BRITISH VIRGIN ISLANDS

BVIHPB 93 of 2011

IN THE ESTATE OF LIAO YO CHANG

IN THE MATTER OF A GRANT AD COLLIGENDA BONA

BETWEEN:

LIAO CHEN TOH

Applicant

and

LIAO HWANG HSIANG

Respondent

Appearances: Ian Mann of Harney Westwood & Riegels for the Applicant,
Paul Dennis, Glenis Potts, Nadine Whyte of O'Neal Webster & Co. for the Respondent.

2011: November 10th and 29th

(Application to set aside Grant of Letters of Administration **Ad Colligenda Bona** -allegation that the application is a sham-no risk of dissipation existing at the time the grant was made-procedural irregularities)

[1] **Joseph Olivetti J**:- **"**Wealth and honour are what men [and women] desire, but unless they can be rightfully claimed it is better not to have them," so said a great sage[1] many centuries ago; an apt precept here. Mr. Yo-Chang Liao ("the Father") from all accounts was an extremely wealthy man when he died in California, USA on June 12, 2010. He died intestate, domiciled in Taiwan. One would have thought that his heirs, namely; his wife, Mrs. Hwang Hsiang Liao ("the Mother") and their two sons, Mr. Chen Toh Liao ("CT") and Mr. Wen Toh Liao ("WT") would, like in a

[1] The Analects of Confucius (English translation by Lionel Giles Easton Press 1976)

fairy tale, have all lived happily thereafter. However, this does not seem to be the case as the benefits of their benefactor's labours are being frittered away as they are now engaged in costly litigation over his estate, both here and in Taiwan as to which of the three should be the Administrator. The Court is now seized of an application by CT to revoke a Grant of Letters of Administration **ad Colligenda Bona Defuncti** ("the Grant") obtained by the Mother on the grounds that the Father's BVI Estate, as below defined, was in need of protection as it was in danger of being dissipated by CT.

Brief Background

[2] The Court will only touch briefly on the prior proceedings in the Territory of the Virgin Islands giving rise to this application and will refer to the collateral litigation in Taiwan[2] only where it is necessary to do so.

[3] The Father's estate in the Territory comprises all the shares in Triple Dragon Limited ("TDL"), all the shares in New Success House Co. Limited ("NSH") and 10,000 shares in Loyal International Enterprise ('LIE"), together "the BVI Estate." And all these corporate entities are business companies incorporated here.

[4] The Father, CT and WT were all directors of TDL which is a holding company that owns 62% of the shares in Loyal HQ Industrial Chemical Corp., a company incorporated under the laws of Taiwan. Loyal HQ in turn has more than ten (10) subsidiaries that are engaged directly or indirectly in the production and sale of expanded polystyrene in China. Allegedly, the Loyal Group, as these companies have been styled, is the largest polystyrene manufacturer and distributor in the world.

[2] There is for example,a criminal matter against WT being prosecuted by CT in respect of an allegedly fraudulent loan WT caused TDL to make to one of Wt's companies..

[5] On 10 August this Court (Bannister J.), upon an **ex parte** application by the Mother ordered that the Grant be issued to the Mother based on allegations that CT had put the BVI Estate at risk. The Registrar issued the grant on the same day. The Mother then took certain steps in relation to the BVI Estate . She applied to be and was registered as the holder of all the shares in TDL on 12 August. Also on12 August the Mother, now as sole registered shareholder of TDL, passed a resolution removing CT as director of TDL and appointed herself as a director. CT was notified of the Grant and those changes in a timely manner.

[6] The Mother filed an application for the Full Grant on16 August 16 (within the time mandated by the **ex parte** order for so doing) and on 17 August CT filed a caveat in those proceedings claiming that the Mother was not entitled in priority to the Full Grant and that all three of the Father's heirs are equally entitled. This dispute is the subject of a Fixed Date Claim Form which was filed by the Mother as a result of the caveat on 14 September and is set for trial on January 30, 2012, ("the Probate Proceedings").

