at the trial 'was a golden age of managerial harmony in Hangzhou Aida and Guobang under the benevolent direction of Jin Biao as *primus inter partes* …'.

[66] In seeking to rely on this passage, Mr. Collins, QC, prays in aid another principle. He submits that the Court must look to the business realities of the situation and must not be confined to the legalistic view, in circumstances where you have a holding company and a subsidiary.[45] In an appropriate case, the conduct of the subsidiary or one of its directors who happens to be a director of the holding company may be regarded as the affairs or conduct of the holding company. He contends that what is going on in Hangzhou Aida, in terms of the exclusion of the appellants from its management (although only two of the appellants have actually been excluded), is really as a result of the prejudice which is going on at the top level in Union Zone. However, at that level, the reality is that none of the appellants have been excluded from the board. In support of his submission, learned counsel relied on the *ratio decidendi* in **Rackind and others v. Gross and others**[46] and to the citation by Sir Martin Nourse with approval, of a passage from

[45] Transcript of Appeal Proceedings, p. 81, 2 to 13.
[46] [2005] 1 WLR 3505

the judgment of Gibson LJ in **Nicholas v Soundcraft Electronics Ltd**[47]. The ratio in **Rackind v Gross** reads:

> The expression "the affairs of the company" in section 459 of the Companies Act 1985 (1) [Companies Act 1985, s 459(I): see post, para 2.] can include the affairs of a subsidiary, and the court has power to make an order regulating the future management of the affairs of a holding company where, first, it is the affairs of its wholly-owned subsidiary that are being, or have been, conducted in an unfairly prejudicial manner, and, secondly, the directors of the holding company are also directors of the subsidiary ..."[48]

[67] In my view, while this principle may be applied in certain situations involving a holding company and its subsidiary, it is of no application here. Firstly, Union Zone is not the holding company of Hangzhou Aida, but a majority shareholder in Aida USA which is the holding company, indirectly, of Hangzhou Aida. Further, this has nothing to do with the Best Nation structure under which Guobang is indirectly owned. Secondly, there is no conduct complained of at the level of Union Zone itself which is said to be prejudicial to the appellants. They in fact complain of conduct by the second respondent at the level of Hangzhou Aida, where he has excluded two of the eight appellants from the board, against a background where there was an attempted ouster of the eighth respondent from its board resulting in court proceedings and his subsequent reinstatement.

[68] Finally, Mr. Collins, QC, submits that a just and equitable winding up of Union Zone 'would bring about a neat and fair solution of a sale by an independent professional of the Company's only asset, namely its majority shareholding in Aida USA, which carries with it control of the underlying business of Hangzhou Aida.'[49] This submission, rather than advancing the case for a just and equitable winding up of Union Zone, smacks of the appellants wanting out in the aftermath of the death of Jin Biao and their own failure to wrestle control of Hangzhou Aida and Guobang from the eighth respondent, who has the right, as the representative of

[47] [1993] BCLC 360 at p. 3511H to 3512A.
[48] At p. 3505C.
[49] Skeleton Argument of the Appellants, Core Bundle, Tab 7, at paras. 3.10.

the majority, to control the management of Union Zone and ultimately these subsidiary companies.

Conclusion

[69] Having regard to the above, I conclude that the appellants have failed to establish a valid basis for setting aside the findings and quashing the decision of the trial judge. They have not made out a good case for winding up Union Zone on the just and equitable ground on a balance of probabilities. There are no findings or circumstances which point to 'something more' as stated by Lord Wilberforce in **In re Westbourne Galleries Ltd**.

[70] Accordingly, I would dismiss the appeal with costs to the respondents at two-thirds of the costs in the court below.

[71] I record our appreciation to learned counsel for the parties for their most helpful submissions.

Gerard St. C. Farara, QC
Justice of Appeal [Ag.]

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal