IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

INTHE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 162 of 2013

BETWEEN

YAOJUAN

Claimant

and

[1] KWOK KIN KWOK
[2] CROWN TREASURE GROUP

Respondents

Appearances:

Mr. David Fisher and Ms. Christina Hart of Hunte and Co. for the Claimant
Mr. Paul Chaisty QC and Mr. Richard Evans of Conyers Dill & Pearman for the First Respondent

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2017: November 13-16, 20-23, 27-30
December 5-8,11-15
2018: . January 10,12, February 4,5
March 13

JUDGMENT

[1] **Adderley, J:** This is a decision relating to an unfair prejudice claim brought under Section 1841 of the Business Companies Act 2004 ("BCA".) The claim is that the conduct of the business affairs in Crown Treasure Group Limited ("Crown Treasure") by the first defendant wa and is unfairly prejudicial to the claimant in her capacity as a shareholder in that company.

[2] The remedies sought by the claimant under the BCA are that the first defendant be ordered to sell her shares to the claimant or alternatively a liquidator be appointed under the just and equitable ground of the Insolvency Act 2003 ("IA"). The claim arises out of an arrangement between the claimant and the defendant in a venture to build and operate a hotel in Xiamen in the People's Republic of China. These proceedings commenced in December 2013 when the claimant brought an application for the appointment of interim receivers which was dismissed by the court.

[3] Crown Treasure, a BVI company, and the second defendant is not an active party, therefore all references to "defendant" shall refer to the first defendant.

BACKGROUND

The inception of the Project

COMPANY STRUCTURE AND HOLDING COMPANIES RELATING TO THE PROJECT

[4] Crown Treasure was a dormant BVI shell company solely owned by Tung Fai ("Mr Tung"), the husband of the defendant. It was selected as the vehicle through which the claimant and the defendant would hold their interest in the Project. Pursuant to their arrangement five of the original ten shares of par value $1 each were transferred by the defendant to the claimant. Strong Nation Investments Limited ("Strong Nation"), a dormant BVI shell company then owned solely by the defendant was adopted as an intermediate holding company and became and remains a wholly owned subsidiary of Crown Treasure. Xiamen Royal Victoria Hotel Ltd ("Xiamen RVH") was incorporated in the People's Republic of China as the operating company to hold the land and develop and operate the 5-star Xiamen Royal Victoria hotel ("the Project").

[5] Madame Kwok was appointed sole director of Crown Treasure and was at all material times the sole director of the other two companies·:

Division of Responsibilities

[6] Based on discussions which took place between the two couples, but mainly between Mr Tung and Wei Dong ("Mr Wei"), the husband of the claimant, in 2005 at the inception stage, the claima_nt alleges that the following agreement was reached on the defendant's obligations to the claimant. The defendant would:

1. Report to the claimant regularly on the management, operations, accounts and finance of Crown Treasure, its subsidiaries and the Project.

2. Promptly notify the claimant and discuss with her any major decision, transaction or dealing affecting Crown Treasure, its subsiaiaries or the Project, particularly those which will or may have a material adverse effect on the claimant's investments, ownership and control of and in the Project, Crown Treasure or its subsidiaries.

3. Not make any major decision or enter into any major transaction or , dea)ing affecting Crown Treasure, its subsidiaries or the Project, particularly those which will or may have a material adverse effect on the claimant's investments, ownership and control of and in the Project, Crown Treasure or its subsidiaries.

[7] In her defence, Madame Kwok disputes the feasibility of this agreement, contending that the Projectwas her idea, stemming from her background in hotel management and the experienced research she carried out when the main discussions were taking place between MrTung and Mr Wei. Mr Wei was primarily introduced to the Project as an appropriate means of procuring repayment by him of a portion of money owed to him from the Fu Ji public listing (discussed below), Both Mr Wei's and the claimant's involvement would never be more than as "passive investors" and it was never intended that the claimant would become

involved in the management of the Project. During cross-examination,Mr Chaisty QC suggested ·and demonstrated that Madame Yao had no experience in the management or operation of five star hotels and hence she had virtually no involvement in the hotel up to its opening in August 2011. It was Mr Wei who participated on her behalf due to her lack of experience.

The Personal Relationships

[8] Mr Wei, had been involved in a separate business venture some years earlier with Mr Tung. Mr Wei and Mr Tung met in 2002 as alumni of the Jiangxi University of Finance and Economics ("JUFE") and embarked upon the public listing on the main board of the Hong Kong Stock Exchange of Mr Wei's restaurant business, using Mr.Tung's expertise in corporate finance. During the time of the public listing the families developed a social relationship though not a close one, but close enough for them to pay a social visit to Madame Yao at her home in Singapore after the birth of her second child.

[9] The reorganisa_tion for the listing of the Restaurant Business leq to the incorporation of a new holding company, Fu Ji Food and Catering Services Limited ("Fu Ji"), of which the claimant and Mr Wei were until approximately October 2009, majority shareholders and also executive directors. Preparatory to that public listing Mr Wei and Mr Tung entered a written contract whereby Mr Wei agreed to pay Mr Tung 10 % of the shares of the company upon a successful listing.

[1O] That written contract was abandoned for several reasons the most important of which was that it would have had to be disclosed inthe published prospectus, and Mr Tung felt that the underwriters would find the listing less attractive if they found that their shareholding would be diluted by 10%. Mr Tung stated that the agreement was replaced by an oral agreement which in his view did not have to be disclosed. By that oral agreement Mr Wei would instead pay him HK$150 million on a successful listing and he would..agree to serve on the board of

directors on the company for a few years after the listing. Mr Wei disputes this arid says that after the cancellation of the written agreement no agreement replaced it and instead he paid Mr Tung a gratuitous sum of HK$30 million for his troubles. Mr Wei did, however, admit that he trusted and relied on Mr Tung's expertise in that area of finance. The public listing was successful and at one stage Fu Ji was worth about HK$9 billion.

[11] In the events which happened trading in the shares and convertible bonds of Fu Ji was suspended on 29 July 2009 and after an unfavourable report by independent financial Advisor Deloitte Touch Tohmatsu who were engaged by the company on 7 October to review its financial statements for the year ended 31 March 2009, it filed a winding up petition and provisional liquidators of Fu Ji were appointed in October 2009 purportedly for the company to preserve and safeguard its assets, and to explore the possibility of a restructuring or other options.

[12] This oral agreement to which we refer as the "Fu Ji Oral Agreement'", was what the defendant says led to the Mr Wei owing Mr Tung HK$150 million upon the successful listing of Fu Ji, and in order to have a half of it paid off Mr Tung agreed that of the HK$160 million that was needed to be paid in for the capital of the Project HK$80 million would be credited to the defendant in part payment of the HK$150 million debt. Mr Fisher submitted in his opening submissions that in making its determination on the precise nature of the agreement, if the court finds that there is no HK$150 million to repay, then the whole basis of the defendant's case falls away, and the whole HK$160 million would then be an investment by or on behalf of the claimant.

[13] It is common ground that sometime in 2005 following the successful Fu Ji listing, the claimant Madame Yao and Madame Kwok reached some agreement as to their participation in the construction and Operation of the Project. It is suggested that initial discussions leading to the agreement took place between Mr Wei and Mr Tung with Mr Wei generating the idea to set up a hotel for Madame Yao and Madame Kwok to run together taking into account Madame Yao's previous

experience in the business of Chinese restaurants and catering, and Madame Kwok's extensive experience in the management of large hotels. On the evidence it appears that Mr Tung and Madame Kwok led the actual proposal of establishing the Project and selecting the site located at Huandao Road in the Fujian Province of Xiamen. Madame Yao's description is that she and Mr Wei were delighted to embark upon the proposal and important decisions as to the investment, equal shareholding and managemen(of the business were agreed from there.

THE CLAIM

[14] The claimant alleges oppression, unfair prejudice, and unfair discrimination by the defendant against her in her capacity as a member of Crown Treasure in breach of section 1841 of the BCA.

[15] The claimant had based her claim on several grounds the foundation of which was the dilution of her interests in Crown Treasure, and her exclusion from the decisions pertaining to the management and operation of the Project, in such a way that it was unfairly prejudicial to her interest and in breach of their agreement.

[16] "She initially relied on a number of acts demonstrating conduct of the defendant which was unfairly prejudicial, but since trial has limited her case to the following grounds, namely, that the defendant:

1) failed to match the funding provided by or on behalf of the claimant to the Project, contrary to what, on the defendant's own case, was agreed between the parties as to the funding of the Project;

2) failed to notify the claimant of and to obtain the claimant's prior consent to a number of major decisions, transactions, and other important matters relating to Crown Treasure, its subsidiaries, their business and the claimant's interest in Crown Treasure including steps that lead to the

. dilution of the Claimant's indirect interest in Xiamen RVH and the alienation of shares in Xiamen RVH to a third party; in particular, causing Strong Nation to enter into the Cooperation Agreement with Cheer Fancy (described below) which led to the alienation of 20% of the shares in Xiamen RVH held and owned by Strong Nation;

3) refused to provide to the claimant information in relation to the business and finances of Crown Treasure and.its subsidiaries;

4) denied the entitlement of the claimant to receive information about the transactions or business of Crown Treasure or its subsidiaries;

All of the above, she claims, were in breach of an agreement or understanding between them which came into being before or at about the time that they became 50/50 shareholders in Crown Treasure, and

5) entered into funding arrangements with Mr Edmond Eng and his companies that were not necessary nor beneficial nor in the best interest of Crown Treasure or its subsidiaries;

6) acted unconscionably and to the detriment of the claimant in that without the consent of the claimant she caused Crown Treasure to enter into the Shareholders' Agreement dated 25 December 2005 whereby Crown Treasure loaned the initial investment of HK$160 million (made, on the claimant's case, solely by the claimant and on the defendant's case equally by each of the claimant and defendant) to Strong Nation for a term of 40 years, interest free and with no effective provision for repayment other than such dividends as might be received by Strong Nation from Xiamen RVH during the 40 year term. On this ground, the claimant seeks, as an alternative relief, the appointment of a liquidator of Crown Treasure pursuant to s 162(1)(b) of the Insolvency Act 2003.

[17] In limiting her case to those 6 areas, the claimant therefore abandoned the following grounds argued during the case· in support of her claim that the defendant had conducted the affairs of Crown Treasure and its subsidiaries in a manner that was unfairly prejudicial to the claimant in her capacity as a shareholder:

a) excluded the claimant from all management and control of Crown Treasure and its subsidiaries;:

b) denied the claimant any involvement or say in the management or control of Crown Treasure and its subsidiaries and their business and

c) failed to maintain proper or adequate accounts of Crown Treasure or dts subsidiaries or to adequately account for the funds of Crown Treasure or its subsidiaries

[18] Limiting her case considerably reduced the extent to which the contents of transactions and the accounts, many of them complex, had to be considered and analysed by the court. As a result it was not necessary to reflect the full complexity of a 24 day trial.

THE PERMITTED INVESTORS AND TYPES OF FUNDING

[19] In the absence of any documentation chronicling the1r arrangement Mr Fisher explored the terms of the arrangement between the claimant and the defendant. He partly relied on the cross examination of the defendant on 5th and 6th December, 2017. Made in the .context of the discussion when the initial arrangements were entered into the exchange on 5th December between Mr Fisher and the witness went as follows:

> 83/9 Q: now I suggest that at the time when you say that discussion took place, it was your intention and the expectation that the only investors who would be involved in this hotel project as investors were you and Madam Yao.

A:Yes...

83/18 Q: And, in fact, ori your case, that is what you·agreed, isn't it, that it would be you and the Claimant 'A'.ho would be the investors in this hotel project.

A:Yes

On 6 December

5/6 Q: So you would have needed Madame Yao's consent to enter into the Cooperation Agreement wouldn't you?

A. With regards to the cooperation Agreement, I would like to answer your question on two points.

Number one, to introduce a loan I would tell Madam Yao about it. And with regards to the terms and provisions listed in the Cooperation Agreement, it's similar to that of getting a loan from a bank. All those detailed terms and provisions in the Agreement.are within my scope of my job responsibilities as a manager like Madam Yao's testimony which she also agreed as a manager those were within h.er job responsibility.

Later on in the transcript at page 88/4 to 9 she admitted that the source of funding was to be her and Madame Yao and bank financing, nor by any further investor.

88/4 Q. So in your agreement, the arrangement that you say you had with Madam Yao, there were only two sources of funding, accofding to this. There are funds contributed by you and Madam Yao in equal shares, correct?

A. , That's correct, for the hotel project.

Q. And bank financing.

A. Yes

Q. There is nothing in there about involving other investors, is there?

A·. At that time.

Q There is nothing in there about other investors, is there, in your agreement?

A Yes, I am saying that in this paragraph by the birth of the agreement and the consensus with Madam Yao, that was the situation at the time.

The Law

(20] The claimant has applied under section 1841 of the BCA. That provides:

> **"A member of a company who considers that the affairs· of the company have been, are being or are likely to be; conducted** in a **manner that is; or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to** him in **that capacity, may apply to the court for an order under this section"**
>
> **"member"** in **re.lation to a company is defined as** ... **"a shareholder or a personal representative of a shareholder." (s.184A)**
>
> **"shareholder"** in **relation to a company, means "a person whose name is entered** in **the register of members as the holder of one or more shares or fractional shares,** in **the company." (s. 78)**

[21] The. BCA s.184I provision has been formulated on the basis of s.459 of the UK Companies Act ,1985 which incorporates the terms "unfairly prejudicial" and "unfairly discriminatory" following amendments to the earlier UK Companies Acts. The BCA has incorporated both these gmunds but has· also included the

"oppressive" ground established in s.48 of the 1948 Companies Act. By definition all "o'ppressive" actions are likely to be unfair.

[22] Section 1841 requires the discriminatory or prejudicial conduct to have a clearly unfair element for the court to consider granting the various remedies available on just and equitable grounds (see s.184I (2)). In **O'Neil v Phillips** [1999] 1 WLR 1092, HL, Lord Hoffmann, with whom the other members of the House of Lords agreed,, explained the criterion of fairness set'out in s.459 (at 1098D-1099A):

> "In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in au/ *D. Harrison & Sons Pie* [1995] 1B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rational principles ...
>
> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economi'c purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which. the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of

good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rigtits in certain relationships in which it considered that this would be contrary to good faith. Those principles have, with appropriate modification, been carried over into company law...

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."

[23] Lord Hoffman was in effect reiterating the findings of Lord Wilberforce in the well-known **Ebrahimi v Westbourne Galleries Ltd** [1973] AC 360. Wilberforce L stated that the purpose of the just ,and equitable provision was to (at 379):

> "...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."

[24] Lord Wilberforce clarified that the "superimposition of equitable considerations" was in itself subject to the requirement for "something more" in the underlying relationship. Typical elements of a relationship involving the "somethihg more" would include (at 379F):

> "(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...of the shareholders shall participate in the conduct of the business and, (iii) restriction upon the transfer of the members interest in the company-so that if confidence is lo t. or one member is removed from.•management, he cannot take out his stake and go elsewhere..."

[25] In **Hollington on Shareholders' Rights** (8th ed) of **O'Neil** at Paragraph 7-24 the author seeks to explain the legal test established in **O'Neil v Phillips:**

> "...in a business joint venture where the interests of two 'competing businessmen (1098F) inevitably clashed, disappointment of reasonable expectations was not a sufficient basis for the court to grant relief and.the needs of legal certainty in such relationships required proof of a breach of contract or of unconscionable dealings applying traditional equitable principles.".

[26] Withholding information is an established possible ground for unfairness. See for example, **Re RA Noble & Sons (Clothing) Ltd** [1983] BCLC 273 which involved facts very similar to the present case, including a company with a 50% equal shareholding between two parties whose joint venture arrangement had not been formally recorded. · Whilst Nourse J acknowledged that the plaintiff's right to consultation was implicit within the terms of agreement and could amounrto unfair prejudice, in that particular case he rejected the principal complaint of the failure to provide details and information as being unfair, due to the plaintiff's display of disinterest (at 291 and 292):

> "I think Mr Noble's attitude was that he just wantedto get on with the business without having to consult Mr Bailey about anything upon which he was not forced to consult him. But in all the circumstances of this case...I do not think that it can be said that Mr Noble's conduct was unfairly prejudicial to the interests of Anafield. In my judgment the crucial

word on the facts of this case is ,iunfairly". It is at this point that Mr Bailey's disinterest becomes a decisive factor. Mr Bailey had partly brought it upon himself. That means that there is no case for relief."

(27] It is apparent from this line of reasoning that the courts have recognised that the test for fairness is an objective one and Nourse J in weighing up the facts of the case before him said (at 290- 291):

> "The test ofunfaimess must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests"

[28] Nevertheless in a case where the conduct adversely affects the value of the member's shareholding, the courts will readily infer unfair prejudice. Nourse J in **Re Noble** at 290 in speaking about section 75 of the Companies Act 1980, which is in para materia with s.1.84I of the BCA adopted the following observation of Slade J in **Re Bovey Hotel Ventures Ltd** (delivered 31 July 1981, unreported):

> "...a member ofa company will be able to bring himself within the s ction if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have had de facto control of the company, , which has been unfair to the member concerned. "

THE WITNESSES

[29] There were four witnesses: for the'claimant, the claimant and Mr Wei, her husband and for the defendants, the defendant and her husband, Mr Tung. All of the

witnesses gave evidence in Chinese, as none of them spoke English, and all questions and responses had to be interpreted. This was the single most significant factor contributing to the length of the trial.

[30] Mr Tung gave evidence by video-link from Hong Kong.

[31] Mr Fisher assessed the performance of his witnesses as passionate. That is an accurate assessment. One could sense from the passion with which they gave their evidence that they felt that they had been gravely wronged and had developed great mistrust in anything said that was being advanced by the defendant. Because of this they tended to unreasonably disagree with some questions put to them in cross examination.

[32] The clear impression which the court formed from their demeanour was that they felt they had been used; while they were doing well the defendants befriended them but when their Fu Ji compahy got into difficulties they appeared to distance themselves from them even apparently to the extent of changing their telephone', numbers. The court noted that their witness statements translated from Chinese into English were almost identical, but in their viva voce evidence they told the story in their different ways. I formed the view that they were basically honest witnesses, but their passion clouded their responses on cross-examination. I had to weigh their responses against the objective facts and circumstances existing at the time as emerged from the evidence'.

