EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0042

BETWEEN:

[1] KWOK KIN KWOK

Appellant

[2] CROWN TREASURE GROUP LIMITED

and

YAO JUAN

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]
The Hon. Mr. Eamon Courtenay, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC with him, Mr. Richard Evans for Appellant
Mr. David Fisher with him, Ms. Christina Hart for the Respondent

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2018: July 13;
2019: March 14.

Commercial appeal – Appointment of liquidator – Unfair prejudice – Whether the trial judge erred in the exercise of discretion in appointing a liquidator – Remedies open to court on an unfair prejudice application – Whether relief granted was just and equitable – Fresh evidence – Whether a respondent can make an application to admit fresh evidence to support the judgment in the court below

The respondent alleged that she and the appellant, through Crown Treasure Group Limited ("Crown Treasure") a British Virgin Islands ("BVI") company of which the appellant was sole director, were and are joint venture partners in the development of a hotel (the "Project"). The respondent, as a 50% shareholder in Crown Treasure, sought relief in respect of alleged past and continuing conduct of the appellant as the other 50% shareholder in, and the sole director of, Crown Treasure. The respondent alleged that the appellant's conduct related to the exercise of control over Crown Treasure and its

subsidiaries, conduct that has been and will continue to be oppressive, unfairly discriminatory and/or unfairly prejudicial to her in her capacity as a shareholder of Crown Treasure. The respondent brought an unfair prejudice claim under section 184I of the Business Companies Act 2004 ("BCA") seeking relief, and also sought the appointment of a liquidator of Crown Treasure, pursuant to section 162(1)(b) of the Insolvency Act, the latter specifically on grounds related to a loan contract for a period of 40 years, which the appellant had caused Crown Treasure to sign with Strong Nation (a subsidiary of Crown Treasure). The particulars of conduct of which the respondent maintained complaints were that the appellant, in breach of an agreement or understanding between the parties which came into being before or at about the time they became shareholders in Crown Treasure:

(a) failed to match the funding provided by or on behalf of the respondent to the Project, contrary to what, on the respondent's case, was agreed between the parties as to the funding of the Project;

(b) failed to notify the respondent and obtain her 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 led to the dilution of the respondent's interest in Xiamen RVH (a company incorporated as the entity to hold land and to develop and operate the Project) and the alienation of shares in Xiamen RVH to a third party, in particular causing Strong Nation (a company incorporated in the BVI which Crown Treasure was at all material times the sole shareholder of and Madam Kwok being the sole director) to enter into a cooperation agreement with Cheer Fancy (a company owned and controlled by a Mr. Edmund Eng) which led to the alienation of 20% of the shares in Xiamen RVH held and owned by Strong Nation;

(c) refused to provide the respondent with information in relation to the business and finances of Crown Treasure; and

(d) denied the entitlement of the respondent to receive information about the transactions and business of Crown Treasure and its subsidiaries; and also

(e) entered into funding arrangements with one Edmund Eng and his companies that were not necessary nor beneficial nor in the interests of Crown Treasure or its subsidiaries.

The appellant admitted that she and the respondent each held 50% of the issued Crown Treasure capital and that she was its sole director, but denied that her conduct had been, is and will continue to be unfairly prejudicial to the respondent. The appellant denied the agreement alleged, that she and Madam Yao were joint venture partners in the Project as Madam Yao sought to characterize, and asserted that they were joint venture partners only to the extent that it relates to the investments that each side had put into the Project. The appellant also denied that the respondent was entitled to participate in the management of Crown Treasure.

The learned judge found that there was an agreement between the parties as alleged by the respondent and that in the circumstances of the case it was just and equitable to appoint a liquidator of Crown Treasure. He ordered that Crown Treasure be wound up in accordance with the provisions of the Insolvency Act 2003, appointed joint liquidators of Crown Treasure and gave certain consequential orders and directions.

Being dissatisfied with the decision of the learned judge, the appellant appealed on the grounds that his decision: (i) was an unreasonable and unjustified exercise of any discretion; (ii) was unsupported by any evidence; (iii) was contrary to the evidence and failed to take proper account of same; (iv) took account of issues not pleaded; and (v) failed to provide any adequate reasons or explanation. The respondent sought leave of this Court to adduce, at the hearing of the appeal, fresh evidence in the form of the evidence set out in and exhibited to her witness statement.

Held: allowing the appeal; setting aside the decision of the learned judge; setting aside the consequential order; and awarding costs to the appellant in the court below to be assessed if not agreed within 21 days, costs to the appellant in this Court on the substantive appeal at two-thirds of the costs in the court below and costs to the appellant on the fresh evidence application to be assessed if not agreed within 21 days, that:

1. In considering whether there was an agreement between the appellant and the respondent, which brought about an obligation on the appellant to provide information to the respondent, the learned judge appears either to have lumped together the duty to notify and consult/provide information, with the duty to obtain consent in relation to introducing a new investor, without a distinction as to the circumstances. Alternatively, the learned judge appears to have sought to extract from the duty to obtain consent, (where it did exist, in relation to introducing a new investor) a general and unrelated duty to notify and consult. The alleged general duty to provide information/notify and consult and the alleged duty to obtain consent for the introduction of a new investor were distinct issues. In the learned judge's finding of a duty to provide information/notify and consult, he relied on his own analysis of evidence elicited in an exchange between counsel for the respondent and the appellant. On the evidence elicited, a duty to notify, consult and obtain consent existed only at the investor level, that is, in relation to introducing new investors. There is no identifiable basis on which the learned judge properly concluded on the evidence, a duty on the appellant generally to provide information, or to notify and consult. The learned judge erred in this general conclusion.

2. On the question of whether the learned judge possessed the jurisdiction to appoint a liquidator, section 184I of the BCA states that: if, on an application made under section 184I, the court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of the subsection, one or more of the orders set out in sub-paragraphs (a) through (h). Sub-paragraph (f) refers to the appointment of a liquidator under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act. The effect of the wording is to confer a very wide discretion on the court to do what is considered fair and equitable in all the circumstances of the case, in order to put

right and cure for the future, the unfair prejudice which the petitioner has suffered. Further, the court is not bound by the specific relief sought by the petitioner.

Re Bird Precision Bellows Ltd [1985] 3 All ER 523 applied; Re Neath Rugby Ltd (No.2); Hawkes v Cuddy and others (No.2) [2009] 2 BCLC 427 applied; Section 184I Business Companies Act 2004, Act No. 16 of 2004 applied.

3. In considering the reasonableness of the decision of the learned judge to appoint a liquidator, the premise for his determination that such an order was appropriate was the learned judge's view that it was unfair that the respondent would be locked into an investment for the next 40 years without the hope of seeing any benefit from the investment. This Court having determined that the learned judge erred in finding that there existed the broad agreement pleaded by the respondent and further that the learned judge clearly premised the exercise of his discretion to appoint a liquidator on the basis that all of the complaints had been proven against the appellant, which this Court determined (except in one instance) not to be the case, the learned judge erred in the exercise of his discretion. The consequence is that the learned judge exceeded that generous ambit within which reasonable disagreement is possible when he appointed a liquidator.

4. To satisfy the requirements for the admission of further evidence, it must first be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and thirdly that the evidence must be such as is presumably to be believed, in other words, it must be apparently credible though it need not be incontrovertible. Though fresh evidence applications are usually made by an appellant seeking its introduction, this application to adduce further evidence is by the respondent, who was successful in the court below. The application is sought on the basis that the new ground will enable the respondent to support the judgment of the court below on grounds that were not available before the new evidence became available. The provision of a further ground for supporting a decision in the court below is not a proper basis for the exercise of this very reserved jurisdiction to admit fresh evidence and does not support the second requirement above. To permit the evidence on this basis would run totally counter to the principle of finality. Further, even if the fresh evidence was otherwise admissible, in the exercise of its discretion, this Court would refuse to admit the fresh evidence based on this Court's setting aside of the finding of a broad and unrestricted agreement between the parties, the basis on which the decision in the court below was made and upon which the application to admit the fresh evidence was grounded. Further, even if all three requirements were met it would still be necessary to conduct an evaluation of the new evidence to determine its effect. This would normally require that the matter be remitted to the lower court as the Court of Appeal is not designed to address a factual issue other than one which has been ventilated in a lower court. In this matter, the interests of justice would not be best served by remitting this matter to the lower court for a retrial of any

kind. The interests of the parties and of the public in fostering finality in litigation are significant.

Ladd v Marshall [1954] 1 WLR 1489 applied; Gohil v Gohil (No.2) [2015] UKSC 61 applied; Transview Properties v City Site Properties [2009] EWCA Civ 1255 applied.

5. By choosing to appoint a liquidator, the learned judge erred in the exercise of his discretion. It is now for this Court to exercise its own discretion in determining the appropriate remedy to grant, bearing in mind that this Court should seek to grant the minimum remedy to repair the misconduct and unfair prejudice and prevent it from happening in the future since that is the Court's main purpose when making a grant of relief in such cases. The remedy granted should be proportionate to the prejudice suffered by the petitioner and is not by way of punishment for bad behaviour. Upon consideration of the relevant factors and the fact that the appointment of a liquidator should normally be a remedy of last resort, this Court orders that for the future conduct of Crown Treasure, Madam Kwok be required to notify, consult with and obtain the consent of Madam Yao in relation to matters at the investor level. This enforces the agreement that this Court has found to exist between the parties.

JUDGMENT

[1] GONSALVES JA [AG.]: This is an appeal against the decision of Adderley J dated 13th March 2018, where on an unfair prejudice claim brought under section 184I of the Business Companies Act 2004[1] ("BCA"), the learned judge found that it was just and equitable to appoint a liquidator of Crown Treasure Group Limited (hereinafter sometimes referred to as "Crown Treasure").[2] Pursuant to that decision, by order dated 27th March 2018, the learned judge ordered that Crown Treasure be wound up in accordance with the provisions of the Insolvency Act 2003[3] (the "Insolvency Act"), appointed joint liquidators thereof and also gave certain consequential orders and directions.

[2] Being dissatisfied with the decision of Adderley J, Kwok Kin Kwok ("Madam Kwok") has appealed the decision. Although named as a respondent in the court below

[1] Act No. 16 of 2004.
[2] The claimant had sought as an alternative the appointment of a liquidator under section 162(1)(b) of the Insolvency Act 2003.
[3] Act No. 5 of 2003.

along with Madam Kwok, Crown Treasure took no part in the contest, and was in fact the subject of the dispute between Madam Kwok and Yao Juan rather than a party to it. Although Crown Treasure's name appeared on the notice of appeal and on subsequent documents in this appeal, the company took no part in the appeal proceedings and will not therefore be named as a party in this judgment; Madam Kwok is accordingly named as the only appellant.

[3] Ground 1, expressed in general terms,[4] is that the decision to appoint a liquidator was wrong in law and that, in respect of the exercise of any relevant discretion, it was outside the generous ambit within which disagreement as to the exercise of a discretion is possible, and such discretion was exercised in a manner which was unreasonable and without proper justification. Ground 2 is that the decision to appoint a liquidator, and the finding that such was the fair and most appropriate order and was just and equitable, was wrong in that: (a) it was not supported by the evidence (and there was no or no sufficient evidence to support such decision); and (b) the judge erred by concluding that the facts justified an order for liquidation. The decision failed to take into any or any proper account the evidence which was relevant to the issue as to the claims advanced and the relief to be granted and that it was against the weight of the evidence before the court. By ground 3, Madam Kwok argued that the judge erred in law in making a decision on a basis which was outside Madam Yao Juan's ("Madam Yao") pleaded case, in not confining and restricting Madam Yao to her pleaded case and in deciding the matter by reference to matters not pleaded in respect of and in support of the issue whether to appoint a liquidator; alternatively, by exercising any discretion to such effect so as to make a decision on a basis which was outside of Madam Yao's pleaded case; alternatively, by making a decision as to the appointment of a liquidator on grounds not advanced by Madam Yao in her pleaded case or in submissions (written or oral). By ground 4, Madam Kwok argued that the learned judge failed to adequately or at all consider the statutory requirements for the making of a liquidation order and wrongly found both as a matter of law and on the facts relied on that it was just and

[4] Mr. Fisher described this as "abstract".

equitable to make a liquidation order. By ground 5, it was argued that the learned judge erred in law in holding and deciding that a liquidation order was a fair and proportionate response to the claimant's claim. Finally, Madam Kwok argued that the learned judge failed to provide proper or adequate reasons to explain his conclusions as to the facts and the rejection of evidence from and on behalf of Madam Kwok and his rejection of submissions on behalf of Madam Kwok and his conclusion in finding in favour of Madam Yao and making the order for the liquidation of Crown Treasure. Mr. Fisher, on behalf of Madam Yao, takes issue with all of these grounds.

[4] It is evident that there is a substantial overlap in the way the individual grounds are expressed. In essence, Madam Kwok's argument is that the learned judge erred in law when he appointed a liquidator of Crown Treasure because his decision: (i) was an unreasonable and unjustified exercise of any discretion; (ii) was unsupported by any evidence; (iii) was contrary to the evidence and failed to take proper account of same; (iv) took account of issues not pleaded; and (v) failed to provide any adequate reasons or explanation. These grounds will be considered conjointly within the discussion and analysis that follows. There will, as it turns out in this matter, be no need to separately consider ground (v).

[5] The orders sought by Madam Kwok are as follows:

(1) That the order appointing joint liquidators over Crown Treasure be set aside;

(2) All such relief as may be just and convenient, consequent upon paragraph (1) above;

(3) That Madam Yao be ordered to pay the costs of Madam Kwok in the proceedings below and on this appeal;

(4) That Madam Yao be ordered to indemnify, and/or make good any loss suffered by Crown Treasure pursuant to the appointment of the joint

liquidators, and in particular be required to hold Crown Treasure harmless in respect of the properly recoverable fees and expenses claimed by the joint liquidators; and

(5) Such further and/or other relief as this Court shall consider just and convenient.

The Pleadings

[6] By her re-amended statement of claim,[5] Madam Yao alleged that she and Madam Kwok were and are joint venture partners in a joint venture (the "Project") for the development of a hotel, through Crown Treasure, in which they were to be equal shareholders. By her claim she, as the holder of 50% of the issued share capital of Crown Treasure, sought relief in respect of alleged past and continuing conduct of Madam Kwok as the other 50% shareholder in and the sole director of Crown Treasure, exercising control over Crown Treasure and its subsidiaries, which conduct, Madam Yao alleged has been and will continue to be and [to] cause conduct of the affairs of Crown Treasure, which is oppressive, unfairly discriminatory and/or unfairly prejudicial to her in her capacity as a shareholder of Crown Treasure. Alternatively, Madam Yao sought the appointment of a liquidator of Crown Treasure, pursuant to section 162(1)(b) of the Insolvency Act on grounds[6] related to what will be described as the "Loan Contract to 2045," which will be explained below.

[7] By her re-amended defence, Madam Kwok admitted that she and Madam Yao each held 50% of the issued share capital of Crown Treasure and that she, Madam Kwok, was its sole director. Madam Kwok denied that her conduct had been, is and will continue to be unfairly prejudicial to Madam Yao in her capacity as a shareholder of Crown Treasure, as pleaded or at all. Madam Kwok also denied that Madam Yao and herself were and are "joint venture partners" in the Project, in the way Madam Yao attempted to characterise such a joint venture and

[5] See: record of appeal, bundle B, p. 95.
[6] See: paragraph 3B of the re-amended statement of claim, record of appeal, bundle B, Tab 6, p. 97.

asserted that herself and Madam Yao were "joint venture partners" only to the extent that it relates to the investments that each side had put into the Project. Madam Kwok also, inter alia, denied that Madam Yao was entitled to participate in the management of Crown Treasure.

[8] Madam Kwok also denied the following allegations made by Madam Yao:

(a) That she, Madam Kwok, had failed to provide funding to the Project in equal shares;

(b) That she, Madam Kwok, had procured any unwarranted benefits to herself;

(c) That the assets of Strong Nation Investments Limited ("Strong Nation"), a subsidiary of Crown Treasure, had been put at risk;

(d) That the sum of HK$160 million (representing the initial investment into the hotel project) was advanced by or on behalf of Madam Yao. Madam Kwok's position was that such sum was advanced on behalf of each of them in equal shares. Madam Kwok further denied that there was any misappropriation in respect of the sum of HK$160 million or at all. The reasonableness/necessity of what is described as the "Loan Contract to 2045"[7] was also pleaded; and

(e) That there was any agreement or understanding between Madam Yao and herself giving rise to a quasi-partnership or that Madam Yao had any reasonable and/or legitimate expectation to take part in the management of Crown Treasure. Specifically, Madam Kwok denied that she had any duty, statutory, contractual, equitable or otherwise, to notify Madam Yao or to obtain Madam Yao's agreement in respect of transactions of Crown Treasure in its ordinary course of business on the basis that as the sole director of Crown Treasure, she had the general management power

[7] This will be explained below.

under its articles of association in respect of its affairs. It was further denied that Madam Yao's interest in Crown Treasure had been diluted in the way asserted by Madam Yao and /or that this would constitute an act of unfair prejudice.

[9] In relation to the alternative claim for the appointment of a liquidator which was based on matters related to the Loan Contract to 2045, Madam Kwok's position was that she admitted that she caused Crown Treasure and Strong Nation to sign the Loan Contract to 2045 as their sole respective director, but that this was done for the proper purpose of complying with the Land Contract[8] dated 19th December, 2005. The loan period of 40 years and the due date of the loan (19th December 2045) under the Loan Contract to 2045 mirror the period of the grant of the right to use the land and the expiry date of the use of the land under clause 5 of the Land Contract. Further, that the loan amount of HK$160 million mirrors the requirement for Strong Nation to set up a project company with a registered share capital of not less than US$20 Million[9] under clause 8 of the Land Contract. The Loan Contract to 2045 was and is a necessary and/or reasonable contractual arrangement between Crown Treasure and Strong Nation, so as to ensure maintenance of Xiamen Royal Victoria Hotel Ltd's ("Xiamen RVH")[10] registered capital and compliance with the Land Contract, as well as maintaining Xiamen RVH as a going concern. It was entered into bona fide and for the proper purposes of Crown Treasure.

[10] Madam Kwok further argued that the Loan Contract to 2045 does not amount to anything that is oppressive, unfairly discriminatory, or unfairly prejudicial to Madam Yao. Therefore, it cannot be relied upon as a basis to seek an order for the appointment of a liquidator and it was in any event denied that there was any proper basis for the appointment of a liquidator. Madam Kwok further pleaded that an order for the appointment of a liquidator would be disproportionate,

[8] By which the land for construction of the hotel was being acquired.
[9] Which approximated to HK$160 million.
[10] The company operating the hotel and owing the land.

especially in the event that Madam Yao was not successful in the trial in obtaining her primary prayer for a buyout of Madam Kwok's shareholding in Crown Treasure.

The Case Before the Judge

[11] Madam Yao opened her case before Adderley J on the basis that Madam Kwok had conducted the affairs of Crown Treasure and its subsidiaries in a manner that was unfairly prejudicial to her in her capacity as a shareholder, in that she had:

(a) Excluded Madam Yao from all management and control of Crown Treasure and its subsidiaries;

(b) Denied Madam Yao any involvement or say in the management and control of Crown Treasure and its subsidiaries and their business;

(c) Failed to match the funding provided by or on behalf of Madam Yao to the Project, contrary to what, on Madam Kwok's own case, was agreed between the parties as to the funding of the Project;

(d) Failed to notify Madam Yao and obtain her 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 led to the dilution of Madam Yao's interest in Xiamen RVH and the alienation of shares in Xiamen RVH to a third party, in particular, causing Strong Nation to enter into a cooperation agreement with Cheer Fancy, which led to the alienation of 20% of the shares in Xiamen RVH[11] held and owned by Strong Nation;

(e) Refused to provide Madam Yao with information in relation to the business and finances of Crown Treasure and its subsidiaries,

[11] This company operated the hotel.

(f) Denied the entitlement of Madam Yao to receive information about the transactions or business of Crown Treasure and its subsidiaries;

all allegedly in breach of an agreement or understanding between Madam Kwok and herself, which came into being before or at or about the time that they became shareholders in Crown Treasure;

(g) Entered into funding arrangements with Edmund Eng and his companies, that were not necessary nor beneficial nor in the best interests of Crown Treasure or its subsidiaries; and

(h) Failed to maintain proper or adequate accounts of Crown Treasure or its subsidiaries or to adequately account for the funds of Crown Treasure or its subsidiaries.

[12] However, at the end of the trial, and having regard to the manner in which the trial proceeded, Madam Yao elected to pursue only the matters in sub-paragraphs 10(c), (d), (e), (f) and (g) above. Madam Yao abandoned her claim that she was entitled to be involved in the management or control of Crown Treasure and its subsidiaries, or that she was entitled to be appointed as a director of Crown Treasure, Strong Nation or Xiamen RVH, or that Madam Kwok failed to maintain proper or adequate accounts of Crown Treasure or its subsidiaries or to adequately account for the funds of Crown Treasure or its subsidiaries.

[13] At the conclusion of the trial, Madam Yao maintained that the conduct of which complaint is made, i.e. the conduct described in sub-paragraphs 10(c), (d), (e), (f), and (g) above, was conduct that was unfairly prejudicial to her as a member of Crown Treasure. The primary relief sought in relation thereto by her, was an order that she buy out Madam Kwok's interest in Crown Treasure. Madam Yao also maintained that Madam Kwok acted unconscionably and to the detriment of Madam Yao in that, without her consent Madam Kwok caused Crown Treasure to enter into a shareholder's agreement dated 25th December 2005, whereby Crown

Treasure loaned the initial investment of HK$160 million (made on Madam Yao's case, solely by Madam Yao, and on Madam Kwok's case equally by each of them) 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 (the "Loan Contract to 2045"). On this sole ground[12], Madam Yao expressly sought as an alternative remedy to the relief claimed, the appointment of a liquidator of Crown Treasure pursuant to section 162(1)(b) of the Insolvency Act.

[14] This was the case left for the learned judge's determination. Having considered the complaints of Madam Yao and the answers of Madam Kwok, and on his view of the evidence, in the final analysis the learned judge found that it was just and equitable that a liquidator be appointed of Crown Treasure, setting out his reasons in paragraphs 88 through 105 of the judgment. It is Madam Kwok's position that he was wrong.

Background

[15] Crown Treasure was incorporated in the British Virgin Islands ("BVI") having an authorised capital of US$50,000.00, divided into 50,000 shares of a par value of US$1.00 each, out of which 10 shares have been issued and fully paid up. All the 10 shares were initially held by Tung Fai, the husband of Madam Kwok,[13] as from the date of incorporation until 9th May 2005 when 5 shares each were transferred to Madam Kwok and Madam Yao, each thereby holding a 50% ownership thereof. As from 9th May 2005, Madam Kwok was and remained the sole director of Crown Treasure.

[16] Strong Nation is a company incorporated in the BVI having an authorised capital of US$50,000.00 divided into 50,000 shares of a par value of US$1.00 each, out of

[12] As set out in the re-amended statement of claim. That Adderley J also saw it this way is shown at paragraph 16(6) of the judgment where he stated: "[o]n 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".

[13] The other player in this transaction, Mr. Wei was the husband of Madam Yao.

which 10 shares have been issued. Crown Treasure was at all material times the sole shareholder of Strong Nation, and Madam Kwok has been the sole director of Strong Nation since 28th August 2009.

[17] By her pleaded case, Madam Yao asserted that Xiamen RVH is a company established in the People's Republic of China ("PRC") on 6th February 2006 as a wholly foreign owned enterprise with an initial registered capital of US$20 million, its then sole shareholder being Strong Nation, and that Madam Kwok had been at all times since its establishment a director thereof. Xiamen RVH was incorporated as the operating company to hold the land and develop and operate the Project.

The Judgment

The Alleged Agreement

[18] In his judgment, Adderley J set out, among other things, the background and the claim followed by a consideration of the various areas of complaint made against Madam Kwok, as had been crystalized by Mr. Fisher in his closing arguments. Commencing at paragraph 6 of the judgment under the heading "Division of Responsibilities", the learned judge set out the agreement alleged by Madam Yao to have been reached at the inception stage[14] by which she claimed that Madam Kwok undertook certain obligations to her, namely:

(a) To report to her regularly on the management, operations, accounts and finance of Crown Treasure, its subsidiaries and the Project;

(b) To promptly notify her and discuss with her any major decision, transaction or dealing affecting Crown Treasure, its subsidiaries or the Project, particularly those which will or may have a material adverse effect on Madam Yao's investments, ownership and control of and in the Project, Crown Treasure and its subsidiaries;

[14] These agreements were alleged to have been reached in discussions primarily between Mr. Wei and Mr. Tung, the husbands of Madam Kwok and Madam Yao respectively. See paragraph 19 of this judgment.

(c) Not to 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 Madam Yao's investments, ownership and control of and in the Project, Crown Treasure and its subsidiaries.

[19] This alleged agreement, as will be demonstrated, would form the substratum of Madam Yao's case and also of Adderley J's judgment. In his judgment, Adderley J recounted Madam Kwok's position in relation to this alleged agreement at paragraph 7 when he stated as follows:

> "In her defence, Madame Kwok disputes the feasibility of this agreement, contending that the Project was her idea, stemming from her background in hotel management and the experienced research she carried out when the main discussions were taking place between Mr. Tung 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."

[20] At paragraph 41 of the judgment, Adderley J found that there was an obligation on Madam Kwok to provide information to Madam Yao that arose from the alleged agreement between the parties when he stated:

> "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 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 (emphasis added)."

[21] The rationale for the judge's decision on the issue of the claimed agreement begins at paragraph 37[15] of the judgment. At that paragraph, the judge noted that the disagreements between the two parties came to light in 2010 when

[15] Under the heading "DISCUSSION" and the sub heading "FAILURE TO GIVE INFORMATION".

Madam Yao instructed her lawyers to write to Mr. Eng and Madam Kwok seeking information relating to the shareholding of Cheer Fancy (Xiamen) in Xiamen RVH. Proceedings were formally commenced in December 2013. The judge noted that Madam Yao says that Madam Kwok withheld, from her, information that she should have been given, and which had she been provided with, in advance of various transactions instead of months and years afterwards, might have averted the breakdown in relations that led to these proceedings. The judge went on to note what he described as a few of the more significant instances referred to, as follows:

(a) Madam Kwok did not inform Madam Yao about her intention to cause Strong Nation and Crown Treasure to enter into the shareholder's agreement, nor, seek her consent to that agreement. It is alleged that that agreement was concluded on 25th December 2005 but it is alleged its existence was not disclosed until 2nd August 2013 by way of an inter lawyer correspondence;

(b) Madam Kwok refused to provide a copy of the shareholder's agreement which was only disclosed in this action;

(c) Madam Kwok did not notify the terms of the cooperation agreement. According to Madam Yao, she did not see that agreement until 9 months after it had been concluded; and

(d) Madam Kwok had failed 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 but was explained during cross examination.

[22] The judge further noted that Madam Kwok was of the view that Madam Yao was not entitled to strategic planning information and that other information ought to have been requested through the proper channels, normally making a request to the board of directors of the relevant company. The judge noted that Madam

Kwok was the sole director of Crown Treasure and of Strong Nation during the time of most of the requests. The judge also noted that Madam Kwok's case was that as sole director of Crown Treasure, she has the general management power under its articles of association in respect of its affairs and denies that she may have any contractual duty or otherwise to provide information to Madam Yao about Crown Treasure's finance or business.

[23] Adderley J did not set out what "facts" he was specifically referring to when he made his conclusion that there was a duty to both notify and consult. Previously at paragraph 36 of the judgment, Adderley J had stated that:

> "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".

Despite this statement of intention, on this particular issue of a duty to notify and consult,[16] other than the admissions by Madam Kwok in the exchange between herself and Mr. Fisher referenced by the judge, and to which I will refer below, I am unable to identify any reasoning or evidence relied on by the learned judge for his conclusion.

[24] In the skeleton argument filed on behalf of Madam Kwok, Mr. Chaisty, QC complains[17] that the judgment:

> "…lacks any real structure or factual or legal analysis. In places rulings appear to be stated based on alleged facts where no findings as to such facts have been made or expressed and certainly no reasoning as to why such factual premise is justified has been provided. It would appear that the basic and essential premise of the judgment is that there was an obligation on the part of A to notify and consult, reference is made to paragraphs 41 and 77 of the judgment (emphasis added). The conclusion is expressed in one sentence at the end of paragraph 41 that, 'On the facts of this case there was a duty to both notify and consult' but there is no analysis of the conflicting evidence that was before the court or

[16] Which on the judge's analysis included a duty to give information- see the introductory sentence to paragraph 41.
[17] See: appellant's core supplemental bundle, Tab 4, p. 83.

> explanation or reasoning provided as to when or how such an obligation arose or the extent of such…The proposition is merely stated as a conclusion."

[25] On this point, in his skeleton submission, Mr. Fisher for Madam Yao suggested[18] that the findings of fact can readily be identified within the judgment. He submitted that the finding of fact here was that there was an arrangement made between the parties at the inception of the Project that Madam Kwok would not make any major decision or enter into any major transaction or dealing with Crown Treasure, its subsidiaries or the Project, particularly those which will or may have a material adverse effect on Madam Yao's investment, ownership and control in the Project, Crown Treasure or its subsidiaries. According to him, this was implied from paragraph 77 of the judgment[19] He went on to state that the judge was entitled to make this finding based on the evidence of Madam Yao and her husband and on the facts (as found by the judge) that the Project was a venture between Madam Kwok and Madam Yao to the exclusion of other investors in which they undertook to fund the Project in equal shares.

[26] He also argued that a finding of fact was that there was an agreement between the parties at the inception of the Project that the only sources of funding would be Madam Kwok and Madam Yao in equal shares and bank financing and would not include any other investor. He argued that the judge was entitled to make this finding based on Madam Kwok's pleaded case at paragraph 33(7)(iv) of the re-amended defence and her own evidence.

[27] I agree with Mr. Fisher, that at least implied in paragraph 77 is a factual finding by Adderley J to that effect.

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[18] See: appellant's core supplemental bundle, Tab 5, p. 114.5.

[19] By that paragraph Adderley J stated: "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'."

[28] In considering the question of what exactly was the arrangement[20] between the parties, Adderley J noted that there was an absence of documentation chronicling the arrangement. At paragraph 35 of the judgment he noted:

> "No contemporaneous documents were presented that record or evidence any agreement reached between 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."

[29] Adderley J referred to, and therefore appeared to rely on, the cross examination by Mr. Fisher of Madam Kwok that occurred on 5th and 6th December 2017, and the exchange that occurred there, made in the context of the discussion of when the initial arrangements were entered into. He noted that Madam Kwok had accepted as correct the following:

(1) That at the time when the discussion took place, it was her intention and the "expectation" that the only investors who would be involved in the hotel project were herself and Madam Yao; and

(2) That she had agreed that Madam Yao and herself would be the investors in the hotel project.

[30] Adderley J also recounted that in response to Mr. Fisher's suggestion that Madam Kwok would have required Madam Yao's consent to enter into the cooperation agreement, Madam Kwok indicated that she would tell Madam Yao about it, but with regards to the terms and provisions listed in the cooperation agreement, those were within her scope of responsibilities as manager. Adderley J also noted that later on[21] in the cross examination, Madam Kwok had admitted that the source of the funding was to be herself and Madam Yao and bank financing, not by any other investor.

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[20] Or agreement.

[21] See: transcript p. 88/4-9.

[31] The question is, was Adderley J entitled to reach the conclusion that "[o]n the facts of this case there was a duty both to notify and consult?". As stated by Mr. Fisher in his submissions, Adderley J's conclusion was based on the evidence of Madam Yao and her husband and on the facts (as found by the judge) that the Project was a venture between Madam Kwok and Madam Yao to the exclusion of other investors, in which they undertook to fund the Project in equal shares. This is an inference that the trial judge would have drawn from those primary facts and would have had very little to do with the credibility of the witness. In such a case, as was pointed out by Lord Hodge in Beacon Insurance v Maharaj Bookstores Ltd.[22] an appellate court is in just as good a position as the trial judge to make these types of inferences. Having considered the judgment on this issue and the way the evidence unfolded in this matter, and the closing submissions of the parties that sought to crystallize this issue, I am of the opinion that in coming to that conclusion the learned judge unjustifiably painted with a very broad brush and found an almost unrestricted duty to notify and consult when this inference was not supported by the evidence on which he sought to rely. There was no or no sufficient evidence to support a stand-alone and general duty to notify and consult. There was evidence on which to find that Madam Kwok could not introduce a new investor without Madam Yao's consent, and also that Madam Kwok needed Madam Yao's consent in relation to non-bank financing. Subsumed within those restrictions would automatically be a consequential or related duty to notify and consult in relation to those things, and to provide information.

[32] The learned judge appears either to have lumped together the duty to notify and consult/provide information with the duty to obtain consent without a distinction as to the circumstances, or to have sought to extract from the duty to obtain consent (where it did exist, in relation to introducing a new investor) a general and unrelated duty to notify and consult. I have arrived at this conclusion because the

[22] [2014] UKPC 21 at para. 17, applied in Dennis Browne v Nagico Insurance Company Limited SKBHCVAP2014/0001 (delivered 8th December 2017, unreported).

only evidence that he actually referred to in support of his referenced "arrangement between the parties"[23] was the exchange between Mr. Fisher and Madam Kwok in her cross examination, which itself was limited to the issue of obtaining consent at the investor level.

[33] The difficulty I find with this approach by Adderley J is that the alleged duty to provide information and the alleged duty to obtain consent were distinct issues. They were so treated by Mr. Fisher in his closing submissions.[24] On this Mr. Fisher indicated to Adderley J: "[s]o, My Lord, moving on then, what was agreed. Well we now limit ourselves to really the provision of information and seeking consent."[25] The failure to "notify the claimant of and to obtain the claimant's prior consent to a number of major decisions, transactions…"[26] is a separate claim from the allegation that Madam Kwok "refused to provide the claimant information in relation to the business and finances of Crown Treasure and its subsidiaries"[27] and "denied the entitlement of the claimant to receive information about the transactions or business of Crown Treasure or its subsidiaries."[28]

[34] In relation to his finding of a duty to notify and consult, it is clear that the judge relied on his own analysis[29] of the exchange between Mr. Fisher and Madam Kwok on the issue of "THE PERMITTED INVESTORS AND TYPES OF FUNDING" to support his conclusion. The actual exchange was as follows:

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[23] The phrase he used at paragraph 41 and on which he purported to rely as the basis for his conclusion.
[24] See bundle A2, tab 20, p. 6/4, p6/17 and p 7/1.
[25] See bundle A2 tab 20 p. 46/23. Also see Mr. Fisher at p. 49 letter 3 on "But what of generally providing information? And this really is an important point, the provision of information and the entitlement to information". See also Mr. Fisher's treatment of the consent point and the entitlement to information point at tab 21, p.137 where in relation to the former he relied on the admission by Madam Kwok and in relation to the latter, he stated that without any evidence from the claimant or Mr. Wei, the court had to determine the content (meaning) of "passive financial investor".
[26] See: para. 16(2) of the judgment.
[27] See: para. 16(3) of the judgment.
[28] See: para. 16(4) of the judgment.
[29] See: para. 19 of the judgment. The judge also at para. 34 referred to weighing Madam Kwok's evidence against the objective facts and surrounding circumstances as came out in the evidence, but did not identify what facts and circumstances he was referring to.

"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, on your case, that is what you agreed, isn't it, that it would be you and the Claimant who would be the investors in this hotel project.
A: Yes.
…
On 6 December
5/6 Q: So you would have needed Madam 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 in 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 her job responsibility.
(And later on)
88/4 Q So in your agreement, the arrangement that you say you had with Madam Yao, there were only two sources of funding according 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."

[35] Now the most that can be gleaned from this exchange is that Madam Kwok agreed that the only investors were to be herself and Madam Yao, funding would be limited to both of them and bank financing, and Madam Kwok could not bring into the Project any investor or utilize any non-bank financing without first obtaining Madam Yao's consent. This requirement to notify, consult and obtain consent was

at the investor level.[30] I am fortified that this was the correct point to extract from all of this, as this follows the position put to Madam Kwok by Mr. Fisher, following on from the aforementioned exchange, when Mr. Fisher put to Madam Kwok twice that she did not have autonomy/complete autonomy "at the investor level."[31] Therefore, as far as finding a duty on Madam Kwok to notify and consult Madam Yao, arising out of Madam Kwok's referenced admissions,[32] it was necessary that this be qualified so as to apply only at the investor level, that is, in relation to introducing new investors.[33] This is what Mr. Fisher put to Madam Kwok in relation to consent. Of course, inherent in a duty to obtain consent would be a duty to provide pertinent information in relation to those matters on which consent was being sought.

