

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 [of Walkers] for the Applicant.

Mr. Martin Mann QC of London with him Mr. Phillip Kite and Mr. Andrew Thorp [of Harney Westwood & Riegels] for the 11th Respondent

2006: July 25, September 04
2006: September 15, November 01

JUDGMENT

- [1] **HARIPRASHAD-CHARLES J:** The decisive issue in this application is whether or not Akai Holdings Limited (In Compulsory Liquidation) ("Akai") is a creditor of the 11th Respondent, Independent Enterprises Limited ("IEL").

Procedural history of Application

- [2] On 9 June 2006, Akai applied to appoint liquidators over the Respondents which are International Business Companies incorporated in the British Virgin Islands including IEL on the grounds that it is just and equitable to do so. At an ex parte hearing on 15 June 2006, the Court appointed Mr. Meade Malone of MWM Corporate Services Limited, Geneva Place, Tortola, British Virgin Islands and Mr. Cosimo Borrelli of Alvarez & Marsal Asia Limited, Hong Kong to be Joint Provisional Liquidators until further hearing of the application on 12 July 2006.

- [3] On 12 July 2006, the Court had to consider two applications namely:
- a) an application by Akai to appoint Joint Liquidators over the 26 Respondents save IEL and
 - b) an application by IEL to discharge or stay the appointment of the Joint Provisional Liquidators over it.

- [4] Judgment on both applications was reserved to 14 July 2006. On 14 July, the Court appointed Mr. Malone and Mr. Borrelli Joint Liquidators over the 26 Respondents on the

ground that it was just and equitable to do so. IEL's application to discharge or stay the appointment of Joint Provisional Liquidators was dismissed. The Order made on 15 June 2006 appointing Joint Provisional Liquidators over IEL still remains in place. In the interim, the Court fixed the substantive application for a hearing on 25 July 2006.

- [5] On 25 July 2006, the Court heard Akai's application for the appointment of Joint Liquidators over IEL on the ground that it is just and equitable to do so pursuant to section 162 (1) (b) of the Insolvency Act 2003 ("the Act"). IEL fervently opposes the application. The crux of IEL's case is that Akai is not its creditor and therefore lacks standing to apply for a winding up order.

The evidence on behalf of Akai

- [6] The evidence on behalf of Akai is contained in the 11th, 28th, 29th and 30th affidavits of Mr. Borrelli. The substance of Mr. Borrelli's evidence in respect of IEL is to be found in his 28th, 29th and 30th affidavits. The essence of Mr. Borrelli's 11th, 28th and 29th affidavits has already been encapsulated in a written judgment of this Court delivered on 21 July 2006. In a nutshell, they state that Mr. Tam held diverse 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.
- [7] Mr. Borrelli states 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, he was the next most senior executive involved in the affairs and operations of the Companies.¹ In short, the Liquidators believe that Mr. Tam was closely involved in the implementation of and in the accounting for numerous suspicious

¹ See paragraph 18 of Mr. Borrelli's 29th affidavit.

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 affidavits. Further, the financial statements of the Akai group for the year ending 31 January 1999 makes no reference to IEL or its role, either directly or indirectly.²

Borrelli's 30th affidavit

- [8] The 30th affidavit of Mr. Borrelli was filed six days after this Court had dismissed IEL's application to discharge or stay the appointment of Joint Provisional Liquidators. Mr. Borrelli asserts that there is no evidence contained in the books and records available to the Liquidators, including the files provided by Akai's former auditor, Ernst & Young that connects IEL to any remuneration or compensation paid to Mr. Tam by Akai or anyone else. He is of the opinion that despite the assertions made by Mr. Tam, the total lack of evidence in the books and records of Akai of any regular payments from Akai to IEL indicates that the funds were not for compensation but for different reasons which warrants further investigation.³
- [9] He states that the other Joint Provisional Liquidator, Mr. Malone took delivery of the files which were maintained by IEL's registered agent, HWR Services Limited. Those documents reflect that since August 2000, the directors of IEL are two BVI companies. Both companies were struck off the register of International Business Companies for non-payment of fees on 1 May 2006. Accordingly, it would appear that there are no directors of IEL which have the legal capacity to direct and manage its affairs. Mr. Tam has not addressed this issue. No information is available as to who ultimately controls IEL.⁴
- [10] Paragraph 16 of Mr. Borrelli's affidavit is by far the most important paragraph. He asserts that since receiving Mr. Tam's first affidavit, the Liquidators have been able to verify the flow of funds regarding the payment of US\$1m to IEL by the 10th Respondent, Higher International Limited ("HIL"). The flow of funds is set out below:

² See paragraph 26 of Borrelli's 29th affidavit.

³ See paragraph 11 of Borrelli's 30th affidavit –Tab. 7 of bundle.

⁴ See paragraph 12 of Borrelli's 30th affidavit –Tab. 7 of bundle.

- a) On 28 January 1999 US\$1m was transferred from IEL to Evora;
- b) On 29 January 1999 US\$1m was transferred from Evora to Goaltop;
- c) On 29 January 1999 US\$1m was transferred from Goaltop to Akai;
- d) On 1 February 1999 US\$1m was transferred from Akai to HIL;
- e) On 1 February 1999 US\$1m was transferred from HIL to IEL.

[11] Mr. Borrelli explains that the alleged loan investment by Mr. Ting and repayment took place over a 5-day period. The financial year ended on 31 January 1999 for Akai and its associated companies. The effect of the transactions was to improve Akai's net cash position at year-end and then immediately reduce it after year-end.

[12] Mr. Borrelli addresses the response or explanation given by Mr. Tam for the lack of bank statements and other documents. He states that in his experience, if the retention period for which a bank will maintain documents for a particular account is 7 years then it is usually 7 years after the account relationship is terminated and in this case IEL closed its account with the bank in 2001. Accordingly, the documents that Mr. Tam refers to might still be available. He is also of the opinion that banks keep such documentation for a period beyond the 7 years.

The evidence on behalf of IEL

[13] Two witnesses gave evidence on behalf of IEL, Mr. Chuck Tam and his wife, Ms. Ng Pui Kuen. Mr. Tam's evidence is contained in three affidavits dated 10 July, 18 July and 21 July 2006 respectively. His first affidavit was already examined in the written judgment delivered on 21 July 2006. For completeness, I shall replicate it in its entirety.

[14] Mr. Tam alleges that he is the beneficial owner and 100% shareholder in IEL and that IEL was incorporated 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 allied companies. A bank account was established for IEL (on which he was a signatory) into which Akai caused his monthly compensation to be deposited. From time to time, he would withdraw funds from the account for his benefit.

- [15] 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.
- [16] 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.
- [17] 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.
- [18] Mr. Tam states 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. At paragraph 31 of his 29th affidavit, Mr. Borrelli dismisses this allegation wherein 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."
- [19] Mr. Tam states that IEL has no assets to preserve. However, he does not deny that IEL 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.

[20] In his 2nd affidavit sworn to on 18 July 2006, Mr. Tam reiterates the reason for the payment to IEL from HIL and states that the absence of documentary evidence is as a result of the Bank's policy. Two different bank officials stated that pursuant to the Bank's customary practices, all account records that are more than seven years old are destroyed and therefore the bank has no records of IEL's account dating back to January/February 1999. He asserts that he was repaid the loan so there was no need to keep the loan agreement especially seven years later.

[21] Mr. Tam says that although he was employed by Akai, neither he nor IEL have been fraudulent or been involved in fraud. No criminal proceedings were commenced or intimated against him. The Hong Kong authorities made extensive investigations at the time of the collapse of Akai and no suggestion of wrongdoing was made against him or his role in Akai.

[22] At paragraph 4 of Mr. Tam's 3rd affidavit sworn on 21 July 2006, he states that Mr. Borrelli has now changed his view regarding the payment made to IEL. He says that Mr. Borrelli establishes the payment made to Evora by IEL on the same terms that he had already advised. He says that Mr. Borrelli has now changed track and tack and is alleging that the flow of funds related to improve Akai's net cash position. Mr. Tam asserts that he cannot comment on Mr. Borrelli's allegation as he had no involvement whatsoever with any of the intermediate transfers. He simply lent the money which was paid back soon after in confirmation of his belief that it related to short-term investments.

[23] Mr. Tam avers that he is at a loss to see how paragraph 16 of Mr. Borrelli's affidavit establishes a basis for a winding up order against IEL as it appears that monies from IEL were paid and then subsequently repaid to IEL. As such, there is no liability owing to Akai or basis for Akai to bring an application against IEL. He further avers that the fact that the

loan was repaid to HIL was of little importance to him as he believed that Mr. Ting owned and controlled various companies and entities.

[24] At paragraph 12, Mr. Tam elucidates his involvement with Akai. In essence, he restates that he effectively retired from Akai after 1997 and his overall role in the activities of Akai was substantially diminished. In the following paragraph he explains that it is possible that he may have been a named director of other companies within the Akai group given the size of its operation but he can categorically state that there was no involvement of which he is aware between IEL and any of the other 26 BVI companies. IEL was a private company into which he received remuneration.

[25] He agrees with Mr. Borrelli that proceedings have been brought in New York against many of Akai's former employees including himself and that he is vigorously defending the claim. The Liquidators suggest that the proceedings involve allegations that Akai benefited at the expense of other companies but Mr. Tam is of the opinion that it is wrong to make any connection to those proceedings.

[26] Mrs. Ng Pui Kuen (Mrs. Ng) also swore to an affidavit in these proceedings. The essence of her affidavit is two-fold namely: (i) her husband is the beneficial owner of IEL and that she was a co-signatory to the IEL's account at the Bank of Nova Scotia, Hong Kong and (ii) the bank's policy is not to keep documents and records over 7 years. Mr. Husbands for Akai vigorously opposed the application to admit Mrs. Ng's affidavit into evidence but in my opinion, nothing of significance turns on her affidavit.

The issues

[27] Three main issues can be distilled from the arguments that were debated before me namely:

- 1) Whether Mr. Tam has standing to bring the application or alternatively, whether the application by IEL is unopposed as IEL has no directors to bring the claim?
- 2) Is Akai a creditor of IEL in respect of the US\$1m; the subject matter of this application?

- 3) If the answer to question (2) is in the affirmative, is it just and equitable to wind up IEL?

Legal status of IEL

- [28] IEL was incorporated under the provisions of the International Business Act, Cap. 291 on 7 June 1994. The registered office of the Company is HWR Services Limited, Cragmuir Chambers, P.O. box 71, Road Town, Tortola, British Virgin Islands.

Standing of Mr. Tam

- [29] Mr. Husbands ably submits that Mr. Tam has no standing to represent IEL and that IEL may only oppose the application through its board of directors. He next submits that by virtue of section 42 of the IBC Act and article 93 of the Memorandum and Articles the power to conduct the business and affairs of IEL is expressly reserved to the directors. The power to conduct the business and affairs of IEL cannot be assumed by the members (i.e. Mr. Tam). As a consequence of the directors of IEL being struck off, there are no directors that can legally act with respect to IEL's affairs. IEL has not had any such capacity since 1 May 2006 and therefore, it is incapable of opposing the application for appointment of liquidators. Any actions by IEL or purportedly taken in the name of IEL since 1 May 2006 are therefore illegal.

- [30] Learned Counsel argues that Mr. Tam describes himself as a beneficial owner of IEL but he has not disclosed how that interest is held, or produced any evidence to establish that in fact, he does hold that interest. Mr. Tam also states in his third affidavit that he is 100% shareholder of IEL.

- [31] Rule 162 (1) of the Insolvency Rules, 2005 states as follows:

"A person who intends to appear on the hearing of an application to appoint a liquidator of a company, other than the company itself, shall send a notice of intention to appear to the applicant."

- [32] Mr. Husbands submits that Rule 164 mirrors rule 162 (1) except that it deals with the situation where the Company opposes the application. A notice under rule 164 was served in the name of IEL on or about 7 July 2006.

[33] Mr. Husbands enlarges this point by stating that the only basis upon which Mr. Tam could apply (though this would require a fresh application to be made) would be on the basis that he is the purported shareholder of IEL. He cautions that the application before the Court is not pleaded in these terms and even if he did apply as a shareholder, he is bound to fail. He makes reference to the fact that the Insolvency Act 2003 is silent as to when the Court should grant a member's application to oppose winding up proceedings. In **Re Rodencroft**,⁵ the Court held that where there is a creditor's petition to wind up an insolvent company and the company offers no opposition to the winding up proceedings, a shareholder cannot oppose the winding up of the company. A member or a shareholder will only have standing to do so if the company is shown to be solvent or if the shareholders are able to demonstrate they may dispose of their shares on the stock exchange.⁶ He further submits that the rationale behind the decision is that a shareholder only has an interest in the assets of the company and where there are no assets the shareholder can have no interest.

[34] One of the significant features of Mr. Husbands' argument is that Mr. Tam alleges but does not produce documentary evidence to substantiate his allegations together with the fact that he is even concealing his address.

[35] It is not disputed that IEL was struck off the register on 1 November 2000 for non-payment of statutory fees. In his first affidavit, Mr. Tam states that he is the beneficial owner of IEL but he makes no mention of the shareholders or the directors of IEL. However, in his third affidavit he declares that he is the sole shareholder of IEL. Mr. Mann QC in his submission cast doubts on the validity of the register of directors and stated that IEL appears to have had no register or corporate director but Mr. Tam is the beneficial owner of IEL. According to Mr. Husbands, if Mr. Tam is opposing the application as a member then he needs to show that the company is solvent. He states that the company has no assets but has not addressed the question of whether the company is solvent or not. Mr. Tam has therefore failed to establish that IEL is solvent and consequently, he has no standing as a member.

⁵ [2004] EWHC 862 (Ch).

⁶ See Mcpherson's Law of Company's Liquidation by Andrew R. Keay at page 191.

- [36] Mr. Husbands submits that in like manner, as the beneficial owner, Mr. Tam would have no standing to bring the application as the company is a separate entity, separate legal person and he cannot act on behalf of the company. Mr. Tam cannot oppose the application on behalf of the company. The company can only act by its directors.
- [37] However, Mr. Tam exhibits to his third affidavit two recently concluded resolutions which demonstrate that on 20 July 2006, it was resolved by a unanimous written resolution of the sole member (Mr. Tam) that Rishton Trading and Norwich International Limited be removed as directors and that he be appointed director forthwith. On the same day it was also resolved that: (i) all past acts of the company in defending the winding-up petition and in the resisting of the appointment of joint provisional liquidators are hereby ratified and (ii) for the legal representation to remain the same.
- [38] Mr. Tam gives an explanation for this perplexity. He says that having been made aware of these proceedings, he, as the beneficial owner and 100% shareholder in IEL, caused IEL to be restored. He discovered that the Companies that held directorship were also struck out so he immediately executed the requisite corporate documents to dismiss those directorships and appoint himself as sole director.⁷
- [39] It therefore follows that Mr. Tam is a director and he is properly clothed to bring this application.

Is Akai a creditor of IEL?

- [40] As I have already alluded, this application stands or falls on whether Akai is a creditor of IEL? Akai asserts that it is a creditor because the US\$1million which was transferred from Akai to HIL then to IEL had no commercial purpose and was without consideration. However, IEL's case is that Akai is not a creditor and therefore lacks standing to apply for a winding up order even though the application is made on the just and equitable ground and not on the insolvency ground.⁸

⁷ See Exhibit "CT-4" attached to the 3rd affidavit of Chuck Tam at Tab. 8 of the Trial Bundle.

⁸ See section 162 (1) and (2) of the Insolvency Act 2003

[41] Mr. Martin Mann Q.C. succinctly submits that the application is not within section 162 (1) (a) of the Act and therefore should be dismissed. He submits that Akai is neither a creditor nor patently a member of IEL. He alludes to the definition of “creditor” as provided by section 9 (1) (a) of the Act. Section 209 1A and Rule 184 1R et seq. govern the making and admission of unsecured claims in a liquidation.

[42] Mr. Mann Q.C. notes that although Mr. Borrelli and the other liquidators of Akai consider Akai a creditor of IEL they lack the confidence to assert positively that it is in fact, a creditor. He relies immensely on paragraph 13 of Mr. Borrelli’s 11th affidavit and paragraph 22(j) of his 28th affidavit respectively. Paragraph 13 reads:

“The liquidators consider Akai to be a creditor of the company (IEL). The liquidators conclude that the company was a party to a series of transactions that stripped the assets from Akai and therefore removed them from the legitimate creditors. There may be books and records in the possession or control of the Company which can assist the liquidators in their investigations, and this information may in turn assist to increase the return for the creditors. It is my submission that it is just and equitable to appoint liquidators to the company.”

[43] Paragraph 22 (j) states:

“accordingly, in the absence of evidence to the contrary, Akai considers itself a creditor of each of the BVI companies.”

[44] Mr. Mann submits that this is entirely correct, not least because Akai could not satisfy the prescribed requirements in Rule 184 1R for the making of a claim as a creditor.

[45] Learned Queen’s Counsel states that it is significant that Mr. Borrelli ⁹ asserts only that the liquidators have identified a payment for which there appears to them to be no commercial purpose, and that paragraph 16 of the same affidavit is actually evidential of indebtedness to IEL rather than the other way around, that is, of a debt due from IEL to HIL, still less to Akai.

⁹ See paragraph 10 of Mr. Borrelli’s 30th affidavit.

[46] Mr. Mann submits that it seems likely that the inescapable conclusion, that Akai cannot, at this juncture, which is relevant to Akai's application, pursue a claim as creditor, is in fact, conceded by Akai. This is because at paragraph 7 of Mr. Borrelli's 30th affidavit, it simply states:

"The Liquidators have applied to wind up IEL on just and equitable grounds. The basis upon which the Liquidators have applied to wind up IEL has been explained to the Court in detail by my Counsel and can be the subject of further submissions if necessary. Broadly, IEL should be wound up in order to assist the Liquidators with their investigations in respect of the largest corporate collapse in Hong Kong history..."

[47] And further, at paragraphs 11 [already recited at paragraph 8 of this judgment] and 28 which reads:

"28. The Liquidators have a genuine need to investigate the role of IEL in respect of the BVI Companies and the Akai group and on the basis of that information available to the Liquidators the winding up of IEL is the most effective and efficient way of facilitating clearly necessary investigations of IEL's role in respect of Akai."

[48] Learned Queen's Counsel submits that the clear inference to be drawn from Mr. Borrelli's 30th affidavit is that the liquidators wish to investigate whether Akai has a claim rather than, at this, the relevant date for the purposes of Akai's application, to pursue a claim which they must know would not qualify in the sense of section 9 because it could not be particularized with a sufficiency of certainty or details for the purposes of the Rules.¹⁰ I totally agree with Mr. Mann QC.

Creditor defined

[49] Section 9 (1) (a) provides as follows:

"A person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in

(a) the liquidation of the debtor that is a company or a foreign company."

[50] Thus, the expression "creditor" for purposes of section 162 is defined as a person with a claim against the debtor admissible in the liquidation of the debtor. In other words, a

¹⁰ See paragraphs 7, 11 and 28 of Mr. Borrelli's 30th affidavit.

creditor must be owed a debt which has not been paid at the time of presenting the Originating Application for winding up.

- [51] Akai applies for the appointment of liquidators on the ground that it is just and equitable to wind up the company. Akai establishes its standing on the basis that it is a creditor. Mr. Borrelli alleges in his 11th and 28th affidavits that US\$1million was transferred from Akai to IEL for no commercial purpose. In his response, Mr. Tam states that this was a repayment of a loan he had given to Mr. Ting. In his 30th affidavit, Mr. Borrelli outlines the background to this transfer from Akai to IEL. Based on this affidavit without more, it is my firm view that Akai faces an uphill task in seeking to dislodge IEL's assertion that Akai is not its creditor.
- [52] In addition, Mr. Borrelli states that US\$1million was previously transferred from IEL to Evora to Goaltop to Akai then from Akai to HIL and back to IEL. Mr. Borrelli gives an explanation for these series of transfer in that affidavit. He elucidates that 31 January was the financial year-end for Akai and its associated companies. The effect of the transactions was to improve Akai's net cash position at year-end and then immediately reduce it after year-end. If the reason is, as stated by Mr. Borrelli, then the money that was transferred to IEL was actually the return of money IEL transferred to Akai via Evora and Goaltop. In that case, Akai would not be a creditor of IEL.
- [53] It is clear from Mr. Borrelli's affidavits and materials that Akai is not a creditor of IEL. In Mr. Borrelli's 30th affidavit, he reveals the background documents to the transactions between IEL and HIL. Mr. Borrelli now agrees that IEL made a payment to Evora as was originally and consistently maintained by Mr. Tam. Mr. Borrelli establishes that funds went to Akai from IEL and were subsequently transferred out. Akai's net position is neutral and therefore Akai cannot be deemed a creditor. As a consequence, Akai lacks the requisite standing to apply for a winding-up order.