[7] On 17 October, CT filed this application to revoke the Grant as being wholly unnecessary .This was on the basis that there is no risk to the assets or alternatively that he be appointed in the Mother's stead or in the further alternative that Mr. Mark McDonald an employee of Grant Thornton be appointed and be given the specific mandate to reinstate him as director of TDL and to remove the Mother and WT.

[8] In the interim, on October 25, CT also applied **ex parte on notice** for an injunction **inter alia** to restrain the Mother from using or permitting the votes of TDL to be used at any general meeting of Loyal HQ and in particular a meeting of 31 October to effect the removal of CT from the board of Loyal HQ at any time before

judgment in the Probate Proceedings, without further order of the Court. This was on the basis that removing him as director and chairman at this time would result in irreparable damage to Loyal HQ. Bannister J. granted relief in those terms.

The Law - Ad Colligenda Bona Defuncti Grant

[9] At this juncture, it may be helpful to consider the general nature of a grant **ad colligenda bona,** and the Court's powers in relation thereto before addressing the various grounds to revoke the Grant.

[10] The Court's jurisdiction in probate causes is to be exercised in accordance with the provisions of the **West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80**, and in accordance with any other law in the Territory and rules of court. In addition, where no special provision is contained in Cap 80 or any other law, the jurisdiction falls to be exercised in conformity with the law and practice of the High Court of Justice in England. See section 11 of Cap 80.

[11] As we have no special provision about grants **ad colligenda bona defunti,** it is properly accepted by both counsel that the Court has a general power to make a limited grant of administration in order to preserve assets of the deceased within the jurisdiction without waiting until those entitled to a grant have applied. This grant is known as an **ad colligenda bona defuncti** grant, although the **"defuncti**" is often omitted when referring to it. "Application may be made for a grant of administration **ad colligenda bona defuncti,** owing to the impossibility, in the special circumstances of the case, of the court constituting a general personal representative in sufficient time to meet the necessities of the estate. It is now more usual, in appropriate cases, to obtain wider powers by invoking the powers conferred upon the court by s.116 of the Supreme Court Act 1981…" Reference Tristram **and Cootes Probate Practice** 28 edn. para. 25.173 pg. 584.

[12] Such a grant is made for a limited purpose, for example, to allow the deceased's business to be run or for any urgent purpose. Unlike an ordinary executor or administrator, the holder of such a grant cannot make any distribution of the estate's assets. His or her role is to protect the assets of the estate until a full grant is made. Accordingly, the grant on issue is usually limited, "for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the same and until further representation be granted." See **op.cit.para.25.177.** The Grant was so limited by the order of 10 August.

[13] It is also well established that a grant **ad colligenda bona, "**may be made not only to a person whom the court considers suitable, but also to the persons who are entitled to a full grant but in the interests of the estate cannot wait, or to entire strangers who have been brought into connection with the matter"- **op.cit para.25.174. And the issue of** such a grant can be objected to on, for example, the grounds of ill health or bad character (which is in part what CT is trying to do here(see **op.cit** .para.14.17.

Grounds relied on by CT for setting aside the Grant

[14] Mr. Mann, learned counsel for CT, relied on 5 main grounds- (i) the evidence in support of the Grant was a sham; (ii) there was no risk of dissipation of assets of the BVI Estate; (iii) the real motivation for the Grant was for WT to squeeze CT out of the family business and to release himself from a loan of USD 20 Million ($20,000,000.00) he owes to TDL;(iv) the Mother has acted outwith the Grant; and (v) procedural irregularity in the **ex parte** application.

[15] It became evident in Mr. Mann's written submissions and at the hearing, that many of those grounds were intertwined.

Was the Mother's evidence in support of the application for the Grant a sham?

