BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0134

In the matter of Independent Enterprises Limited
And in the matter of the International Business Companies Act, Cap. 291
And in the matter of the Insolvency Act, 2003

BETWEEN

AKAI HOLDINGS LIMITED (In Compulsory Liquidation)

Applicant

-and-

(1) BRINLOW INVESTMENTS LIMITED
(2) CALCULUS INVESTMENTS LIMITED
(3) CTS CAPITAL LIMITED (formerly know as SONIC TIMES CORPORATION)
(4) DASSETT LIMITED
(5) EVERWIN DYNASTY LIMITED
(6) GOALTOP LIMITED
(7) GOLDEN CHORD LIMITED
(8) GOLFLAND LIMITED
(9) GOOD NO. 1 INVESTMENTS LIMITED
(10) HIGHER INTERNATIONAL LIMITED
(11) INDEPENDENT ENTERPRISES LIMITED
(12) INVESTCO COMPANY LIMITED
(13) JT CAPITAL INC.
(14) KILTER LIMITED
(15) LONG MARCH INVESTMENTS LIMITED
(16) OKHAI LIMITED
(17) OPPIDANS LIMITED
(18) POWERFUL INTERNATIONAL INC.
(19) PRUNELLA LIMITED
(20) RITUALS INTERNATIONAL LIMITED
(21) SELINE INTERNATIONAL LIMITED
(22) SPACE MOUNTAIN LIMITED
(23) STARCODE LIMITED
(24) TAISHOKU MANAGEMENT LIMITED
(25) TEAKOON LIMITED
(26) TISCO SECURITIES LIMITED (formerly known as ALMEIDA MORANO LIMITED)
(27) WORLDWIDE INTERNATIONAL LIMITED

Respondents

Appearances:

Mr. Samuel Jackson Husbands with him Ms. Julie Engwirda and Mr. Jerry Samuel for the Applicant

Ms. Hazel-Ann Hannaway with her Mr. Phillip Kite and Mr. Andrew Thorp for the 11th Respondent, Independent Enterprises Limited

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2006: July 12

2006: July 14, 21

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 12 July 2006, the Court had to consider the following applications namely:

a) the application of Akai Holdings Limited (In Compulsory Liquidation) ("Akai") made on 9 June 2006 pursuant to section 162 (1) (b) of the Insolvency Act 2003 ("the Act") for the appointment of liquidators over the Respondent Companies ("the Respondents") on the just and equitable ground; and

b) the application of the 11th Respondent, Independent Enterprises Limited ("IEL") filed on 10 July 2006 at 4.08 p.m. with the supporting affidavit of Chuck C.H. Tam ("Mr. Tam") filed on 11 July 2006 at 9.50 a.m. for the discharge or stay of the Order dated 15 June 2006 appointing joint provisional liquidators over the Respondents including IEL pending Akai's application for the appointment of joint liquidators over it [the present application].

[2] The Court heard the application in respect of the winding up of each Respondent save IEL. The application was not opposed by any of the Respondents other than IEL and no appearances, either in support or in opposition to the application were served and filed. Judgment on these applications were reserved to 14 July 2006. To be brief, on the 14 July, the Court appointed joint liquidators namely Mr. Cosimo Borrelli and Mr. Meade Malone over those Respondents on the ground that it was just and equitable to do so.

[3] Despite all procedural irregularities and late receipt of all documents by the Court (in fact, documents from IEL were handed to me minutes before the hearing), the Court proceeded on 12 July 2006 to hear IEL's application to discharge or stay the appointment of the joint provisional liquidators over it because of its urgency. Suffice it to say, Akai did not have the opportunity to respond to any of the allegations contained in the affidavit of Mr. Tam. I heard both Ms. Hannaway for IEL and Mr. Husbands for Akai and reserved my decision to 14 July 2006. Concomitantly, I gave directions for an expedited hearing of IEL's application opposing the appointment of joint liquidators over it. The hearing of this application is fixed for 25 July 2006.

[4] In an oral judgment on 14 July 2006, I dismissed IEL's application and continued the appointment of joint provisional liquidators over it. IEL has appealed. This represents my reasoned judgment.

The Akai Group: some background facts

[5] The background to the Companies' winding up is extensive and complex. Akai was wound up and placed into compulsory liquidation in Bermuda and Hong Kong on 29 September 2000 and 23 August 2000 respectively. Mr. Cosimo Borrelli was appointed joint liquidator on 31 May 2005 by the High Court of Hong Kong, SAR and on 30 June 2005 by the Supreme Court of Bermuda. Although Mr. Borrelli was appointed a joint liquidator in 2005, he had primary conduct of the winding up of Akai since 2001 on a daily basis on behalf of the Liquidators.

[6] Until 1999, Akai was part of the Semi-Tech Corporation Limited ("STC") group of companies, which was listed on the stock exchanges of Toronto and New York. Mr. James Henry Ting ("Mr. Ting") was in control of STC, as well as a number of other listed companies, of which he was the chairman, and in most cases, the chief executive officer. In the annual report of Akai for 1996, the STC group was described as an international business comprising numerous public companies listed on the world's leading stock exchanges, with market capitalizations aggregating US$4.5 billion and employing 100,000 people in over 120 countries worldwide. Akai was listed among the principal assets of STC

in that report. The shares of Akai were listed on The Stock Exchange of Hong Kong Limited since 1987. Its corporate domicile was transferred from Hong Kong to Bermuda in 1991.The annual report of Akai for 1999 listed 20 subsidiaries and associated companies held directly or indirectly by Akai with net assets of over US$1 billion as at 31 January 1999. Mr. Ting was the chairman and chief executive of Akai.[1]

[7] At paragraph 11 of his 29th affidavit sworn to on 14 July 2006, Mr. Borrelli averred as follows:

> "The audited financial statements of Akai recorded that, as of 31 January 1999, Akai had over US$2.3 billion in assets which included US$262 million in cash and in excess of US$1 billion of net assets. However, the Liquidators' enquiries indicated the following:
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> 1) at the date of the presentation of the winding up petitions the Companies had no businesses, staff or premises;
>
> 2) the books and records which the Liquidators could locate or access were clearly insufficient for an operation of that size and complexity as the Akai group of Companies;
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> 3) most of the key directors and executives of the Companies (including Ting) had left Hong Kong or resided overseas and have not been cooperative;
>
> 4) the Companies have received claims from creditors in excess of US$1 billion but few assets which could be readily realised for the benefit of the Companies' creditors have been identified and
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> 5) directors including Ting, Tam and Clara Loh had been actively involved in the affairs of the Companies, were involved in numerous substantial transactions entered into by the Companies and had access to and control of the books and records of the companies and their subsidiaries."

[8] These same observations are accentuated at various paragraphs of the judgment of Kwan J.[2] At paragraph 10 of his judgment,[3] Kwan J. also had this to say:

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[1] See HCCW 49/2000 and HCCW 50/2000- In the Matter of Akai Holdings (In Compulsory Liquidation) Between The Joint Liquidators of Kong Wah Holdings Limited (In Compulsory Liquidation) v James Henry Ting (heard together) [unreported] –per judgment of Kwan J., Judge of the Court of First Instance of Hong Kong, paras. 6 and 7.

[2] Ibid, see paragraphs 14, 17 and 24 of judgment.

> "The collapse of the Akai Group constitutes the largest corporate insolvency in the history of Hong Kong. The liquidators have discovered that as at the date of the winding-up orders, Akai was massively insolvent, it had no business, staff or premises of its own and barely any documentary records in relation to what has been, and purported to be, an international conglomerate. The Akai Group appeared to have liabilities in excess of US$1 billion, but few assets remaining in the possession or control of Akai which could be realised for the benefit of the creditors, as many assets now appear to be controlled by or are claimed to be beneficially owned by the Grande Holdings Limited ("Grande HK") or companies controlled by or associated with Grande HK."

[9] Mr. Ting was an executive director and substantial shareholder of Grande HK. On 30 June 2005, he was found guilty of 2 counts of false accounting and is presently serving a 6-year sentence in a Hong Kong jail.

[10] The present position is that the Akai Group is massively insolvent and appeared to have liabilities in excess of US$1 billion. Though hampered by lack of sufficient books and records and the uncooperativeness from key directors and executives, the Liquidators have revealed approximately 200 transactions occurring between 1986 and 2002 and involving the transfer or disposal of assets (predominantly cash) of approximately US$1.7 billion. According to Mr. Borrelli "the transactions all appear to provide no valid commercial benefit to Akai and do not appear to have any real or legitimate commercial purpose. The bona fides of these transactions are highly suspicious. A large number of the transactions representing about US$350,000,000 took place in the six months leading up to Akai being wound up. The effect of the transactions was to strip assets from the Applicant [Akai] and leave little or no assets available for the Applicant's legitimate creditors."[4] To date, the substance of this affidavit remains unchallenged.

The Order of 15 June 2006

[11] Learned Counsel for Akai relied substantially on the 28th affidavit of Mr. Borrelli in the ex parte application to appoint joint provisional liquidators over the 27 Respondents including IEL. At paragraphs 150 and 151 of his copious affidavit, Mr. Borrelli said:

[4] See paragraph 14 of the 28th affidavit of Cosimo Borrelli filed on 9 June 2006.

> "Many of the Companies in the BVI Group appear to be, or have been, controlled by Mr. Ting and/or his associates. Mr. Ting and anyone else associated with him including the authorized signatories are unlikely to come forward to assist the Liquidators. This is not unusual as they are likely to have benefited, or continue to benefit, from the transactions described herein. Further these parties have been integral in the massive fraud committed in respect of the Akai Group and it is likely that any records which are available through the BVI Group will only serve to prove their involvement in this fraud.
>
> There is a real risk that if Mr. Ting or his associates are forewarned of the application to appoint joint provisional liquidators, steps may be taken to remove any assets which may remain in the control of the BVI Group, or destroy any records which may further implicate Mr. Ting and/or his associates, and which in turn may assist the investigations of the Liquidators."

[12] At the conclusion of the hearing, the Court appointed Mr. Meade Malone of MWM Corporation Services Limited, Tortola, British Virgin Islands and Mr. Cosimo Borrelli of Hong Kong joint provisional liquidators ("the joint provisional liquidators") of each of the Respondent Company including IEL. The Court also ordered that the Joint Provisional Liquidators shall have the following powers which may be exercised without further sanction or intervention of this Honourable Court:-

a. to preserve the books and records of the Company, to identify any assets which may remain in the possession or control of the Company, and to protect any such assets from removal or dissipation.

b. to commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the Company.

c. to carry on the business of the Company so far as may be necessary for its beneficial liquidation.

d. to take all necessary steps to obtain from any person documents or copy documents which belong to the Company or have been created or maintained on its behalf or which the Company has a right to obtain or inspect; and

e. to appoint an agent including a solicitor, or accountant to do any business that the provisional liquidator is unable to do himself, or which can be more conveniently done by an agent.

[13] The essence of the Order was to preserve books and records of the Company and to protect any such assets from removal or dissipation.

The present application

[14] On 12 July 2006, IEL opposed the application for the continued appointment of joint provisional liquidators over it and applied to have them discharged or stayed pending hearing of Akai's application for the appointment of joint liquidators. The grounds of its application are as follows:

1. The debt is disputed on genuine and substantial grounds.
2. IEL has a meritorious defence to the very brief allegations made within the application.
3. The claim as pleaded is statute barred. The Applicant refers to a transfer of money that occurred in February 1999.
4. IEL has neither assets nor creditors and the joint provisional liquidators is not justified by the evidence and there were no adequate grounds to apply on an ex parte basis.

[15] I heard submissions from Ms. Hannaway, Counsel for IEL. Mr. Husbands indicated that because of the exceptionally short notice given to him, he was unable to respond. He eventually submitted written submissions to the Court.

The evidence

[16] Akai alleged that on 1 February 1999, US$1 million was transferred from Higher International Limited ("HIL") Scotia Bank account to IEL Scotia Bank account, which funds originated from Akai's Scotia Bank account. The purpose of the transaction is unknown. The book and records of Akai do not disclose any commercial or other legitimate purpose for the transfers. It is further alleged that this may be one of the transactions which the BVI group was involved in; that is, false or sham transactions used to reduce these debit balances and mask the transfers and payments made out of the Akai group.

Tam's affidavit

[17] In his affidavit sworn to on 10 July 2006, Mr. Tam claims to be the beneficial owner of IEL. He alleged that IEL was incorporated in the British Virgin Islands in or about 1994 for the

purpose of serving as a vehicle to receive compensation due to him for his services as a director of Akai and of certain affiliated companies. A bank account was established for IEL (on which he was a signatory) into which Akai caused his monthly compensation to be paid. From time to time he would withdraw funds from the account for his benefit.