Dishonest assistance

- [54] Mr. Husbands argues that this is a strong case that IEL has received and misapplied trust property for its own benefit and is accordingly liable as constructive trustee. He

summarizes the essential ingredients of this type of trust to be (i) the misapplication of funds held in trust by HIL for Akai; (ii) the receipt of the funds by IEL and the dealing with them as if they were owned by IEL and (iii) the knowledge by IEL that the funds were transferred in breach of trust. He next submits that on any analysis of the facts, the transfer of the funds to IEL, in circumstances that existed in 1999 and with the knowledge of Mr. Tam, must constitute or create a constructive trust in favour of Akai, even if the funds originally paid to Evora came from the bank account of IEL. He contends that the funds paid to Evora were not segregated with a special trust in favour of IEL once they entered the coffers of Akai. Learned Counsel asserts that there is at least an arguable case that IEL dishonestly assisted Mr. Ting in placing funds outside the reach of creditors. In receiving the funds, he was therefore 'dishonest' in the **Twinsectra Ltd v Yardley**¹¹ sense; as a higher standard of conduct could be expected from him as a senior officer and director of the group.

[55] Mr. Mann QC submits that the authorities of **Twinsectra** [supra] and **Barlow Clowes International Ltd v Eurotrust International Ltd**¹² are helpful to the issue of dishonesty raised by Akai. Learned Queen's Counsel submitted that Akai's difficulties start with its assertion that the transactions it complains about are transactions with no obvious commercial purpose; terminology which both recognizes that they legally subsist and that they must be set aside before Akai can claim to be entitled to the subject matter, if at all.

[56] He helpfully demonstrates by means of a chart how Akai could have no direct claim to the subject matter of the transactions complained of and also, that it could not have any indirect claim because it had expressly abstained from making any allegations of dishonesty against either IEL or Mr. Tam (who is the controlling mind and beneficial owner of IEL). The cases of **Twinsectra** and **Barlow Clowes** make this point good for no such claim lies without dishonesty on the part of the 'assister'.

¹¹ [2002] AC 164.

¹² [2005] UKPC 37 –judgment delivered on 10 October 2005.

[57] What is meant by dishonesty was explained in **Twinsectra**. It simply means “not acting as an honest person would” – an objective standard which is assessed in light of what an alleged ‘assister’ or accessory actually knew at the relevant time, as distinct from what a reasonable person would have known or appreciated, taking into account any personal attributes of the alleged accessory such as his intelligence and experience, and the reason why he acted as he did.¹³ Therefore, if judged by ordinary standards, an alleged assister’s or accessory’s mental state would, against this background, be described as dishonest; it is irrelevant that the alleged accessory judges his conduct by different standards. It is enough that his state of mind consists either in knowledge that the transaction is one in which he cannot honestly participate or in suspicion combined with a conscious decision not to make inquiries which would have resulted in such knowledge.¹⁴

[58] To encapsulate. I agree with Learned Queen’s Counsel that Akai asserts no facts capable of supporting a claim that IEL (whether through Mr. Tam or otherwise) acted dishonestly according to this objective standard.

Grounds on which the Court may wind up

[59] By section 162 (1) of the Act, the Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159 (1) if:

- a) The company is insolvent;
- b) The Court is of the opinion that it is just and equitable that a liquidator should be appointed; or
- c) The Court is of the opinion that it is in the public interest for a liquidator to be appointed.

[60] Akai applies to wind up IEL on the just and equitable ground.

¹³ See *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389, 391.

¹⁴ *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37.

