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THE MINORITY SHAREHOLDER'S STATUTORY EXITS

Sim Yong Kim v. Evenstar Investments Pte. Ltd.[1]

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I. INTRODUCTION

A troubled minority shareholder of a private company who desires to liquidate his investments in the company commonly resorts to one of two statutory exits. He may ask to be bought out or seek to wind up the company under section 216 of the *Companies Act*[2] on establishing oppressive conduct by the dominant shareholders, or he may seek an order to wind up the company under section 254(1)(i) of the *Companies Act* on the ground that it is "just and equitable" to do so.[3] The Court of Appeal's recent decision in *Evenstar* provided timely clarification on the relationship between these two jurisdictions. The court affirmed the notion of "unfairness" as the essence of both. For that reason, neither provision should be used as a means of facilitating an "exit at will," *i.e.*, as a vehicle to permit a minority to foist a buy-out or a winding up order on the majority in the absence of any relevant inequity. The Court of Appeal further delineated the distinct though overlapping ambit of these two jurisdictions, highlighting the peculiarity of their common conceptual basis but divergent applications.

Although *Evenstar* was primarily concerned with a petition for winding up on the just and equitable ground under section 254(1)(i), the Court of Appeal in its analysis placed considerable reliance on the House of Lords' decision in *O'Neill v. Phillips,*[4] an "oppression" case. Subsequent to *Evenstar*, the Court of Appeal has also applied *O'Neill* in *Lim Swee Khiang v. Borden Co. (Pte.) Ltd.*,[5] a decision dealing with oppressive conduct under section 216. It follows that the reasoning

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1 [2006] SGCA 23; [2006] 3 S.L.R. 827 [*Evenstar*].

2 Cap. 50, 1994 Rev. Ed. Sing. [*Companies Act*].

3 This comment is concerned only with non-consensual statutory exit routes and does not therefore touch on other means of exit such as share buy-backs under ss. 76B-76E of the *Companies Act*, or capital reduction under Division 3A of the *Companies Act*.

4 [1999] 1 W.L.R. 1092 [*O'Neill*].

5 [2006] SGCA 33; [2006] 4 S.L.R. 745.

in *O'Neill* is now applicable to both sections 216 and 254(1)(i). In England, some commentators[6] have interpreted *O'Neill* as introducing a more restrictive and an essentially "contractarian" approach to the unfair prejudice remedy (the English equivalent of the section 216 remedy).[7] This comment examines the extent, if at all, to which *Evenstar* has imported these aspects of the English jurisprudence in evaluating sections 216 and 254(1)(i) petitions. Further, *O'Neill* is also said to have conflated the distinct jurisdictions for awarding unfair prejudice remedies[8] and for ordering just and equitable winding up.[9] This comment will thus consider the reasons for the Court of Appeal's apparent departure from this approach in *Evenstar*, and the resulting implications.

II. Facts & Holdings

The petitioner in this case owned 13.5% of the issued shares of Evenstar Investments Pte. Ltd. ("EIPL"), a company formed by him and his brother Mike to hold their shares in Sinwa Limited, a company whose shares were listed and traded on the Singapore Exchange Limited. Prior to injecting their Sinwa shares into EIPL, Mike had assured the petitioner that he would "buy him out" if and when he wished to realise the value of his Sinwa shares. Subsequently, however, the parties were unable to agree on the terms of a buy-out when the petitioner decided to pull out of EIPL owing to his poor health. The petitioner then applied to wind up EIPL on the just and equitable ground under section 254(1)(i) of the *Companies Act*, alleging that the parties' relationship had broken down. At trial, Tay Yong Kwang J. refused the petition.[10] Tay J. found that the company's business was thriving, and that there was no evidence of a management deadlock. Further, Tay J. construed Mike's assurance to buy the petitioner out as no more than a "first right of refusal" and thus held that Mike was not in any event obliged to purchase the petitioner's shares in EIPL. In the circumstances, the petitioner's application was merely an attempt to exit at will. Following *Quek Hong Yap v. Quek Bee Leng*[11] and *O'Neill*, such attempts were impermissible in the absence of any specific provision allowing for such exit, and any holding to the contrary would "fundamentally contravene the sanctity of the contract binding the members and the company".[12] The petitioner appealed against this decision.

The Court of Appeal accepted the trial judge's finding that the petitioner had not lost trust and confidence in Mike's ability to manage EIPL's business, and that the real cause of his unhappiness was Mike's refusal to facilitate his exit from EIPL.[13] Nevertheless, the petitioner's appeal succeeded. In a judgment delivered by Chan Sek

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6 See *infra* note 37.

7 Pursuant to ss. 459-461 of the *Companies Act 1985* (U.K.). These provisions have recently been repealed and substantially re-enacted as ss. 994-996 of the *Companies Act 2006* (U.K.). This comment will, however, continue to make reference to the repealed provisions since all the decisions under discussion were decided under the previous regime.

8 *Ibid*.