[18] At paragraph 2 (repeated at paragraph 21) he states that the US$1 million that IEL received from HIL in or about February 1999 was a repayment of a personal loan he made to Mr. Ting in January 1999 and as such, Akai has no claim against IEL.

[19] At paragraph 14 of his affidavit, Mr. Tam said "in early 1999, Mr. Ting called me to request that I lend him on a personal basis US$1 million. I do not recall the exact purpose for which Mr. Ting sought the loan but believe that it was related to some short-term investment that Mr. Ting wished to make." At paragraph 15, he stated that because he was grateful to Mr. Ting for having made him a director of Akai, Semi-Tech and Singer and for continuing to keep him as a director of Akai and Semi-Tech despite his reduced role in the businesses of those companies, he agreed to lend Mr. Ting US$1 million.

[20] They drew up a loan agreement, payable in 90 or 120 days and bearing interest on the capital. At Mr. Ting's instruction, the payment was made to Evora Limited out of IEL account. In or about February 1999, Mr. Ting called him to say that he had repaid the US$1 million which Mr. Tam confirmed. He had no discussions with Mr. Ting regarding how he used the proceeds of the loan or why he instructed that the US$1 million be paid to Evora, or from which account he caused the US$1 million to be repaid to IEL.

[21] Mr. Tam stated that because the loan was repaid, he did not keep the loan agreement they drew up but that Mr. Borrelli, as Akai's liquidator should be able to confirm the payment of US$1 million from IEL to Evora. This, of course, implies that the liquidators have access to Evora's books and records. Mr. Borrelli dismisses this allegation in his 29th affidavit at paragraph 31 where he states: "Evora was a company incorporated in Liberia and beneficially owned by Mr. Ting. The liquidators have no access to the books and records."

[22] Mr. Tam states that the Company has no assets to preserve. It is however not denied that it does not have in its possession, custody, power or control (whether in its own filing cabinets or computers or in banks or in the offices of accountants or trust companies) resolutions, bank statements, cancelled cheques and other documents and information related to its ownership, the purpose for which it was formed and the purposes for which the funds were applied and whether the funds include money belonging to Akai that was obtained wrongfully or in breach of trust to which the creditors of Akai may have recourse.

The Borrelli's 29th affidavit

[23] At paragraph 15 of his 29th affidavit, Mr. Borrelli averred that Mr. Tam held a litany of executive positions within the Semi-Tech group of companies including (i) Executive Director and Chief Financial Controller of Akai from 1987 to November 1999; (ii) Director and Executive Vice President of Semi-Tech Corporation since 1987 and until after the Company's bankruptcy filing on 7 September 1999 and (iii) Director and Vice Chairman of The Singer Company N.V. from August 1991 to December 1997.

[24] Mr. Borrelli stated that the information available to the Liquidators indicates that Mr. Tam's role was to oversee all of the accounting and finance processes and procedures of the Companies in Canada and Hong Kong and held the title of "Finance Director". Mr. Tam held various directorships of 14 companies in the Akai group and after Mr. Ting, together with Clara Loh, was the next most senior executive involved in the affairs and operations of the Companies.[5]

[25] The Liquidators have undertaken substantial work in respect of the role of Mr. Tam within the Companies including interviewing and/or examining a number of the Companies' former management including Mr. Ting. Mr. Ting said that Mr. Tam was (i) employed to lead the accounting departments and functions of the Companies in Canada and Hong Kong; (ii) part of the core management team of Akai and was involved in the decision making of the Companies including in relation to substantial transactions; (iii) responsible for engaging and working with auditors and other legal and financial advisers and was

[5] See paragraph 18 of Mr. Borrelli's 29th affidavit.

closely involved in the preparation of annual reports and financial statements of the Companies; (iv) able to 'create accounting solutions' and (v) responsible for the manner in which transactions were reported in the books and records of the Companies.[6]

[26] In short, the Liquidators believe that Mr. Tam was closely involved in the implementation of and in the accounting for numerous suspicious transactions. The Liquidators say that there is no evidence in Akai's books and records of IEL having any role in respect of Mr. Tam's compensation as suggested in his affidavit. Further, the financial statements of the Akai group for the year ended 31 January 1999 makes no reference to IEL or its role, either directly or indirectly.[7]

Deficiencies in the evidence

[27] Mr. Tam produces no evidence apart from his allegation that he is the beneficial owner of IEL. In fact, he does not know exactly when IEL was incorporated. Surely, he must have the Certificate of Incorporation in his possession.