[36] But at least some of the information to which the learned judge was clearly intending to cover in his conclusion that there was a duty to notify, was not information that would be collateral to the duty to obtain consent at the investor level. At paragraph 39 of his judgment, the learned judge referred to "strategic planning…and other information". At paragraph 40, the learned judge referred to information "…about the Company's finance or business". But the requirement to provide this type of information would not arise at the investor level and the judge would have had to identify some agreement or understanding between the parties in relation to this. But Mr. Fisher was not able to point to any evidence of such an agreement or understanding. This is in fact borne out in his oral closing submissions in the court below. Mr. Fisher, having already dealt with the issue of the alleged failure of Madam Kwok to obtain Madam Yao's consent as a distinct issue, went on to address as a separate issue the obligation of Madam Kwok to provide Madam Yao with information as to the business and finances of Crown Treasure and its subsidiaries, a position he said Madam Kwok continued to maintain, and the related issue of a denial of Madam Yao's entitlement to that

[30] That is in relation to funding.
[31] See: bundle A2, tab 12, p.85/12 - 85/18.
[32] See: tab 21, p. 137 where the requirement for consent was said to rely on Madam Kwok's admissions.
[33] Which also includes non-bank financing.

information.[34] In this regard, however, Mr. Fisher admitted that there was no evidence that he could point the Court to assist it on this point.[35]

[37] On this particular issue, the premise for Mr. Fisher's contention that a duty to provide information arose was that it must have been agreed as "…no one would invest this sort of money in a project like this on terms that they were to be shut out from all knowledge of what's happening in the business, what the plans are for the business, what the strategy is". It would not, according to Mr. Fisher, make commercial sense or common sense; it would make nonsense. Mr. Fisher was relying on an implication arising out of the alleged relationship between the parties and the nature of the investment.[36] It would be helpful to reproduce Mr. Fisher's submission to Adderley J on this, which went as follows:[37]

> "So, my Lord, what we say is that in this case there was an agreement. I accepted that there were agreements between the parties which limited the right of the Defendant to act to exercise the legal rights that she had as director of Crown treasure and director of Strong Nation. She accepts, **as I have already pointed out, that she couldn't enter into** loan contracts with non-**banking organizations. She couldn't** enter into any agreement whereby third party investors would be introduced without the consent of the Claimant. But we go further than that and say clearly, based on the relationship and the nature of the investment, (emphasis added) that the Claimant was clearly entitled to receive the information about this project, about the companies and about the businesses the company had as being conducted and how it was to be conducted. And it doesn't have to be a contract, it doesn't have to be enforceable. It's what's understood between the parties and…that clearly was understood between the parties."

[38] In his reply oral submissions on this point, Mr. Fisher further addressed Adderley J on this[38] and the points that came out were as follows:

(1) On this point there was no evidence from the claimant or her husband Mr. Wei, and the court had to decide what is the content of the term "passive financial investor" because that was the term

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[34] See: bundle A2, tab 20, p. 6/17 and p. 7/1.
[35] See: bundle A2, tab 21, p.139, and tab 20, p. 6, line 7 and p. 7, line 1.
[36] It must be borne in mind that Madam Kwok had dropped any claim based on quasi-partnership.
[37] See: bundle A2, tab 20 pp. 74/4–74/23.
[38] See: bundle A2, tab 21, p. 137/7 and following to p. 142/15.

used by Madam Kwok and no content was put on it by her. There was no evidence that Mr. Fisher could point to.[39]

(2) Mr. Fisher submitted that "passive" suggested inactive, but not uninformed.

(3) The relationship was such that these were not two strangers introduced to some crowd-funding, responding to an advertisement in the Beacon for an investor. These people knew each other and had a history. This was not an investment in an existing venture but the commencement of a venture.

(4) Given the nature of the investment, the nature of the project, the long term nature of the project, it is fanciful to think that either of the parties intended that Madam Yao would put in her investment (HK$80—HK$160 million) go away and forget about it and be told nothing about it for 40 years until she got a letter saying here is some money.

[39] After Mr. Fisher acknowledged that there was no evidence on this point, he indicated (and seemed therefore to rely on) that the Court still had to ask what was meant by the term "passive financial investor,"[40] and that it connotes that Madam Yao, though not taking part in the business will have information, because the contrary is ludicrous.[41]

[40] Importantly, Adderley J in his judgment does not refer to the argument of Mr. Fisher that the parties must have agreed to the provision of information arising out of the circumstances of the relationship, or the nature of the investment, nor to a definition of what "passive investor" meant.[42] I am therefore left to conclude

[39] See: bundle A2, tab 21, p 139/7.
[40] See: bundle A2, tab 21, p. 139/9.
[41] See: bundle A2, tab 21, p 142/4.
[42] See: para. 96 of the judgment "… Whether a 'passive investor', whatever that may mean, or not…".

that Adderley J did not accept or rely on any of these arguments in coming to his conclusion that an obligation to provide information existed. In his analysis contained in his judgment, the only evidence expressly mentioned was the exchange between Mr. Fisher and Madam Kwok which I have already stated must be limited to an admitted restriction on Madam's Kwok's autonomy at the investor level. This in my opinion lent no support for the argument that a general obligation to provide information as that claimed, actually existed.

[41] There is a further tangential point, to be extracted from a previously cited paragraph of the learned judge's judgment. It appears that in searching out the "agreement", Adderley J was still, incorrectly in my view, considering that it would somehow concern the management of Crown Treasure and its subsidiaries. At paragraph 35 he stated:

> "No contemporaneous documents were presented that record or evidence any agreement reached between the parties in relation to the management (emphasis added), 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 (emphasis added) was made and what were its terms."

But Madam Yao had already dropped any claim to be entitled to participate in management. With that concession, there remained a lack of clarity as to its effect on the claim by Madam Yao that Madam Kwok had agreed not to make any major decisions or enter into any major transactions[43] etc. of a certain nature. Other than in the clear case of introducing a new investor, there would appear to be potential for overlap. With Madam Yao having dropped her claim to be entitled to participate in management, it is very difficult to imagine and marry with that, a general obligation still existing to both notify and consult on the very far reaching and wide list of matters set out at paragraph 18(b) and (c) above.[44]

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[43] See: para. 77 of the judgment.

[44] Although a similar division was referenced in Re R A. Noble & Sons (Clothing) Limited [1983] BCLC 273 but the division appeared to have been more distinctive in that case.

[42] There is also another subsidiary point that suggests that there was in fact no such obligation and this is related to a point made by Mr. Chaisty, QC in response to Madam Yao's claim that her initial investment of HK$160 million was a demand loan. One of Mr. Fisher's main arguments was that it was fanciful to think that either of the parties intended that Madam Yao would put in her investment (HK$80 to HK$160 million) go away and forget about it and be told nothing for another 40 years until she got a letter saying here is some money. But it was not Madam Yao's position on her pleaded case that her original investment was to go towards "registered capital". Her claim was that the HK$160 million that she invested was a demand loan that she could call in at any time, although she intended not to do so if all things were going well. So, on her pleaded case, if she was not getting any information or was otherwise displeased with the position in which she found herself, she could simply have called in her loan. On her case, she would not have put in her investment and gone away for 40 years[45] because she would have had the option to recall her money. Mr. Fisher's argument is that, if she was going to be in this for 40 years, one would expect that the parties would have agreed to the provision of information. But his allegation of the entire matter being fanciful loses at least some of its attraction as soon as it is realised that on Madam Yao's pleaded case there was no requirement for her to "go away and forget about it…for 40 years". It is then rather odd to say, well that's my pleaded case - it's all a demand loan, but if you find it's not and it's capital[46] then if I am going to be in this for 40 years, then there was an agreement that I would be provided with information.

[43] In the circumstances, outside of a duty to provide information as a necessary corollary to cases where there was an obligation to obtain Madam Yao's consent, that is at the investor level, I can identify no basis on which the judge properly concluded on the evidence before him that there was a general duty on Madam Kwok to provide information, or to notify and consult as the learned judge put it.

[45] This must have been a reference to the term of the Loan to 2045.
[46] That is equity or registered capital.

In the circumstances, I am of the opinion that the judge erred in this general conclusion. This initial finding by Adderley J would have underpinned his later findings in relation to the various areas of complaint made by Madam Yao to ground her claim of unfair prejudice and for the specific request for the appointment of a liquidator.

Areas of Complaint

Failure to Match Funding

[44] Adderley J then proceeded to consider the allegation that Madam Kwok had failed to match funding. He acknowledged that Madam Yao's position was that she would provide all the initial funding and there would be discussions between her husband, Mr. Wei, and Madam Kwok if additional funds were needed, secondly through bank financing, and thirdly further funding, if necessary, through Madam Yao and Madam Kwok.[47]

[45] According to Adderley J, Madam Yao and Madam Kwok agreed that they would be responsible for all necessary capital needed for the Project in equal shares up to RMB550 Million, exclusive of the cost of the land. Adderley J observed that at paragraph 60 of Madam Kwok's witness statement dated 4th August, 2014, she had stated "the principle of equal capital contribution applies to the construction cost (which I estimated to be around RMB550 million) as well as the land cost to be incurred".[48] In the end, Adderley J found that an amount of RMB128 million was advanced by Madam Yao's husband on behalf of Madam Yao, as funding by way of an interest free demand loan, which was used in the purchase of the land upon which the hotel was to be built. He also found that Madam Kwok also provided some funds, totaling some RMB73,386,000 at the end of 2008, and that this presented a shortfall of RMB54,614,000 to reach Madam Yao's RMB128 million. Madam Kwok's position was that she had no obligation to match funding

[47] As background, it should be noted that Adderley J found the initial HK$160 million represented an equal investment of HK$80 million by each of Madam Yao and Madam Kwok. Any inequality now depended on the matching by Madam Kwok of the HK$128 million provided by Madam Yao's husband on her behalf.

[48] See: bundle A1, tab 8, p. 80/11 where Mr. Chaisty, QC stated that Madam Kwok agreed they would contribute equally to the capital.

other than in relation to "capital", that term meant not to include loans. Adderley J rejected that answer and found that the arrangement was that Madam Kwok would equally match the financial contribution of Madam Yao. He concluded that while Madam Yao made available the RMB128 million through the period from December 2005 to January 2010, until it was paid off, Madam Kwok had not matched that amount. This was his factual determination and constituted a breach of the funding agreement.

[46] Madam Kwok's argument with this finding is that such a proposition (the obligation to match funding) in relation to loans was unworkable nonsense. It would never be practical to be required to contribute loans equally, as either party, on such a case (assuming these were demand loans) could demand repayment forthwith, and where would that leave issues of equality or inequality. Mr. Fisher's position on this was that factually, Madam Kwok was in breach of the agreement as to equal funding in the manner found by the judge[49] and the judge was entitled to come to that conclusion, but he did not engage directly on the argument raised by Madam Kwok.

[47] I find there is much merit in Madam Kwok's argument. While it may be possible in theory for the parties to have been under an obligation to match loans on coordinated terms that would ensure there were no issues of inequality as to amounts, term, repayment etc., the difficulty I find is that Adderley J, having concluded that the RMB128 million was an interest free demand loan, which meant that it could be called in at any time, found there was an obligation on Madam Kwok to match it. But as suggested on behalf of Madam Kwok, this would result in a totally unmanageable, and in my opinion unmeasurable and therefore unenforceable, situation, if any of the lenders could determine at her own choosing when to call in her loan. This absolute right to call in a loan, as and when she saw fit, was in fact insisted upon by Mr. Wei. In cross examination Mr. Wei agreed that, theoretically in the middle of April 2006, Madam Yao could

[49] See: appellant's core supplemental bundle, tab 5, p. 8.

have demanded that the RMB160 million and the RMB128 million (which Madam Yao pleaded were both demand loans) be repaid, even if the hotel had been half completed.[50] If this was so, it must mean that had Madam Kwok advanced similar sums, she too could have demanded repayment at any time. Consequently, any perceived obligation to match funding, if it did exist, was in relation to loans totally illusory. One cannot match a moving or unmeasurable target. My conclusion is also supported by the fact that Madam Yao in cross-examination expressed that she did not see any need to discuss her right to recall her shareholder loan with Madam Kwok. According to her, she did not need to talk to Madam Kwok - that was the nature of a shareholder loan. This shows that there was no expected coordination between the parties in relation to the granting or recall of any shareholder loans. In the circumstances, the judge was wrong to conclude that the obligation to match loans existed. Here again this conclusion does not depend on the credibility of the witnesses, but is an inference to be drawn from primary facts and the simple workability, or lack thereof, of what was claimed by Madam Yao.

The Shareholder's Agreement

[48] Under the heading "FAILURE TO NOTIFY THE CLAIMANT OF AND TO OBTAIN THE CLAIMANT'S PRIOR CONSENT TO A NUMBER OF MAJOR DECISIONS, TRANSCATIONS, AND OTHER IMPORTANT MATTERS", the learned judge went on to consider the shareholder's agreement.

[49] The judge's consideration of the matters under this heading "failure to notify" would have been premised on his earlier finding that there was an obligation on Madam Kwok to notify and consult Madam Yao. I have previously determined that this obligation should have been limited to the matters related to obtaining consent from Madam Yao at the investor level. It had been Madam Yao's contention that this transaction was unconscionable and unfairly prejudicial to her

[50] See: bundle A1, tab 2, pp. 33/10 and 34/11 where Mr. Wei said the loans were repayable on demand, and that Mr. Tung and Madam Kwok understood that.

as a 50% shareholder in Crown Treasure. Madam Yao argued that, by the shareholder's agreement between Crown Treasure and Strong Nation entered into on 25th December 2005, Madam Kwok locked in the HK$160 million investment capital for 40 years (until 19th December 2045) and the only provision for repayment by Strong Nation is out of dividends received from Xiamen RVH. To the extent that the loan was not repaid before the end of the term, it was never to be repaid. There is no provision for interest.

