BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

SUIT No. 21 of 2000

BETWEEN:

NAM TAI ELECTRONICS INC.

Appellant

and

1. DAVID HAQUE
2. TELE-ART INC.
(In Liquidation)

Respondents

Before:

The Honourable Sir Dennis Byron — Chief Justice
The Honourable Mr. Justice Albert Redhead — Justice of Appeal
The Honourable Mr. Justice Albert N.J. Matthew — Justice of Appeal

Appearances:

Mr. Michael Todd Q.C. and Mr. Terrance Neale
for the Appellant
Mr. Francis Belle for the Respondents

2001: January 19;
March 26.

JUDGMENT

[1] **MATTHEW J.A.:** On June 27, 1997 on the basis of its inability to pay a judgment debt entered against it on November 10, 1993, in the British Virgin Island's High Court, Suit No.196 of 1993 in the sum of $799,099.12 the Appellant presented a petition to wind up the second Respondent. The First Respondent was appointed Liquidator.

[2] The present suit originated by way of a summons filed on February 25, 1999 in which the Appellant applied for an order that the Liquidator be removed from his office on grounds of conflict of interest and bias in the performance of his duties.

[3] The summons was supported by affidavits of Stephen Seung, a director of the Appellant and Lorne Waldman, Legal Counsel in Canada, for the Appellant, filed on March 15, 1999 and April 25, 1999 respectively. The Official Liquidator filed his affidavit in opposition on April 23, 1999.

[4] *Benjamin J.* heard the summons on April 26 and 27,1999 and delivered his judgment on September 4, 2000. The Order in respect of the judgment was filed on September 8, 2000 whereby it was ordered that the application for the removal of the Liquidator be dismissed with costs to the Liquidator to be taxed and paid by the Petitioner on an indemnity basis.

[5] Paragraphs 50 and 51 of the judgment are crucial to the appeal and I set out below the relevant portions:

> "(50) The present application for the removal of the Liquidator came several months after, at a time when, contrary to the wishes of the Petitioner, the Liquidator had embarked upon litigation to establish the priorities of the claims of the Petitioner and the Bank of China. Any dispassionate bystander would immediately be put on the *qui vive* as to the bona fides of the Petitioner's application.
> (51) I am therefore not inclined to exercise my discretion in favour of granting the application for the removal of the Liquidator. I can find no fault with his performance. I can discern no conflict of interest, perceived bias or lack of impartiality. Any evidence of a risk of breach of confidentiality is overshadowed by the questionable motives of the Petitioner in the timing of this application and the surrounding circumstances."

[6] On October 30, 2000 the Appellant obtained leave to appeal against the order of the Court of September 4, 2000 refusing to remove the Liquidator from office. On November 10, 2000 the Appellant filed his notice of appeal containing three substantial grounds of appeal. The grounds of

appeal were dealt with together and centered on the last sentence of paragraph 51 of the judgment which related to the bad motives of the Appellant. Additionally, the Appellant complained of the failure of the Judge to apply the principles enunciated in the House of Lords case, **Prince Jefri Bolkiah v KPMG** (a firm) 1999 1 AER 517.

[7] In his written submissions before us learned Queen's Counsel submitted that before the learned Judge the grounds upon which Mr. Hague's removal was sought were: (a) breach of confidence and (b) bias/lack of independence but no appeal was being made in relation to the learned Judge's findings in relation to the second ground. Accordingly, ground 3(6) of the notice of appeal was no longer relied on. I also did not hear any argument by either side in respect of ground 3(5) pertaining to Stephen Seung's second affidavit; and I heard only a fleeting mention of authorities as regards the issue of costs on an indemnity basis mentioned in ground 3(7).

Submissions of Appellant

[8] Learned Counsel for the Appellant in his submissions attacked paragraphs 50 and 51 of the judgment because it referred to the bad motives of the Appellant in as much as the learned Judge came to his conclusion based on the timing of the summons to remove the Liquidator; the summons dated February 25, 1999 coming two weeks after the Liquidator's summons to the Court to determine the priority of debts owed by the Second Respondent.

[9] Counsel submitted that the issue of priority of debts was before the Hong Kong Court for several months before the Liquidator embarked upon his duties. Counsel was of the view that the finding of bad motives by the Appellant was not open to the learned Judge on the evidence. Reliance was placed on **Re Smith and Fawcett** 1942 Ch.304 at page 308.