[28] Mr. Tam does not set out his full role in the Akai group. He paints the picture of being on the periphery of Akai; a reluctant director with " reduced role in the businesses" of the companies yet he appears to be handsomely paid judging from the fact that the account had at least US$1 million as he was able to loan to Mr. Ting that amount without any security. Mr. Borrelli has detailed the executive positions held by Mr. Tam who is a chartered accountant in the Province of Ontario, a certified public accountant of the State of Washington and an associate of the Hong Kong Society of Accountants.

[29] Mr. Tam does not deny that IEL received US$1 million from HIL in or about February 1999. He says it was a personal loan and that he did not keep the loan agreement they drew up. In my considered opinion, this assertion is as bald as it could be without any substantiation by reference to any contemporaneous documents. Primarily, it was paid to Evora, a Liberian company beneficially owned by Mr. Ting. Mr. Tam did not go into any discussions

[6] See Paragraph 19 of Mr. Borrelli's 29th affidavit.
[7] See paragraph 26 of Mr. Borrelli's 29th affidavit.

with Mr. Ting regarding how he used the proceeds of the personal loan or why Mr. Ting instructed him to pay US$1 million to Evora, or from which account he caused the US$1 million to be repaid to IEL. After all, he is deeply indebted to Mr. Ting who declined to accept his resignation as a director of Akai and its affiliated subsidiaries and who continued to pay him.

[30] The Liquidators state that, at paragraph 14, Mr. Tam advances an explanation of the IEL's transaction and in particular that "Mr. Ting requested a personal loan of US$1 million." They find this explanation implausible and lacking commercial reality as their investigations revealed that Mr. Ting had regular access to tens of millions of dollars at this time and would have no need to borrow US$1 million. This necessitates the need for an investigation of the transaction and the role of IEL and Mr. Tam in respect of Akai.

Legal considerations

(1) The debt is disputed

[31] Ms. Hannaway submitted that the law governing winding up order is well settled. The Court will not make a winding up order where a debt is disputed on "substantial or reasonable" grounds.[8] Learned Counsel insisted that the affidavit of Mr. Tam is prima facie evidence of a matter that should be tried by either the "Court itself or in an action or by some other proceeding."

[32] It is also alleged that the evidence exhibits clear triable issues and therefore the application is not the appropriate process in which such a dispute should be heard.

[33] According to Akai, in February 1999, US $1million was transferred from HIL to IEL for no consideration. IEL is not disputing that this money came to it from Akai. IEL alleges that this was a repayment of a personal loan from it to Mr. Ting. IEL has made bald assertions unsubstantiated by contemporaneous documentary evidence.

[8] See Sparkasse Bregenz Bank AG and In the Matter of Associated Capital Corporation, Civil Appeal, No. 10 of 2003, Court of Appeal of the Eastern Caribbean Supreme Court- per Byron C.J.

[34] In Re Claybridge Shipping Co SA [9], Oliver LJ at page 579 had this to say:

> "… the refusal of the court to entertain cases where the underlying debt is said to be disputed is, in my judgment, a matter of practise only. It is not, in general, convenient that the very status of the petitioner to proceed with his petition should be fought out on a winding-up petition. There may well be cases where to compel the creditor to go off to another division of the court to establish his debt would effectively deprive him of any remedy at all. This may be inevitable where the Court is convinced that the dispute is genuine one, genuinely raised and persisted in, and one which cannot conveniently be determined in a short space of time on hearing the one application…But it ought not to, in my judgment, to be an inflexible rule that the Companies Court should never take upon itself the burden of determining the matter on hearing the petition. It does so in petitions on the just and equitable ground, *and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that because a dispute of fact cannot be determined without cross examination, the petition should not be heard at all…* Whilst I do not in any way, therefore seek to weaken the rule of practice as a general rule, I think that it ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case simply because the debtor files mountains of evidence raising disputes of fact which require to be determined by cross-examination. The court must, I think, reserve to itself the right to determine disputes –even perhaps in some cases substantial disputes - where this can be done without undue inconvenience and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether."