[50] At paragraph 61 of the judgment, Adderley J set out what he understood to be Madam Yao's explanation of how the unfair prejudice arose in this regard. He stated:

> "It was put to the defendant that because the Shareholders Agreement put the claimant in the 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 the subsidiary companies, and receiving all the perks that go with 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."

[51] Adderley J then proceeded to set out the explanations or answers of Madam Kwok on this including:

(1) The shareholders had already gained value of their equal contributions of HK$80 million as a result of the appreciation in value of the hotel;

(2) Out of cash flow, the bank loan and interest and property taxes were being paid. The bank loan was expected to be paid off in 2022, after which consideration could be given to the payment of dividends. Under a term of the bank loan, Xiamen RVH could not pay dividends until the loan had been repaid. The judge remarked that none of this information had been given to Madam Yao.

(3) The Loan Contract to 2045 was commercially necessary, and was made to effectively satisfy the capital requirements of the Project. Madam Yao maintained that locking her investment in for 40 years was not necessary for Xiamen RVH to maintain a capitalization of at least US$20 million (approximately HK $160 million) and the capital could have been maintained by the injection of new funds.[51]

[52] The judge noted at paragraph 66 that the actual decision per se was not necessarily being criticized, that Madam Kwok was allowed to make management decisions under the principles of **O'Neil**l and another v Phillips and Others.[52] What was being most criticized was that Madam Kwok did not consult with and inform Madam Yao of the planned contract, thereby giving her an opportunity to be heard on it in line with their agreement.

[53] At paragraph 67 of the judgment, Adderley J found that Madam Kwok was in breach of the agreement between herself and Madam Yao. His explanation was as follows:

> "I find 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 50/50 shareholder. Furthermore, because of the onerous terms, under 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."

[54] Mr. Chaisty, QC's complaint here is that this simply expresses conclusions but provides no reasoning. Nowhere is it said how or when the agreement to notify and consult was reached. He argues that there simply was no such agreement. Further, it is not explained how such a failure was unfair or prejudicial. If the Loan Contract to 2045 was a requirement of the PRC authorities, why was it "unfair" not to consult, he asked. The effect of the 2045 contract was equal to

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[51] Also refer to Madam Kwok's defence on this issue, set out at paragraphs 7 and 8 above.
[52] [1999] 1 WLR 1092.

Madam Yao and Madam Kwok, as the judge found that they had each contributed HK$80 million. If it had to be entered into, why was the failure to consult prejudicial? He concluded that, in any event, given the finding that no remedy under section 184I would be made for the compulsory sale of shares, it is wholly unclear how these conclusions led to a liquidation order.

[55] On this matter, I am also not in agreement with Adderley J. Firstly, this finding is premised on the purported agreement to notify and consult. But outside of the introduction of a new investor, where I have found there was a requirement to obtain consent (with notification and consultation being subsumed thereunder), there was no evidential basis for any finding of a general obligation to notify and consult. This was not an issue concerning the introduction of a new investor. Secondly, there is a very unhappy relationship between Adderley J on the one hand finding that Madam Kwok was allowed to make management decisions, with this being one instance and still superimposing thereon an obligation to consult and inform (again, this not being the introduction of a new investor situation, thereby justifying this superimposition).[53] Thirdly, Adderley J had already found at paragraph 57 of the judgment that the HK$160 million was used to capitalize the land holding company in accordance with the requirements of the Chinese authorities. Fourthly, as pointed out by Mr. Chaisty, QC, the prejudice identified by Adderley J at paragraph 61 of his judgment included matters such as the salary and perks enjoyed by Madam Kwok, when these formed no part of any complaint in the pleaded case.

[56] In the circumstances, I disagree with the learned judge that there was any obligation to notify and consult in this case as this was by the judge's own admission a management decision. Even if there was any such obligation, I am of the opinion that the decision taken by Madam Kwok was not unfair (even if it

[53] I allude here to my concern over the resultant unhappy overlap at paragraph 41 above of this judgment. Madam Yao had already dropped any claim of quasi-partnership.

could have been prejudicial to Madam Yao)[54] in that capitalization of the land holding company was, as the judge found, a requirement of the Chinese authorities[55] and the judge made no factual finding that the capitalization could have been satisfied in the short-term funding method suggested by Madam Yao. There was also the further argument by Mr. Chaisty, QC that if the HK$160 million was initially capital (i.e. equity as against a demand loan as Madam Yao pleaded) then, the Loan Contract to 2045 did not affect her position. As pointed out by Mr. Chaisty, QC, Adderley J did not clearly indicate whether he found the HK$160 million to have been contributed as registered capital or as a loan.[56] However, if it was registered capital, I think that would have supported the conclusion that it was not unfair to Madam Yao that the 2045 Loan was entered into because her HK$80 million contribution would already have been tied up for the duration of the investment. In answer to this point, Mr. Fisher had argued before the judge that there is a difference in a company having cash reserves rather than having that cash tied up for 40 years. But considering the requirement for the land holding company to be capitalized as found by the judge, I am not impressed with this argument.

[57] Consequently, based on my reasons given above, the judge was wrong when he concluded at paragraph 67 of the judgment that it was a breach of the agreement not to have notified and consulted Madam Yao about the planned arrangement and that it was unfair and prejudicial to her in her capacity as a 50/50 shareholder.[57]

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[54] The conduct complained of must not merely be prejudicial, but unfairly so. One element without the other will not suffice. Per Neil LJ in Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at p. 31.

[55] As Mr. Fisher himself had put to Adderley J, as a matter of principle only of course, if Madam Kwok was not at fault then there could be no unfairness and no inequity and no unconscionability and that's the end of it. See: bundle A2, tab 20, p. 10/10.

[56] See: para. 24(16) of Mr. Chaisty, QC's submissions where he suggests that at para.60 Adderley J appears to accept that the HK$160 million was "capital" and not a short-term loan.

[57] It should also be noted that Mr. Fisher's closing argument on this point was that this conduct goes to the just and equitable jurisdiction because it affected Madam Yao in her capacity as a creditor. This was based on her case of having loaned money to the Group. See: bundle A2, tab 20, pp. 8 and 9. But the judge did not find that it was unfair and prejudicial to Madam Yao in her capacity as a creditor, but in her capacity as a 50/50 shareholder. See: para. 67 of the judgment.

[58] Now, Mr. Chaisty, QC argued that this was the sole case advanced by Madam Yao for the appointment of a liquidator. At paragraphs 5 and 7 of his written submissions,[58] he stated:

> "5. Further, it is very important to see precisely how the alleged entitlement to a winding-up order was pleaded. Reference is made to the Re-Amended Statement of Claim at Paragraph 3B. The basis for claiming the relief was very narrow and very specific:
>
> (1) That money was advanced by R, HK$160 million, as a loan and that such was repayable on demand;
>
> (2) That without consultation that money was appropriated by A as capital of the Second Defendant which entered into a Loan Agreement to 2045 with Strong Nation and that therefore R will have no access to "her" HK 1$160 Million until 2045.
>
> …
>
> 7. The reasoning in the Judgment leading to a winding-up order does not address the case as advanced."

[59] Mr. Chaisty, QC's position is that the order for liquidation was made on grounds not advanced by Madam Yao and therefore not in issue during the trial.[59] This argument was no doubt made on the basis that at paragraph 106 of the judgment, Adderley J appears to be implying that he was relying on all of the areas of complaint in coming to his decision to appoint a liquidator and not just on the Loan Contract to 2045. Mr. Fisher disagrees with Mr. Chaisty, QC and submitted that while it is correct to say that failure to consult in relation to the Loan Contract to 2045 was introduced by re-amendment in August 2017, as an additional ground for the appointment of a liquidator, such relief has always been part of Madam Yao's pleaded case as an alternative remedy in relation to all the matters that she complained of under section 184I. He further submitted that the appellant was attempting to separate the complaints in "S184I", complaints which she argues are irrelevant to the remedy of liquidation, and the "liquidation" complaint, which she seeks to limit to matters concerning the Loan Contract to 2045, and to argue that the "S184I" complaints were dismissed, whereas the

[58] See: para. 26 of the judgment.
[59] See: appellant's core supplemental bundle, tab 4, para. 51.

"liquidation complaint" did not by itself justify the appointment of liquidators. Mr. Fisher submits that this is to misconstrue the legislation, as liquidation is itself a remedy available on a complaint under section 184I, and that liquidation has been a pleaded remedy since the issue of the claim form, and the judgment was not granting relief exclusively under section 159(1) (a) but also and primarily under section 184I.

[60] In his summary starting at paragraph 88 of the judgment, the learned judge appears to have encapsulated all the breaches that he had found (including in relation to the cooperation agreement and the Eng Loan that I discuss below) in arriving at a basis for the appointment of a liquidator as his explanation at paragraph 106 (the conclusion) is "For all of the above reasons, (emphasis added) I am minded…to appoint a liquidator of Crown Treasure…on the ground…that it is just and equitable that a liquidator should be appointed". As I understand Mr. Chaisty, QC, this would have taken the learned judge outside of Madam Yao's pleaded case for the appointment of a liquidator as he relied on grounds other than the Loan Contract to 2045 for coming to his decision, and that this would have been improper.

[61] On this point, I agree with Mr. Fisher. Mr. Chaisty, QC is suggesting that the remedy of liquidation was only open to the judge in relation to the conduct claimed surrounding the Loan Contract to 2045, because it was on this premise that the remedy was specifically asked for in the pleadings. I disagree. Section 184I is clear. It states, that if on an application made under section 184I, the court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of the subsection, one or more of the orders set out in sub-paragraphs (a) through (h). Sub paragraph (f) refers to the appointment of a liquidator under section 159(1) of the Insolvency Act on the grounds specified in section 162(1) (b) of that Act. As was stated by Oliver LJ in Re Bird Precision Bellows Ltd,[60] the effect of the wording "…is to confer on

[60] [1985] 3 All ER 523.

the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company…". When considering the appropriate remedy, the court is not bound by the relief sought by the petitioner. In Re Neath Rugby Ltd (No 2); Hawkes v Cuddy and others (No 2)[61] the Court of Appeal stated:

> "It was suggested that on a petition under s 994 the court cannot award relief that the petitioner does not seek. In the present case, the correctness or otherwise of that proposition is academic, since ultimately, when it was apparent from the judge's judgment that Mr Hawkes would not be able to buy out Mr Cuddy, he agreed to the order proposed by the judge being made on his petition. On any basis, therefore, the judge had power to make the order he did. But I would not want it to be assumed that that proposition represents the law. The terms of s 996 are clear: once the court is satisfied that a petition is well founded, 'it may make such order as it thinks fit', not 'such order as is sought by the petitioner…"

[62] So there are two answers to Mr. Chaisty, QC. Firstly, relief is at large. On a proven unfair prejudice claim, on any pleaded ground, the court can make any order it considers fit including a liquidation order. It is not necessary that a petitioner must have requested a liquidation order because it is the court that determines the suitable remedy. It has become a standard requirement that a petitioner should state what relief he is seeking.[62] The fact that the petitioner is seeking a particular remedy, or the view of the petitioner[63] of the relief that the court would otherwise consider appropriate, is only a consideration[64] to be taken into account when deciding what relief to grant. It goes to the exercise of the court's discretion, not to the power of the court to make such order as it thinks fit.[65] Secondly, and in any event, on the claim form, I agree with Mr. Fisher that liquidation was set out as a remedy. At paragraph 3 of the reliefs sought, Madam Yao requested "Further or in the alternative to Paragraphs 1 and 2 above and as

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[61] [2009] 2 BCLC 427 at para. 85. See also Fulham Football Club (1987) Ltd. v Richards [2011] EWCA Civ 855 at para. 46.
[62] See Re Antigen Laboratories Ltd [1951] 1 All ER 110; Re J. Cade & Son Ltd [1992] BCLC 213.
[63] Whether he finds it to be acceptable or not.
[64] But a major consideration.
[65] Re Bird Precision Bellows Ltd, supra n. 60, at para. 90. It was there stated that the court could in fact grant a remedy the petitioner did not ask for or desire.

a fallback position of the Claimant, an Order pursuant to Section 184I(2)(f) of the BCA appointing a liquidator of the 2nd Defendant under Section 159(1) of the Insolvency Act on the grounds specified in Section 162(1)(b) of the Insolvency Act". Further, paragraph 4 of the reliefs included the catch-all phrase, "Such further or other order within Section 184I(2) BCA as the Court considers just or equitable".[66] Mr. Chaisty, QC is correct to imply that Mr. Fisher focused his argument on liquidation on the Loan Agreement to 2045. However, that would only go to the issue of the court's exercise of its discretion when fashioning the appropriate remedy, not to the court's power to grant whatever remedy it saw fit.