Locus to present the Originating Application

[61] The categories of persons who can apply for the appointment of liquidators are listed in section 162 (2) of the Act. They are:

- a) the company
- b) a creditor
- c) a member
- d) the supervisor of a creditor's arrangement in respect of the company
- e) the Commission
- f) the Attorney General

The just and equitable ground

[62] By section 162 (2) of the Act the court is vested with power to make a winding-up order if it is of the opinion that it is just and equitable to do so. It is common ground that a creditor can bring an application to appoint a liquidator on the just and equitable grounds. Having found that Akai is not a creditor of IEL, then it is superfluous to proceed any further under the just and equitable ground.

[63] However, in the event that I were wrong in finding that Akai is not a creditor of IEL, then is it just and equitable to wind up IEL?

[64] Mr. Husbands submitted that Akai's application is founded on the just and equitable grounds under section 162 (1) (b) of the Act due to the massive fraud committed on the creditors of Akai and the involvement of the Respondent companies. He submitted that even if Mr. Tam is successful in disputing the transfer in January 1999, which is unlikely, Mr. Tam cannot dispute the existence of the second transfer in September 1999 and his failure to disclose this second transfer is prima facie evidence of his inability to offer any legitimate explanation.

[65] In the landmark case of **Ebrahimi v Westbourne Galleries Ltd** ¹⁵, Lord Wilberforce explained the rationale of the 'just and equitable' ground for winding up a company at the suit of a minority shareholder. He said at page 379:

"The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, ...entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."¹⁶

[66] It is clear from the judgment that the words 'just and equitable' are not to be construed as including only matters *ejusdem generis* with the other grounds for dissolution by the court contain in section 162, nor is the generality of the words to be confined to particular categories or headings of action.¹⁷

[67] I am of the considered opinion that the present application to wind up IEL on the just and equitable ground is misconceived and unnecessary. I think it would be draconian to wind up IEL and to sound its death knell particularly since there is no evidence to show that IEL was involved in any fraud, massive or otherwise. For my part, I am unable to find any decided case where a court ordered the winding up of a company with evidence such as in this case.

Contingent claim of \$US1 million

[68] Mr. Mann QC argues that three days before the hearing, a new allegation has been made which is not contained in the petition. Evidence has been proffered showing funds going to

¹⁵ [1973] A.C. 360.

¹⁶ See also the case of *Choon v Tahansan Sdn. Bhd.* (Privy Council Appeal No. 8 of 1985).

¹⁷ *Ibid*, per Lord Wilberforce at 374

IEL but in the same vein as the initial flawed allegation, no documentation showing the background to the transfer is adduced at this time. As Mr. Tam asserts before, these were loans which were then repaid.

[69] At paragraph 10 of his 30th affidavit, Mr. Borrelli reveals that the Liquidators have identified another payment of HK\$7 million (approximately US\$1m) from Akai on 3 September 1999 (2 months before Mr. Tam resigned as a Director of Akai). He obtained this information from Akai's voucher and a bank instruction letter for this transfer (which is an exhibit in the case) however they provide no details as to the reason or purpose for the transaction.

[70] Mr. Husbands has since clarified this issue. He submits that the claim is not a contingent claim. It is not dependent on the occurrence of a future event. It is a present claim for at least US\$1 million that first accrued in February 1999 (although the evidence indicates the debt is closer to US\$3 million). He submits that accordingly, cases such as **Law Society v Sephton & Company & others**¹⁸ have no applicability.

[71] It is therefore a pointless exercise to delve any further into this issue and to the many cases which were cited.

Conclusion

[72] As I said from the outset, the key issue for determination is whether Akai is a creditor of IEL. I have found that Akai is not a creditor and therefore, the entire application inexorably fails. In the event that I were wrong to find that Akai is not a creditor of IEL, in my judgment, in the evidence before the Court, it would be draconian to wind up IEL on the just and equitable grounds.

Order

[73] The Order of this Court will be as follows:

1. The application for the appointment of liquidators over IEL is hereby dismissed.

¹⁸ [2006] 2 WLR 109.

2. The appointment of Joint Provisional Liquidators of IEL is consequently discharged.

3. All documents both original and copies to include all documents held by electronic or other means obtained by the applicant pursuant to their appointment as joint-provisional liquidators of IEL be returned to Harney, Westwood and Riegels, PO Box 71, Craigmuir Chambers, Tortola, British Virgin Islands forthwith.

4. Costs to IEL to be assessed if not agreed.

Indra Hariprashad-Charles
High Court Judge