

(10.00 am)

MS LOK: May it please the court. Would the court like to hear me first or hear Ms Ho first?

COURT: I don't mind, really.

Closing submissions by MS LOK

MS LOK: If my Lord doesn't mind, then I will be really brief. I will only make four points subject to the last word in case Ms Ho raises anything new in her oral closing.

The first point is that in our closing in writing, we have adopted the analytical framework referred to by my Lord before we parted, and upon reflection, that that was indeed the right way to go, because one can always see that if one starts by what is clearly indisputable, the first two parts of our closing, one can readily see there is overwhelming evidence about not only the fault on the part of Harbour Front, but the fact that it was those fault that caused the complete breakdown of trust and confidence since the early 2000s.

We say that, and give my Lord all the chapter and verse, about the judicial findings, but we also, on top of that, rely on the admission by Harbour Front itself in some of the correspondence that we have gone through in evidence.

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If one starts from there, a large chunk of my learned friend's submissions simply falls apart because the starting point is that really Harbour Front's wrong has caused the complete breakdown of trust and confidence since the early 2000s.

Pausing here, the approach by my learned friend -- I would make this simple point at the very outset is that they try to confuse themselves by all this misleading wording about whether or not the basis of their corroboration has gone or something like that instead of saying the simple word of "breakdown of trust and confidence".

The simply reply to that is the shareholders agreement may subsist, but the trust and confidence clearly does not. So my learned friend keeps interchanging between the two, and that is meaningless, because we know the shareholders agreement was there but the trust was not. As simple as that.

Now, my Lord, I move on to my second point, which is this. After and following on the first clearly indisputable finding, what comes after that?

That is the next issue we addressed in our written closing: what comes after break down. That's where my Lord needs to consider the proper text of how the innocent shareholder can call it a day, basically.

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Our respectful submissions, the method of approach, is very simple: we base ourselves very firmly on that remark in *Chu v Lau* and say that of course, after complete breakdown, breakdown means breakdown, there is no mutuality in the relationship, the trust is not mutual any more. And you cannot say, "I beg", or "I'm very sincere, can you please forgive me", et cetera, had they really done that -- which they have not, by the way -- but if the wrongdoer had done that, if the innocent shareholder is not so unreasonable in retaining the mistrust and their relationship cannot go back to where it was at the inception, the basis of trust and confidence, then it is, as a matter of law, good enough for the innocent shareholder to call it a day and say, "I want out".

That is where, as a matter of approach, we say it's the correct proposition of the law. That, after we review the cases that we cited in our opening submissions, the submissions, my Lord, remember about burning bridges, et cetera, those cases fall nicely into this principle. Although those words were not said expressly in those older cases, but if you think about the fact, that was exactly it. If there was breakdown of trust, then you can't force and the law would not be so harsh as to force the innocent shareholder to say

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"You have to be tied with that person no matter what, come what may, and you are stuck forever". That's not the law.

My Lord, the impossibility test put up by my learned friend is really not supported by the cases that she cites. She said a lot about O'Neill v Phillips, but, my Lord, we remember those cases were about discussions on whether or not there can be a no-fault divorce. So the judges were thinking if there is a no-fault situation, can the shareholders partway, but we are not talking about that situation because, on ground one, which we started all our analysis, we are firmly in the area where Harbour Front was the wrongdoer shareholder who has caused all the breakdown of trust and confidence in the beginning.

I would add that this impossibility test is not formulated with any clarity, and it is very unattractive as a matter of proposition, because if you are saying that these shareholders should be together because of trust and confidence, if that trust and confidence is gone, of course, even though technically they can go on hating each other and carry on the company, why would the law impose that on those shareholders?

My Lord, the third point I need to make is the point about delay, which is my learned friend's new allegation

10:06 in her closing. My Lord will remember that down to the stage of the analysis, clearly YK is entitled to the buyout order had he asked last time, and we say because of all the analysis we have made in our written closing, there is no good reason why he should not be entitled to a buyout order now. But my learned friend says, "But you are so late, why didn't you ask for it back then since the breakdown in the 2000s?"

This, as a matter of fact, we do invite my Lord in light of Harbour Front's present stance to make a clear finding about the reason why Mr YK Leung did not ask for a buyout order back then. We have added that part in our closing, the good reason for him not to. And my Lord heard his evidence, he was all sincere and said, "I believe I had a duty, I was trying to do it", and he did try to do it, my Lord. You remember that it was in 2015, when they were talking about the Chung Sing offer, Harbour Front objected and said, "I don't like private tender, do it publicly", and they even raised the requisition to ask for public tender.

So after everybody went back from court after my Lord's judgment, YK went back and said, "All right, I know now that Harbour Front really want public tender", so he arranged a public tender, incurred expenses, put in a lot of efforts, got the valuation.

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And then just before the public tender was about to close, it was the matter of this injunction application, this third round of petitions in the Companies Court. And it was really the last straw. My Lord remembers the evidence of YK, that I really -- you know, "It took so much for me to do all these, and then it took two petitions and off it goes, everything goes down the drain". So he called it quits.

As a matter of fact, those must be clearly good enough for reasons for him to decide not to present unfair prejudice petition better than to change his mind now and say, "I don't want it any more". And that finding is very important for YK not only to have his case vindicated, that's part one, but also when it comes down to the valuation, my Lord has read Ms Ho's submissions that they indeed reserve their position and they want to take every point in the valuation stage. They say that they will take the delay point at the valuation stage.

COURT: Well, I'm not -- well, they want a separate valuation hearing. It's not quite clear from Ms Ho's written submissions -- I'll ask her about this later -- what the timing point is. But, of course, it's inherently unlikely that I will choose a time which did not result in a valuation of what the assets are worth

10:10 now.

MS LOK: I see. I'm grateful for that indication, my Lord. But just in case Harbour Front wants to take it further, which is what we learn from experience, it is better to have all the findings there so that they can't cause a lot of second argument in a later stage.

Then I digress a little, my Lord. On the delay part, we have addressed the factual aspect of it. But on the legal aspect of it, my Lord, it is very clear that in these sorts of contexts, the delay alleged to bar -- an innocent shareholder's remedy to a bar or relief has to cause some sort of prejudice to Harbour Front, and there is none. None on the fact and none pleaded.

My Lord will remember I made a complaint expressly in my closing submissions that Harbour Front does it every time. In the round one petition before Mdm Justice Kwan in the round two petitions before my Lord, they always raise something unpleaded. And now, here, we have it again. This delay allegation, we cannot find it anywhere in their pleaded case. They did not raise as a defence that even if you are entitled, YK, to a buyout petition, you are too late: delay and laches, it was not pleaded. And in any event, no prejudice is in the evidence and can be found by my Lord

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10:11 in light of the earlier finding I invite my Lord to make about my Lord having perfectly good reason not to ask for a buyout order in the second round of petitions.

My Lord, if you need any reference in that regard, the requirement to get -- to prove prejudice in delay is -- I don't think I need to trouble my Lord to turn it up, but I'll just jot down the reference. It's in the fourth item of our list of authorities, Re Edwardian Group Limited, paragraph 571.

So the test is whether, first, I'm justified -- unjustified delay, so the delay has to be unjustified, and then resulted in prejudice or an irretrievable change in position, which test comprises the essential ingredients of laches. So all these are absent in the present case.

My Lord --

COURT: You're asking for valuation at -- you want the valuation date to be when?

MS LOK: What I want the valuation --

COURT: Yes, I can't remember.

MS LOK: -- date?

COURT: Yes.

MS LOK: There was a suggestion earlier on in opening that because the IDL offer was a third-party offer made to Fonfair, definitely good for cash, so we simply adopted

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that offer at that date as the valuation, and we don't need the fanfare of valuation evidence. That was the suggestion. In fact, it would be very, very simple, because we have that \$910 million, so you just divide it by two, and then times the ownership.

COURT: Forget the calculation, but if I'm just choosing a date, what date? Are you suggesting that date?

MS LOK: There are a few alternatives in front of my Lord if we're not making the decision now. The IDL offer date is a date, the date of the public tender is a date. Of course, you also have the date of the petition, the cross-petition, and you also have the date of the order. But we're mindful of how the property market goes, my Lord, so if my Lord wants to keep it open, we may as well keep it open and decide on that issue in that second hearing.

COURT: I think I would be inclined to do that, given the fact that there hasn't been, as far as I can see, focus directly on that issue, because I assume what may have happened -- but I don't know -- is that the price went up, maybe at peak around the IDL offer time, and then it's come down a bit. So there may be room for arguments about whether you use the IDL offer point in time of that offer, or whether it should be now, or what have you.

10:15 MS LOK: Yes. In fact, I have, not to count my chickens again but solely just to assist my Lord, drafted my orders in the three respective conditions in case my Lord finds in favour of YK. Just for argument's sake, that might be provided after Ms Ho makes her submissions, and we can look at the terms in terms of what comes next.

My Lord, I'm down to the fourth point of my submissions which is to correct a few mistakes in the respective submissions of the parties.

First of all, my Lord, at paragraph 47 of my written closing, my Lord finds the word "issuance".

COURT: Whereabouts in paragraph 47.

MS LOK: At paragraph 47 of my closing --

COURT: It's quite a long paragraph. Where in paragraph 47?

MS LOK: I've just lost my reference, my Lord. Can you bear with me.

COURT: Oh, (6), with the issuance with notice of appeal.

What is the point about the word "issuance"?

MS LOK: Yes, it was a mistake; it should be "pursuance" instance of "issuance" --

COURT: So that --

MS LOK: The notice of appeal was issued by the former solicitor Tsang & Lee.

Yes, (6), my Lord is right, the second line:

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"Amongst Yiu & Associates' first acts were the issuance of the Notice of Appeal ..."

So strike "issuance" and replace it with "pursuance". The notice of appeal itself was issued by Tsang & Lee.

Just in case my learned friend makes a song and dance about it and says we are wrong.

COURT: Okay.

MS LOK: Yes, and the same goes for the appendix of hostile letter that Yiu & Associates issued a notice of appeal, it should be pursued a notice of appeal. But that is a very small point, my Lord. The point is still that all these hostility were non-stop. No matter whether you look at it from the board level or from the solicitor's level, what I name the "legacy of hostility" is passed on forever and ever. That is it, basically.

COURT: Yes.

MS LOK: The second point of correction is as to the allegation that YT did not involve in Harbour Front since year 2010, my Lord. The reference is Harbour Front's closing, paragraph 24. Now, my Lord, I just need to add one more reference to rebut that. I have done that under the small section in my written closing about the allegation of "nice, trustworthy, new board", it just has not an ounce of truth in it.

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But I would add one reference, which is the discussions in the 2018 EGM, at bundle D15, tab 464, page 8588 onwards. My Lord does not need to turn that up, but my Lord will remember the reference to "Male 2" in that recording was to Mr YT Leung himself. So we say he was the moving genius behind it all, and you can see that 2018 he was discussing intimately about all these discussions over tenders, whether to do it in parallel, et cetera. He was very much interested in this.

The third point of correction is about the allegation in paragraph 57(2) of my learned friend's closing. What they say is that:

"... Harbour Front has duly complied with the Court's undertaking not to disclose [about the injunction] ..."

So I presume their point is to say that that injunction has nothing to do with the rise and fall of the public tender itself. I need to make a reference to YK's witness statement, paragraph 62(3). The reference is C, tab 4, page 464.

The point made by YK, which was not subject to any cross-examination, is that one day after Harbour Front's petitions in these proceedings were presented, Harbour Front already wrote to the agents, including

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Savills and Cushman & Wakefield, to inform them about the Harbour Front petitions. Therefore, even before the interim injunction hearing was heard and by the time the undertaking was given, the market already knew about the petitions, and it came as no surprise that the public tender was not particularly successful. If you see all these shareholders are fighting among themselves yet again, they are presenting petitions, et cetera, nobody in their senses will come to say that "I want to bid in that land anyways", and that is a factual point which I need correction on the transcript.

My Lord, those are the four main points I want to make. The final remark would be that as a matter of finding goes, indeed to avoid any re-litigation on the matter, we do need, in particular, certain findings by my Lord. The first is, as I have indicated before, the findings about YK being justified in not taking out the petition earlier on, doing it now with good reasons.

The second is that we do need my Lord to make a finding on the wrong on the part of Harbour Front in respect of the public tender and the IDL offer. Those were not the matters subject to previous findings before, but they are clearly there for my Lord to make a finding. Because, my Lord, if you come down again to this level of the analysis, up to this very point in

10:22 time, Harbour Front has no right to barge in to the management and interfere with it, but that is what they have done. Because of those wrongful actions, they have just sabotaged not only the public tender but also, they refused to even consider properly the IDL offer. And we do need those findings to avoid any further argument later, and I have a strong feeling that these findings will become relevant when my Lord comes to decide on the proper valuation date because my Lord will remember one of the classic dates chosen will be the date of the wrongs.

Does my Lord wish to see the draft orders now or later?

COURT: Why don't you give them to me now so we all have them in front of us.

MS LOK: I have drafted one order in respect of each action. I will hand them up to my Lord now and give them to Ms Ho.

Why don't I address them in reply, if anything?

COURT: Let's just have a look at them first.

MS LOK: My Lord, let's start then with the easiest, which is the 1988.

COURT: Yes.

MS LOK: This is the Money Facts position. This is the shortest because all we need is for the petition by

10:23 Harbour Front be dismissed, and a cost order.

COURT: 1987, you need the injunction --

MS LOK: Correct.

COURT: -- discharged, and an enquiry as to damages?

MS LOK: What we want to do is to push the date for the directions, et cetera, to 28 days afterwards. That is because if we read it together with the cross-petition one, the 1471, this is our proposal about the valuation. So we want to keep it short and keep it easy by way of writing to my Lord.

There are only two issues to decide at this stage. Now we are reserving everybody's position and arguing in that part of the hearing, the basis of the valuation and the proper valuation date and flowing from those two determination what are the consequential directions one needs, so these can be pretty straightforward. I venture to put in the page limit, just so nobody is buried in paper.

My Lord will see in 1471, draft order with all these proposed directions to be determined in writing first. Then that enquiry as to damages will come after this. So, who knows, maybe the parties can come to an agreement and then we don't need to trouble my Lord. But in case we don't, then we sort out the directions for the valuation first and then decide what to deal

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10:25 with the enquiry as to damages. That is the way we think is the proper and cost-saving way to proceed. We don't want a fully fledged 10 days' hearing to determine the question of valuation.

COURT: You are going to have a problem with getting a one-day hearing.

MS LOK: Ah. Well, it's no harm fixing it first in any event, my Lord.

COURT: No, that's not the problem; the problem is when you get a one-day hearing, you're not going to get it a very, very long time, like next autumn.

MS LOK: Autumn?

COURT: Yes, because I have lots of trials.

MS LOK: My Lord, I'm proposing a one-hour hearing, would that change the matter a bit?

COURT: Well, I thought I saw one day. Well, it may or may not -- the fact that you set it down for one hour doesn't mean to say there may not be a lot of work involved, plus you may still have difficulty getting one hour. Because I have long trials and they're competition cases which will start at 9.00.

MS LOK: I see.

COURT: Maybe I will put some things in in the afternoon which dictate --

MS LOK: We can be flexible, my Lord. If at 5 o'clock, if

10:27 my Lord is with us, we can do it. We just require some determination on the valuation date and that's it.

COURT: All right, the valuation date may be fairly straightforward. Sorry, I was thinking I had seen it as one day.

MS LOK: No, no, no, one hour. Yes, thank you, my Lord.

Closing submissions by MS HO

MS HO: My Lord, I also make four points, the first is to address your Lordship's question to me after close of evidence as to the timing of YK's presentation of the cross-petition, the legal relevance of that.

The other three points, I'll just be responding to my learned friend's closing.

On the first point, we have to make clear that we are not saying that because of the, we say, lateness of YK taking out the petition, he cannot get any buyout order. The legal relevance here would be the date of valuation, and because that would be left for another day, I'll just highlight that this will be the principle in the Edwardian case which my learned friend has referred to, and the relevant paragraphs will be 570, 571 and 607.

The gist of it is that there was a delay of four years in the quote/unquote "innocent" petitioner in taking out the petition, and the court made

10:28 an adjustment, moving the year four years up to reflect the situation.

Here, we do urge your Lordship to take that into account, although I heard your Lordship's indication, but even if your Lordship were to make a buyout, the valuation date has to be assessed in a principled way.

Your Lordship will note that there is indeed prejudice on Harbour Front's side, because according to YK's case, the complete breakdown of trust and confidence took place 20 years ago. So the buyout could have made in 20 years ago, and we won't be here, and then trying to go back to the management; we would be managing the company ourselves.

So these are the matters which I would, in later submission, elaborate on.

We are talking about a valuation date, not a preclusion of YK in getting the buyout order.

COURT: Well, I would have thought -- we don't need to bottom this out now -- your client hasn't been pushing for sale of the land to anybody in particular, and the impression that emerges from the evidence is that he's been preventing the disposal of the land, therefore, it's not readily apparent why the court would take the view that he is financially prejudiced because the

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value of the land is the value of the land, it's -- as it transpires, it continues to go up. Of course, I'm likely to say, "Well, you valued it 20 years ago, you can take the benefit of all the appreciation over the last 20 years."

The date, choosing a date other than one round about the time the petition was issued, whether that date or the time when an offer was actually being made to buy, is a different point. But as YK himself said, I'm inclined to the view that this is eminently sensible, it made much more sense to try to sell the land rather than put the company into liquidation or anything of that sort. So I can't immediately see what the prejudice would be to your client, and to the extent that -- and to allege any prejudice would seem a little bit artificial since he's not been terribly keen on having the land sold. I mean, there's no evidence, is there, of any time him saying, "Actually, I can see this offer might be quite attractive. There are a few things I would like clarified, but in principle, I would like it taken seriously"; everything is "no". He is a limited vocabulary, it's one word, basically: no.

So I'm not sure some kind of attempt to analyse the thing on the basis of anything other than the fact that your client has just made a nuisance of himself for

10:32 20 years is realistic. But you don't need to comment on that. You might just bear that in mind going in the future.

MS HO: I do understand your Lordship's concern, and thank you for the indication. We'll work on that. But that would be a marker that I'll make and also make clear that we're not trying to run anything unpleaded, it's just the valuation dates that we'll be concerned with.

COURT: Yes.

MS HO: Of course, my learned friend just now mentioned a few dates for valuation, we'll talk about that in the separate hearing. She also seems to be quite keen to still rely on the 910 million. Again, another marker here. What your Lordship will be assessing is the valuation of the shares itself, so it may not be that direct as to a transposition of 910 million that would mean the value of the share -- of Money Facts, which is two layer up. So that is another marker that I will put down, and I will leave it at that.

COURT: I wouldn't get too bogged down in the technicalities. If one accepts that the guide figure should be the offer price, then frankly you should be able to negotiate, I would imagine, a small discount just to get rid of the thing, because you're

10:34 not going to be talking about much in the adjustment of the value. Quite frankly --

MS HO: No, because it's not a minority --

COURT: -- I have no confidence, to be quite blunt, in Gillian Leung understanding some highly technical value adjustment to shareholder valuations.

MS HO: No.

COURT: So just try not to be too clever.

MS HO: I'm not clever at all, so I can't.

COURT: You can try and be too clever but make sure that other people don't try and be cleverer than they actually are. If we get to that point.

MS HO: Right. That deals with the question which your Lordship raised with me last time.

COURT: Yes.

MS HO: Then, three points in reply. First of all, again, it is about the complete breakdown of the trust. I have set out my submission and I do not intend to repeat, but I am duty-bound and I will repeat these few points.

First of all, showing a complete breakdown is YK's pleaded case for defending our petition as well as supporting his cross-petition.

The standard of showing complete breakdown is high. Whether you look at the basis of association by reason of the terms of association positively agreed between

10:35 the parties or if we look at the mutual trust and confidence scenario, both scenarios are high, the threshold.

My learned friend commented on the Chu v Lau case, we have looked in the Chu v Lau case as well as the case referred to in Chu v Lau and we can see the test is really the impossibility of the parties engaging in the business as they originally contemplated. That is the test.

COURT: Well, aren't there possibly at least two points here?

MS HO: Yes.

COURT: Remind me, because I haven't gone back and checked it myself -- let's assume -- the parties are entitled, according to the shareholders agreement -- actually, where is that, if we could go back.

MS HO: It will be bundle D1, tab 4.

COURT: Let me go back to that.

So there's going to be equal representation on the board.

Let's see if I understand your argument. What you're saying is there is no reason to conclude that it's not perfectly possible for YT to be put back on the board, although apparently he's not interested in running the business, this small problem, and, assuming

10:37 he did go back on the board, he and his brother being able to work together.

MS HO: My argument goes beyond YT because your Lordship will recall, after Harbour Front became the shareholder, there is no dispute between the parties that Harbour Front will take over YT. So according to this shareholders agreement as it is, it will be Harbour Front and YK having equal representation.

COURT: Well, is there any reason not to understand that as being Harbour side's representative director, who would be YT?

MS HO: If that is your Lordship's finding then that would be, if your Lordship assumes they are same.

COURT: I think at the material time, that would be the obvious thing to assume.

MS HO: Yes.

COURT: I mean, that is no more than assumption because that is not what they agreed, and we go back years to a point of time where it is inherently unlikely it would be anybody else. If it was today, it might be different.

So that's what we are talking about, YK saying, well, the position I accept is that Harbour's side would have a representative but clearly the representative would be YT.

Let's assume it is YT for present purposes.

10:39 The issue is what, as a matter of fact, has YK demonstrated that it would be very difficult -- you used the word "impossible", I'm not sure that's a very meaningful word to use in this kind of -- it would be very difficult to expect -- it's unrealistic to expect the two of them to work together in a constructive way. The reason for that is YT's conduct for 20-odd years.

MS HO: All these other things, yes.

COURT: Do you accept that that's, in practice, the test?

MS HO: I would say the test is what I have submitted, whether it's impossibility or impractically difficult would be the test that your Lordship would apply. What I'm advocating, and what I still stand by as an important point is that apart from looking at Harbour Front's conduct or YT's conduct, the other thing which your Lordship has to take into account in your objective assessment as to whether it is practically difficult for these two partners to continue to work would be YK's own conduct.

The other thing which your Lordship has to take into account in your objective assessment as to whether it is practically difficult for these two partners to continue to work would be YK's own conduct. Because we are not talking about us being a partner in the business; it's their partnership. So YK's conduct is very important as

10:40 well.

One important factor here, and which we say is an unusual factor, is that there is this shareholders agreement, and we -- I have also -- which says there is equal representation --

COURT: Of course it's not -- in one sense, it's clearly not impossible for them to work together. YT could turn up at a meeting and he could say, "All right, I'm going to be sensible. My brother and I are going to be sensible. I can see the property market might be flat or continue to drift down for who knows how long, so we'll just get on and sell it". I don't know. I mean, it's obviously -- as you say, that's possible. So if "impossible" means the opposite of that, it would never be possible to demonstrate impossibility, would it? So it presumably means, on the basis of the evidence to date, can the court properly conclude that given the evidence to date, YK and YT, as a result of YT's behaviour, would be unlikely -- presumably the balance of probabilities is the requisite test -- to be able to approach their business dealings in the way it must reasonably be assumed was expected at the time the shareholders agreement was entered into? Would you accept that would be --

MS HO: Yes, I would accept. Your Lordship can certainly

10:42 reach that finding, but what I say is that your Lordship must take into account the shareholders agreement and YK's affirmation or his agreement to be bound by it in your thinking process.

COURT: All right, well --

MS HO: That is key.

COURT: -- I'm not too fussed about that. I can see that it's relevant, but let's take one piece of evidence, indisputable, to investigate how the deliberation works in practice.

So in 2019, I think it is, YK sends a personal email -- I can't remember where it is, although it says -- reference to it --

MS HO: The letter to YT, your Lordship is requesting?

COURT: That's, the personal one. It's referred to in Ms Lok's closing, if you --

MS HO: D10, tab 408. We get, some time after the judgment in the last set of proceedings, YK writing to his brother personally, a letter in English, no suggestion that YT couldn't read it because his English isn't very good, obviously they're all educated.

COURT: I think I am likely to take the view that this was a perfectly sensible letter, written clearly, using language which was not likely to cause offence, to acknowledge the differences between them, and to suggest

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that despite those differences, it made sense, commercial, financial sense, to proceed as is suggested in the letter.

So, on the face of it, a kind of -- an attempt, an olive branch we might say in English, borrowing from the Romans, a clear olive branch, and very, very well written.

YT doesn't respond, doesn't reply. His daughter replies, and his daughter, in a letter which presumably was written by the rather less skilful in terms of drafting this kind of thing, the solicitor that they use, doesn't even have the wit to start off "Dear uncle". It starts off "Dear Mr Leung".

Now, over and above the tactical stupidity of the people who drafted this, to be quite blunt, juts -- this makes me roll my eyes at the tactical incompetence of some of the solicitors, but anyway, be that as it may, she might have thought herself, presumably YT probably saw the draft, you really need to try and respond in kind. Even if we don't think it, let's try and sound like we are nice, diplomatic people. They can't even do that.

It might sound a bit like a rhetorical question to you, but what am I meant to make of this? Doesn't this reasonably invite the conclusion that Gillian and her

10:46 father just don't get it?

MS HO: My response --

COURT: They can't work together because they're too pig-headed, too daft -- I mean, Gillian doesn't strike me as, frankly, an especially bright woman, I've been trying to work out what language to use in the judgment which isn't too perjorative. It is the second time I've heard her cross-examined.

But what am I to make of this? Why shouldn't I give it its natural effect, which is that, frankly, YT and Gillian simply are congenitally incapable of behaving in a sensible, reasoned way, even if they don't want to --

MS HO: I hear your Lordship.

COURT: -- they can't bring themselves to say, "All right, for the next hour, we're going to smile"?

MS HO: Yes, my Lord, I hear your comment on YT and Gillian. Again, of course, your Lordship has also mentioned Gillian didn't use "Dear Uncle" and you also raised the idea of, "Why don't you apologise in the letter?" Exactly.

COURT: Yes, I've never apologised, I mean, well ...

MS HO: But of course, here I would invite your Lordship, in deciding whether business partners in a company will part, your Lordship will be looking at the commercial relationship -- even though it's a quasi-partnership,

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10:47 even if we go down that route, it is still a company and the parties would be bound by the ground rules which they agreed to work together. So whether apologising, whether saying "Dear Uncle" might be one of the factors, it cannot be the most important factor. That is one thing that I want to make clear.

COURT: But I'm trying to work -- it's not very difficult, I think, to conclude that there is rather a lot of evidence, about 20 years' worth, of YT and his children's inability to behave in a sensible way to deal with what you're telling me should be viewed as a purely commercial transaction. So concluding that they've contributed significantly to a deteriorating relationship is not very difficult.

Presumably, the point you're making can always be made in relation to any case, can't it? You're dealing with a business. Some people are difficult to deal with. It doesn't stop businesses being run. Is that, however, the criteria here? Whilst there may be differing views on how you talk about breakdown of trust and mutual confidence and how it operates in the context of things of, like, by analogy, partnerships, presumably there is at least a significant element of it involving people having difficulty working together constructively, people who actually have to run

10:49 partnerships.

MS HO: Yes. My response would be this. For each of these cases, the test will be the same. Whether it's the present case or the other cases, the test will be the same. It's the degree and the different factual scenario which will lead the court to reach a different result.

Your Lordship is certainly right that in some of these scenarios there are facts showing that the parties cannot work constructively according to what they initially contemplated. For example, there are cases which we cited where the parties just don't attend any meeting, they just pass their memos and they don't see each other. We have also seen cases where the parties fight and then they positively said, "Okay, we're going to part ways". So we have that on one side of the spectrum.

Of course, we have the other side of the spectrum: the parties are very cordial, the nephew says, "I'm sorry, uncle", and then I write all these letters, et cetera, that's the other.

Here, we have something in between. Of course, I hope that after your Lordship considers the evidence, you will consider it is towards the other side, saying that the parties still can work together.

10:50

Why do I say that?

COURT: I'm not quite sure that's -- maybe I'm just not refining the question enough.

I can see that if you've got two directors on a board and one of them never turns up, that's a rather obvious way of demonstrating that it's impossible for them to work together. But the expression that the judgments use is "mutual trust and confidence", and a "breakdown in mutual trust and confidence". It doesn't actually say, "It is impossible for them to make decisions because", for example, a necessary party doesn't want to turn up at a meeting and therefore there is no quorum.

MS HO: But when one looks at the test of breakdown of mutual trust and confidence, that is why I spent a little bit of time to look at *Chu v Lau* and also the cases cited therein, and one will see -- can I just quickly take your Lordship to my closing, page 6. Do bear with me, my Lord, because this point will be important for other cases as well, because we do need your Lordship's guidance as to, in this type of cases, what tests should be applied and when should we consider the complete mutual trust and confidence has broken down.

If your Lordship can look at paragraph 12, here

10:52 I cited the Yenidje Tobacco case which was referred to  
in Chu v Lau.

COURT: Sorry, paragraph 12?

MS HO: Yes.

COURT: Why am I -- sorry, I'm looking at the wrong closing.  
That explains it. So your paragraph 12, which you  
say?

MS HO: Yes, my paragraph 12. Here, I set out the threshold  
for the breakdown of trust and confidence even by  
analogy to law of partnership. Because in the previous  
paragraph, I cited a few cases and authorities saying  
that in a company setting, the analogy to partnership  
cannot go too far, but even if we are applying  
the analogy of partnership, and look at even  
the partnership law, one will see that the standard is  
high.

Then the phrase of "it is impossible for the company  
to be conducted" would come from the Chu v Lau case  
which I will take my Lord to in summary at the moment.  
But your Lordship can see from 12(1), there is this case  
of Yenidje Tobacco. This case was referred to in  
Chu v Lau in paragraph 46, I stated that. Then, here,  
the two businessmen agreed to amalgamate their business  
but subsequently the company was in a deadlock and then  
the parties were very hostile and they didn't talk to

10:53 each other, and then they passed memos. That was the case which I referred to.

COURT: Yes.

MS HO: In the first instance, the judge gave the two parties some time to cooperate. But in the end, they couldn't do that. Sub-paragraph (b), at the Appeal Court, the judge referred to Lindley & Banks and considered that "a refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation have been held sufficient to justify a dissolution."

Then on the facts of that case, because there was a deadlock, the company was "in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible."

So it was to that extent, then the court found that dissolution is inevitable.

COURT: Well, but it does say, doesn't it, "continued quarreling and in such a state of animosity that precludes all reasonable hope of reconciliation and friendly cooperation have been held sufficient to justify a dissolution".

MS HO: That would be your Lordship's finding of a fact

10:55 based on the present case. Of course, I hear your Lordship's comments on the letters, et cetera, but on the other hand, your Lordship will note over the years there have been various correspondence not only about debates as to the rights, et cetera, they did deal with different offers, they explained why, and if your Lordship can go to the meetings, YK would be explaining to Gillian why her proposal was not good and then Gillian will be explaining to Uncle. So they did communicate. Just that they have a difference in the view as to how to deal with the land.

So one would -- I would hope that your Lordship can have a look at the communication between the parties. It's not that they are at deadlocks, they are not talking to each other. They're not. Every time Gillian will go to the meetings, and all the offers they will be discussing with each other. On some occasion, they wrote down the offer together for different reasons, but they are talking. But what is absent in the past 20 years is that because of course due to our fault of not paying back the loss of Fonfair, we got excluded from management. So --

COURT: Let's just explore one specific component of this. If you have 50/50 management of a company, in order for anything to be done, in this case either you sell

10:56 the land or you presumably enter into a much more sophisticated development arrangement, both parties have to agree. But the evidence suggests that your client has a very fixed view on things.

MS HO: My submission would be, actually, both parties have their views on things. Whether fixed or not, they have their views. But what is absent, as I said, during the past 20 years is that there has never been this originally contemplated cooperation of both on the board, both having equal information and then you discuss. It has never happened. Of course, it's our fault --

COURT: But that's the point: it's your fault and you've never accepted it's your fault, and current management have to be left to make the decision. You trot off to court and get an injunction, you try to manufacture a way of interfering with the sale. Isn't that a relevant matter? It can't just be a question of looking forward and, "Could you come to your senses."

MS HO: Of course, on our case, we still need to get over the hurdle of convincing your Lordship that our acceptance of the reconciliation exercise was genuine, was made in good faith and we have remedied the breach before we can go back to the management.

COURT: Actually, while I think about it, is there any

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10:58 example of your client ever saying, "All right, well, we don't agree with you on this, but we'll agree it all the same. This is a matter that we don't need to argue about any longer"?

MS HO: About the reconciliation?

COURT: Anything. Is there anything they've ever agreed to?

MS HO: If your Lordship is talking about, say, for example, the Chung Sing offer, eventually both parties voted down the Chung Sing offer, and YK's view was because the value was too low, and Gillian's view was that as well. Then your Lordship will see from the discussion in the AGM, in fact, YK was sort of teaching --

COURT: No, I was actually thinking have they ever agreed to something which there was a disagreement over? Obviously, if they'd both agreed on something -- maybe they could have disagreed just out of spite but it would have been a bit pointless. But have they ever said, "All right, well, if we were in charge, we wouldn't do it that way, but, all right, we'll let you get on and do it your way"?

MS HO: I do not think insofar as the land proposal is concerned, no. And the reason which I would explain is that all along, because our case is that without the information, and you have seen some of the missing information or the incorrect information which we got

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10:59 from YK, we are not comfortable with expressing any view or agreeing with what YK does which concerns the most valuable piece of land. So it was on that basis that there was this scenario --

COURT: Yes, but surely -- I don't think any reason has been advanced, as far as I see, to suggest that YK wouldn't prefer to maximise the value of his interest in the land. Of course, that doesn't mean to say that he might not make an error of judgment: he has a choice of doing A or B, he chooses A when in fact B would have been more proper. But there's no reason to think that he's not genuinely trying to maximise value.

MS HO: There's no evidence to that effect, no.

COURT: So surely the context must be you've got this businessman who's trying to do what he thinks is in everybody's best interests, because whatever he gets your client gets, and there's no indication anywhere of your client recognising that.

MS HO: Of course, again, there is no evidence saying that YK doesn't want to maximise the interest, but if your Lordship can consider, for example, the other offers which we will take or the other action that we will take -- of course your Lordship has your view saying that we tried to block, but if one looked at it from another perspective, for example, an offer adding

11:01 \$10 million on top of the third-party offer, we're just giving this alternative for the company to consider, and we just make reference to the third-party offer, which YK said is an arm's-length offer, and then so we add on to it. So that is our way of understanding what should be the best interests: if the outsider wants to buy at this price then I add \$10 million, would you consider doing that? So that is our side's approach of the matter.

Again, going back to the test, your Lordship will have to see, look at the parties' conduct. Of course, your Lordship might not want to work with YT but, after all, YK is the counterparty in the partnership and they are brothers, so that is another reason why this matter can linger on for so long. If one looks at YK's conduct, notwithstanding he said that there was a complete breakdown for so many years, he is still complying with the basis of their original agreement, ie, the shareholders agreement, which gives them equal representation.

So that is another factor which we hope your Lordship will consider is an important one. What the other partner considers is important. So that is the point that I wish to make and also wish to highlight here.

11:02

Of course, I have *Chu v Lau* in the other paragraph.

The impossibility reference comes from *Chu v Lau*, and we have discussed as to what is the proper reading of that paragraph.

Quickly moving on to the last two points, which deal with the enforcement of undertaking as to damages and a request for YK's undertaking in relation to the land. I'll just quickly take your Lordship to paragraph 67 of YK's closing. Here YK says:

"YK seeks directions for the undertaking given by HF ... to be enforced ..."

We, in principle, have no objection to the undertaking being enforced, so the enquiry of damages exercise can be done according to the timetable proposed in the draft order. So that's our response.

The other thing is that if your Lordship were to order a buyout, because the valuation would take some time, in the meantime we do invite YK or your Lordship to make an order that YK would not procure Fonfair to dispose of the land.

COURT: Why would I do that?

MS HO: This is to preserve the-- hold the ring and preserve the status quo, because we would be buying the share from YK and then the valuation will be based on --

COURT: All right, so if you're going to have to buy

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11:04 the shares, you would like the land?

MS HO: No, no. If we --

COURT: Well, no, presumably that's what you've just said, isn't it? You're going to buy the shares, you'd like the company to still own the land, otherwise you wouldn't mind him selling. I thought what you were saying is when you acquire the company, you want it to own the land.

MS HO: Yes. That's what I want.

COURT: Yes, all right. I suppose YK probably won't care, will he?

MS HO: Yes.

COURT: Well, he probably won't want to spend time and effort selling it --

MS HO: YK would be giving the undertaking he doesn't care. That would be --

COURT: Am I right in thinking that? Your client probably doesn't care, does he, if he's won?

MS LOK: One seriously wonders whether offer comes from, this time of the --

COURT: Yes, well, that's what I was thinking. But presumably your client is quite happy to say, "All right, well, it's going to be your company, if you don't want to sell the land, fine."

MS LOK: I presume that will be the case, but to put things

11:05 on record, I need to get instructions from him.

COURT: All right, but I would guess that isn't very controversial.

MS HO: Yes, that would give a peace of mind to my client.

Lastly, concerning the draft order which my learned friend submitted concerning 1471 --

COURT: I don't know why it would give him peace of mind.

If I was him, if I was YK, I'd at the moment -- and as I think I told you at the last trial, I'd be looking at land in the (unclear), I think I'd be thinking, "I wish I'd sold it to IDL". But anyway, I don't own it so I don't --

MS HO: The land still there. Yes.

Just one comment on paragraph 3, 1471 order.

COURT: The longer one, yes.

MS HO: The longer one.

Concerning the written submission about the basis of valuation, et cetera, we just want to make clear that within 14 days of the order would be from the date of the reasons for decision, because we want to see the reasoning and the findings by your Lordship before we prepare.

COURT: Well, that seems reasonable.

MS HO: Yes.

So unless your Lordship has any questions for me,

11:06 those would be my submissions.

COURT: Ms Lok, is there anything you -- you don't have to say anything, but --

MS LOK: No, I don't. Thank you, my Lord. Subject to the confirmation my client --

COURT: Yes. There's nobody you can check with now, but just send a letter in, I assume it won't be controversial, just to make sure we all understand what your client is saying is, "If I'm going to acquire the company, I would like it to still own the land when I acquire it."

MS LOK: Correct.

COURT: Of course, if he changes his mind, he can always write to YK and say, "Actually, I don't mind you trying to sell it." But at the moment, that's --

MS LOK: That's the position.

COURT: -- not what he wants.

MS LOK: Just to make sure my learned friend is not having in mind an elaborate undertaking in terms of an injunction that says, "You shall be restrained from dealing with the land without ..." --

MS HO: An undertaking would be sufficient, undertaking to the court.

COURT: All right. You'll get the judgment before the-- is that the right date? Yes, 11 June 2024.

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Thank you.

(11.07 am)

(The hearing concluded)

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