[63] As far as the grounds or areas of complaint or conduct are concerned, what is clear is that whatever relief is to be granted, by the judge, must be based on conduct alleged to constitute unfair prejudice and contained in the pleaded case. This is established in Wang Zhongyong et al v Union Zone Management Limited et al[67] This presents no difficulty in this case.

[64] Mr. Chaisty, QC sought to rely on the case of George W. Bennett Brys**on's Co.** Ltd v George Purcell[68] in support of his argument that Madam Yao was bound by her pleaded case, in the sense that there was only one ground on which the judge could have made the liquidation order. In that case Blenman JA noted:

> "[30] The legal principles regarding the importance of pleadings are well-settled by authorities. It is a rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served…
>
> [31] In London Passenger Transport Board v Moscrop, Lord Russell of Killowen had this to say:
>
> > 'Any departure from the cause of action alleged for the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so

[66] See the implication of this in Re Bird Precision Bellow Ltd, supra n. 60.
[67] BVIHCMAP2013/0024 (delivered 12th January 2015, unreported). See also: In re Cuthbert Cooper & Sons Ltd [00160 of 1937.]- [1937] Ch. 392 and In re Fildes Bros Ltd. [1970] 1 WLR 592 at p. 597.
[68] ANUHCVAP2011/0023 (delivered 28th February 2018, unreported).

> that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be deemed to be amended" or "treated as amended." They should be amended in fact.'
>
> …
>
> [33] In short then, the function of pleadings is to "give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties." It is duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings...
>
> …[35] Applying the above principles, it is clear that by unilaterally framing the issue of breach of contract for determination that was not pleaded nor responded to by the parties, the learned trial judge fell into error."

[65] These principles are well entrenched. However they do not address the issue here where, on section 184I, once any pleaded ground or conduct is found by the judge to constitute unfair prejudice, the judge may in his discretion award any remedy he sees fit, whether requested by the petitioner or not.

[66] I will now consider the two remaining areas of complaint that were apparently included by Adderley J in the reasons for his decision to appoint a liquidator.

The Cooperation Agreement

[67] Adderley J then went on to consider the cooperation agreement between Strong Nation and Cheer Fancy. At paragraph 68 of the judgment, he stated as follows:

> "The defendant procured a 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 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."

[68] Under the agreement, Cheer Fancy, a company owned and controlled by Mr. Eng, agreed to invest up to RMB 220 million into the Project in return for 40% of

the shares in Xiamen RVH, such shares to be redeemable before 8th June 2012. At paragraph 70, Adderley J at the outset describes this as "essentially a loan agreement".[69] The main provisions were as follows:

(1) Cheer Fancy would invest RMB 220 million in the Project.

(2) Strong Nation warranted that the hotel would be completed and open for business by 31st December 2010; and

(3) The amount to be paid by Strong Nation to redeem the 40% shareholding in Xiamen RVH was the amount of RMB 220 million actually invested with compound interest at 10% per annum.

[69] By a side agreement the shares transferred would be held in Cheer Fancy Xiamen, a wholly owned subsidiary of Cheer Fancy. By a supplementary agreement, the loan was decreased by one half to RMB110 million and shareholding in Xiamen RVH to 20%. Strong Nation defaulted on the loan and the 20% shares were appropriated to Cheer Fancy. As it occurred, 20% of the shareholding in Xiamen RVH was lost.

[70] Adderley J held that the loan from Cheer Fancy, it not being a bank, was prima facie a breach of the agreement. He also held that the mortgage of the shares with the possibility of Cheer Fancy becoming a shareholder constituted a serious breach of the agreement not to introduce another shareholder. In his opinion, it mattered not that on the evidence, Madam Kwok saw the arrangement as similar to that of a bank loan and the mortgage of shares as not admitting Cheer Fancy as an investor.

[71] Adderley J noted that Madam Kwok's position was that the transactions were commercially justifiable, arising from the shortfall in funding arising from the position adopted by Madam Yao and the banks. She had argued that at the time

[69] I understand this description by Adderley J not to be determinative of the true nature of the agreement.

of the transactions and the loan agreements, there was a real need for funds and Madam Yao was not prepared to contribute more than the initial HK$160 million.

[72] Adderley J's conclusion at paragraph 80 of his judgment was as follows:

> "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 compliant lies in not having been consulted, because although the shares were redeemable the documents actually gave Cheer Fancy (sic) 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."

[73] Mr. Chaisty, QC's complaint here is that the judge ought to have found, based on Madam Kwok's detailed evidence, that she did inform Madam Yao of the financial issues and difficulties facing the Project and that she was given the "green light" to take steps which she felt were necessary and appropriate. The argument was that Madam Kwok's evidence in chief contained a full narrative as to the conversations that she had with Madam Yao as to the need for Crown Treasure and subsidiaries to enter into agreements with third parties.[70] There was little cross examination of Madam Kwok on these, it was argued, while in contrast there was detailed cross examination of Madam Yao. Mr. Chaisty, QC complains that the judge ignored all of the evidence. Madam Kwok's case was that there was no obligation to consult but that in any event she did. This evidence, according to Mr. Chaisty, QC, was completely overlooked by the judge.

[74] It was further argued on behalf of Madam Kwok that the judge accepted that the relevant decision was a management one and that Madam Yao could not therefore complain. Yet, despite that finding, and Madam Yao having previously dropped her claim as to a right to participate in management, the judge found that Madam Yao had a right to complain about not being consulted. Even on this analysis, argued Mr. Chaisty, QC, if Madam Yao had been consulted, the

[70] See: for example bundle A/1, tab 8, pp 87 and 94 and tab 9, pp 69, 75 and 97.

management decision to enter into the transaction was still with Madam Kwok and the lack of consultation, even if obliged to consult goes nowhere.

[75] As far as the issue of whether the learned judge's conclusion was supported by the evidence, Madam Kwok is really complaining that the judge ought to have preferred her evidence over that of Madam Yao, and not that there was no evidence at all to support the judge's conclusion. That determination was entirely within the province of the trial judge and I see no basis upon which to interfere with his decision. The fact that Madam Yao was cross examined at length is itself no indicator of any particular outcome on the evidence because, for example, she consistently denied what was put to her on this and the learned judge obviously preferred her evidence on this.

[76] I can however see some basis for the discomfort expressed by Mr. Chaisty, QC with the judge trying to marry his first finding, that this was a management decision of which prima facie Madam Yao could not complain (bearing in mind she had dropped her claim to participate in management), with his finding that Madam Kwok was still under a duty to consult with Madam Yao. However, I think I understand what the judge was saying here. He used the word "prima facie". My understanding is that the judge was saying that this decision was a management decision in relation to which normally Madam Yao could not complain, but to the extent that it had the effect or the potential effect of introducing a new investor, it was no longer simply a management decision but engaged the restriction in the agreement about introducing new investors without first obtaining consent. In that regard, I do not think the judge's conclusion here is objectionable. It has clearly been established that Madam Kwok agreed that she could not introduce a new investor without consulting Madam Yao and obtaining her consent. The arrangement here, although described as "essentially a loan" contained an option to redeem, not an obligation to redeem and shares were in fact transferred. This indirectly resulted in the introduction of a new investor to whom Madam Yao, on the judge's finding, had not agreed. It was

unfair[71] to her as she was not consulted on the matter and did not have any opportunity to provide or refuse her consent in breach of the agreement. It was also prejudicial in that it resulted in a dilution of her shareholding percentage. Further, the fact that it may have had a similarly adverse effect on Madam Kwok's shareholding should not necessarily remove the prejudice suffered by Madam Yao.

The Eng Loan

[77] Adderley J then moved on to consider the Eng loan. In relation to this matter, Adderley J noted that, on 10th January 2010, Crown Treasure agreed by resolution signed by both Madam Yao and Madam Kwok that Strong Nation enter into secured loan contract and associated agreements with Edmund Eng by which Mr. Eng agreed to advance HK$100 million to Strong Nation at 6% per annum, interest payable on or about 10th January 2012. As security for the loan, Strong Nation agreed to a pledge of 40% of its shares.

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

[79] Adderley J found that Madam Kwok had misrepresented to Madam Yao that these monies from Mr. Eng were needed for urgent construction purposes.[72] He

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[71] To be unfair the conduct need not be such as to justify a winding up order on just and equitable grounds. A useful test is to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is however different if that breakdown in relations causes the majority to exclude the petitioner from the management of Crown Treasure or otherwise to cause him prejudice in his capacity as a shareholder- Grace v Biagioli and others [2006] 2 BCLC 70 at para. 61.

[72] See: nexchange between Mr. Fisher and Madam Kwok, appellant's core bundle, tab 14, pp. 557 and 575 and between Mr. Chaisty, QC and Madam Yao at bundle A/1, tab 6, p. 99 and between Mr. Chaisty, QC and Mr. Wei at tab 5, p.18.

found that this was not the case because all of the monies were used to pay off the RMB128 million loan. The finding of a misrepresentation appears to be the essential element of wrongdoing by Madam Kwok that Adderley found in relation to this transaction, explaining later that the secured loan eventually went into default. The learned judge found that on 16th January 2012, Strong Nation, represented by Madam Kwok, and Mr. Eng entered into an agreement acknowledging that Strong Nation had defaulted under the cooperation agreement and the secured loan contract and that Mr. Eng would enforce his security by unraveling the earlier transfer to Cheer Fancy's shares in Cheer Fancy Xiamen to Strong Nation. This resulted in Cheer Fancy Xiamen owning 44% of the hotel (Xiamen RVH). Adderley J found that all the documents on behalf of Strong Nation were signed by Madam Kwok as sole director and there was no consultation with Madam Yao.

[80] In his cross examination of Madam Kwok, Mr. Fisher had directed her that Madam Yao had stated in her witness statement that she, Wei Dong and Tung Fai met in Singapore around late December 2009 or early January 2010. In that meeting Tung Fai told Madam Yao and Mr. Wei that the project was in acute shortage of funds and that additional funding was necessary to complete the construction works at the Project. Tung Fai said he had already discussed and agreed with Edmund Eng for the latter to provide a loan of HK$100 million to Strong Nation, which would have been secured by a 40% mortgage of the shares of Crown Treasure. The loan would be repayable two years later and the interest would be 6% per annum. Tung Fai strongly emphasized that if such a loan from Mr. Eng was not made available immediately, then the Project would have to be abandoned unfinished and all their investments in the Project would be completely lost.

[81] Madam Kwok denied that this ever happened, and also thereby denied that Tung Fai ever made such a representation. When Mr. Fisher put to her that at the time there was not an acute shortage of funds for construction, she insisted there was

such a shortage.[73] Mr. Fisher went on to suggest that it was because of the statements made by Mr. Tung Fai to Madam Yao that Madam Yao signed the resolution. Madam Kwok disagreed.

[82] Mr. Chaisty, QC's complaint here is that paragraph 83 of Adderley J's judgment is just extraordinary. There is a conclusion as to a misrepresentation but there is no reasoning or analysis of the evidence. There is not even an introduction to the issue of misrepresentation which attempts to set the scene for any analysis or decision. According to Mr. Chaisty, QC, the evidence as to the Eng Loan and its purpose to repay the RMB128 million which Madam Kwok contended had been demanded by Madam Yao to be repaid was extensive. The analysis in the schedule was totally ignored. He concludes that there was no basis to find a misrepresentation and no misrepresentation was made. It was Madam Kwok's case that Madam Yao knew why the Eng transaction was entered into and it was to repay the RMB 128 million and this was simply not addressed.[74]

[83] In relation to this matter the allegation and counter allegations between the parties were set out in the evidence and answers in cross-examination[75]. It was entirely up to the judge to determine, whether for example, Madam Kwok had stated via Mr. Tung that the monies from Mr. Eng were needed for urgent construction purposes. Madam Kwok and Mr. Tung deny that this representation was ever made. As to the repayment of the HK128 million, Madam Kwok's position was that Madam Yao and Mr. Wei had demanded repayment and would have been made aware that the loan from Mr. Tung was to facilitate this. Madam Yao and Mr. Wei were of the position that Madam Kwok and Mr. Tung offered to invest HK128 million to repay the HK128 million advanced by Madam Yao and

[73] See: appellant's core supplemental bundle, tab 14, pp. 557-558.
[74] See: exchanges at appellants core supplemental bundle, tab 14, p. 553/2 and 11, and p. 556/12, bundle A/2, tab 19, p. 33/22.
[75] Mr. Chaisty, QC throughout his submissions suggested that the judge should have drawn adverse inferences against the evidence of Madam Yao and Mr. Wei on the basis that Madam Yao had dropped parts of her pleaded case and thus had lied in relation to those parts. This determination was a matter for the judge. As was sated in Gohil v Gohil [2015] UKSC 61, a person who has been dishonest in relation to one matter may well be telling the truth in relation to another matter.