[16] Mr. Mann submitted that the Mother's evidence in support of the application for the Grant contained in her affidavit of 10 August ("the First Affidavit") was a sham as she was unwittingly used by WT for his own purposes. Mr. Mann based this submission on CT's first and second affidavit in which he alleged:- that the Mother was unable to read, write, speak or understand any English; that she told CT that she had no idea of what she had signed to when she signed the First Affidavit; that she only remembers signing some English documents for WT who had asked her to sign them; that she had no knowledge of any litigation in the BVI at all and had never had any contact with the BVI firm, O'Neal Webster, at any stage or indeed, any lawyer at all and that she had taken no step in her capacity as the BVI appointed administrator **ad colligenda bona** and had no understanding as to what that signified. CT's case therefore is that the real applicant for the Grant was WT who was bent on taking over the Father's business empire and releasing himself from a debt to TDL. It is noted that he made those allegations when he applied for and obtained the injunction here.

[17] On the other hand, the Mother herself has denied unequivocally those alleged conversations with her son CT in both her Third and Fourth Affidavits and has also relied on the affidavit of her lawyer in Taiwan, Ms. Maxine Chiang, a partner in the firm of Lee Tsai Partners in Taipei, Taiwan.

[18] The Court is thus called upon to resolve this factual conflict without the benefit of cross-examination –a far from enviable task. I have considered the evidence of both the Mother and CT carefully and find that on a balance of probabilities, the Mother's evidence is more credible. The mere fact that she cannot speak ,read or writes English (a fact she readily admits to) is not sufficient to find that her First Affidavit was a sham. The Mother is not only a retired schoolteacher but a university graduate and she was a director of several companies on the Loyal Group during the Father's lifetime. These facts are not disputed.

She is of mature years (79) but not an illiterate person or in any way disabled. As is borne out by many world leaders over the ages, maturity in years does not itself signal disability of mind or body.

[19] The Mother explained the circumstances under which she swore the First Affidavit in English. Namely, that it was translated by her lawyer to her in Mandarin and explained to her and she understood what she was doing. Ms. Chiang bears this out. It also appears that the Mother travelled from Taiwan to Hong Kong to swear the First Affidavit and have it notarized to meet the requirements of our law. The notary public seal on the face of the First Affidavit attests to that. This apparently was a long journey and certainly does not accord with the notion of WT simply putting an affidavit before her and asking her to sign.

[20] In opposition, we only have CT's word that those important conversations in which the Mother allegedly retracted her role in the **ex parte** application actually took place. I find it hard to believe that an experienced businessman as he undoubtedly is, (he is the successful chairman of the Loyal Group) having recognized the significance of those conversations would not have taken proper steps to have the Mother put the alleged disclaimers in writing and have it notarized and submitted to this Court especially as he is claiming that WT brought undue influence to bear on their mother.

[21] In the light of the Mother's evidence as supported by Ms. Chiang, I accept the Mother's evidence as to the making of the First Affidavit and find that it was not a sham. She made it voluntarily with full knowledge and understanding of its contents and of the nature of the application and I find that she was not acting under the influence of WT in applying for the Grant and was not his nominee.

Is it the case that the real motivation for the Grant was for WT TO Squeeze CT out of the Family Business and to release himself from a USD 20 Million Loan he owes to TDL?

[22] This ground is obviously linked to the first as CT relies on the alleged retractions by the Mother to bolster it. The retractions having fallen by the wayside, what is left? Mr.

Mann's argument in the main is that WT is indebted to TDL in the sum of USD 20 million and that he is seeking to gain control of TDL through the Mother and so get TDL to write off the debt. To substantiate this he refers to the Mother and WT seeking to revoke Ai-Chuan Chow's agency(an agency granted unilaterally by CT) to act on behalf of TDL to recover the debt and says that that must have been the obvious motive in the first place, namely to take over TDL and release himself.

[23] Mr. Dennis, learned counsel for the Mother, emphasized that the principal debtor is in fact ED –In Data Technology Group Ltd., ("Ed-In"), WT's company. WT as director was required to give a personal guarantee for the loan, a not uncommon practice of the financial institutions in Taiwan when lending to a company. (Indeed, this is a common and prudent practice in this part of the world and I daresay worldwide). Mr. Dennis also submitted in short that the dealings of CT with the promissory note whereby CT sought to assign it to Ms. Ai-Chuan Chow ostensibly to enforce it cannot bear scrutiny and that this ground has no substance.

[24] It is not disputed that the loan was made in 20 October 2010, short months after the Father went to join his revered ancestors, and that at the time both CT and WT were directors of both TDL and Ed- In. I also take note of the dealings with the promissory note by CT claiming to act as **de facto** director of TDL and assigning the note to Ms. Chow, a mere secretary in Taiwan, allegedly to enforce the note on behalf of TDL in Taiwan. CT said he did this on the basis that it would be too difficult for TDL as a foreign company to sue in Taiwan. That is not credible, as it is well known that Taiwan is an international business centre. Was his real motive the far from filial one of putting pressure on his younger brother, WT?

[25] Moreover, it seems odd that the loan was made mere months after the Father's death when all the heirs knew that they were entitled to his estate and no distribution had been made and now without any discussions that CT by himself should have opted without consultation with his mother and brother to assign the promissory note to a mere

secretary. It begs the question as to what had changed. I also note that this controversy has given rise to criminal proceedings instituted in Taiwan by CT against WT and not the Mother with whose actions and integrity to hold the Grant we are concerned.

[26] Having regard to the totality of the evidence(I also have had regard to WT's affidavit and to that of the other shareholder in Royal HQ on behalf of the Mother)and in particular to CT's own attempts to allegedly enforce the promissory note, I am not satisfied that CT has made out that the Mother and WT are in cahoots and that their sole aim was to gain control of TDL and release WT from his guarantee as alleged.

Has the Mother exceeded her authority under the Grant?

[27] Mr. Mann accepts and correctly so that the Mother properly caused herself to be registered as the legal owner of 100% of the shares in TDL. However, he contends that the Mother has taken the following steps which go beyond the terms of the Grant in that she has: - (1) appointed herself director of TDL; (2) removed CT as a director of TDL and (3) sought to remove CT as a director of TDL's subsidiary, Loyal Group HQ, save that she was enjoined from doing so.

[28] Mr. Mann submits that the Mother seeks to justify interference in the subsidiary companies of TDL on the basis of a fear of a diminution in the value of the BVI Estate. However, he posits that by reason of the doctrine of separate corporate personality, the assets of TDL, NSH and LIE belong to those companies and not to the BVI Estate and therefore the Mother has no authority to do the acts that she did or sought to do. He relied on the rule in **Foss v Harbottle [3],Johnson v Gore wood [4][and Prudential Insurance Co. Ltd. v Newman.[5]**

[3] **1843) 2 Hare 461,**
[4] **[2002] 2A.C 1**
[5] **[1982] 1 Ch. 204 at 210.**

[29] Mr. Dennis argues that the Mother was entitled to appoint herself director of TDL as she did and to remove CT as director as this was done to preserve the BVI Estate having regard to CT's actions at the time of the Grant. Moreover that the actions she sought to take against CT in respect of his position with Loyal HQ could not disqualify her from holding the Grant as Ct has put the BVI Estate at risk. Mr. Dennis argued that the doctrine of corporate personality does not apply in these circumstances.

[30] **Gore-Browne on Companies** explains the principle of corporate personality at para.1.004 -1.3 **Vol. 1 thus:- "***The separate personality of a company and its entity as distinct from its shareholders was established by the House of Lords in Solomon & Co. where it was held that however large the proportion of the shares and debentures owned by one man, even if the other shares were held in trust for him, the company's acts were not his acts nor were its liabilities his liabilities; nor is it otherwise if he has sole control of its affairs as governing director.***"**This basic principle has been developed and is illustrated by the cases cited by Mr. Mann and it is now established law that a shareholder cannot sue to right a wrong done to the company r for reflective loss caused to his shareholdings in it.