[10] Counsel further submitted that the learned Judge was wrong to take cognizance of the view of a bystander and he should rather look at the facts before him.

[11] Counsel submitted that what the Liquidator is doing is taking the part of the Bank of China in that he is going to the Court and asking the Court to find in favour of the Bank of China on the issue of priority of debts.

[12] Counsel submitted that the adverse possession of the Liquidator and the Appellant only arose when the Liquidator filed the summons as regards priority of debts on February 10, 1999.

[13] And as already stated the other main complaint of the Appellant is that the learned Judge did not correctly apply the principles enunciated in the **Bolkiah** case. The Respondents of course take a contrary view.

Submissions of Respondents

[14] Learned Counsel for the Respondents submitted that there was no evidence that PWC was doing litigation support services for the Appellant as was the case in the **Bolkiah** case and in this context referred to *Lord Halsbury's* two observations in **Quinn v Leathem** 1901 AC 495 at page 506.

[15] Counsel referred to the fact that it was the Appellant who appointed the Liquidator in the voluntary winding up and the Appellant passed information to the Liquidator after the appointment. Counsel submitted that the Appellant must have consented to the information being used in the winding-up.

[16] Counsel submitted that the Liquidator asked the Appellant and the Bank of China to join with him in the issue of the summons to the Court to determine priorities. Reference to this is made in paragraph 29 of Hague's affidavit and Exhibit "D2" where the Respondents' Counsel wrote to the Appellant's Counsel.

[17] According to Counsel, the Appellant refused and shortly thereafter amending its Articles of association to include a power to redeem the shares of members against whom it had judgment, gave notice on December 22, 1998 of its intention to redeem some of the Second Respondent's shares to satisfy the judgment debt on January 22, 1999.

[18] Counsel submitted that strenuous efforts were made by the First Respondent to negotiate with the Appellant and when these failed the First Respondent was obliged to resort to an injunctive order obtained on January 21, 1999 restraining the Appellant from redeeming the shares.

[19] Counsel submitted that part of the injunctive order was that the First Respondent should issue the summons to deal with the priority of debts owed by the Second Respondent.

[20] The summons was issued on February 10, 1999. According to David Hague it was served on the Appellant soon after as an affidavit in support of service was filed on February 12, 1999. Counsel submits that the action for removal of the Official Liquidator was in substance an answer to the action taken by the Official Liquidator to preserve the assets of the company.

The Bolkiah Case

[21] Both sides rely on the authority of **Bolkiah.** Where they disagree is in its application to the facts. The learned Judge also relied on that authority

and dealt with the case at paragraphs 32-38 of his 52 paragraph judgment.

[22] The facts of **Bolkiah** are as follows: KPMG was employed as auditors of the Brunei Investment Agency of which Prince Bolkiah was chairman until his removal in 1998. For a period of 18 months between 1996 and 1998, KPMG had acted for Prince Jefri in providing litigation support services of the sort usually undertaken by solicitors in certain private litigation in which the Prince was then engaged. In the course of so acting for the Prince KPMG acquired extensive confidential information about the assets and financial affairs of the Prince. The litigation was settled. The Prince was subsequently dismissed from his position as chairman of the BIA.

[23] In June 1998 the Brunei Government commenced an investigation into the conduct of the affairs of the BIA, including the destination and present location of money which had been transferred from the BIA's funds while the Prince was chairman. The Government wished to retain KPMG to assist the investigation. KPMG took the view that they could accept the instructions because they had ceased to act for the Prince more than two months previously and he was no longer a client.

[24] But the firm was aware of the possibility of a conflict of interest because the investigation was likely to be adverse to the Prince's interests and they possessed confidential information relating to his financial affairs. The firm therefore erected an information barrier (a so-called Chinese Wall) around the department carrying out the BIA investigation on behalf of the Brunei Government. The Prince was not informed by KPMG of their instructions nor had his consent been sought. He applied for an injunction against KPMG.

[25] *Pumfrey J*. granted the Prince an injunction restraining KPMG from continuing to carry out the work on the investigation. KPMG appealed. The Court of Appeal discharged the injunction on the grounds that KPMG was only obliged to make reasonable efforts to protect the Prince's confidential information and that balancing the competing interests, the precautions taken by KPMG meant that there was no real or appreciable risk that the confidential information would be disclosed. The Prince appealed to the House of Lords who allowed the appeal.

[26] The House of Lords held that like a solicitor, an accountant providing litigation support services owed a continuing professional duty to a former client following the termination of the client relationship to preserve the confidentiality of information imparted during the subsistence of that relationship. That duty was unqualified and required the accountant to keep the information confidential, not merely to take all reasonable steps to do so, and also not to misuse it.

[27] The *House* held where, therefore, a former client established that the defendant firm was in possession of information which had been imparted in confidence, that he had not consented to its disclosure, and that the firm was proposing to act for another client with an interest adverse to his in a matter to which the information was or might be relevant, the Court would intervene to restrain the firm from acting for that other client, unless the firm satisfied it, on the basis of clear and convincing evidence, that effective measures had been taken to ensure that no disclosure would occur and that there was no risk of the information coming into the possession of those acting for the other client.

Conclusions:

[28] Learned Counsel for the Appellant in his written submissions stated that there is simply nothing in the alleged timing point and the learned Judge

should not have taken it into consideration. It is necessary to put the events in perspective. The Liquidator was appointed when the winding up order was made on July 17, 1998. He was put forward by the Appellant whose firm had been appointed as auditors for the Appellant. Between December 21, 1998 and April 7, 1999 the issue of priorities was before the Hong Kong Court and, in fact, was never determined. PWC ceased to be the Appellant's auditors in 1998. In December 1998 the Appellant altered its Articles of Association and, consequently, on December 22, 1998 gave notice that it would redeem some shares in the Appellant belonging to the Second Respondent.

[29] The Liquidator made efforts to dissuade the Appellant from continuing with the redemption of shares and when that failed he had to proceed by way of injunction on January 22, 1999 to preserve the assets of the company. In approaching the Court for the injunction it was indicated that the summons as regards priorities would be issued. The summons was issued and served on the Appellant not later than February 12, 1999. the Appellant made no response to the summons. The next step was the issue of the summons to remove the Liquidator issued on February 25, 1999.

[30] One does not need to resort to the views of the by-stander to exercise a discretion in this matter. The Second Respondent, at all material times and certainly at the filing of the petition for winding-up was the owner of 375,727 shares in the Appellant and it seems only 138,000 were needed to satisfy the Appellant's debt. No steps were taken to redeem the shares. In fact, the Appellant proceeded to wind up the Second Respondent and supported the First Respondent as Liquidator. When the Liquidator proceeds to perform his statutory duty under **section 128** of the **B. V. I Companies Act** to take into his custody or under his control the

property of the company which the Appellant has taken possession of, and asks the Court how to deal with it, he is met by this removal summons.

[31] The facts of the case including the sequence of events dictate that the learned Judge should not have exercised his discretion in favour of the Appellant to remove the Liquidator from office.

[32] The learned Judge found that the protective measures in PW C outlined by the First Respondent in paragraphs 13 and 14 of his affidavit were ineffective. Even if confidential information concerning the Appellant passed to the First Respondent, that would be so before February 10, 1999 when the First Respondent issued his summons. The Appellant must have been aware of that. But Counsel for the Appellant submitted that the First Respondent did not attempt to use the information adverse to the Appellant until he issued the said summons of February 10, 1999

[33] The *House of Lords* in **Bolkiah** held that the protection of the client would be put in place when the firm was proposing to act for another client with an interest adverse to the former client. On February 10, 1999 all the Liquidator did was to ask the Court to decide upon priority debts between the Appellant and the Bank of China. How could such a request be adverse to the interest of the Appellant? Even if, as learned Counsel for the Appellant submitted, the Liquidator was going to the Court and in fact telling the Court that the Bank of China has priority, that would not alter the situation.

[34] In answer to me, learned Counsel conceded that if the Liquidator was going to the Court and asking the Court what to do, that would not be an adverse situation. I cannot see that the Liquidator is doing anything else. His view would be immaterial to the Court which was asked to decide on priorities. Learned Counsel for the Respondent submitted that even if the

learned Judge found that there was a risk of breach of confidentiality that was reduced to the theoretical.

[35] Counsel observed that the documents in support of Liquidator's summons have already been filed by solicitors acting for the Official Liquidator and the documents are a fair indication of the evidence which will be led by the Respondent in the application to determine priorities; and yet no reference has been made to any part of the Respondent's affidavit in support of the summons to further substantiate the allegation that there is risk of disclosure of confidential information. I think Counsel's observations in this regard are sound. In this context we were told the summons for priorities and the summons for the removal of the Liquidator were listed to be heard on the same day and the priority summons is not yet heard.

[36] Learned Counsel for the Respondent submitted that the situation in **Bolkiah** is far different to the circumstances of this case. I agree. In **Bolkiah** KPMG was involved in the investigation of a former client, to whom they had provided litigation support services. This situation was clearly adversarial. At the commencement of his speech in **Bolkiah**, *Lord Millet* who gave the leading judgment with which the other Law Lords concurred, stated the parameters of the case thus:

"*My Lords, the question in this appeal is whether, and if so in what circumstances, a firm of accountants which has provided litigation support services to a former client and in consequence has in its possession information which is confidential to him can undertake work for another client with an adverse interest."*

[37] To bolster up his submission on the difference between the facts of **Bolkiah** and the present case learned Counsel rightly referred to another *House of Lords Case* **Quinn v Leathem 1901 AC** 494 at page 506 where the distinguished *Lord Chancellor*, the Earl of Halsbury stated:

"There are two observations of a general nature which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

I respectfully agree with these words of wisdom.

[38] I agree with the submission of learned Counsel for the Respondent that the litigation in Hong Kong was not important to these issues for the Liquidator is there to protect the interests of all creditors, and it was not just a Nam Tai/Bank of China issue. I have already referred to the Liquidator's duties under section 128 of the B.V.I. Companies Act, Cap.285 of the Laws of the Virgin Islands. As Counsel for the Respondent submits, the Liquidator's action was not instituting a suit by an adversary, but performing an administrative function under the supervision of the Court aimed at ensuring a just winding-up of the company.

[39] The learned Judge made copious references as to the Court's jurisdiction to remove a liquidator with which I agree and adopt. The Court's jurisdiction is at once discretionary and wide and is not to be restricted to cases involving the personal fitness of the Liquidator. There is no allegation that Mr. David Haque is unfit to be the Liquidator in this case.

[40] The governing principle to be gleaned from the authorities is that the Court must satisfy itself on the evidence that the retention of the liquidator would be against the interest of the liquidation. In **Re Edennote Ltd [1966]** 2 BCLC 389 at page 398 *Nourse L.J.* restated the principles as follows:

"*Sir John Vinelott* said that the decision in **Re Keypak Homecare Ltd.** was founded on and usefully illustrated the general principle that a liquidator must act in the interests of the general body of creditors and should not continue in office if in the circumstances the creditors no longer

had confidence in his ability to realize the assets of the company to their best advantage and to pursue claims with due diligence….. ……..
Again, I respectfully agree. But there is an important qualification… The creditors' loss of confidence must be reasonable. Moreover, the Court does not lightly remove its own officer and will, amongst other considerations, pay a due regard to the impact of a removal on his professional standing and reputation."

I do not think it can be said that the retention of the First Respondent would be against the interests of the liquidation.

[41] In **Re Stewden Nominees No. 4 Pty Ltd [1975]** 1 ACLR 185 *Bowen C.J.* accepted the principle that the liquidator must not only be independent but must be seen to be independent. Paragraphs 4 and 6 of Stephen Seung's affidavit would tend to suggest that as long as the Liquidator and the Appellant have the same interest, all is well; but if the Liquidator takes action in the performance of his duties that is not in accordance with the Appellant's wishes then he ought to be removed. I cannot agree with the Appellant's stance here.

[42] In **Johnson and Dinnan v Deloitte Touché A.G.** 1997 Cayman Islands Law Reports, *Georges J.A.* at page 145 stated:

"*A review of the cases establishes that the process of resolving an application for the removal of a liquidator raises three stages: (a) Does the applicant have the* locus standi *to apply? (b) Has due cause been shown and (c) If such cause has been shown, should the court exercise its discretion and remove the Liquidator? The issues as to whether or not due cause has been shown and whether the discretion should be exercised are far more frequently canvassed than the issue of standing. That issue is often uncontroversial, the application being usually made by a creditor or contributory".*

It is not disputed that the Appellant has passed the first stage. In my judgment he has not passed the second stage far less the third.

[43] I would therefore dismiss the appeal, set aside the costs order for the reasons stated above, and order the Appellant to pay the costs of the Respondent, both here and in the Court below, to be agreed or otherwise taxed on the normal basis.

ALBERT N.J. MATTHEW
Justice of Appeal

I concur.

C. M. D. BYRON
Chief Justice

I concur.

ALBERT REDHEAD
Justice of Appeal