Mr. Wei. Each side in their own way sought to cast doubt on the likelihood of the story being told by the other. In the end, it was up to the judge to determine, considering the credibility of each witness, what weight he would attach to each item of evidence and to come to a conclusion. I am unable to find any error committed by the judge in this regard. I do note, however, that there is no express finding of unfair prejudice by Adderley J in relation to this particular complaint.

[84] Consequently, I am unable to find any basis to upset the findings by Adderley J in relation to the cooperation agreement and the Eng transaction. As to whether these justified the appointment of a liquidator, this would now engage the argument by Mr. Chaisty, QC that the remedy granted was an unreasonable and unjustified exercise of the judge's discretion, that is, it was disproportionate. However, before I consider that question, I propose to deal with Madam Yao's fresh evidence application.

The Fresh Evidence Application

By application made to this Court, Madam Yao sought leave to adduce at the hearing of the appeal the evidence set out in and exhibited to her witness statement made on 18th June 2018. The application is opposed by Madam Kwok. The grounds of the application were as follows:

(1) The evidence referred to in and exhibited to the witness statement of Madam Yao made on 18th June 2018 came to the attention of the Madam Yao between 25th April 2018 and 24th May 2018, after judgment in this action had been handed down.

(2) Madam Yao's first concern on becoming aware of the evidence was to seek interim relief from the court below. This involved a without notice application for interim relief followed, on 31st May 2018, by a fully opposed inter partes hearing for the continuance of the relief granted on 7th May. Only following that inter partes hearing was

Madam Yao able to consider the implications of the new evidence for this appeal.

(3) The new evidence is relevant to the following issues:

(a) The appropriateness of the relief granted by the trial judge, i.e. the appointment of joint liquidators of Crown Treasure pursuant to section 184I(2)(f) of the BCA and sections 159(1) and 162(1)(b) of the Insolvency Act;

(b) The proportionality of the relief granted by the judge;

(c) The continuing nature of the conduct of the appellant that was unfairly prejudicial to Madam Yao and/or unconscionable, i.e. failing, contrary to the arrangement between Madam Kwok and Madam Yao, to notify and/or consult Madam Yao about major transactions or dealings affecting Crown Treasure, its subsidiaries or the Project, particularly those which will or may have a material adverse effect on Madam Yao's investments, ownership and control in the Project, Crown Treasure or its subsidiaries;

(d) The impossibility and/or impracticability of policing a direction that Madam Kwok should, in the future, inform and consult Madam Yao;

(e) The degree and impact of the breakdown in trust and confidence between Madam Kwok and Madam Yao consequent upon the conduct of Madam Kwok that was unfairly prejudicial to Madam Yao and/or unconscionable.

(4) With the exception of the records of the Xiamen Bureau of Industry and Commerce, all the new evidence was in the

possession custody or control of Madam Kwok before the conclusion of the trial and ought to have been immediately disclosed by her to Madam Yao under her continuing duty of disclosure under CPR 28.12(2). Madam Kwok's failure to disclose the new evidence before the conclusion of the trial deprived the judge the opportunity to consider it and take it into account in reaching his judgment.

(5) The new evidence enables Madam Yao to support the judgment in the court below on grounds that were not available to her before the new evidence became available.

[85] From a review of the document entitled "Third Witness Statement of Yao Juan" exhibited in support of the application adduce fresh evidence, the complaint at paragraph 2 was that Madam Kwok had, without consulting her, entered into or facilitated major transactions involving Strong Nation and Xiamen RVH the effect of which was to have a material adverse effect on her investments, ownership and control of the Project, Crown Treasure and its subsidiaries. Specifically, she claimed that Madam Kwok had:

(1) Caused Strong Nation to enter into a Debt Assignment and Offset Agreement with herself (Madam Kwok) and Xiamen RVH;

(2) Caused Strong Nation to abandon its pre-emption rights as a shareholder of Xiamen RVH in favour of herself;

(3) Facilitated the issue by Xiamen RVH to herself of shares amounting to 22.03% of the equity in Xiamen RVH;

(4) By virtue of (1), (2) and (3) above, caused the dilution of Strong Nation's shareholding in Xiamen RVH from a majority holding of 54.4446% to a minority holding of 43.32%.

(5) Cooperated in the amendment of the articles of association of Xiamen RVH to re-structure the board of directors in such a manner that Strong Nation has a minority representation on the board; and

(6) By virtue of the above, removed from Strong Nation control of Xiamen RVH at both the shareholder and board level.

[86] In paragraph 6 of the witness statement, Madam Yao stated that shortly before (she did not say exactly when) 25th April 2018 she instructed her attorneys in the PRC to search the records of Xiamen RVH Limited at the Xiamen Bureau of Industry and Commerce ("Xiamen BIC") and she received a copy of the search results on 25th April 2018. The search results showed that: (a) before 13th March the registered shareholders of Xiamen RVH were Strong Nation holding 55.5556% of the shares, and Cheer Fancy Business Management (Xiamen) Company Limited holding 44.4444% of the shares; (b) on 13th March the Xiamen BIC records were amended to show the registered shareholder of Xiamen RVH as Strong Nation holding 43.32% of the shares, Cheer Fancy (Xiamen) holding 34.65% of the shares and Madam Kwok holding 22.03% of the shares, and (c) on 13th March, 2 new directors of the board of Xiamen RVH were recorded.

[87] In paragraph 7, Madam Yao states that on 4th May 2018 following a further search of the records of Xiamen RVH held by the Xiamen BIC, she obtained copies of the following records from the Xiamen BIC:

(1) The temporary board meeting resolutions of Xiamen RVH dated 5th March 2018 signed by Madam Kwok, Mr. Xie Jiazheng and Ms. Song Xialong as directors of Xiamen RVH;

(2) The resolutions of the board of directors of Xiamen RVH dated 5th March 2018 signed by Madam Kwok, Mr. Xie Jiazheng, Ms. Song

Xialong, Ms. Kwok Kin Sang and Ms. Cai Xiaomei as the directors of Xiamen RVH; and

(3) The articles of association of Xiamen RVH altered on and dated 5th March 2018 signed on behalf of Cheer Fancy (Xiamen), Strong Nation and Madam Kwok.

[88] Madam Yao went on, inter alia, to explain the effect of the resolutions and she also at paragraph 13 stated that what was in issue was that Madam Kwok had undertaken those actions without consulting or notifying her.

[89] In the skeleton filed on her behalf, Madam Yao argued that the new evidence meets the test laid down in Ladd v Marshall[76] in that:

(1) The evidence could not have been obtained by Madam Yao by the exercise of reasonable diligence for use at the trial, which concluded on 13th March 2018, the same date as the amendments made to the records of the Xiamen BIC (although some hours later due to the time difference between Xiamen and the BVI);

(2) The evidence would probably have had an important influence on the result of the case. The conduct of Madam Kwok between January 2018 and 13th March 2018, in engaging in important transactions with and between Crown Treasure and its subsidiaries and others, which have the effect or the potential to adversely affect the position of Madam Yao as an investor in and shareholder of Crown Treasure is of a kind with the conduct which the judge found to be proven against Madam Kwok (see paragraph 91 of the judgment) and which founded the judge's decision to appoint liquidators. The new evidence would have reinforced (emphasis added) the judge's findings in relation to the conduct of Madam

[76] [1954] 1 WLR 1489.

Kwok and as to liquidation being an appropriate and proportionate remedy.

(3) The new evidence is credible. It is not disputed.

The reason that the new evidence was not before the court is that Madam Kwok failed to disclose the documents which were generated and came into her control between January 2018 and 13th March 2018 pursuant to her continuing duty of disclosure.

Analysis

[90] The well-known guidelines for the admission of further evidence are set out in Ladd v Marshall.[77] Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed, in other words, it must be apparently credible though it need not be incontrovertible.

[91] In the skeleton argument of Madam Kwok filed in relation to this application, no issue has been taken with Madam Yao's assertion that further evidence could not have be obtained with reasonable diligence by Madam Yao or as to the presumed credibility[78] of the additional evidence. What has been asserted on behalf of Madam Kwok is that Madam Yao seems to be seeking to adduce further evidence in support (of the argument) that the decision below was correct. Her objections are:

(1) That it raises issues not addressed below or part of Madam Yao's case below;

(2) The process in this Court is to review, not re-hear;

[77] [1954] 3 All ER 745.
[78] But not the effect.

(3) There are disputes as to the issues raised and the reliance placed on same by Madam Yao. This Court cannot arrive at any concluded view as to who is correct on the explanation and allegations provided;

(4) If Madam Yao is proposing that if she were to lose this appeal matters should be remitted to the court below with, say, amendments to the case and further evidence and cross examination, that would be robustly opposed; and

(5) There is a need for finality and this appeal should be decided on the current issues. If Madam Kwok feels that new matters have arisen as to which she can validly complain, her remedy is to pursue a fresh cause of action, not to invite the Court to conduct a paper trial as a re-hearing.

[92] This application to adduce further evidence is rather strange. It is by the respondent, who prevailed in the court below. Fresh evidence applications are usually made by an appellant who is seeking to have same introduced in the hope of obtaining an order for a new trial being, or where such is not necessary,[79] overturning the decision in the court below. In this case, the basis submitted for the application is that the new ground enables the respondent to support the judgment of the court below on grounds that were not available to her before the new evidence became available. This explanation ties in with what influence it would have on the result of the case under guideline 2 in Ladd v Marshall. Madam Yao was unable to provide this Court with any authority to support the proposition that a respondent can properly make such an application for such a purpose. I am of the opinion that the application is misconceived. The provision of a further ground for supporting a decision in the court below is not a proper basis for the exercise of this very reserved jurisdiction and in my opinion does not satisfy guideline number 2. I am of the opinion that such a purpose was not in

[79] Where perhaps the documentary evidence is effectively unanswerable.

contemplation when guideline number 2 of Ladd v Marshall was explained by Denning LJ (as he then was). To permit fresh evidence for the above purpose would run totally counter to the principle of finality and I am inclined to believe that the true purpose of the application is as explained by Mr. Chaisty, QC in paragraph 92(4) above. Fresh evidence applications are not intended to enable a party to patch up weak points in his case and fill in omissions at the Court of Appeal or to enable a plaintiff to make out a fresh case on appeal or simply to improve their case by calling further evidence.[80]

[93] However, if I am wrong that the simple provision of a further ground for supporting a decision in the court below does not satisfy guideline number 2, I would in my discretion still, for the following reasons, not admit the fresh evidence. Firstly, guideline 2 of Ladd v Marshall is that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Now the fresh evidence application was premised on it providing a further ground for supporting the learned judge's decision. But that decision was based on a finding of a duty to notify and consult in the broad or unrestricted manner expressed by the judge. That finding of a broad and unrestricted agreement having been set aside,[81] it immediately throws into question the basis of the fresh evidence application and the relevance of the various items described therein. This Court would have to re-write the basis for the fresh evidence application and then, without assistance, proceed to divide and consider[82] the various items of evidence along that new benchmark in its application of principle number 2. This is not something this Court should entertain. Secondly, assuming all three requirements of Ladd v Marshall were satisfied, as pointed out by the Supreme Court in Gohil v Gohil (No 2),[83] it would still be necessary to conduct an evaluation of the new evidence to determine its

[80] Mzee Wanjie & 93 Others v A.K. Sakwa & 3 others [1982-88] 1 KAR at pp. 465-466 cited in Mbasau v Mwambi and Orange Democratic Movement Party Republic of Kenya- Election Petition Appeal No. 34 of 2017, also referring to Ladd v Marshall.
[81] Now limited to consultation at the investor level and in relation to banking.
[82] But for determining the application only.
[83] [2015] UKSC 61.

effect.[84] This would normally require that the matter be remitted to the lower court as the Court of Appeal is not designed to address a factual issue other than one which has been ventilated in a lower court.[85] This proposition of remitting the matter to the lower court is strongly resisted by Mr. Chaisty, QC and in my opinion justifiably so. This case was instituted in 2013. The trial lasted 24 days, primarily due to the challenges relating to the necessity of translations. In the substantive appeal, thus far I have found that the parties had a much narrower agreement than that found by the learned judge. In relation to the new evidence, it will therefore be necessary that any evaluation thereof be carried out, by the lower court, against this "new" narrower agreement. The interests of justice would not be best served by remitting this matter to the lower court for a retrial of any kind, when it is open to the respondent to institute a fresh and more defined action based on the new allegations and bearing in mind the guidance from this Court as to the ambit of the initial agreement. I agree with the appellant that the admonition in Transview Properties v City Site Properties[86] is quite applicable here:

> "The interests of the parties and of the public in fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice."