[31] Having regard to the First Affidavit of the Mother, in my view, there was sufficient evidence before Bannister J. for him to find as he did (by ordering the issuing of the Grant) that the BVI Estate was at risk by CT's actions. On that evidence which has not been seriously challenged, CT was bent on disrupting the business of Loyal HQ by **inter alia** having the board pass a resolution to sell off all of Loyal HQ's assets and then attempting to get its shareholders to pass a similar resolution. If this had succeeded then undoubtedly TDL's majority interest in Loyal HQ would have been at risk. The Mother is not seeking to sue CT for a diminution in value of TDL's shares in Loyal HQ as she cannot properly do so. But she, as interim Administrator, would have been remiss in her duty to preserve the BVI Estate if she simply stood by and allowed CT to continue unchecked without taking steps to utilize TDL's majority interest in Loyal HQ such a way as to effectively stop CT from carrying out his plans.

[32] I am of the view, having perused CT's application for the injunction and the arguments advances and not having had the benefit of the learned judge's reasons for granting the interim injunction, that the relief was to a large extent granted on the basis that as the Mother had a limited Grant and as her right to it and to a full grant was being challenged by CT in the Probate Proceedings, that the court saw it prudent to maintain CT as director of Loyal HQ in the interim; that is until the determination of the Probate Proceedings. (I note that CT obtained a similar injunction in Taiwan and on a perusal of the judgment, I am of the view that the injunction was granted for the same reasons.) Had this Court been of the view that the Mother was not acting properly in removing CT as director of TDL and attempting to remove him as director of Loyal HQ, I hazard that Bannister J would not have hesitated to revoke the Grant at the same time as he issued the injunction. In all the circumstances, in my judgment, the Mother has not exceeded her authority under the Grant.

NO Risk of Dissipation of assets and failure to make full disclosure

[33] Mr. Mann submits that there are good grounds for setting aside the Grant on the basis that full and frank disclosure was not made, as the Court was "**positively misled** "as to the risk of dissipation of assets of Loyal HQ in the First Affidavit of the Mother. As has been seen, this ground has no merit and it is no answer to say that the anticipated disruption of Loyal HQ's business did not take place. This would be to overlook the effect of the Mother obtaining the Grant.

[34] I also note Mr. Mann's further contention that far from dissipating assets, CT, as chairman of the Loyal Group is the only person capable of running the world's largest expanded polystyrene specialist and manufacturer in the world. He says that this is an extremely valuable going concern and cannot be allowed to be placed in the hands of "rank amateurs whose integrity is seriously in question".

[35] If CT as a co-heir and the Chairman of the Loyal Group were truly concerned about the business being left in the hands of "rank amateurs whose integrity is seriously in question" as he claims, then one wonders why he himself did not seek to have the estate administered immediately on the heels of the Father's demise or himself seek a Grant of Letters of Administration if he thought he was equally entitled to it. Instead he seemed bent on soldiering on despite the obvious danger as he alleges of these "rank amateurs". In any event, anyone who obtains a full grant is obliged to distribute the estate among the heirs and even if CT were the full administrator there is no guarantee that his co-heirs and the other shareholders of Loyal HQ would have all agreed for him to continue as chairman. No doubt, if he is as successful as he claims he would have little difficulty in persuading them to allow him to carry on.

[36] In my view, having regard to he Mother's evidence, CT's actions gave real cause for concern, the BVI Estate was in real danger of being dissipated, and the Mother was entitled to apply for and obtain the Grant.

Has the Mother breached her duties in Taiwan?

[37] Mr. Mann submits based on CT's evidence that the Mother's integrity is in question as before any partition of the Taiwan estate, the Mother donated a sum reaching NTD100 million to the National Taiwan University of Arts out of the estate without CT's approval as a co-heir . CT as the assertor provided no proof other than his word that the monies came from the Taiwan estate.

[38] The Mother admits making the donation but asserts that the monies were her own and formed no part of the Taiwan estate. This is a bald assertion about a matter which can be supported by documentary evidence, for example, evidence from the financial institution which processed the funds.