9 Pursuant to s. 122(1)(g) of the *Insolvency Act 1986* (U.K.).

10 *Sim Yong Kim v. Evenstar Investments Pte. Ltd*. [2005] SGHC 236; [2006] 1 S.L.R. 685.

11 [2005] SGHC 111.

12 [2006] 1 S.L.R. 685 at para. 32.

13 *Supra* note 1 at para. 16.

Keong C.J., the court found that it was just and equitable to wind up EIPL because Mike had breached his *promise* to purchase the petitioner's shares. Although the petitioner had used the words "first right of refusal" to explain what he understood to be Mike's assurance to buy him out, Mike had in substance promised to buy the petitioner out as a condition for the latter's agreement to pool their Sinwa shares together in EIPL.[14] Chan C.J. was not persuaded by the counter-argument that Mike's assurance to buy the petitioner out meant no more than a first right of refusal, as such a promise would not have enticed the petitioner to exchange marketable Sinwa shares for unmarketable EIPL shares.[15] Further, Chan C.J. noted that a right of first refusal, being in essence a right *not* to buy, would have made no sense in the context as it directly contradicted the assurance to buy the petitioner out.[16]

At both trial and appeal, the mainstay of EIPL's defence was that the just and equitable winding up order ought not to be granted where the majority shareholder was not found to have been unfair or oppressive to the minority under section 216, as to do otherwise would be to permit an exit at will through section 254(1)(i) when the same was disallowed under section 216. Given the Court of Appeal's finding that Mike was obliged to buy the petitioner out and had failed to do so (thus establishing "unfairness" for purposes of section 216 as well as section 254(1)(i)), it was strictly unnecessary to deal with this argument at length. Nevertheless, Chan C.J. took the opportunity to examine the relationship between the two provisions. In Chan C.J.'s view, both sections 254(1)(i) and 216 were founded on the notion of "unfairness" as elucidated in *O'Neill* and *Ebrahimi v. Westbourne Galleries Ltd.*[17] Neither provision may be invoked to facilitate an exit at will because "[it] cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will."[18] But this did not mean that the two provisions operated identically in their reach and relief. In particular, section 254(1)(i) encompasses a *broader* scope of conduct and may apply, for instance, to a case of a deadlock involving two equal shareholders neither of whom is guilty of any oppressive conduct, while section 216 provides a wider range of relief.[19]

Turning to the facts, the Court of Appeal found the petitioner's expectation of Mike to purchase his shares in EIPL to be legitimate. Although such a promise might not have been enforceable as a contract for lack of essential terms, it was nonetheless binding "as a matter of justice and equity".[20] Consequently, "[this] is not a case of exit at will but one of exit by *right* due to the failure of the majority shareholder to live up to his promise to allow the minority shareholder to do so as a condition of their associating in a separate legal entity for a specific object."[21] Mike's breach of promise resulted in obvious inequity to the petitioner, for it "left the petitioner trapped in [EIPL] and placed him at the mercy of Mike".[22] An order to wind up EIPL would, in such circumstances, be appropriate for restoring to the petitioner

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[14] *Ibid.* at paras. 17-22.
[15] *Ibid.* at para. 17.
[16] *Ibid.* at para. 21.
[17] [1973] A.C. 360.
[18] *Supra* note 1 at para. 31.
[19] *Ibid.* at paras. 37-38.
[20] *Ibid.* at para. 42.
[21] *Ibid.* (emphasis added).
[22] *Ibid.*

the benefit of which he had been deprived. Interestingly, the Court of Appeal also sought to mitigate the harshness of the winding-up order by exercising its powers under section 257(1) of the *Companies Act* to *stay* the execution of the order until the parties have had adequate opportunity to negotiate a compromise. Indeed Chan C.J. considered such a compromise to be a superior outcome since it would meet both shareholders' objectives by enabling the petitioner to liquidate his interests in EIPL and Mike to retain control of the Sinwa shares.

Even though *Evenstar* was concerned with an application under section 254(1)(i), its analysis of "unfairness" clearly applied to the jurisdiction under section 216 as well. The significance of this decision therefore lies not just in clarifying the criteria for invoking the just and equitable jurisdiction, but also in rationalizing the statutory framework regulating shareholder exits under sections 216 and 254(1)(i). The following discussion considers whether, if at all, this attempt at rationalizing the law has the effect of introducing a *restrictive* and *contractual* approach to the award of relief under both jurisdictions, as well as the implications flowing from the distinct applications of these two jurisdictions.

III. Unfairness—A Restrictive Approach?[23]

In identifying conduct that is oppressive or unfairly prejudicial, the court faces the invidious tension of having, on the one hand, to preserve a broad and flexible jurisdiction that would enable it to do justice in each case, and to avoid, on the other hand, the oppression of the majority by opening the floodgates of litigation through a liberal interpretation of the statutory jurisdiction. Lord Hoffmann's analysis of unfairness in *O'Neill* is generally perceived as limiting the breadth of "unfairness" to guard against the latter risk. In a judgment that has been invariably cited in subsequent unfair prejudice petitions in the U.K., his Lordship emphasized the importance of understanding the notion of fairness *in context*.[24] A company is usually constituted through a process of negotiation and shareholders should in general expect their rights and interests to be regulated closely in accordance with the agreed terms. Thus, a shareholder may not ordinarily complain of unfairness unless he establishes a violation of his *legal* right, *i.e*. a breach of the terms of the company's constitution or related agreements. Where no such violation is established, equitable principles may *exceptionally* intervene to moderate this strict approach in circumstances where the enforcement of the dominant party's legal rights would be contrary to good faith. To invoke this exception, the petitioner has to demonstrate that he has a *legitimate expectation*[25] (quite apart from his legal rights) that is protected by *established principles of equity*. Legitimate expectations may arise where there is "a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as

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[23] For convenience, this section and the next consider the impact of *O'Neill* and *Evenstar* only in the context of s. 216, but to the extent that this jurisdiction overlaps with that under s. 254(1)(i) (see *infra* text accompanying note 60), the same observations would apply.

[24] *Supra* note 4 at 1100-1101.

[25] But note his Lordship's admission that it was "probably a mistake" to have used this term as it had been misunderstood as creating a novel and additional type of equitable constraint: see *ibid.* at 1102 and *infra* text accompanying note 33.

will affect the conscience of the former."[26] A "useful cross-check" for identifying those circumstances where it would be inequitable for one party to enforce its strict legal rights against another would be "to ask whether the exercise of the power in question would be contrary to what the parties, by words of conduct, *have actually agreed*".[27] And it would suffice if such agreements or promises are binding as a matter of justice and equity, even if they are not independently enforceable as a matter of contract.

Lord Hoffmann also identified, by analogy with contractual frustration, another category of conduct that may give rise to unfair prejudice under section 459 of the U.K. legislation. The prejudice in this category arises not from the breach of some promise or undertaking, but from "some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association."[28] In this instance, the unfairness resides in the majority's *conduct* in maintaining the association in the changed circumstances, and not in the changed circumstances themselves.[29] This may explain Lord Hoffmann's subsequent observations in *O'Neill* that it would almost always be unfair to exclude a minority from management without making an offer to purchase his shares or some other reasonable arrangement, but "the unfairness does not lie in the exclusion alone *but in exclusion without a reasonable offer*."[30] In other words, where exclusion from management is not in itself a breach of any promise or understanding between the parties, the effect of such "changed circumstance" would have to be judged by reference to the reasonableness of the parties' conduct in response to the altered circumstance.[31]

Overall, the effect of Lord Hoffmann's approach in *O'Neill* was to preclude the appeal to general notions of unfairness or a petitioner's reasonable expectations by confining the relief to situations in which equity's intervention is justified.[32] It places, in particular, tangible limits on the ambit of a petitioner's "legitimate expectations":

> [the] concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.[33]

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[26] *Ibid.* at 1101, citing Jonathan Parker J. in *In re Astec (B.S.R.)plc* [1998] 2 B.C.L.C. 556 at 558.

[27] *Ibid.* at 1101(emphasis added).

[28] *Ibid.* This part of Lord Hoffmann's judgment was cited with approval in *Evenstar*: See *supra* note 1 at para. 31.

[29] *Re Guidezone Ltd.* [2002] 2 B.C.L.C. 321 at para. 176, per Jonathan Parker J.

[30] *Supra* note 4 at 1107.

[31] Thus a minority could not complain of unfairness if it was his own unreasonable conduct that obstructed the negotiation of an acceptable resolution in the changed circumstances: see *Re Metropolis Motorcycles Ltd.* [2006] EWHC 364 (Ch), *Cf. infra* note 71.

[32] *Modern Company Law for a Competitive Economy: Developing the Framework* (U.K., Department of Trade and Industry, Consultation Document of the Company Law Review Steering Group, London: Her Majesty's Stationery Office, March 2000) at para. 4.108 [*Developing the Framework*]. See also B Clark, "Unfairly Prejudicial Conduct: A Pathway Through the Maze" (2001) 22 Co.Law. 170 at 173. *Cf.* A. J. Boyle, *Minority Shareholders' Remedies* (Cambridge: Cambridge University Press, 2002) [*Boyle*] at 98, who argues that "[Lord Hoffmann's] observations do not amount to a restatement of the pre-existing body of case law. Earlier decisions are not overruled. It neither extends nor restricts the range of circumstances which may amount to unfair prejudice."

[33] *Supra* note 4 at 1102.

The rules of equity thus provide a principled basis for the exercise of judicial discretion in this context and promote *legal certainty*. As Lord Hoffmann explained:

> In my view, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under section 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed.[34]

In the U.K., it has been observed that this more restrictive approach would have the effect of excluding cases previously thought to fall within the purview of the U.K. unfair prejudice regime. For instance, unfair changes to class rights, unfair refusals to register transfers and changes to articles with expropriatory effects would not, under the *O'Neill* principles, constitute oppression unless these acts violated some legal rights or agreements enforceable in law or equity.[35] Again, a minority shareholder may have no recourse under section 216 if the majority persistently refuses to declare dividends in the face of substantial and sustained profitability in the absence of any prior agreement to make such distribution. Although profit distributions are conventionally seen as matters best left to the exercise of managerial discretion, it is questionable whether section 216 ought *never* to apply even when such refusals are irrational. In *Evenstar*, the Court of Appeal did not, of course, have the opportunity to consider the application of Lord Hoffmann's analysis to these exceptional circumstances. However, to the extent that the tests in *O'Neill* did import some degree of predictability into the workings of section 216, some measure of sacrifice as to its reach appears to be unavoidable. That said, this balance between certainty and flexibility is one which may be judiciously maintained—as is argued in the following section – by adopting a broad approach to the application of equitable principles.

IV. Unfairness—A Contractual Approach?

Lord Hoffmann's attempt to confine the concept of unfairness has also been said to be constructed on an essentially *contractual* foundation. Support for this view may be found in various parts of Lord Hoffmann's speech. Apart from according dominance to the parties' express agreements, his Lordship also explained the scope of the applicable equitable constraints by reference to the language of bargain. Thus, a "useful cross-check" for identifying those circumstances where it would be inequitable for one party to enforce its strict legal rights against another would be "to ask whether the exercise of the power in question would be contrary to what the parties, by words of conduct, *have actually agreed*."[36] Although his Lordship subsequently clarified that it was not necessary for such agreements to be enforceable as a matter of contract and that the reasoning would extend to promises which are binding as a matter of justice and equity, the premise so identified nevertheless appears to be of a distinctively promissory or consensual nature. In the same vein, the inclusion of quasi-frustrative

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[34] *Ibid.* at 1099. Similarly, the U.K. Company Law Reform Steering Group has concluded that on balance, the benefits of certainty outweighed the risk of injustice in the periphery cases: See *Modern Company Law for a Competitive Economy: Completing the Structure* (U.K., Department of Trade and Industry, Consultation Document of the Company Law Reform Steering Group, London: Her Majesty's Stationery Office, November 2000) at paras. 5.78-5.81 [*Completing the Structure*].

[35] *Supra* note 32 at para. 4.109.

[36] *Supra* note 4 at 1101 (emphasis added).

events as instances of unfair prejudice may also be understood as applications of contractual analysis. This has led, for instance, to the observation that:

> According to Lord Hoffmann's analysis in . . . *O'Neill v. Phillips* . . ., the common theme in the application of partnership, and indeed all equitable principles, is that the court is enforcing the real bargain between the shareholders which may not be fully expressed in the written documents and thus giving effect to their full intentions, so that the petitioner is required to establish either a breach or the frustration of that real bargain in order to make out a case of unfair prejudice.[37]

Indeed the actual result in *O'Neill* is illustrative of the central importance of promise or agreement in this context. In *O'Neill*, the petitioner, O, was first engaged as a manual worker by Petel Ltd., a company wholly-owned by P. Impressed by his energy and ability, P gave O 25% of the company's shares, and O eventually took over the running of the company's business. For a number of years thereafter, the profits of the company were distributed to P and O equally. O also invested in the company by capitalizing part of his profit entitlements, and assumed personal liability by guaranteeing the company's bank account. The parties also commenced negotiation for increasing O's shareholding to 50%, but no agreement was eventually concluded. The company's business subsequently declined and P regained control as managing director in place of O, who was then relegated to the position of an employee with just 25% shareholding and profit entitlement. O alleged that he had been unfairly prejudiced because P had breached his "legitimate expectation" for equal profit sharing as well as further allotment of equity shares. The House of Lords rejected O's arguments, holding that his expectations, though reasonable,[38] were not in fact legitimate because P had not unconditionally promised to distribute profits and shareholdings equally in all circumstances. Absent the finding of a binding promise, there was no equity to restrain P from withdrawing from the negotiations, and to do so would be to impose on P an obligation to which he had not agreed.

Taken at its highest, this emphasis on the parties' bargain could be understood as evidencing an economic approach to corporate law. Under this approach, the oppression remedy is efficient and defensible when it is applied with a view to holding the parties to their bargain.[39] As the *ex ante* agreement made by the shareholders (as rational profit maximisers) represents the anticipated optimal outcomes of their investment in the company, any conduct that is consistent with such an agreement cannot be said to be unfair. For that reason, the court that adjudicates such shareholder dispute essentially performs a gap-filling function by considering what the parties would *hypothetically* have agreed to in order to maximize the wealth of the firm

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[37] R. Hollington, *Shareholders' Rights*, 4th ed. (London: Sweet & Maxwell, 2004) at para. 7-78. In *Completing the Structure*, *supra* note 34 at para. 5.79, the Company Law Reform Steering Group endorsed the approach in *O'Neill* and commented that "the best basis for focusing such an allegation [of unfair prejudice] is the notion of departure from an agreement broadly defined, between those concerned, to be identified from their words or conduct." It has been observed that such an approach has the advantage of utilizing, in effect, criteria developed by the parties themselves for judging unfairness, thereby neatly avoiding the need for the courts to develop their own criteria: see P. Davies, *Gower and Davies' Principles of Modern Company Law,* 7th ed. (London: Sweet & Maxwell, 2003) at 521.

[38] In the sense that they were *likely to occur; s*ee *supra* note 4 at 1103.

[39] B. Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 U.T.L.J. 775 at 789-795.

in respect of matters on which the contract is silent. Thus, to the extent that Lord Hoffmann's approach suggests that focus should be placed on the shareholders' (expressed and imputed) agreement in adjudicating oppression petitions, it may be said to accord with economic theory.

The economic approach is, however, vulnerable by reason of its questionable assumptions, such as the assumptions that shareholders are *sufficiently informed* to determine their optimum interests when engaged in *ex ante* bargaining, and that such bargaining would not be impeded by transaction costs. On the contrary, the reality is that shareholders' lack of prescience at the time of bargaining often results in a corporate contract that is informal and confusing. And even if the parties' had unlimited foresight, it would be impracticable and prohibitively costly to attempt to contract for *all* future events that are likely to occur. For these reasons, the shareholders' contract is one that is characterized by "a process of active judicial construction rather than mere passive judicial discovery, a constructive process in which contractual freedom becomes, of necessary, limited."[40] Another weakness of this theory is that it is not descriptively accurate of the unfair prejudice regime. In practice, the terms implied by the courts are not necessarily those which the parties would have bargained for. It has been observed,[41] for instance, that shareholders may not reasonably be assumed to have agreed to poor or incompetent management, and yet mismanagement is rarely found to constitute unfair prejudice or oppression in the absence of dishonesty or bad faith.[42] In the face of such incongruence between theory and practice, it would seem more accurate to conclude that a court that is asked to adjudicate an oppression petition is ultimately developing its own standard of fairness.[43]

More fundamentally, however, it is probably a distortion of Lord Hoffmann's speech in *O'Neill* to understand section 459 of the U.K. legislation as an exclusive application of economic theory. In invoking equitable principles to constrain the exercise of the parties' legal rights, Lord Hoffmann was highlighting the need to achieve *fairness* and *justice*. This may, in appropriate circumstances, entail a result *contrary* to the parties' express agreement. It is true that some equitable principles, such as the promissory estoppel, assist in identifying the parties' true bargain, but not all are so intended. The doctrine of undue influence, for instance, is more appropriately understood as denouncing the abuse of ascendancy acquired under a relationship of trust and confidence, rather than the promotion of an optimal bargain.[44] In addition, Lord Hoffmann's reference to frustration-like events as possible occasions of unfairness makes it plain that the court's discretion under sections 216 and 254(1)(i) extends to situations *outside* the parties' agreement. The court's task in such situations is not merely to "fill gaps" on the basis of the parties' implied or

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[40] C. Riley, "Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts" (1992) 55 M.L.R. 782 at 785 [*Riley*].

[41] P. Paterson, "A Criticism of the Contractual Approach to Unfair Prejudice" (2006) 27 Co. Law. 204 at 214.

[42] *Re Tri-Circle Investments Pte. Ltd,* [1993] 2 S.L.R. 523 at para. 41.

[43] *Riley*, *supra* note 40 at 797.

[44] And thus the element of "manifest advantage" is not strictly required in the test for undue influence, even though it is obviously of significant evidential value in establishing the impropriety of the influence: see *Royal Bank of Scotland plc. v. Etridge* (No. 2) [2001] UKHL 44; [2002] 2 A.C. 773; *Macklin v. Dowsett* [2004] EWCA Civ. 904; [2004] 2 E.G.L.R. 75.

hypothetical agreement but to determine a fair outcome.[45] As Mance J. explained in a subsequent decision:

> In putting that case Lord Hoffmann was demonstrating that unfairness does not arise only out of a failure to comply with prior agreements or to fulfil prior expectations. The relationships between shareholders are more subtle than that, *and Lord Hoffmann was recognising that unfairness can come out of a situation where the game has moved on so as to involve a situation not covered by the previous arrangements and understanding*. In those circumstances the conduct of the affairs of the company can be unfairly prejudicial within the section notwithstanding the absence of the prior arrangements, and the court can thus intervene.[46]

Moreover, the requisite inequity does not arise from the mere occurrence of a non-contemplated event. The court's intervention is only warranted where "the change in the circumstances is ... such that it is *not reasonable or fair* to require the former association to remain as it was".[47] This really calls for a *qualitative* evaluation of the parties' relationship including, in particular, the reasonableness of their conduct in circumstances which they had not contemplated at the inception of their association.

In Singapore, cases decided before *Evenstar* have recognized the critical relevance of the shareholders' contract in the resolution of section 216 disputes. In *Ng Sing King v. P.S.A. International Pte. Ltd. (No. 2),* Rubin J. observed that where parties dealing at arm's length had comprehensively set out their respective rights and obligations in an agreement, it would be difficult to find any legitimate expectation apart from those contained in the agreement.[48] Indeed, Rubin J. was even of the view that the parties could exclude any extra-contractual legitimate interests through an "entire agreement clause".[49] However, these observations should not be interpreted as lending credence to an exclusively contractual approach, for Rubin J. made it plain that the court's responsibility was not merely to adjudicate shareholders' contractual rights under section 216, but to identify breaches of commercially accepted standards of conduct:

> It does not necessarily follow, however, that breach of any expectations enshrined in the Agreement is tantamount to oppressive conduct. Admittedly, breach of these terms would disappoint the shareholders' expectations. Nonetheless, many other factors have to be considered to ascertain whether the breach resulted in unfairness, such as whether the breach was deliberate, whether it was a significant breach in disregard of a major expectation and whether any detriment was caused to the aggrieved shareholder. Above all, the plaintiffs have the onus of showing that the breach prejudiced their interest in some way.[50]

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[45] See *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] A.C. 696.

[46] *Re Metropolis Motorcycles Ltd.*, *supra* note 31 at para. 90 (emphasis added).

[47] *Ibid.*

[48] [2005] 2 S.L.R. 56 at paras. 95 and 103.

[49] *Ibid.* at para. 137. This is an interesting observation indeed, and lends some support to the argument that the protection of the oppression remedy is really not required by sophisticated commercial parties, who should thus be allowed the option to exclude the said remedy in their agreements: see C. J. Ryan, "Public Policy and Freedom of Contract: Part 1" (2001) 22 Co. Law. 177.

[50] *Supra* note 48 at para. 96.

This led the learned judge to conclude:

> In short, there can be no precise guidelines stipulated as to whether there were unfair dealings by the strategic shareholders. *The question is far more complicated than merely ascertaining whether the Agreement was violated. The expectations of the plaintiffs must be considered against the backdrop of commercial realities*.[51]

There is no reason to think that the Court of Appeal intended, in *Evenstar*, to depart from this understanding of "unfairness" as a prescription for *objective* standards of fair conduct. Although any contractual or promissory arrangement has to be considered in identifying the *relevant standard* by which to evaluate the parties' conduct, Chan C.J. stressed that the object of section 254(1)(i) (and presumably also section 216) is:

> . . . *to impose contemporary standards of corporate responsibility* on errant members. Majority shareholders in quasi-partnership companies, such as [EIPL], are expected to keep their promises and assurances to minority shareholders. *They are expected to take a broader and more generous view of their obligations having regard to what is fair to minority shareholders*.[52]

This is not, however, to deny the importance ascribed to the parties' contractual arrangement. As the shareholders' relationship is essentially contractual in nature, it is undeniably the natural and necessary *starting point*[53] for *ascertaining the appropriate standard of fairness*.[54] In the majority of cases, it is difficult indeed to see why it will be unfair to hold parties to their bargain. But it is another thing to assert that the court's only mandate is to adjudicate in accordance with the parties' (including hypothetical) bargain. In the case of closely held family businesses or quasi-partnerships, the issue of fairness is embedded in a web of express contract provisions, informal understandings and promises, as well as the trust and confidence that the parties reposed on each other. The exercise of the discretion to grant relief in such circumstances ought surely to begin by considering the parties' bargain, but it is not wholly confined by it. In particular, the application of equitable principles in such circumstance should not be so constrained. The parties' contract is only *one* clue, albeit the dominant clue, in determining the fair outcome of their dispute.

V. The Distinction Between Section 216 and Section 254(1)(i)

On Chan C.J.'s analysis, the oppression and just and equitable winding-up provisions have overlapping but distinct jurisdictions. The overlap is explained by their common *conceptual* rationale—redressing unfair conduct. The distinction arises, however, as

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[51] *Ibid*. at para. 97 (emphasis added).

[52] [2006] 3 S.L.R. 827 at para. 45 (emphasis added). See also the Court of Appeal's subsequent decision in *Lim Swee Khiang v. Borden Co. (Pte.) Ltd*, *supra* note 5, which emphasized the higher standard that ought to obtain in a quasi-partnership relationship.

[53] *In re Saul D Harrison & Sons plc* [1995] 1 B.C.L.C. 14 at 18.

[54] See *Boyle*, *supra* note 32 at 94, where the learned author observed that the concept of unfairness ought to be understood not so much as an analytical concept but rather as a *general standard* to guide the court as to the kind or degree or misbehaviour or mismanagement that would justify the court's intervention.

a matter of statutory construction and is confined to their *application*. The learned judge reasoned that the fact that the discretion to order winding up is conferred under *two* different provisions would itself suggest that "[these] two provisions should . . . be treated as prescribing *different* grounds to warrant winding up, rather than raising the threshold of the 'just and equitable' jurisdiction to allow a winding up as a higher order remedy for more severe 'oppression' cases."[55] Thus, the jurisdiction under section 254(1)(i) is not a mere subset of that under section 216, and there is no presumption that a petitioner who failed to obtain a remedy under section 216 would surely also fail under section 254(1)(i). In fact, a textual analysis of the two provisions suggests that the just and equitable winding-up jurisdiction is in some ways broader than the oppression jurisdiction.[56] Unlike section 216, section 254(1)(i) is more generally phrased and its application is *not* confined to particular categories of conduct concerning (a) the conduct of the company's affairs or the exercise of directors' powers; and (b) the acts of the company or resolutions by members or debenture holders.[57] Chan C.J. cited as an example of cases which may *only* fall within the broader jurisdiction of section 254(1)(i) (and to the exclusion of section 216) instances of deadlock between two equal shareholders.[58] In such cases, it may be just and equitable to wind up the company even in the absence of proof of oppression or wrongdoing by either party because:

> [the] inequity justifying a winding-up order in such situations does not lie in the oppressive or wrongful conduct of the other shareholder *in the management of the company or the conduct of its affairs*, but in the opposing shareholder's insistence on locking the applicant shareholder in the company *despite the stalemate they have reached concerning the conduct of the company's business*.[59]

Where the two jurisdictions do in fact *overlap*, a principled approach would require the application of a *common* standard of unfairness to these concurrent jurisdictions.[60] This would not render either provision superfluous, because the *relief* that may be obtained under the two provisions differs. For example, a petitioner who has established unfair conduct under section 216 is not entitled to an order for winding up as of right, because such an order is only appropriate as a relief of "last resort".[61] By contrast, the only remedy available under section 254(1)(i) is that of winding up. Further, a court is not bound to decline to make a winding-up order under section 254(1)(i) only because the petitioner could have sought (but did not seek) an alternative and more appropriate remedy under section 216.[62] However, a shareholder who petitions for a company to be wound up under section 254(1)(i) with spiteful or

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[55] *Supra* note 1 at para. 35 (emphasis in original).
[56] *Ibid.* at para. 36.
[57] See s. 216(1)(a) and (b), *Companies Act*.
[58] Citing *In re Yenidji Tobacco Company Ltd.* [1916] 2 Ch. 426.
[59] *Supra* note 1 at para. 35 (emphasis in original).
[60] *Ibid.* at para. 37.
[61] *Ibid.* at para. 38.
[62] *Cf.* s. 125(2) of the U.K. *Insolvency Act 1986*, which allows the court to decline to wind up a company on the just and equitable ground if the petitioner is found to have acted unreasonably in not pursuing another more appropriate remedy.

malicious intent, or a desire to pressurize the counter parties into a disadvantageous buy-out or exit, takes the risk of his action being struck out for abuse of process.[63]

In maintaining the distinctiveness of the two jurisdictions, the Court of Appeal clearly did not feel constrained by Lord Hoffmann's analysis in *O'Neill* to conflate the oppression and just and equitable winding up jurisdictions. This is unlike the position in the U.K., where Jonathan Parker J. reasoned in *Re Guidezone Ltd.*[64] that since Lord Hoffmann had placed both the unfair prejudice and the just and equitable winding up jurisdictions on a common platform, the jurisdiction for just and equitable winding up could not be wider than that for unfair prejudice. Chan C.J.'s contrary conclusions are, as explained,[65] clearly defensible as a matter of statutory construction. However, several implications flow from this distinction.

First, while it is trite law that cases involving fault-neutral deadlock are one of the "classic" instances that warrants the dissolution of the company on the just and equitable ground, it is less clear whether such cases are necessarily confined to the *exclusive* jurisdiction of section 254(1)(i). Indeed, the reasoning in *O'Neill* may suggest that such cases could fall within the purview of both jurisdictions in England. As observed above, Lord Hoffmann in *O'Neill* identified quasi-frustrative events as capable of invoking the court's intervention in the U.K. equivalent of a section 216 petition.[66] The inequity that is said to arise in such situations, that of insisting on the continuation of the parties' association despite the impasse,is comparable if not identical to that which Chan C.J. ascribed to the deadlock situations. In isolating such instances as capable of generating a remedy only under section 254(1)(i), Chan CJ appears to have excluded the same from the province of section 216. Thus, whilst attempting to preserve the breadth and flexibility of the just and equitable jurisdiction, the Court of Appeal may appear to have restricted the jurisdiction of the oppression remedy. In practical terms, a petitioner who pleads that his shareholding has been unfairly retained can only seek a winding up order on just and equitable ground.

Secondly, the breadth of the just and equitable jurisdiction should not be overstated. It is hard, indeed, to think of circumstances other than fault-neutral deadlocks that would fall *only* within the jurisdiction of section 254(1)(i). Further, although previous cases commonly permitted a company to be wound up under section 254(1)(i) once it had been established that the relationship of trust and confidence between shareholders had broken down,[67] the analysis in *Evenstar* makes it plain that it is not every case involving a loss of trust and confidence that would amount to a deadlock for purposes of section 254(1)(i). The *cause* of the breakdown is relevant in evaluating the merits of the complainant's claim. Obviously, the court would not intervene where the loss of trust and confidence between the parties was attributable

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[63] *Supra* note 1 at para. 39, citing *Tang Choon Keng Realty (Pte.) Ltd. v. Tang Wee Cheng* [1992] 2 S.L.R. 1114.

[64] *Supra* note 29 at para. 179. *Cf*. *Re R. A. Noble & Sons (Clothing) Ltd.* [1983] B.C.L.C. 273 and *Jesner v. Jarrad Properties Ltd.* [1993] B.C.L.C. 1032, which held to the contrary. These latter cases were, however, decided prior to *O'Neill* and applied a slightly different approach in evaluating unfair prejudice. For criticism of *Re Guidezone Ltd.*, see *Boyle*, *supra* note 32 at 99.

[65] See *supra* text accompanying notes 54-57.

[66] See *supra* text accompanying notes 27-30.

[67] *Re Goodwealth Trading Pte. Ltd,* [1990] S.L.R. 1239; *Ng Sing King v. P.S.A. International Pte. Ltd.* (No. 2), *supra* note 48.

to the petitioner.[68] Similarly, the jurisdiction may not be invoked in cases where, for instance, the loss of trust and confidence had arisen mainly in connection with the petitioner's failed attempt to secure an exit from the company on acceptable terms.[69] Even in cases where the parties' relationship has deteriorated over time through no obvious fault of either party, the granting of a winding-up order is not a matter of course. Given that the inequity that justifies intervention lies in the opposing shareholder's *conduct*—in insisting on locking the applicant shareholder in the company in the changed circumstances[70]—evidence to the contrary should tilt the balance against the applicant. For instance, a dominant shareholder who has made genuine and reasonable (though rejected) offers to purchase the applicant's shares cannot be said to have unfairly retained the latter's assets, and it would follow that a winding-up order is not warranted in such circumstance.[71] Thus, while it has been said that the underlying policy for dissolving the company on account of irretrievable breakdowns is that of pragmatism,[72] and that the court will not inquire into the cause of such breakdowns once they are established,[73] the analysis in *Evenstar* would suggest that both the complainant's and the opposing shareholder's conduct are critical in balancing the parties' respective equities.

Finally, the decision in *Evenstar* demonstrates that the difference between section 216 and section 254(1)(i) may in fact be rendered less distinct by the practice of staying the winding-up order to allow the parties sufficient time to negotiate a settlement, the practical effect of which approximates that of a buy-out order under section 216.

VI. Conclusion

The Court of Appeal's lucid and thorough analysis has undoubtedly clarified the conceptual basis on which relief might be granted under sections 216 and 254(1)(i). In the past, complainants habitually pleaded for relief in the alternative in the hope of enhancing their chances of success. Now, they are able to do so with a better appreciation of the different circumstances which these provisions address. However, to the extent that the introduction of Lord Hoffmann's guidelines in *O'Neill* may have a limiting effect on the scope of these jurisdictions, such effect should be moderated by a broad and sensible application of the guidelines with a view to vindicating the very object of these jurisdictions—that of fairness and equity.

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[68] *Supra* note 1 at para. 31.

[69] *Summit Co (S.) Pte. Ltd. v. Pacific Biosciences Pte. Ltd,* [2006] SGHC 190; [2007] 1 S.L.R. 46. See also *Re Metropolis Motorcycles Ltd.*, *supra* note 31; and *Phoenix Office Supplies Ltd. v. Larvin* [2002] EWHC 591 (Ch); [2003] 1 B.C.L.C. 76. Note, however, that the latter cases dealt with exits at will under the U.K. unfair prejudice regime.

[70] See *supra* text accompanying note 59.

[71] To the extent that the complainant had acted unreasonably in rejecting the offer, this may be seen as part of the larger equitable principle that the complainant must come to the court with "clean hands": see M. Chew, *Minority Shareholders' Rights and Remedies* 2d ed. (Singapore: LexisNexis, 2007) at 271. It is submitted, however, that the test suggested in *Evenstar* may be distinguished, as the focus lies not (except in an incidental manner) in the complainant's conduct but in the reasonableness of the opposing shareholder's conduct.

[72] In that it would be futile to compel parties who are disenchanted with each other to continue in a cooperative relationship: see Chew, *ibid.* at 273-274.

[73] See generally Chew, *ibid.* at 272, citing *Re Central Realty Co. (Pte.) Ltd.* [1999] 1 S.L.R. 559.