[33] The defendant was a well-informed, charming and good witness. In contrast to the claimant and her husband she was dispassionate and was persuasive in giving the reasons for her conduct. The court thinks that she too was basically an honest witness. However; being as dispassionate and intelligent as she appeared to be, the court formed the view that any changes in her position were therefore deliberate. For example, she changed her position on the provenance of the initial RMB128 million that went into the Project from it being a loan from Mr Wei to it being arranged by Mr Wei notwithstanding that the audited accounts for many

years showed it as a loan outstanding to Mr Wei. It seems that the most reasonable purpose for her change in position, as suggested by Mr Fisher, was to make up for what had been demonstrated to be a shortfall in her matching funding obligation.

(34] When it came to the question of providing information she demonstrated an understanding of shareholders' rights to information and seemed to have adopted a formalistic approach stating that requests had to be made to the board of directors even when she was the sole director of Crown Treasure and Strong Nation and the claimant and her were the only two 50/50 shareholders. These are two examples which led the court to the view that although she was basically an honest witness, the objective of proving her case could easily compete with telling the complete truth. So, here again, the court had to weigh her evidence against the objective facts and surrounding circumstances as came out in the evidence.

[35] No contemporaneo_us documents were presented that record or evidence any agreement reached betweer the parties in relation to the management, financing and operation of the hotel. It therefore fell to the court to evaluate the evidence of the witnesses at the. trial and to make a determination as to whether such_ an agreement was made and what were its terms.

DISCUSSION

[36] I shall in each case briefly set out the areas of complaint and the views of the parties as disclosed in their pleadings witness statements submissions and oral evidence, and close with brief findings of fact. My findings of fact also took into account the latter matters as well as what I gleaned from the demeanour of the witnesses.

A. FAILURE TO GIVE INFORMATION

[37] The disagreements *came* to light in 2010 when the claimant instructed her lawyers at Dacneng Law Offices, PRC lawyers in Hong Kong to write to Mr Eng and Madame Kwok seeking information relating to the shareholding of Cheer Fancy (Xiamen) in Xiamen RVH. A members Extraordinary General Meeting meeting took place in August 2013, at which the claimant proposed resolutions relating to her involvement in Crown Treasure including that she be appointed as director of the company. The defendant voted against this but agreed to the claimant's proposal that the defendant prepare profit and loss accounts and balance sheets for each of the years ended 31 December 2011 and 2012. Proceedings were formally commenced in December 2013.

[38] The claimant says that the defendant withheld from her information that she should have been given and which, had she been provided with it in advance of various transactions instead of months and years afterwards, might have averted the break down in relations that has led to these proceedings. A few of the more significant instances referred to are:

a. The defendant did not inform the claimant about her intention to cause ·Strong Nation and Crown· Treasure to enter into the Shareholder's Agreement (below); nor, of course, seek her consent to that agreement. It is alleged that The agreement was concluded on 25 December 2005 but it is alleged that its existence was not disclosed until 2 .A.ugust 2013 by way of an inter-lawyer correspondence.
b. The defendant refused to provide a copy of the Shareholder's Agreement which was only disclosed in this action.
c. The defendant did not notify the terms of the Cooperation Agreement. According to the. claimant she did not see the agreement until 9 months after it had been concluded.
d. The defendant's failure to. provide the explanation of the trial balance requested in a letter from Forbes Hare dated 16th June 2017 which could

easily have been explained before trial as it was explained during the cross examination the Claimant.

[39] The defendant was of the view that the claimant was not entitled to strategic planning information and that other information ought to have been requested through the proper channels, namely making a request to the board of directors of the relevant company. The board of directors of Xiamen RVH comprised representation from Cheer Fancy as well as Strong Nation at one point but the defendant was the sole director of Crown Treasure and Strong Nation during the time of most of the requests.

[40] The defendant's case is that as sole director of Crown Treasure, she has the general management power under its articles of association in respect of its affairs. She denies that she has any contractual duty or otherwise to provide information to the claimant about the Company's finance or business.

[41] The requirement to give information is not circumscribed solely by the articles of association of the company. There are other factors to be considered such as the initial arrangement between the parties. Whether in any case the information ought to have been given, and or the claimant ought to have been consulted would depend on the nature of the action proposed and the terms of the arrangements to be made. On the facts of this case there was a duty both to notify and consult,

8. FAILURE TO MATCH FUNDING

[42] There is a dispute over who invested what according to the agreement reached. The claimant's position is that during the course of their agreement in 2005, three branches of funding for the Project were agreed. First, that the claimant would provide all the initial funding and that there would be a discussion between her husband Mr Wei, and the Defendant if additional funding was needed. Secondly, through bank financing and thirdly further funding, if necessary, through the claimant and defendant.

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[43] The clarmant and the defendant agreed that they would be responsible for all) necessity capital needed for the Project in equal shares up to RMB550 million exclusive of the cost of land. At paragraph 60 of the defendant's witness statement dated 4 August 2014 she confirmed this where she stated *"the principle of equal capital contribution applies to the construction costs (which I estimated to be around RMB550 million) as well as the land cost to be incurred'.*

[44] It appears that the word "capital" as used by the parties meant "funding" including working capital. This is the only way that equal contribution would make sense. For example, in paragraph 38 of her affirmation in February 2014 in justification of her going to non-bank sources for funding the defendant stated *"'...Even taking into account the loan of RMB128 million the balance of the working capital for the Project was only around RMB 30 million".*

[45] The Project used the funding in various ways, some o.n items classified by accounting terms as capital, some as working capital. Accordingly, its source could be·from funds made available to the company as short term loans which in some cases were used to contribute towards the funding of what are classified as capital items, or used for working capital. This was .the case with the RMD128 million initial funding of the claimant which contributed to the purchase of the land even though it was an "on demand" loan. This view is consistent with the defendant as well having made short·term loans to Strong Nation for use on the Project. Both the claimant and the defendant made funds.available to the Project on that basis but the defendant did not match the contribution of the claimant in accordance with their acrangement.