[35] In the present application, IEL has only made bald assertions as to the reason for the payment of US$1million. There are no supporting documents. I am very far from being persuaded that the dispute in the instant case in fact warrants the description of "substantial". In any event, Akai has applied to wind up IEL on the ground that it is just and equitable to do so.

Is claim statute barred?

[36] It is submitted by Ms. Hannaway that the claim as pleaded is very vague and it is not clear what cause of action Akai can assert against IEL. However, what is clear from the allegation is that monies were transferred on 1 February 1999. Any allegation of fraud,

[9] (1997) 1 BCLC 572.

breach of contract or an account will be the subject of a six-year limitation period.[10] This period has expired. Accordingly, it is an absolute defence to any claim asserted.

[37] Mr. Husbands asserted that the allegation that the claim is statute barred is misconceived by IEL. He submitted that the claim is not for enforcement of a debt. The claim is for the class remedy of the winding up of IEL on the just and equitable ground based on the use of IEL as part of the scheme to strip assets from Akai and to disguise or mask the asset transfer by sham and meaningless transactions.[11] In any event, Akai does not characterize the US$1 million payment as a loan. It is a wrongful payment and in breach of trust to which the limitation period, and specifically section 4 of the Statute of Limitation for contracts do not apply. Akai is a creditor with a breach of trust claim and is entitled to wind up IEL on the just and equitable ground having regard to the use by IEL in the asset-stripping scheme.

[38] In his comprehensive submissions, Mr. Husbands argued that the claim that the payment is statute-barred does not sit comfortably with its characterization as a loan payment. If it was truly repayment for a loan by HIL or Mr. Ting, no consideration of the limitation point would arise. Limitation would arise only if the payment were treated as a loan from HIL and this is not alleged by Mr. Tam. Even if the payment constituted repayment of a personal loan to Mr. Ting by an Akai corporate vehicle, this would raise serious suspicions about the co-mingling of corporate and personal funds and would tend to support the claim by Akai.

[39] It is trite law that a statute bar debt cannot serve as a basis for a petition. Section 4 of Limitation Act, Cap 43 specifies the limitation period to be 6 years in respect of fraud, breach of contract, tort or account. Section 25 however states:

> "Where, in the case of any action for which a period of limitation is prescribed by this Ordinance, either-
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

[10] See section 4 of the Limitation Act, Cap. 43, Laws of the Virgin Islands..
[11] See McPherson's Law of Company Liquidation (2001 English edition) paras 4.23, 4.24 and 4.34.

(b) the right of action is concealed by the fraud of any such person as aforesaid or

(c) ….

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it."

[40] In GL Baker Ltd v Medway Building and Supplies[12], the English Court considered the application of a similar provision to section 25. Here the auditor of a company paid money which he was permitted to receive on its behalf into its banking account and made payments by cheque out of the money in the account in favour of an innocent third party who did not give value for the payments. The third party was held to claim through the auditor as it was based on the fraud of the auditor because he made payments in fraud to the plaintiff and therefore within the terms of section 26 (a), (similar to 25 (a) of our Act).

[41] The Court also found that the facts fell within section 26 (b) [(25 (b) of our Act] as the auditor did not tell the plaintiff that he had paid its money away wrongly. It was left to the plaintiff to discover it by such means as was available and therefore the right of action was concealed by the auditor. The Court went on to determine the date at which the plaintiff discovered the fraud or could have so discovered it with reasonable diligence.

[42] IEL's claim to the US$1million is through Mr. Ting as it received this money from Mr. Ting. This money as is alleged by Mr. Borrelli fraudulently came from Akai, an allegation that Mr. Tam cannot disprove. He has stated that it was a repayment of a personal loan to Mr. Ting and he did not know from which account the money was deducted. Mr. Ting was the director of Akai. He certainly did not tell Akai that he had fraudulently transferred this money. It was left to the liquidators to discover this transfer. It therefore follows that section 25 (a) and (b) apply to this case so that the limitation period will not begin to run until the fraud was discovered or could have been discovered with reasonable diligence. The money was transferred in February 1999. Mr. Ting was still in control of the company. The company did not go into liquidation until 29 August of 2000 and 23 September 2000

[12] [1958] 2 All ER 532.

respectively. It was not until after (not indicated in the affidavits filed on behalf of the Akai) that through the investigations of the liquidators that this transfer was detected. The transfer could not have been discovered before September and August 2000 as Mr. Ting, the alleged perpetrator of the fraud on Akai was still in control. The petition was filed on 9 June 2006 which is before the expiration of the 6 years.

[43] However, Akai's case is not one of fraud as pointed out by Mr. Husbands. The claim is for the class remedy of the winding up of IEL on the just and equitable grounds based on the use of IEL as part of the scheme to strip Akai of its assets and to disguise the asset transfer by bogus and disingenuous transactions. Akai is a creditor with a breach of trust claim and is entitled to present its application to wind up IEL on the just and equitable ground.

IEL has no assets - appointment of joint provisional liquidators not justified

[44] IEL says that there is no purpose for the appointment of joint provisional liquidators because it has no assets and as such, there is nothing to preserve. Akai says that this is not so. Because of its improper use in the scheme to strip Akai of its assets, IEL may have valid claims against other participants in the fraud including Mr. Tam and IEL may have documents and information to which the liquidators are entitled. It is irrelevant that IEL may have disgorged all its funds. The liquidators will certainly look to see where those funds went. This is a legitimate object of a liquidation and provisional liquidators: see section 170 (4) (b) of the Insolvency Act. The ultimate objective is to maintain the assets pending the appointment of permanent liquidators. I totally agree with Mr. Husbands' appealing submissions.

A good case for the appointment of joint provisional liquidators

[45] Mr. Husbands trenchantly submitted that this is a classic case for the appointment of joint provisional liquidators and the order should be continued pending the hearing of the substantive application. According to Learned Counsel, there has been massive insolvency – the biggest in Hong Kong. There appeared to be incalculable sham transactions with no apparent commercial purpose in which the cumulative effect was to

strip the assets of Akai and cloak the transfer of its assets. The main man behind all of this is serving a six-year prison sentence. The directors have refused to cooperate with the liquidators. Substantial amounts of information are missing and/ or destroyed.

[46] Section 170 of the Act gives the Court the discretion to appoint a provisional liquidator where an application for the appointment of a liquidator of a company has been filed but not yet determined. This application can be made by a creditor. Akai said it is a creditor on the ground that US$1million was transferred from Akai to IEL (not directly) for which there was no consideration or commercial or legal basis for the transfer. This was done while Mr. Ting was in control of the company and at a time when the liquidators say that several other sham transactions took place which were designed to strip Akai of its assets. Mr. Tam has given an explanation for this transfer without any supporting documents. Akai has established that it is a creditor and has the standing to make the application.

[47] The application can be made exparte. In South Downs Packers Ltd v Beaver[13] Mcpherson J (as he then was) said that for an ex parte application to be made there must be cogent evidence that a delay in serving the company or the fact of notice of the application is likely to defeat the purpose of appointing a provisional liquidator. At para. 6.10 of McPherson's Law of Company Liquidation, the learned author states that while a court will not usually appoint a provisional liquidator unless satisfied that a valid and duly authorized petition to wind up has been presented, and there is a reasonable prospect that a winding up order will, ultimately, be made,[14] courts will, where the appropriate circumstance exist, make an appointment notwithstanding the fact that it is unlikely that the company will be wound up. While an appointment will usually be made where the assets of the company are proved to be in jeopardy, there are other circumstances, including such matters as danger to assets; such that the affairs of the company are in jeopardy or, as in Re a Company (No. 007070 of 1996)[15] where there was a need for a speedy and urgent investigation. Para 6.13 states that unless an applicant can demonstrate that there is a need for an interim control of the company pending the winding up of the company, no

[13] (1984) 2 A.C.L.C. 541.
[14] Re Railway Finance Company (Limited) (1866) 35 Beav. 742; 55 E.R. 979.
[15] [1997] 2 B.C.L.C. 139.

appointment will be made. An appointment will only be made where the reason for the appointment is consistent with maintaining the status quo.[16] Matters that the court should consider in deciding whether to approve an appointment are:

- whether the assets will be dissipated in the interim period;
- whether the applicant has established a prima facie case for a winding up;
- whether the applicant has established a prima facie case that he or she has standing

[48] The author also listed some circumstances where the Court has held that appointment of a provisional liquidator is appropriate. He concluded by indicating that while specific instances like the above may be cited, it has been said that the power to appoint is a broad one and it is not appropriate to limit the power by restricting its exercise to fixed categories.