[94] That in my opinion results in a cleaner and more orderly state of affairs, brings finality to this matter and leaves the respondent to consider pursuing, by separate action, any other claims that she may have. For the reasons stated above, I would dismiss the application.

The Exercise of Discretion in the Relief Ordered – The Proportionality of the Remedy to Appoint a Liquidator

[95] After Adderley J had considered the various areas of complaint, commencing at paragraph 88 of the judgment, the learned judge set out a summary of his findings as a prelude to his decision to appoint a liquidator. It is important to consider the

[84] That is at the trial level - see Lord Wilson at para. 25.
[85] See dictum of Lord Wilson at para. 18(a).
[86] [2009] EWCA Civ 1255 at para. 23.

various points highlighted by the learned judge in this process. At paragraphs 88 and 89, the learned judge summed up the entirety of the case with a picture that he described as follows:

> "[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 an ostensible owner, while (to borrow the lyrics of a once popular song) Madame Yao, her 50/50 partner has nothing, and can only watch 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."

[96] But as Mr. Chaisty, QC has pointed out, there were never any complaints by Madam Yao against Madam Kwok in relation to anything concerning benefits, salary or perks, etc. and Madam Yao had dropped any claims of any right to participate in management, or that this was a quasi-partnership. At paragraph 92 of the judgment, Adderley J acknowledged the hard work that had been undertaken by Madam Kwok in bringing the hotel to where it is today and commended her for efforts in pursuit of the success of the hotel. So the very picture that the learned judge commenced with as a framework within which to determine the appropriate remedy was flawed. It would appear that the picture in question was not painted by the evidence but by the learned judge's consideration of his own idea of general fairness.

[97] At paragraph 90 of the judgment, the learned judge proceeded to set out what was in my opinion, when read in conjunction with paragraph 88, the real premise for his determination that a liquidation order was appropriate, that is, that Madam Yao would be locked into this investment for the next 40 years without any hope of

seeing any benefit from her investment, which he clearly thought to be unfair. Paragraph 90 read as follows:

> "Except for the RMB128 million that was repaid from borrowings 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 70'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."

[98] But this line of thinking would certainly have been based on the learned judge's earlier findings against Madam Kwok in relation to both the Loan Contract to 2045 and also the claimed obligation to match loan funding, which I have already determined to have been incorrect. With those two bases removed, the learned judge's apparent rationale for the appointment of a liquidator would begin to disintegrate. In relation to another factor apparently relied on by Adderley in his summary, the general duty to provide information, Adderley J commented at paragraph 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 Madame Kwok prior to their embarking on the Project."

Adderley J also referenced this duty to provide information at paragraph 93, "secretive with the information", paragraph 94 "lack of information may have caused or contributed to the claimant being in her present predicament and probably the breakdown in relations that seem apparent", and paragraph 96, "…failure of Madam Kwok to give her necessary information in relation to the possibility of the dilution of her share value…". However, as I have already determined and for the reasons I have explained, the duty to provide information

was much more restricted than found by Adderley J and at least the Loan Contract to 2045 did not engage that obligation.

[99] The learned judge then proceeded to consider the issue of the appropriate remedy from paragraphs 99 to 105 of the judgment, noting at paragraph 102 the traditional categorization of cases where a winding up order would be made on the just and equitable basis as set out in **Hollington on Shareholders' Rights**,[87] namely, loss of substratum, deadlock, justifiable loss of confidence due to mismanagement, and expulsion of a "working partner". The learned judge noted at paragraph 103 that Mr. Chaisty, QC argued that this case (the cases as then found by the judge) did not fall into any of those categories, so winding up was probably not a proportionate remedy. The judge's answer to this was set out at paragraph 104 of the judgment as follows:

> "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 those 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 trust and confidence 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 the 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."

[100] At paragraph 106 of the judgment the learned judge indicated that he was relying on all of those findings[88] when he said "For all of the above reasons I am minded…to appoint a liquidator of Crown Treasure…". I have already determined that the learned judge erred in finding that there existed the broad agreement

[87] Hollington on Shareholders' Rights, 8th Edn., 2017 at para. 10.30.
[88] In conjunction with the legal principles he had referred to.

claimed by Madam Yao and that there was any general obligation to provide information. I have also determined that the learned judge erred in finding in favour of Madam Yao in relation to her complaint based on the Loan Contract to 2045, as well as her complaint based on an alleged obligation to match funding as it related to demand loans. The only express finding against Madam Kwok of unfair prejudice that remains is in relation to the cooperation agreement, something that occurred in June 2009, that Madam Yao learnt about in March to May of 2010[89] and which she included in her suit in 2013. As the learned judge clearly premised the exercise of his discretion to appoint a liquidator on the basis that all of the complaints had been proven against Madam Kwok, which I have now determined not to be the case, he erred. It is also my opinion that, as a consequence of his error, the learned judge exceeded that generous ambit within which reasonable disagreement is possible when he decided to appoint a liquidator. This is because the learned judge, having found unfair prejudice on every pleaded ground, was obviously seeking to provide a remedy for what he considered to have been a greater infraction than what had truly occurred. He considered, wrongly, that there was a general duty to notify and consult and the breakdown in trust and confidence[90] that he identified was therefore necessarily exaggerated as it was premised on perceived breaches of a duty that was itself not well founded. Importantly the learned judge was, in light of his finding on this complaint,[91] unable to consider in the exercise of his discretion in deciding on an appropriate remedy, that the remedy of a winding up was expressly sought on the sole ground of the alleged breach relating to the Loan Contract to 2045 (which I have resolved in Madam Kwok's favour). With that complaint being resolved in Madam Kwok's favour, it becomes a major consideration in determining the

[89] See: para. 68 of the judgment.

[90] Whether or not that was in itself a proper finding, or a proper ground for appointing a liquidator. Mr. Chaisty, QC in his submission argued that the learned judge merely refers to loss of trust and confidence, not the pleaded case, and does not identify any relevant equitable considerations of how such arose or how such were broken down. This was not a quasi-partnership- the claimant had dropped any claim to such. Mr. Chaisty, QC also had argued that a mere lack of trust and confidence can never justify a purchase order under O'Neil v Phillips [1999] 1 WLR 1092. But if the breakdown in relations causes the petitioner prejudice in his capacity as a shareholder that may suffice. See Grace v Baigoli [2006] 2 BCLC 70 at para 61 and V B Football v Blackpool Football Club (Properties) Limited, Case No. CR 2015-006989 at para 316(6).

[91] That is the Loan Contract to 2045.

appropriate remedy that the liquidator was expressly sought and expressly argued for in closing on this ground alone. Further even within that particular complaint, I am of the opinion that the learned judge did not pay sufficient weight to the fact that the fundamental complaint was not of any action actually taken by Madam Kwok, but of her failure to consult, as pointed out by Mr. Fisher in his closing submissions before Adderley J, and recognised by Adderley J at paragraph 91 of the judgment. Also in relation to this, and I certainly place it no higher than this, I would be very hesitant to appoint a liquidator in a case of a failure to consult where the court acknowledges that had the petitioner been consulted she might very well have agreed[92]. Also, and importantly, when Adderley J stated at paragraph 105 of the judgment that he considered that a proportionate response might have been for him to order that Madam Kwok begin to give Madam Yao regular information to which she was entitled but that it was too late, the damage had been done, his exclusion of this remedy was no doubt made against the backdrop of his incorrect evaluation of the duty owed to Madam Yao to provide information and the various infractions that he had found to have been proven against her. The applicability of that remedy was not considered against the backdrop of the single remaining infraction relating to the cooperation agreement.

[101] In his submissions, Mr. Chaisty, QC had suggested that having found that the primary relief sought, an order that Madam Kwok be required to sell her shares to Madam Yao, was inappropriate, that it was inappropriate for the judge to nevertheless make an order to put Crown Treasure into liquidation which was a death sentence decision, citing Re a Company.[93] I do not think it is necessary to resolve that issue as being necessarily so as a matter of principle. Suffice it to say that, a death sentence argument may be somewhat tempered by the fact that the target company is a holding company and that there can be cases where a

[92] See Adderley J at paragraph 91 of the judgment and also see similar related point made by Mr. Chaisty, QC at para. 25 of his submissions.
[93]Re a Company (No 00314 of 1989), Re, ex p Estate Acquisition and Development Ltd [1990] BCC 221 at p. 227.

purchase order might be unsuitable for one reason or another and liquidation is a better proposition.[94]

[102] The learned judge having erred in the exercise of his discretion by choosing to appoint a liquidator, it therefore lies for this Court to exercise its own discretion in determining the appropriate remedy to grant. In so doing, I bear in mind that the court should seek to grant the minimum remedy to repair the misconduct and unfair prejudice and prevent it from happening in the future. In F. Ming Inc. et al v Ming Sui Hung, Ronald et al,[95] Blenman JA delivering the unanimous decision of this Court stated:

> "The court's main purpose when granting relief in such cases is to remedy the unfair prejudice suffered by the petitioner. The court will exercise its wide discretion, in circumstances where unfair prejudice has been established, so as to correct the unfair prejudice. In the exercise of its discretion in granting relief, as well as in determining fairness of the conduct complained of, the court will take into account all of the circumstances of the case, including any misconduct on the part of the claimants such as delay in the commencement of proceedings. Critically, the remedy granted should be proportionate to the prejudice suffered by the petitioner and is not by way of punishment for bad behavior (emphasis added)."

[103] In this case, the factors that I consider to be relevant are the very factors I have mentioned in paragraph 101, including the point emphasised by Mr. Chaisty, QC that the appointment of a liquidator should normally be a remedy of last resort. The unfair prejudice in this case, on the pleadings, is limited to that identified in relation to the cooperation agreement. Bearing in mind the various factors I have mentioned above, I am of the opinion that the appropriate remedy is not the appointment of a liquidator or a purchase order, but the making of an order for the future conduct of Crown Treasure, in that Madam Kwok be required to notify, consult with and obtain the consent of Madam Yao in relation to matters at the

[94] See: Re Full Cup International Trading Ltd. [1995] BCC 682.
[95] BVIHCMAP2016/0039 (delivered 30th June 2017, unreported) at para. 83.

investor level,[96] thereby enforcing the agreement that this Court has found to exist between the parties.

[104] In the circumstances, I would order as follows:

(1) The appeal is allowed;

(2) The decision of Adderley J dated 13th March 2018 is hereby set aside and the consequential order of Adderley J dated 27th March 2018 whereby the learned judge ordered that Crown Treasure be wound up in accordance with the provisions of the Insolvency Act and appointed joint liquidators thereof and also gave certain consequential orders and directions is set aside.

(3) The respondent is ordered to indemnify, and/or make good any loss suffered by Crown Treasure pursuant to the appointment of the joint liquidators, and in particular shall hold Crown Treasure harmless in respect of the properly recoverable fees and expenses claimed by the joint liquidators.

(4) The Court is minded to make the following order:

Madam Kwok shall hereafter:

(a) notify and consult with Madam Yao in advance on all matters that relate to the introduction of a new investor in the Project, whether in Crown Treasure or any of its subsidiaries, including any non-bank financing;

(b) obtain Madam Yao's consent prior to making or implementing any action that would result in or have the possibility of resulting in the introduction of a new investor to the Project whether through Crown Treasure or any of its subsidiaries, including non-bank financing;

[96] This exceeds the proposal made by Mr. Chaisty QC at para. 50 of his submissions for an order as to the provision of information as it includes obtaining consent.

(c) in the process of notifying and consulting Madam Yao as required above, provide to Madam Yao in a timely manner all information that would reasonably be required to enable Madam Yao to properly consider the matters in relation to which Madam Kwok is obliged to notify, consult and obtain consent as herein set out.

The parties are at liberty, within 14 days of the date hereof, to make submissions to this Court limited to the wording of this particular order contained in paragraph (4), with the intention of assisting the Court in ensuring that it goes no further than, but properly captures, the agreement found by this Court to be in existence between the parties. This Court shall make an order confirming this proposed order in paragraph (4) whether in its present or any varied form, within 28 days of the date hereof.

(5) The parties are at liberty, within 14 days of the date hereof, to make submissions to this Court on any order this Court should make consequential on the order at paragraph (2) above. This Court reserves the right to make any consequential orders within 28 days of the date hereof.

(6) Costs are awarded to the appellant in the court below to be assessed if not agreed within 21 days. Costs are awarded to the appellant in this Court on the substantive appeal at 2/3 of the costs in the Court below.

(7) Costs are awarded to the appellant on the fresh evidence application to be assessed, if not agreed within 21 days.

I concur.
Mario Michel
Justice of Appeal

I concur.
Eamon Courtenay
Justice of Appeal [Ag.]

By the Court

Chief Registrar