I. The RMB 128 million

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[46] On the evidence which I accept the agreement between the parties was that start-up capital in the way I have described it could be by way of capital or loans. On the claimant's case she invested HK$160 million (approximately US$20 million) and RMB128 million (approximately US$16 million). The defendant's pleaded case is that RMB128 millio111 represented an on demand interest free loan by Mei Wei to Strong Nation.

[47] The position adopted in her composite witness statement was that when it was time to purchase the land for the project Mr Wei said that they did not have any money but he would arrange for a third party to make an interest free loan to the project. Her current case is that it was a loan from Shanghai Dexian to Strong Nation arranged by Mr Wei.

[48] The audited financial statements of Strong Nation for the years ended 31st December 2005 to 2009 inclusive recorded the RMB 128 million as a debt due to Mr Wei. Before her composite statement signed 4th August 2017 both in ,her affirmation dated 11t.h February 2014 and her witness statement dated 27th February 2015 the defendant stated that it was a loan from Mr Wei.

[49] The claimant stated that the RMB 128 million was her and Mr Wei's joint contribution to the project. Supported by Mr Wei, she says that the ,Land was purchased using the initial sum of RMB128 million transferred from Shanghai Dexian to Shanghai Yuqian.

[50] I find that the RMB128 million was funding by way of an interest free demand loan from the claimant's husband on behalf of the claimant which was used in the purchase of the land. It was repaid from another loan in 2010. The evidence shows that on 8th December 2005 the land was auctioned and Strong Nation and Shanghai Yuqian su,ccessfully bid for the land for RMB 248 million. On 19th December 2005 Strong Nation and Shanghai ' Yuqian entered into a Land Use Contract with Xiamen Land resources management auth6rities. Later that month

RMB128 million was transferred by Shanghai Dexian to the PRC bank account of Xiamen Yuqian for the benefit of Strong Nation at the request of Mr Wei.

[51] The defendant provide some funds as well. On.1st December 2007 the defendant entered into a loan a reement with Strong Nation under which she agreed to lend to Strong Nation up to HK$40 million interest free repayable on 30th November 2010. On 1st January 2008 she entered into a loan agreement with Strong Nation under which she agreed to lend to Strong Nation up to HK$50 million interest free repayable on 30th June 2009. This was repaid on 16th June 2009 'under the Loan Assignment Contract between the defendant, Strong Nation and Cheer Fancy whereby she assigned all her rjghts and obligations under that 1st January loan agreement.

[52] The financial statements of Strong Nation show that the total amounts owed by Strong Nation to the defendant at the end of 2008 was RMB73,386,000. The shortfall to reach Madam Yao's RMB128million was therefore RMB54,614,000. At that time when, according to her evidence, the Project was in dire need of funds, if the defendant had injected her shortfall of RMB54,614,000, the Project funding would have fallen short by only RMB10 million of the net amount.that the Cheer Fancy loan actually yielded (RMB64 million).

[53] The claimant therefore submitted that if the defendant had matched her contribution ofRMB128 million above her HK$80 million capital injection at the end of2008 the shortfall would only have been about RMB10 million and there may not have been a need to borrow from Cheer Fancy. The loan of RMB110 million from Cheer Fancy only yielded RMB 64 million because at that time the defendant actually repaid herself HK$46 million which was then due to her from Strong Nation.

[54] That analysis was not challenged by the defendant. Her answerwas that she had a right to her repayment, and under the arrangement she had no obligation to match funding other than capital (the HK$ 160 million). Of course, with the

. 'reasonablemeaning that can be attributed to the word "capital" that does not meet Madame Yao's complaint. Having regard to aH the evidenceI reject that answer and fin·d that the arrangement was that she would equally match the financial contribution of Madam Yao. While the claimant made available the RMB128 million through the period from December 2005 to January 2010 until it was paid off, the defendant did not match that.

II. The HK$160 million

[55] The claimant states that in addition she invested HK$160 million. This was by way of her brother-in-law, Wei Ming, through an interest free loan. The defendant claims that HK$80 million of that was to be credited to Mr Tung as her equal contribution in payment of part of a HK$150 million debt allegedly due by Mr Wei to Mr Tung under the Fu Ji Oral Agreement for work done in taking his restaurant business public on the Hong Kong stock exchange.

[56] Having reviewed the evidence and observed the demeanour of Mr Tung on cross examination I find that there was a Fu Ji Oral Agreement. One persuasive piece of evidence though not the only evidence relied on was that the approximate value of the written agreement was, HK$175 million and it would not make any commercial business sense for Mr Tuhg to forego that amount on a promise of a gratuitous payment, as alleged by Mr Wei. A contract for HK$150 million was a reasonable compromise.

[57] I find that the HK$160 million was used to capitalize the land holding company in accordance with the requirements of the Chinese authorities.

[58] I also find that HK$80 million was contributed by the defendant by way of part repayment by Mr Wei of monies due to Mr Tung under the Fu Ji Oral A9reement.

C. FAILURE TO NOTIFY THE CLAIMANT OF AND TO OBTAIN THE CLAIMANT'S PRIOR CONSENT ·To A NUMBER OF MAJOR' DECISIONS, TRANSACTIONS, AND OTHER IMPORTANT MATTERS

I. THE SHAREHOLDER'S AGREEMENT

[59] The claimant submits that this transaction was unconscionable, and unfairly prejudicial to her as a 50/50 shareholder in Crown Treasure.

[60] By the Shareholders Agreement between Crown Treasure and Strong Nation entered into on 25 December 2005, the defendant locked in the HK$160million investment capital for 40 years (until 19th December 2045), and the only provision for repayment by Strong Nation is out of dividends received frorr, Xiamen RVH. To the extent that the loan is not repaid before the end of the term it is never to be repaid. There is no provision for interest.

[61] It was put to the defendant that because the Shareholders Agreement put the claimant in a position that she would not be able to see any returns from her investment for 40 years it was unfairly prejudicial to her. It was unfairly prejudicial to the claimant because the defendant, the other 50/50 shareholder, was in the meantime enjoying a good salary as the manager of a five star hotel, directorships on the company and on all of the subsidia-rycompanies,and receiving all the perks that go with the ostensible ownership of a five star hotel. The claimant .in the meantime had no real expectations of a return on her investment of HK$80 million for 45 years.

[62] Durin·gcross examination of the defendant it was highlighted that according to the most recent balance sheet the accumulated losses of the hotel were HK$184 million since commencing operations in 2011, and there were only two ways that the shareholders could hope to gain value on their investment, either by the hotel becoming profitable whereby dividends could be paid out to shareholders or to sell the assets of the company and divide up the net proceeds after paying of creditors.

[63] · The defendant expressed the view that the shareholders had already gained value of their equal contributions of HK$80 mill,ion each by th_e appreciation of the value of the hotel. The hotel had cost an estimated HK$600 million to build. Although not giving.an estimate of the hotel, later evidence showed the value to be jn the region of HK$800 million to HK$1 billion.

[64] In addition the defendant said that the annual cash flow of the hotel was about HK$133 million. Out of that the bank loan and interest was being paid as well and the real property taxes which otherwise under the law would have had to be paid by the shareholders. The accounts showed that the bank loan was being reduced and according to its terms it was expected to be paid off by 2022 after which consideration could be given to the payment of dividends. It was said to be a term of the bank loan that Xiamen RVH could not pay dividends until th-eloan had oeen repaid. None of this information had been given to Madame Yao.

[65] She further stated that the Loan Contract 2045 was commercially necessary and is to be viewed in light of the Land Use Contract of 19 December 2005 entered.into with the Xiamen authorities in order to acquire the site. In particular, the Loan Contract 2045 was satisfying clause 18 of the Land Contract which within 2 months required the establishment of a project company with a registered capital of not less than US$20m. She stated that the Loan Contract 2045 was made to effectively satisfy the capital requirements of the Project. In her view, the $HK160m was an equal contribution (the $80m/$80m split) and she is equally affected as Madam Yao by the loan Contract 2045. The claimant maintained that locking her investment in for 45 years was not necessary for Xiamen RVH to maintain a capitalisation of at least US$20 million (approximately HK$160 million). The capital could have been maintained by injection of new funds.

[66] The actual decision per se is not necessarily being criticised; the defendant was allowed to make management decisions under the principles of **O'Neil v Phillips.** What is being criticised most is that she did not consult and inform the claimant of

the planned contract thereby giving her an opportunity to be heard on it in line with their agreement.

[67] I fi d that it was a breach of their agreement not to have notified and consulted Madame Yao about the planned arrangement and it was unfair and prejudicial to her in her capacity as a 50/50 shareholder. Furthermore; because of the onerous terms, untler their particular agreement she should also have given her an opportunity to be heard on the intended terms. It matters not that the decision affected their investment equally because in reality the defendant would be reaping other benefits from the Project as a shareholder attributable to the investment of the claimant.

II THE COOPERATION AGREEMENT BETWEEN STRONG NATION AND CHEERFANCY

[68] The defendant procureda Cooperation Agreement to be entered into on 8 June 2009 between Strong Nation and Cheer Fancy. The claimant gave evidence that she had no information or knowledge of it until around March to May of 2010 when it was delivered to her. Because of the terms of the agreement it was manifestly a matter on which the defendant ought to have consulted the claimant, and it was unfairly prejudicial to her in her capacity of a shareholder not to have done so in breach of their arrangement.

[69] Mr Edmond Eng is the sole director of the Cheer Fancy Group, comprising Cheer Fancy Limited ("Cheer Fancy"), incorporated in Hong Kong, and its subsidiary Cheer Fancy Business Management (Xiamen Co., Ltd) ("Cheer Fancy (Xiamen)").

[70] Under the agreement Cheer Fancy, a company owned and controlled by Mr Eng, agreed to invest up to RMB220 million into the Project in return for 40 % of the shares of Xiamen RVH, such shares to be redeemable before 8 June 2012. It was essentially a loan agreement. The main provisions were as follows:

i) Cheer Fancy would invest RMB220 million in the project

ii) Strong Nation warranted that the hotel would be completed and open for business by 31 December 2010

iii) The amount to be paid by Strong Nation to redeem the 40% shareholding in Xiamen RVH was the amount of the RMB220 million actually invested with compound interest at 10% percent per annum.

[71] Side agreements concluded on the 8th and 10th June 2009 secured that the shares would be held in a Cheer Fancy Xiamen a wholly owned subsidiary of Cheer Fancy, and the autonomy *qf* the board of directors of Strong Nation and Cheer Fancy Xiamen and Xiamen RVH was restricted in relation to certain specified matters.

[72] On 19 October 2010 they, entered a Supplementary Co-operation Agreement whereby th loan amount was decreased by a half to RMB110 million and shareholding in Xiamen RVH to 20%, certain transfer of shares from Cheer Fancy to Strong Nation would take place which would have the effect of returning to Strong Nation 24% of the shares held by Cheer Fancy Xiamen. When deciding on certain matters concerning Cheer Fancy the written consent of Mr Eng was required and until the shares w re redeemed Mr Eng would act as chairman of the board of the board of Xiamen, RVH.

[73] In the events which happened Strong Nation defaulted on the loan and the 20% shares were appropriated by Cheer Fancy. It is not disputed that because of the assignment of loans due to the defendant from Strong Nation to Cheer Fancy the net inflow of cash to Strong Nation from the Cheer Fancy loan was RMB68 million. This meant that 20% of the shareholding in Xiamen RVH was lost based on a net cash inflow to Strong Nation of RMB68 million.

[74] The defendant explained that in her view Cheer Fancy was not an investor, but only a secured creditor as the shares transferred were redeemable in three years at the option of Strong Nation.

[75} In my judgment the loan itself from Cheer Fancy, not being a bank, was prima facie a breach of the agreement. In addition, the mortgage of shares with the possibility of Cheer Fancy becoming a shareholder was a serious breach of the agreement not to introduce another investor. It matters not that on the evidence, the defendant saw the arrangement as similar to that of a bank loan and the mortgage of shares as not admitting Cheer Fancy in as an investor.

[76] On the authorities it does not matter that the party whose conduct was unfair and prejudicial did not have that intention; the test of whether the conduct was unfairly prejudicial is an objective one. (See **Re Noble).**

[77] This was a clear breach of the arrangement between the claimant and the defendant to:

> "Not make any major decision or enter into any major transaction or dealing affecting Crown Treasure, its subsidiaries or the Project, particularly those which will or may have a material adverse effect on the claimant's investments, ownership and control in the Project, Crown Treasure or its subsidiaries".

[78] The claimant questioned whether the loan arrangement was necessary and complained that Mr Tung and the defendant did not disclose the material fact that the Cooperation Agreement and investment Proposal were entered into when Xiamen RVH had purportedly secured a construction loan of RMB200 million from the Industrial and Commercial Bank of China ("ICBC") of which RMB140 million was available for drawdown (the "ICBC Loan"). Her complaint was that in breach of their agreement the defendant resorted to non-banking third party finance from Mr Eng or his companies before the ICBC facility was used.

[79] Madame Kwok's position was that the transactions were commercially justifiable, arising from the shortfall in funding arising from the position adopted by the claimant and the banks. At the time of the transactions and loan agreements,

there was a nee·d for funds and the claimant was not prepared to contribute more than the initial HK$160 million.

[80] I find that there was funding in place but the defendant made a management decision of which prima facie the claimant cannot complain. The claimant's valid complaint lies in not having been consulted, because although the shares were redeemable the documents actually gave Cheer Fancy equity in Xiamen RVH, not just a pledge. That was unfair because it was done' in breach of their 50/50 shareholder's arrangement, and it was prejudicial because it ,had the effect of diluting her interest without her consent, also in breach of their agreement.

THE ENG LOAN

[81] About a year later on 10 January 2010 Crown Treasure agreed by resolution signed by both the claimant and defendant that Strong Nation enter into a Secured Loan Contract and associated agreements with Edmond Eng by which Mr Eng agreed to advance HK$100 million to Strong nation at 6% per annum interest. rep yable on or about 10 Janu ry 2012. As security for th loan, Strong Nation agreed take a pledge of 40% of its shares.

[82] By a Supplemental agreement made 11th January 2011 it was agreed that the monies advanced by Mr Eng should be used only for the purpose of repaying to Shanghai Dexien the RMB128 million. The sum of RMB 128 million was paid in January 2010 at the direction of Mr Wei to a company which was a subsidiary of Fu Ji.

[83] The defendant had misrepresented to the claimant that these monies from Mr Eng were needed for urgent construction purposes. In fact this was not so because all of the money was used to pay off the RMB 128 million.

(84] The Eng transactions can more specifically be defined as a loan made by Mr Eng of HK$100 million to Strong Nation with security of a pledge over 40% o(Crown Treasure's share in Strong Nation. The arrangement was made in January 2010 and was disclosed by Mr Tung to the claimant and Mr Wei sometime after at a meeting in Singapore. According to the defendant the purpose of the loan was to facilitate financing the repayment of the investment of RMB128 million by Strong Nation to the claimant and Mr Wei, termed in the pleadings as the "Investment Proposal".

[85] The Eng transaction was different from the Cheer Fancy transaction because in reading the documents it is evident that in the Cheer Fancy transaction the remedy for default by Strong Natioh was essentially forfeiture of the shares as they had already been transferred. The Eng transaction being only a pledge of the shares, the remedy on default was that Mr Eng could sell the shares to recover his money.

THE DEFAULT

[86] The secured loan went into default and Mr Eng sent a demand letter dated 30th December 2011 to Crown Treasure. Crown. Treasure sent a letter signed by Madame Kwok dated 3rd January, 2012 to Madame Yao asking her to pay on or before 12:00 10 January 2012 (9 days later) the sum of HK$56 million representing one half of the principal and interest due to Mr Eng. It stated that if payment was not made by her, and the other half by Madame Kwok, Mr Ng would take necessary steps to assign the 40% shareholding in Strong Nation. The claimant replied on 6 Janu,ary stating that she was prepared to make the repayment but first demanded information; she wanted proof that the money had in fact been provided by Mr Eng. No information was forthcoming.

(87] On the 16th January 2012 Strong Nation, represented by Madame Kwok, and Mr Eng entered an agreement acknowledging that Strong Nation had defaulted under the Co-operation Agreement and the Secured Loan Contract and that Mr Eng was entitled to enforce his security by unravelling the earlier transfer of Cheer Fancy's

shares in Cheer Fancy Xiamen to Strong Nation. This resulted in Cheer Fancy Xianien owing 44% of the hotel (Xiamen RVH). All the documents on behalf of Strong Nation were signed by the Madame Kwok as sole director so there was no consultation with Madame Yao.

SUMMARY

[88] The picture that is painted by the evidence is that Madame Kwok who, according to the evidence did not even have a job when they met her, largely with the claimant, and Mr Wei's start-up money is and will be enjoying all the benefits and power of a sole director of various companies, a salary as general manager of a billion RMB hotel, and all the economic and social prestige and perks that go along with being its ostensible owner, while (to borrow the lyrics of a once popular song) Madame Yao, her 50/50 partner, has nothing, and can only watch her with her nose pressed up against the window pane.

[89] Mr Fisher adds that the window pane is an opaque one at that; Madame Yao hardly being able to see in because of lack of information.

[90] Exc pt for the RMB128 million th-at was rep id from borrowin s by Strong Nation from Mr Eng four years after being used in the Project, there is no realistic hope of seeing any benefit from her HK$80 million contribution for at least the next 40 years, if ever at all. By that time both her and her husband, Mr Wei, will be in their late ?O's. All of this is within the context of Madam Kwok during a crucial period not having lived up to matching her cash contribution as agreed in their initial meetings before the Project began.

[91] It is not open to the court to speculate on what Madame Yao would have agreed to do had Madame Kwok informed her about the terms of the private non-bank loan from Cheer Fancy, or the Cooperation Agreement or the Shareholder's Agreement. She may well have agreed to the very same terms as well, or she may not have. What is relevant is that she was not given an opportunity to be

heard on it and in the circumstances she had a right in equity to that information in line· with the business arrangement concluded· with Madallle Kwok prior to their embarking on the Project. In the circumstances it atters not whether or not the arrangement was not a legally enforceable contract as Mr Chaisty QC sought to propound. As Lord Hoffmann stated in **O'Neil v Phillips** [1999] 1 WLR 1092, HL, with whom the other members of the House of Lords agreed, at 1098D-1099A:

> In section 459 [equivalent to our s.184I] Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *Saul D. Harrison & Sons Pie* [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable.

[92] One cannot in any way denigrate the hard work that was undertaken by Madame Kwok in bringing the hotel to where it is today. She was career driven to achieve her expressed lifelong dream of owning and operating a 5 star hotel. Her efforts in pursuit of the success of the hotel were commendable and apparently she continues to work hard to do so. At various stages of the trial the claimant abandoned her claims of impropriety, so in her final submissions no case had been retained by the claimant upon which the court could conclude that Madam Kwok was motivate in her conduct by ill motives or lack of *bona fides.* But in the area of unfair prejudice, motive is not determinative. It is now settled law that *"it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith".*

[93] Within that context, though, it does beg the question why was Madame Kwok so secretive with the information if it was not for the reason that she knew that she should consult 'in accordance with their arrangement, but if she had she done so Madame Yao might not have agreed with the terms.

[94] The court would .have to take a very narrow view of justice and to artificially constrain itself to a few authorities to conclude that in the circumstances of this case the claimant was not entitled to more information and, in particular, information abmit the material terms of the non-bank financing arranged by Madam Kwok esp cially as it related to the shares in the company and its subsidiaries. What the evidence has disclosed is that the lack of information may have caused or contributed to the claimant bei'ng in her present predicament and probably to the breakdown in relations that seems apparent. This type of conduct comes squarely within the cla s of conduct identified by **Re Noble** as unfairly prejudicial to her in her capacity as a sharehold r.

[95] Lack of involvement or disinterest of a claimant can be a reason for a court making a finding that the conduct of a defendant was not unfair, as happened with Mr Bailey in **Re Noble,** but this case is different. The defendant seeks to blow both hot and cold at the same. She seeks to rely in a case that the claimant was disinterested, while at the same time positively asserting a case that their agreement only allowed the claimant to be a "passive investor".

[96] Whether a "passive investor", whatever that may mean, or not, I find that Madam Yao was entitled to the information. The failure of Madam Kwok to give her necessary information in relation to the possibility of the dilution of her share value was undoubtedly prejudicial and:unfair to the interests of the claimant as a 50/50 shareholder. Also !aches does not play a significant part in this case because some information, for example the explanation of information pertaining to trial balances requested five months before the trial, was not made available until the trial itself, in that case by way of cross examination.

[97] Mr Fisher described his witnesses as passionate as indeed they should have been. The court observed the passion; it was palpable in the courtroom. Where is justice, they seemed to ask?

[98] Well, justice reposes right here in these courts.

[99] I sought counsel's assistance on whether it was open to the court to grant a remedy other than any of the two remedies sought by the claimant, namely an order that Madam Kwok sell her shares to Madam Yao, or alternatively winding up the Company. Mr Chaisty QC felt that if the court was not minded to grant any of the remedies, it should dismiss the claim. Mr Fisher was of the view that the court would first have to give the parties an opportunity to be heard on the proposed alternative remedy, and as Mr Chaisty QC submitted, this would have the effect of giving the claimant two bites at the cherry.

[100] Having fourid for the claimant, in my judgment dismissing her claim, would maintain the status quo against which she has a justifiable complaint. That would be unfair.

[101] Mr Chaisty QC drew the court's attention to **Hollington on Shareholders' Rights** Eighth Edition 2017. At [10-22] it stated that it is the policy of the courts to discourage a claim for winding-up on the just and equitable ground in a petition which principally claims relief on the unfair prejudice ground, and states in the footnote that the remedy of winding-up is one of last resort, and an exceptional remedy in the context of disputes between shareholders **(Fulham Football Club (1987) v Richards** [2012] Ch. 333 at [54], [56].)

[102] At [10.30] It further states that:

> "...it remains conventional for the purposes of exposition to follow the traditional categorisation of cases where a winding-up order would be made on the just an equitable basis. There are four such categories
>
> (1) loss of substratum
> (2) deadlock
> (3) justifiable loss of confidence due to mismanagement; and
> (4) expulsion of "working partner"

[103] Mr Chaisty QC argued that this case did not fall into any of those categories so winding up was probably not a proportionate remedy.

[104] A helpful guide though the textbook may be, I do not suppose that the list was intended by Mr Hollington to be exhaustive, nor was any authority drawn to my attention that the claimant must prove that she comes within any of those categories in order to obtain a winding up order, although she might indeed come within one of the categories. As matters stand this is one of those cases, rare though it may be, where the circumstances dictate that winding up the Company is the fairest and most proportionate response. From the evidence it appears that the trust has broken down between the two equal shareholders. Also Madam Kwok has indicated that each has a valuable interest in the Company above the HK$80 million capital that they each provided. Placing the parent, Crown Treasure, into liquidation would make it available to the highest bidder without unduly disturbing the business of the hotel operated by a subsidiary. This would afford each of the equal shareholders an equal opportunity to purchase the company from the liquidator. In the event a third party purchases the company each will be entitled to 50% of the surplus, if any.

[105] Ordering Madame Kwok to sell to Madame Yao, as she asked the court to do, would have been a disproportionate response in Madame Yao's favour against Madame Kwok as an equal shareholder. I considered, too, that a proportionate response might have been to order that Madame Kwok begin to give Madame Yao regular information to which she is entitled, but it is too late; the damage has been done. Also having regard to the history, policing such an order would be a formidable task very likely inviting further litigation down the road.

CONCLUSION

[106] For all of the above reasons, I am minded pursuant to section 1841(2)(to appoint a liquidator of Crown Treasure under section 159(1)(a) of the Insolvency Act 2003

on the ground set out in section 162(1)(b) of the Act, namely, thaUhe Court is of the opinion that it is jusfand equitable that a liquidator should be appointed.

[107] However, I will delay this judgment for a period of 14 days to allow the parties and their advisors an opportunity to seek some alternative resolution. Should an alternative solution be reached they should notify the court forthwith. If not, the parties or their counsel shall return to the court on 27 March 2018, for the judgment. At that time each should submit for the consideration of the Court one nomination in accordance with the requirements of the Insolvency Act of a person who qualifies to serve as a liquidator. The Court will decide whether to appoint one liquidator or joint liquidators.

[108] I will hear the parties on costs.

Hon. K. Neville Adderley
Commercial Court Judge

By the Court

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