[49] Paragraphs 150 and 151 of Mr. Borrelli's affidavit states clearly the grounds on which Akai relied to make the application for the appointment of joint provisional liquidators. He was of the view that there is a real risk that if Mr. Ting or his associates are forewarned of the application to appoint liquidators, steps may be taken to remove any assets or destroy any records which may further implicate Mr. Ting and/or his associates and which in turn may assist the investigations of the liquidators. Additionally, the money was alleged to have been transferred to close friends and associates of Mr. Ting who would have benefited from these transactions and may be party to the fraud. Mr. Borrelli states that there has been a lack of cooperation from the directors of Akai during their investigations and it appears that many of Akai's documents have gone missing as to date only 650 boxes of documents have been located which is very little given the magnitude of the Akai group.

[50] Mr. Tam has asserted that he was one of the directors of Akai. IEL was incorporated to receive payments from Akai for compensation due to him for his services as a director of Akai. This continued until November 1999 when he resigned despite his reduced role in the company. The US $1million was a repayment for a personal loan to Mr. Ting. He does not recall the purpose for the loan, does not have the loan agreement, does not give

[16] Re Dry Docks Corporation of London [1888] 39 Ch.D. 306.

details of his bank account so that one could see this transfer to Evora as he alleges. IEL alleges that the provisional liquidators who were appointed in the instant case are not exactly independent as they are also the liquidators in Akai and would have that company's interest at heart.

[51] A provisional liquidator can be appointed in this case because:

a. A winding up petition is before the Court.

b. Akai has established a prima facie case for the winding up of the company – US$1million dollars was transferred from the Akai to this company for no consideration at all. From the affidavit filed by the respondent, this is not denied. What is being suggested is that this was a repayment for a personal loan that IEL had given to the director himself not to Akai.

c. Akai has established that he has the necessary standing i.e. that it is a creditor based on the above argument.

d. The status quo need to be maintained, the company has no assets however there may be documents, books and records which are important to trace the funds.

[52] Blackstone on Civil proceedings para. 79.40 indicates that the usual object of the appointment is that an independent person will take charge of the company's affairs, maintain the status quo and prevent prejudice either to those supporting the petition and those against it, pending the decision of the court. The Liquidators are independent persons operating under the direction of the court for a purpose that is entirely one of preservation during the interim period.

No prejudice to IEL

[53] IEL has, according to Mr. Tam, disposed of all its cash and has no saleable property. It had been struck off the register since 2001 and was only restored on 7 July 2006 for the purpose, I believe, of defending this claim. The appointment of joint provisional liquidators will not disrupt IEL's business or cause its property to be encumbered or impounded. There will be no discernible effect on IEL. The joint provisional liquidators, as officers of this court will have a duty to act in good faith with respect to any information they obtain. The privacy of IEL will be affected by the limited disclosure to the joint provisional liquidators as a result of access to corporate information by them but that infringement into

the affairs of IEL is greatly outweighed by the benefit to creditors who have lost hundreds of millions of dollars. In a sense, Mr. Tam has no real cause for complaint as he was at the heart of the collapse of Akai and he must expect that he must do whatever is reasonable to cooperate with the liquidators even at some inconvenience in respect of the affairs of IEL which he claims that he beneficially owns. The truth of the matter remains that IEL received a large baffling infusion of cash from a company in the Akai group without any supporting documents.

[54] For all of the reasons stated above, I will continue the Order which I made on 15 June 2006 appointing Mr. Meade Malone and Mr. Cosimo Borrelli as joint provisional liquidators of the 11th Respondent, Investment Enterprises Limited until further order of the Court. In order to expedite this matter, the following directions were given:

1. The 11th Respondent, Independent Enterprises Limited, file and serve any affidavit in response to the 29th Affidavit of Mr. Cosimo Borrelli by noon on Tuesday, 18 July 2006.

2. The Applicant, Akai Holdings Limited (In compulsory liquidation) to file and serve any affidavit in response by noon on Thursday, 20 July 2006.

3. The parties are to file and exchange skeleton arguments on or before Friday, 21 July 2006.

4. The hearing of the Application is to take place on Tuesday, 25 July 2006.

Indra Hariprashad-Charles
High Court Judge