[39] However, this issue does not directly concern the BVI Estate, and is a matter governed by Taiwan law on which we have not had the benefit of an expert. I therefore cannot determine if the monies came from the Taiwan estate or not on the state of the evidence or whether, if it did come from the Taiwan estate whether the Mother as co-heir is entitled to make any distribution without the consent of her co-heirs. This cannot then without more be a basis for revoking the Grant to the Mother.

Procedural irregularity- was the ex parte Application unusual and wrong as the Mother failed to make full disclosure.

[40] An application for a grant **ad colligenda bona** is usually made **ex parte** to the Registrar in the first place who may refer it to a judge. See **Tristram and Cootes para**. 25.175 And CPR 2000 authorizes a judge to hear urgent matters **ex parte.** And in **Ghafoor v Cliff**[6]] it was held that where allegations of dishonesty are being made it may be a factor such that those parties should be given an opportunity to refute the allegations at an **inter partes** hearing. The Court thus had jurisdiction to entertain an **ex parte** application and having regard to the allegations made by the Mother and to the timeframe involved, it clearly was not possible for her to give notice of the ex parte hearing.

[41] **Ghafoor** also held that, "If the applicant decides that it is proper to apply without notice, he is subject to the usual duty to make full and frank disclosure. This is the usual duty imposed by the court on a litigant who moves the court without notice to his or her opponent. It means that such a litigant has a duty to make full and fair disclosure of all material facts. The material facts are those which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the Court and not by the applicant or his or her legal adviser. The duty also requires the applicant to draw to

[6]Ghafoor v. Cliff 2006] 1 W.L.R. 3022

the Court's attention any possible defences by opposing parties who have not been given notice of the hearing. See **Brink Mat Ltd. v Elcombe** [7][

[42] I do not find that the duty to make full disclosure was breached in any material way. Further, in my view, in a probate matter, albeit one of great value, one does not expect the full panoply of the law on disclosure to apply as it does to commercial matters for the obvious reasons.

Conclusion

[43] In conclusion, for the foregoing reasons, in my judgment, Ct has not made out a good case for revoking the Grant. The application is therefore dismissed with costs to the Mother to be assessed if not agreed. In the event of failure to agree within 14 days formal application must be made within 21 days and written submissions filed and exchanged. The application shall be dealt with on paper.

Postscript

[44] CPR 2000 Rule 25.1 enjoins the Court to further the overriding objective by actively managing cases which may include "(h) encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures." And it is the duty of the parties to help the court to further the overriding objectives i.e to deal with cases justly having regard to the matters set out in rule 1.1.

[45] In keeping with this obligation and as the parties are not present in person I will take this opportunity to make the following remarks.

[46] First, maybe it might be useful to remind these warring parties who are so closely related of what no doubt their legal advisors have already told them. This costly struggle,

[7] 1988] 1W.L.R. 1350.

ostensibly for **rights of administration** (whether for a limited or full grant), certainly does not mean that the winner thereby becomes the owner of the BVI Estate. Once a full grant is made the administrator must distribute the estate according to law. The person who eventually obtains the full grant has to distribute the estate according to the law of Taiwan, as in the Territory, shares in a company constitute personal property - the BVI Business Companies Act 2004 section 33 -and the distribution of personalty on an intestacy is governed by the law of the place of domicile of the deceased at the date of death.

[47] Maybe the parties might also care to ask themselves what they are really fighting about, what deep family rifts has resulted and what happens to these once lucrative businesses in the meantime as litigation apart from the cost (both financial and emotional)can be very protracted. For example, will the unsuccessful party in the Probate Proceedings be content to accept a first instance judgment? They might also choose to reflect that whatever the Father might have indicated whilst he yet lived, the fact is that he did not leave a will. As a result they are co-heirs to a business empire albeit some may be not as well versed in it as others. Further that rank amateurs are never precluded from enjoying his or her inheritance and there will always be professionals available to assist. The future of both TDL and Loyal HQ and indeed the entire Loyal Group now lies in their hands; they can jointly decide about the future course or continue to wrangle among themselves with the inevitable results. It remains to be seen what they do next.

[48] I thank both counsel for their invaluable assistance.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands