The Court of Appeal for Bermuda

113 Front Street
Hamilton HM 12
Bermuda

Civil Appeal
2007: No 20

Before:

THE HONOURABLE JUSTICE ZACCA,
PRESIDENT
THE HONOURABLE JUSTICE WARD
and
THE HONOURABLE JUSTICE AULD

- - - - - - - - - - - - - - - - - - - -

JAMES HENRY TING	**First Appellant**
BLOSSOM ASSETS LIMITED	**Second Appellant**
COSTNER HOLDINGS LIMITED	**Third Appellant**

-and-

COSIMO BORRELLI	**First Respondent**
NICHOLAS TIMOTHY CORNFORTH HILL and R CRAIG CHRISTENSEN as Liquidators of Akai Holdings Limited Respondents	**Second And Third Respondent**
and	
AKAI HOLDINGS LIMITED (In Compulsory Liquidation)	**Fourth Respondent**

.....

Dates of Hearing: 17, 18, 19 June 2008
Date of Judgments 28 November 2008

.....

Mr Alun Jones, Q C, and Mr. Mark Diel for the Appellants
Mr Leslie Kosmin, QC, and Mr. K. Taylor, Appleby for the Respondents

JUDGMENTS

AULD JA:

Introduction

1. This appeal concerns the construction and/or enforceability of a widely expressed release in an agreement ("the Settlement Agreement") compromising litigation between the Appellants and the Respondents arising in the insolvent liquidation of Akai Holdings Limited ("Akai"), an electronics multi-national corporation registered in Bermuda and trading in Hong Kong and the Far East. In late 1999, Akai collapsed with an estimated net asset deficiency estimated at the time of appointment of its Liquidators in early 2000 at over US $1 Billion, and having seemingly lost about US$2.3 billion of gross assets within 12 months. It is said to have been the largest corporate insolvency in the history of Hong Kong. It was wound up in Hong Kong in August 2000 and in Bermuda in September 2000.

2. For some years before and at the time of the collapse, James Ting, the First Appellant, was its Chairman, a director and Chief Executive Officer. Through his control of Blossom Assets Limited ("Blossom") and Costner Holdings Limited ("Costner"), the Second and Third Appellants, he controlled 5.2% of Akai's issued share capital. The present Liquidators are Cosimo Borelli, R. Craig Christensen and Nicholas Cornforth Hill, the Respondents ("the Liquidators").

3. The matter comes before the Court in an anti-suit claim by Mr Ting, Blossom and Costner. They seek to rely on the Settlement Agreement to restrain the Liquidators, by way of injunctive and declaratory relief, from continuing with proceedings instituted against them in Hong Kong in 2005 ("the Hong Kong Proceedings"), to which they added Mr Ting as a defendant in 2006. The Liquidators claim damages in those proceedings against various persons and entities for damages arising, inter alia, out of Mr Ting's alleged fraud, conversion and/or breach of fiduciary duty to Akai.

4. The Settlement Agreement was made on 30th December 2002. It followed the gradual discovery by the then Liquidators, despite much obstruction and delay from Mr Ting in the liquidation, of a number of very troubling matters. As well as the dramatic disappearance of all the company's assets and the estimated net deficiency of over US$1 Billion, there were very few company books and records. There were documentary indications of Mr Ting's involvement in some highly questionable and substantial transactions in relation to the assets and control of Akai in its dying days. In addition, towards the end of 2002 he made a determined and fraudulent attempt, involving, they believed, forgery, to frustrate their proposal, through a Scheme of Arrangement, to obtain funds to enable them to continue with the liquidation. The forgery, they believed, consisted in procurement by him of signatures purporting to be his, authorising Blossom and Costner to vote against the Scheme at a Special General Meeting convened in late November 2002 for the purpose of securing the shareholders' approval.

5. All of this prompted the then Liquidators, acting through Mr Borelli, to apply on 29th November 2002 to the Supreme Court of Bermuda for directions to enable them to proceed with the Scheme of Arrangement ("the Bermuda Scheme Proceedings") to secure funds for continuance of the liquidation. Akai's only

potential realisable asset by that stage was represented by the value of its public listing on the Hong Kong Stock Exchange. It was likely to lose that listing irrevocably if the proposal in the Scheme of Arrangement was not executed by 31st December 2002. The proposal, which had been approved by Akai's creditors and sanctioned by the Hong Kong Supreme Court, was for the transfer for about HK47 Million to Hang Ten of Akai's shares in exchange for Hang Ten shares and a cash payment, thereby effecting the withdrawal of Akai's listing and its replacement by the introduction of Hang Ten to listed status. That would leave the winding-up of Akai to continue, with the Liquidators holding its shares in trust for the shareholders, albeit that the shares had little or no economic value.

6. In an endeavour to overcome Mr Ting's, Blossom's and Costner's opposition and to save the liquidation, the Liquidators negotiated with them a settlement of their dispute, the negotiations taking some three days and both sides having the benefit of advice from experienced corporate lawyers throughout. In return for Mr Ting, Blossom and Costner agreeing to withdraw their opposition to the Scheme, the then Liquidators undertook in very wide terms not to pursue any claims of any kind or nature whatsoever, whether known or unknown to them, against Mr Ting, Blossom or Costner. They reached agreement, consigning it to the Settlement Agreement on 30th December 2002.

7. The provisions of the Settlement Agreement excluding pursuit by the Liquidators of any such claims, counsel told the Court, were wider than any they had been able to find in any reported case. They were set out in clauses 3 and 9 ("the exclusion clauses"):

> "3. ...[the Liquidators and Akai] irrevocably covenant not to sue or otherwise pursue any claims against Mr Ting, Blossom and Costner from [sic] any and all past present and future rights, claims, demands, debts, causes of action and suits at law or in equity of any kind or nature whatsoever whether presently known or unknown howsoever or wheresoever (including any rights and claims in but not limited to Hong Kong, Bermuda, PRC and any other competent jurisdiction) arising out of or in connection with Akai and/or Kong Wah and/or their respective Liquidators."
>
> "9. Akai, Kong Wah and the Liquidators shall immediately cease all further investigations with a view to or in connection with issuing legal proceedings and/or making claims against Mr Ting."

8. The Liquidators adhered to those undertakings until 2006, by which time they claim to have become aware, from material provided to them in 2005 by the Hong Kong Commercial Crime Bureau, that there was evidence to suggest that Mr Ting, in association with the defendants to the Hong Kong Proceedings instituted in 2005, had committed very substantial frauds against Akai. They sought recovery of sums claiming fraudulent misappropriation of Akai's assets to the value of US$52.5 Million and other breaches of fiduciary duty, and have since threatened to make further similar claims against him to the value of US$471.6 Million. They maintained, and maintain in these proceedings, that the exclusion clauses, though wide, are not wide or specific enough to bar them from claiming in respect of massive frauds of the sort since discovered and alleged in the Hong Kong Proceedings. Mr Ting, Blossom and Costner maintain that the clauses were expressed in the widest possible terms, and clearly exclude claims based on fraud of whatever amount, and, in these proceedings, seek declaratory

and injunctive relief to that effect so as to restrain the Liquidators from continuing with the Hong Kong Proceedings.

The facts known to and state of mind of the Liquidators when entering into the Settlement Agreement

9. Akai's collapse, as I have said, was the largest in Hong Kong's corporate history – a disappearance of over US$ 2 Billion in gross assets within 12 months and an estimated net asset deficiency at the time of the Liquidators' appointment in the Spring of 2000 of over US$ 1 Billion, for neither of which Mr Ting has ever provided any cogent explanation. The Liquidators sought without success to contact him about missing books and records and about transactions likely to have contributed to such substantial losses in which he appeared to have been involved. They were at that stage hampered by lack of company records and documents and lack of cooperation and, from afar, obstruction, from Mr Ting. However, he was an obvious target for their investigations, as indicated by their announcement on 24th May 2001 that they were waiting to speak to him about the whereabouts of several hundred million dollars in assets diverted from the Group prior to its liquidation.

10. Mr Borelli, in his evidence in the Bermuda Scheme Proceedings and in this suit, confirmed that the then Liquidators and he had formed the view long before any question of the Settlement Agreement arose, that he was deliberately seeking: 1) to impede their attempts to recover the bulk of the books and records of Akai in the three years prior to its collapse, 2) to evade their investigations into the collapse with a view to prosecution of claims against him, and 3) that he was doing so because he had things to hide, including fraud of one sort or another, though, Mr Borelli said, not, in the main of the type or of the magnitude subsequently revealed.

11. Mr Andrew Sheppard, a solicitor and partner of Holman Fenwick and Willan, acting on behalf of petitioning creditors of Akai, also gave evidence in the Bermuda Scheme Proceedings about the earlier conduct of Mr Ting in matters germane to the winding-up. In it he deposed to: 1) a statement of Mr Ting in January 2000 that Akai had no money at all; 2) 32 meetings between February and August 2000 of a steering committee of Akai's creditors, none of which Mr Ting attended, despite requests to do so; 3) repeated delays by Mr Ting and obstruction in responding to requests of the steering committee for information and generally in relation to the winding-up proceedings; and 4) his production in about early June 2000 of an information memorandum asserting unaudited losses of Akai of nearly US$2 Billion, which he attributed as "mainly due to exceptional and non-recurring items resulting from provisions and write-downs made under the unstable and uncertain financial position of the Akai Group". Mr Sheppard's concluding paragraph of commentary on those matters contained the following passage:

> "25. From the foregoing text, I trust that I have satisfied the ... Court as to my belief as to the lack of *bona fides* on the part of Mr Ting generally, and the fact that in my view he will have no hesitation whatsoever in utilising or invoking any tactic or strategy which will forestall the long overdue investigation of the collapse of the Company and the Akai Group of Companies generally. ... at no time whatsoever did Mr Ting make any tangible endeavour of which I am aware to assist in the rescue of the Company. Instead he adopted a strategy of obstruction,

obfuscation and delay during which time he disposed of his personal assets in Hong Kong. ..."

12. By the time of the Bermuda Scheme Proceedings, as Mr Borrelli indicated in an affidavit sworn in those proceedings, the Liquidators had "very considerable concerns over the conduct of the management of the Company in the years and months leading to its liquidation" and "wish[ed] to investigate various claims against its directors, in particular against Mr Ting". He indicated in that evidence, and also in oral evidence to the Chief Justice, that the Liquidators, before the Settlement Agreement, had had good grounds for believing Mr Ting to have acted in clear and serious breach of Akai's Articles of Association and of his fiduciary duties to it, including potential fraudulent trading in a number of purported transactions all in late 1999, when Akai was in its death throes. More particularly, they then suspected him of fraud and misappropriation. The transactions to which he referred included the following:

i) an undisclosed agreement of 12th November 1999, signed by Mr Ting, transferring unfettered management control of Akai and its subsidiaries to Grande Group, a subsidiary of Grande Holdings Ltd. ("Grande"), seemingly without consideration – which the then Liquidators and he believed to have been deceitful;

ii) a number of other purported transactions of disproportionate benefit to Grande and at the expense of Akai, including an agreement of 1st November 1999 purporting to appoint Alpha Capital Group, another subsidiary of Grande Holdings Ltd, as Akai's financial adviser for a fee of US$ 5 Million, though no financial advice was given – an agreement that he and the then Liquidators thought could be a fraud;

iii) a loan agreement of 15th November 1999, a fortnight after the Alpha Agreement, with Toyo Holdings Ltd, another subsidiary of Grande Holdings, for an underwriting agreement in the form of a revolving "on demand" loan facility, undisclosed to shareholders of Akai and seemingly never drawn on by Akai;

iv) the transfer by a number of transactions of the majority of Akai's assets to Toyo in consideration for a loan in an amount significantly less than the assets, leaving Akai with no assets;

v) a series of transactions in 1998/9 involving – on the Chief Justice's finding at paragraphs 32 and 33 of his judgment – what seemed to Mr Borelli and the then Liquidators at the time to be some form of false accounting in respect of movement out and into Akai's accounts of HK300 million for a fictitious purchase of and disposal of shares in a company called Micro-Main Systems Ltd (the Liquidators also knew that those transactions had been referred to the Commercial Crime Bureau of Hong Kong for consideration of proceedings against Mr Ting);

vi) other similarly questionable documented transactions at the end of 1999, which, if they took place, involved very substantial losses to Akai, involving dealings with Definite Holdings BV; and

vii) Mr Ting's refusal to transfer to the Liquidators certain properties of Akai in Shanghai, acknowledged by him in its statement of affairs to belong to the Company.

13. Mr Ting was not the only one keeping relevant matters to himself as the parties approached the need to consider settlement of the Bermuda Scheme Proceedings. Mr Borelli, on 13th December 2002 in paragraph 41 of his seventh affidavit in those Proceedings, stated, and later confirmed in his oral evidence in these proceedings, that the transactions mentioned in his various other affidavits prior to the Scheme Proceedings and Settlement Agreement were only "examples" of matters known to and causing the Liquidators concern at that stage. And he declined on behalf of the Liquidators to reveal to Mr Ting the full extent of their potential claims against him.

14. Mr Borrelli chaired the Scheme Meeting of 25th November 2002 for approval by the shareholders of the proposed Scheme of Arrangement. Mr Andrew Ng and Mr Lie, solicitors, attended on Mr Ting's behalf, and in the course of the meeting tendered to it authorisations purportedly signed by Mr Ting on behalf of Blossom and Costner to act as their respective proxies, authorisations on which, if valid, the outcome of the vote would turn. It is plain, as the Chief Justice has found – and not challenged in this appeal – that, at Mr Ting's instigation, his purported signatures on those authorisations were forged.

15. The manner in which Mr Ng, in particular, did that and the suspicion of forgery that it immediately engendered in Mr Borrelli's mind were detailed by him in his affidavit evidence in the Bermuda Scheme Proceedings, and need no repetition here. The forgery was a blatant and dishonest attempt by Mr Ting to thwart approval by Akai shareholders of the Scheme. Mr Borrelli, as Chairman of the Scheme Meeting, responded to it by marking the purported votes of Blossom and Costner as "objected to", and adjourned the Meeting pending the outcome of an application by the Liquidators to be made to the Court. At the immediately ensuing Special General Meeting of Akai, he refused to allow Blossom or Costner to vote on the Scheme, and it was approved by a majority vote of the other shareholders present and voting. Mr Ng, who attended that meeting also, volunteered that if Blossom and Costner had been permitted to vote they would have voted against approval.

16. The then Liquidators promptly issued the Bermuda Scheme Proceedings seeking an order permitting them to treat the votes of Blossom and Costner tendered at the Scheme Meeting as "objected to" and seeking approval of the Scheme of Arrangement. They made vigorous attempts to have both matters listed in good time before the effective cut-off date, 31st December 2002, for "transfer" of Akai's Stock Exchange listing to Hang Ten. Mr Borrelli, in affidavit evidence in those proceedings on 25th November 2002, stated:

> "6. ... there are very strong grounds for suspecting that shareholders connected to the former management of the Company have an improper interest in voting against the Transaction which places their interest in conflict with the interest of the other shareholders. The key directors, assets and most of the books and records of the Company have disappeared. The Company has suffered the largest loss in a single year in Hong Kong's corporate history. The Liquidators are without funds to investigate the disappearances or prosecute those involved with these [sic] disappearances. The implementation of the Transaction is the only means by which the Liquidators will receive sufficient funds in order to investigate and prosecute these disappearances.

...

8. About the time at which the Liquidators were appointed, Ting and other directors of the Company left the jurisdiction of Hong Kong. Despite the efforts of the Liquidators, the Hong Kong Police and the Commercial Crime Bureau in Hong Kong and others to locate and make contact with Mr Ting, no co-operation has been received from Mr Ting and his whereabouts are unknown.

9. The Liquidators of Akai have attempted to conduct an investigation into the affairs of the Company and, in particular, the role of Ting. The Liquidators to a large part have been unsuccessful because of a lack of funding and complete lack of cooperation by Ting and others involved in the management of Akai prior to its collapse. The Liquidators do, however, believe that there are potential causes of action against Ting and others.

...

12. The Liquidators are concerned that Ting and his associates and other[s] associated with the management of Akai prior to its collapse have wholly improper motives for the way in which they intend to cast their votes at the Scheme Meeting ...

...

14. Upon the appointment of the Liquidators on 16th March 2001, it was found that the Group had no business, staff or assets (other than the Company's listed status). ... Most of the key directors and executives of the Group had left Hong Kong and the Liquidators have experienced a complete lack of co-operation from them. ...

...

18. the only conceivable incentive to oppose the Transaction lies in the desire of those who have been involved and benefited from the collapse of the Company and the disappearance of its assets, books and records to prevent any investigation into the circumstances of [the] Akai collapse. ..."

17. Mr Ting, acting through solicitors instructed on behalf of Blossom and Costner, equally vigorously indicated his intention to oppose the Liquidators' application. As the end of December 2002 drew near, the Liquidators were desperate to save the Scheme of Arrangement and keen to pursue Mr Ting and others for substantial sums and assets salted away by fraudulent trading of Akai to which they were parties. This can be seen from the following extract from a letter of 24th December 2002 from their solicitors, Appleby, Spurling & Kempe, to the Registrar of the Bermuda Supreme Court:

> "..... It is Akai's case that ... [Blossom and Costner] are controlled by Mr James Ting ... The Liquidators have identified potential claims against Mr Ting and associates of Mr Ting. However, these claims cannot be pursued as there are insufficient funds presently in Akai's estate. The proceeds from the sale of Akai's

> listing will be used, inter alia, to investigate and pursue these claims if the Liquidators are so advised. The Liquidators are of the view that Mr Ting has known about the potential claims against him and his associates for some time.
>
> ... [Blossom and Costner], the Liquidators say, at the direction of Mr Ting, attempted to block the scheme of arrangement from passing by voting against the scheme of arrangement at the scheme meeting. The Liquidators will contend at the hearing of the Objection Application that ... [Blossom's and Costner's] votes should be disallowed or disregarded because they were exercised for an ulterior and improper purpose, against the interests of the class of Akai's shareholders as a whole, in that it is in Mr Ting's interest that the Liquidators are deprived of funds so that claims against him and his associates will never be pursued."

18. As a result of Mr Ting's various stratagems for delay and other reasons, it became apparent by 27th December that the matter could not be listed for hearing before the end of the year.

19. It was in those circumstances that the parties, with their respective lawyers, spent that day and the next two days in negotiations for settlement of the Bermuda Scheme Proceedings, with a view, but "with differing objectives", as Kawaley J, was later to put it in further proceedings in Bermuda between the parties on a different point (see paragraph 21 below):

> "to snatch victory from the jaws of defeat by negotiating a settlement under which Blossom and Costner would withdraw their opposition to the Scheme in return for releasing Mr Ting from any liability in respect of [Akai's] demise."

20. On 30th December 2002, with only one day left to go, they reached agreement and consigned it to writing in the Settlement Agreement on that date, leading to a consent order approving the Scheme and its implementation and, thus enabling the liquidation to continue.

21. In 2003, in reliance on the Settlement Agreement, Blossom and Costner sought an injunction from Kawaley J in the Bermuda Supreme Court to restrain the Liquidators from pursuing applications in Hong Kong for the examination of Mr Ting under section 221 of the Hong Kong Companies Ordinance ("the 2003 Bermuda Proceedings"). In doing so, the Liquidators stated that they were not seeking, in the Hong Kong applications, to make any substantive claims against Mr Ting. On that basis, Kawaley J refused to grant the injunctions sought.

22. In August 2005 Mr Ting attended for examination. Some six months later, in a letter dated 16th February 2006, solicitors for the Liquidators, who by then included Mr Borrelli, wrote to Mr Ting notifying him of their intention to add him as a defendant to the Hong Kong Proceedings already commenced against others for theft of assets from Akai and other breaches of fiduciary duty. They alleged in the letter that it was evident, from the Liquidators' investigations since entering into the Settlement Agreement, that he had misappropriated property from Akai for his own benefit and had facilitated its misappropriation for the benefit of others. They went on to indicate the nature of the allegations to be pursued against him in the Hong Kong Proceedings, including: 1) defalcations of hundreds of millions of US$ of Akai's funds through payments to him and

companies registered in other jurisdictions under his direction and control, all recorded in a general ledger known as "BT Deposit" and disguised by various actual or bogus transactions with, amongst others, Micromain (see paragraph 12(v) above); 2) breaches of his fiduciary duties, including transfer of control of Akai to the Grande Group (see paragraph 12(i) above); and 3) the likelihood of later addition of further claims.

23. The Liquidators duly added Mr Ting as a defendant to the Hong Kong Proceedings in March 2006, with a pleaded allegation that he had misappropriated the equivalent of about US$ 52.5 million from Akai.

The issues

24. The matter has reached this Court on appeal from the decision of the Chief Justice on 5th December 2007 dismissing Mr Ting's, Blossom's and Costner's claim for an injunction and/or declaratory relief to stop the Hong Kong Proceedings as against him. The Chief Justice so held on a number of heavily overlapping bases, each one of which, if correct, would be sufficient to defeat the claim

25. They are all issues on the appeal, along with two issues raised by the Liquidators in a Notice to Vary. The Chief Justice held:

i) Construction - the exclusion clauses, though wide, are not as a matter of construction wide enough to exclude claims of fraud of such a type, and on such massive scale as alleged in the Hong Kong Proceedings, and both unknown and undisclosed to the Liquidators when entering into the Settlement Agreement;

ii) Voidability - the Settlement Agreement was voidable by the Liquidators for non-disclosure by Mr Ting of the wrong-doing alleged against him in the Hong Kong Proceedings to the extent that it would otherwise have covered such undisclosed and unknown wrong-doing;

iii) Unenforceability for "sharp practice" - the Settlement Agreement was, in any event, unenforceable by Mr Ting by reason of his 'sharp practice' in not revealing his knowledge of the claims now alleged against him when negotiating it;

iv) Unenforceability for "unclean hands" – alternatively, if he was wrong on all the above issues, he would nevertheless have refused to enforce the Settlement Agreement in respect of the Hong Kong Proceedings on the ground that Mr Ting had come to court with "unclean hands".

v) Section 98(2) of the Bermuda Companies Act –which renders void, inter alia, any contract between a company and an officer of the company from liability for fraud or dishonesty in relation to the company, does not apply to a release, by way compromise or otherwise, of any such liability;

vi) The form of the Declarations granted by the Chief Justice – the Liquidators were not barred by the exclusion clauses from claiming against Mr Ting in respect of the subject matters of the Hong Kong Proceedings and in any other proceedings founded upon breach by him of his fiduciary or statutory duties to Akai that were undisclosed and

unknown to Akai and its Liquidators at the time of the Settlement Agreement.

Issue 1 – Construction

The Chief Justice's judgment

26. The Judge's main findings of fact are not in issue in the appeal, save only - and peripherally - for his findings as to the level of the Liquidators' *actual* knowledge and/or suspicion before they entered into the Settlement Agreement of previous fraud on Akai by Mr Ting. In brief, his findings on that aspect were that, although the Liquidators may have suspected dishonesty and some level of fraud on his part, they did not know of or suspect the particular type of transactions or their magnitude the subject of their present claim in the Hong Kong proceedings. On that factual basis he held that the exclusion clauses, on their proper construction, were not sufficiently clear or specific to cover the claims against Mr Ting in those Proceedings.

27. In reaching that conclusion, the Chief Justice, having first set out the background and the events leading to the Scheme Proceedings in Bermuda, found as a fact that the information derived by the Liquidators from the Hong Kong authorities in 2005 on which they have in large part based their claims in the Hong Proceedings was not available to them before then. In doing so, he relied upon written and oral evidence from Mr Borrelli who, although not himself one of the Liquidators at the material time, he found to have been so closely involved with the liquidation that, in the absence of evidence to the contrary, he could treat his knowledge as that of the Liquidators for the purpose. He took paragraph 44 of Mr Borrelli's witness statement in these proceedings as the essence of his evidence on the issue of the Liquidator's knowledge, evidence that he was to accept:

> "Nothing of what I knew of these transactions indicated to me that Mr Ting had been misappropriating hundreds of millions of dollars in cash from Akai. To the extent that my knowledge suggested any misconduct on the part of Mr Ting, I believed this to relate to false accounting to conceal the true financial state of Akai. I was aware of no grounds whatsoever to suspect or believe that Mr Ting had been fraudulently misappropriating Akai's cash on a massive scale or that this was in fact a substantial cause of Akai's financial collapse."

28. The Chief Justice accordingly found as a fact:

> "27. that the evidence concerning these transactions was not available to the Liquidators until after the court ordered disbursement of the CCB documents to them in May and June 2005. They therefore did not know of these transactions at the time of the Settlement Agreement, nor did they know of them at the time of the 2003 Proceedings, which concluded at first instance in this jurisdiction with the judgment of Kawaley J on 24th February 2004. I also accept that they had no means of finding out about these transactions until 2005, because (i) they did not have access to the books and papers of Akai; (ii) no mention of these payments was made in Mr Ting's Statement of Affairs of December 2000 (which was in any event a woefully inadequate document); and (iii) Mr Ting was, through a long

> process of evasion and prevarication, avoiding providing them with any meaningful information. To the extent that it is alleged that Mr Ting was, at any stage, co-operating with the Liquidators, I reject that suggestion, and to the extent that Mr Ng relies on his blizzard of unhelpful and obstructive correspondence to suggest otherwise, I also reject his evidence on that."

29. After referring shortly to the evidence before him as to what the Liquidators did know at the material time of Mr Ting's general involvement in the affairs and other suspect transactions of Akai shortly before and after its collapse, he concluded:

> "34. Against that background, what I take Mr Borrelli's evidence to come down to is that, while he and the Liquidators may have had suspicions that Mr Ting might, amidst his other misconduct, have taken some of Akai's assets, they had no evidence to support that, and certainly no evidence of the defalcations that have now come to light, or of anything on that scale. I accept his evidence on that. I find, therefore, that although Mr Borrelli and the Liquidators inevitably had suspicions about Mr Ting at the time of the Settlement Agreement, they had no knowledge or suspicion of the BT ledger transactions [see para 22 above], including the subject matter of the Hong Kong proceedings. I also find that those transactions are of a different character and are on a different order of magnitude from anything that the Liquidators knew or suspected or, indeed, had reasonable grounds to suspect at the time."

30. Those findings should be considered against the fuller account that I have given in paragraphs 9 to 16 of this judgment of the unchallenged evidence before him as to what the Liquidators knew or suspected of Mr Ting's conduct in relation to the affairs of Akai when they entered into the Settlement Agreement. That included, in particular, what was to be seen in such company and other documentation as was then available to them and the evidence of Mr Borrelli and Mr Shephard.

31. The Chief Justice then considered the effect of those findings on the construction of the exclusion clauses. At paragraph 37 of his judgment, he took as the general governing principle Lord Bingham's cautionary principle expressed, in paragraphs 10 and 17 of his judgment in *BCCI v Ali* [2002] 1 AC 251, that a court should be slow to infer that a party intended to surrender rights and claims of which he did not know or could not know that he had at the material time. In paragraph 40 of his judgment, the Chief Justice applied that principle to the facts as he had found them in this case, and held that the words of the exclusion clauses were insufficiently specific to include the present claims for fraud of which the Liquidators had been unaware at the material time:

> "40. ... Applying ... [that principle] to my findings on the Joint Liquidators' knowledge (or rather the lack of it), and the absence of any reasonable means of finding out about the matters now alleged before they entered into the Settlement Agreement, I conclude that, as a matter of strict construction, the matters now alleged are not covered by the Settlement Agreement. If Mr Ting had wanted them to be, then he should either have disclosed them (which is not the same thing as saying that he was under a duty to

> disclose them), or, applying Lord Clyde's approach, negotiated an express release of all claims for fraudulent conversion by him of the assets of Akai based upon facts and matters not at that stage known or disclosed to the Liquidators. Had he bargained for that, then the Liquidators would at least have had some inkling of the true extent of what they were giving up. Without that degree of precision, I do not think that the mere inclusion of the words "whether presently known or unknown" in clause 3 of the Settlement Agreement is sufficient."

32. He returned to the point in his general conclusions in paragraph 74 of his judgment:

> "The alleged defalcations which are the subject matter of the Hong Kong Proceedings ... [were] not disclosed at the time of the Settlement Agreement, and ... [were] otherwise unknown to the Liquidators. As a matter of strict construction, therefore, I find that the subject of the Hong Kong Proceedings, and any similar undisclosed defalcations, are not subject to clauses 3 or 9 of the Settlement Agreement. ..."

The Law

33. The Court is concerned with a release from civil claims of any sort and whether known or unknown as part of a compromise of civil proceedings in which one party – Mr Ting – relies in seeking to bar claims of fraud based on facts that the other party – the Liquidators – maintain they did not know and could not have known at the time of the release. It is thus different on its essential facts from the leading case on a similar, but not the same, issue *BCCI*. There, employees of *BCCI* succeeded in claims against the bank arising out of wide publicity given in its notorious insolvent liquidation that had put them at a disadvantage on the labour market, notwithstanding their earlier acceptance of payment "in full and final settlement of payment all or any claims ... of whatsoever nature that exist or may exist". Neither side had known at the time of the release of the potential for such a claim.

34. There was thus no question in *BCCI* of exclusion of claims for fraud or of non-disclosure by the party seeking to rely on the release. Nevertheless, in what may often be a difficult factual issue to resolve, one of knowledge or imputed knowledge of the parties at the time of agreement, the law is tolerably clear, and Lord Bingham, in paragraphs 8 and 9 of his speech in that case, provides the best starting point:

> "8. ... In construing ... any ... contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the essentials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme apply in a case like this.

> 9. A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. ....”

35. I venture to repeat and add to that summary the following tabulation of the relevant law as I have taken it from the authorities:

i) Construction of any contractual term is the search for the objective meaning of the words in their context, namely by reference both to the words and to how they would have been understood by a reasonable person in the position of the parties at the time of entering into the contract; as summarised by Lord Hoffmann in his formulation of the general principles of ... *Investors Compensation Scheme Ltd v West Bromwich Building Society* [[1998] 1 WLR 896, at 912-3; see also *BCCI,* per Lords Bingham, at para 8, Lord Nicholls, at para 26 and Lord Hoffmann, at para 37.

ii) There is no difference in the approach to construction as between general releases, compromises or exclusion clauses; they are to be construed in the same way as any other contract.; *BCCI,* per Lord Bingham at para 8; see also *MAN Nutfahrzeuge AF v Ernst & Young* [*2*005] EWHC, 2347, at para 207, Moore-Bick LJ, as he had then become;

iii) A court should be very slow to infer that a party intended to surrender rights and claims of which he did not or could not have known at the material time - not a rule of law, but a cautionary principle that should inform the approach of the court to the construction of such provisions; *BCCI,* per Lord Bingham at paras 10 and 17:

> “10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. ...
>
> ...
>
> 17. ... the.. authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. I accept ... that authorities must be read in the context of their peculiar facts. But the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other, knew or could know that he had.”

iv) Exclusion clauses, in settlement agreements or otherwise, to be effective, should be expressed in clear language appropriate to their subject matter and context. it is not necessary to express the sought exclusion at length; *BCCI,* per Lord Hoffmann at para 38, or depending on its generality and

context, the many specific instances of it that may arise; see per Lord Nicholls in *BCCI*, at para 29:

> " ... the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

v) Where the claims sought to be excluded were based on fraud or other dishonesty, very clear and specific language in a release is required to exclude their subsequent pursuit, *a fortiori* if they were unknown to the releasor when granting the release; *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWHC 31,[2008] EWCA Civ 487, per Lawrence Collins LJ, at para 82 – a settlement agreement case;

vi) However, if the provision is sufficiently clearly and widely expressed in its context, there is no requirement in the case of a claim for fraud or other dishonesty of some further special formula for its exclusion, e.g. by specifically using words such as "fraud", "theft, dishonesty" or "fraudulent misappropriation".

36. I do not consider that the approach of Flaux J, at first instance or that of the Court of Appeal in upholding him, in *Satyam*, on which Mr Kosmin relied for the Liquidators, suggests any additional or special rule of construction for effective exclusion of exposure to claims of fraud. That case - unlike here - was one in which the history of dealing between the parties leading to the settlement agreement, gave no reason to the party granting the release to suspect the existence of possible claims for fraud.

Submissions

37. Mr Alun Jones QC submitted, on behalf of Mr Ting, Blossom and Costner, that the exclusion clauses bar the Hong Kong Proceedings claims of fraudulent misappropriation of Akai's assets and other breaches of fiduciary duty and also any further claims threatened by the Liquidators, for the following reasons:

i) The meaning of the exclusion clauses are clear, namely to bar the Liquidators from pursuing "any and all claims" against Mr Ting arising out of or in connection with Akai and the Liquidators. He stressed the width of clause 3, in particular the phrases in it, "any and all past present and future ... claims ... suits at law or in equity of any kind or nature whatsoever", "whether presently known or unknown howsoever or wheresoever", subject only to the limitation "arising out of or in connection with Akai ...". Its obvious purpose, given the context in which it came to be agreed, he submitted, was to achieve finality, one given emphasis by clause 9, requiring the Liquidators to cease all further investigations with a view to making claims against Mr Ting.

ii) He maintained, contrary to the Chief Justice's conclusion in paragraph 40 of his judgment, that the words of clause 3, including "whether presently known or unknown" were sufficiently wide and precise to encompass matters of the sort alleged in the Hong Kong Proceedings, that is, for fraudulent misappropriation by Mr Ting of Akai's assets for himself and/or others and other breaches of fiduciary duty based on facts and matters not known or disclosed to the Liquidators at the time of the Settlement Agreement. He also criticised the Chief Justice's reliance

upon Lord Bingham's cautionary principle in *BCCI*, given the wide and clear words of the exclusion provisions and their context, including all the indicia of serious dishonesty on the part of Mr Ting of which the Liquidators were aware when entering into the Settlement Agreement.

iii) He maintained that the Liquidators have, throughout these proceedings, placed an inappropriate emphasis on the *actual* knowledge or belief of the Liquidators, in particular that of Mr Borelli, at the time of the Settlement Agreement as to the particular nature of Mr Ting's fraudulent conduct and as to its magnitude, and that the Chief Justice has made the same mistake. The question of construction, he submitted, cannot properly turn on precisely what Mr Borrelli, the only material witness for the Liquidators on this issue, *actually* knew or suspected at the material time. He submitted that, as a matter of construction, the knowledge of one party as described in evidence long after entering into an agreement is relevant only if it throws light on the mutual contemplation and agreed intention of the parties at the time.

iv) To the extent that the clear width of the words of exclusion clauses needed bolstering by their context, Mr Jones submitted that it is to be found primarily in the history of the matter as set out by the Liquidators in their evidence before the Chief Justice, including the conduct of Mr Ting throughout leading to the Settlement Agreement, showing: a) their knowledge (see paragraphs 9 to 16 of this judgment); and b) that their approach by that time was properly commercial and tailored to the dilemma they faced in abandoning the liquidation or proceeding with it to trace and recover any available Akai assets, rather than pursue Mr Ting along in addition to the other defendants with claims of fraud. Mr Jones referred, in addition, to acknowledgement by Mr Borrelli in evidence of the Liquidators' view at the material time that they had in Grande Holdings, a firm of accountants and others "bigger fish to fry", and that it was unlikely that they could successfully pursue Mr Ting because he had left Hong Kong, probably for China, and was unlikely to return.

38. In summary, Mr Jones submitted that, in the light of the evidence on behalf of the Liquidators in the Scheme Proceedings as to the scale of deficiencies in Akai's assets and Mr Ting's conduct evident to them by then, they should at least have had reason to suspect or contemplate the possibility when entering into the Settlement Agreement that Mr Ting had been guilty of frauds of the type and magnitude now alleged. How else, he asked cogently could the exclusion clauses be construed so as to provide certainty in the case of any fraud or dishonesty whether it is of a type or sufficiently serious to be covered by the clauses. Such a problem - where to draw the line - he submitted, is well illustrated by the difficulty the Chief Justice had in formulating the Declarations he eventually granted, leading to the Liquidators' challenge to them in their Notice to Vary (see paragraphs 48 to 54 below).

39. Mr Leslie Kosmin QC, for the Liquidators, submitted that the Liquidators' claims against Mr Ting in the Hong Kong Proceedings were, in the main of a different nature and, in one important respect at least, the BT General Ledger Account entry transactions, of far greater magnitude than those they had contemplated as a possibility when entering into the Settlement Agreement. His submissions may be summarised as follows:

i) An exercise of construction of a release by way of compromise, as for any contractual provision, is an objective determination of what the parties knew or contemplated at the time of entering into it, rather than an enquiry into their respective subjective states of mind. However, where one party knows of the existence or potential existence of a claim against him of which the other is ignorant, the governing principle is that stated by Lord Bingham in *BCCI,* at paragraph 10, that a court should be slow to infer that an agreement on a proper construction, includes the surrender of a party to it of rights and claims of which he was unaware and could not have been aware at the time. He added that, as to context, the essential facts giving rise to the Settlement Agreement are of a piece with those in *BCCI* so as to attract application of that principle.

ii) The Chief Justice found that, at the time of the Settlement Agreement, the Liquidators did not know, and could not have known or contemplated from the information available to them, of any fraudulent misappropriation by Mr Ting of Akai's property of the nature or magnitude of those now alleged in the Hong Kong proceedings.

iii) The Chief Justice correctly applied Lord Bingham's principle in construing, as he did, the release of Mr Ting from rights and claims as described in the exclusion clauses as insufficiently specific to include claims of the type and magnitude of those now claimed in the Hong Kong proceedings. The context of the Agreement was the contemplation of the parties arising from their common knowledge of: 1) potential civil claims for false accounting but not of any fraudulent transactions or, at least, as the Chief Justice found, of different and lesser fraud than now claimed or, as he also put it " in a totally different league of transactions from those later discovered".

iv) For the release in the Settlement Agreement to cover any fraudulent and undisclosed misappropriations now claimed and which may be claimed against him, it would have required specific words to give the Liquidators, in the Chief Justice's words, at para 40, "some inkling of the true extent of what they were giving up".

v) As to what specific words would have been necessary for that purpose, it was for Mr Ting to make it clear to the Liquidators and he could only do that in relation to a claim of fraud, whatever its context, by specifically excluding it;

vi) There was no litigious "dispute" between the parties to which the Agreement applied because the Liquidators made no claims against Mr Ting in the Scheme Proceedings, and the Scheme was a release rather than a compromise; and

vii) Mr Ting was not formally a party to the Scheme Proceedings, his role in them was merely to put pressure on Blossom and Costner to oppose the Scheme, Mr Kosmin's point presumably being that it was those companies rather than Mr Ting who, by their submission to the Scheme Agreement, provided the consideration for the release of claims.

Conclusion

40. The fundamental rule of construction of any contractual provision, that it should be construed, if necessary in its context, to determine the objective intention of the parties, is not modified by Lord Bingham's "cautionary principle" for informing the approach of the court in the case of a claim by one party that he did not know and could not have known material facts known to the other at the time of entering into the contract. It is an aid to a finding of objective intention on the conventional civil burden of proof subject to an overlay of a burden of persuasion against an inference of an intention to surrender unknown rights or claims.

41. This is not a case of claimed mutual ignorance of material facts, as in *BCCI*, but of alleged ignorance of one party only, the Liquidators. The Chief Justice rightly, in my view, resorted, in paragraph 37 of his judgment to Lord Bingham's cautionary principle. However, in doing so, he appears to have focused unduly on the subjective state of mind of Mr Borelli, as the voice of the Liquidators, in his evidence that they did not know and could not have known at the time of the nature and magnitude of Mr Ting's fraudulent conduct in respect of which they now seek to claim. That, in turn, led him to focus unduly on the credibility of Mr Borrelli in his evidence as to his precise state of knowledge and belief about such matters at the time.

42. The outcome of the appeal on construction does not turn on what Mr Borelli and the Liquidators actually knew or believed at the material time, or on the credibility of Mr Borelli's testimony on that subject, which the Chief Justice accepted. It turns on a search for an objective intention or contemplation of the Liquidators and Mr Ting as to what they thought, or should reasonably have thought, they were or might be giving up when entering into the Settlement Agreement. More particularly, It turns on what, in the context of the events leading to that agreement, experienced, competent and attentive liquidators knew or should reasonably have known or suspected, and on what any one in Mr Ting's position, with his commercial knowledge, experience and manner of involvement in the affairs of Akai before and after its collapse, would realistically have understood them have in mind when subscribing to the Settlement Agreement. Accordingly, it would, in my view, be wrong for the Court to feel constrained by the Judge's acceptance of Mr Borelli's credibility as a witness, in reaching its own view on the evidence as to whether the Liquidators and Mr Ting were ad idem as to what they and he were respectively giving up when they entered into the Settlement Agreement.

43. In my view, the summary of facts and allegations by the Liquidators against Mr Ting in paragraphs 9 to 16 of this judgment, drawn from their own evidence of their knowledge at the material times, would or should have alerted all but the most inexperienced, incompetent and naive liquidators practising at this commercial level that there was a real likelihood that he had been concerned in the fraudulent trading of Akai to his own great advantage. They knew: 1) of the disappearance of nearly US$2 Billion of the gross assets of Akai within a year or so while under the control and management of Mr Ting, leaving it with an estimated net deficiency of over US$1 Billion; 2) of his alienation of control and assets of the company in its dying days; 3) of the absence of any assets at all other than the potential value of its Hong Kong Stock Exchange listing; 4) of the disappearance of most of its books and records, for which he had failed to account in the liquidation; 5) of his disappearance for months during the liquidation; and 7) of his obstruction and delay of it thereafter – all culminating

in his vigorous attempt to undermine the Scheme of Arrangement, so as to prevent the continuation of the liquidation and possible recovery of company assets.

44. The fact that the Liquidators might not have had enough information at that stage of the precise nature of the fraud or frauds of the magnitude now claimed is, in my view, immaterial to the issue of the state of mind of liquidators in their position, considering the implications of what they were giving up in entering into the Settlement Agreement. It is commonplace for auditors acting in the chaos of corporate collapse involving disappearance of company assets and records to have to – and to expect to have to - grapple with the sheer unknown as to who, if anyone, is culpably responsible and how, and whether pursuit of them would be in the interest of the shareholders and creditors.

45. Mr Kosmin in his submissions, as had Mr Borelli in his more recent affidavit and oral evidence, drew back from applying words to the conduct of which the Liquidators complained in the Scheme Proceedings, such as "dishonesty" or "fraud" or "theft" or "defalcation" or "dishonest misappropriation". They tended to equate the conduct to some lesser form of breach of fiduciary duty or other lesser form of dishonesty than discrete allegations of fraud or theft. In my view, given what the Liquidators knew of Mr Ting's behaviour - whatever Mr Borrelli said in the witness box and however credible he may have been as to his own assessment of the nature and seriousness of Mr Ting's behaviour - any reasonable, experienced and competent body of Liquidators, acting at the time of the Settlement Agreement with the benefit of legal advice, would have known or at least contemplated or suspected that what had been revealed thus far was merely the tip of an ice-berg. The dilemma for them was that, but for the imminent threat to the Scheme of Arrangement engineered by Mr Ting, much – much – more would be discoverable if only they could continue with the liquidation. As Mr Borrelli agreed in his evidence, in cross-examination before the Chief Justice, it was "Hang Ten or nothing".

46. I, therefore, respectfully disagree with the Chief Justice's conclusion in paragraph 34 of his judgment, seemingly based largely on his acceptance of Mr Borrelli's assertions in evidence that the Liquidators had no evidence of acts of theft or of the character or scale of the dishonesty alleged in the Hong Kong Proceedings. In doing so, I do not seek to go behind his acceptance of the credibility of Mr Borrelli. Rather, it is my view that he allowed that aspect to dominate his approach instead of giving proper weight to: 1) the context in which the parties entered into the Settlement Agreement and the powerful evidence before him of what the Liquidators knew of Mr Ting, of what he had done and of what he was probably capable. Can it be said that experienced, competent and attentive liquidators in their position, in the Chief Justice's words in paragraph 40 of his judgment, "would not "at least have had some inkling of the true extent of what they were giving up" or, in Lord Bingham's terminology, not have been "alerted" to potential claims of fraud of the type and magnitude now made? See Lord Bingham's observations when applying his cautionary principle to the exceptional facts of *BCCI* when contrasted with those here:

> "19. What then of the claim for stigma damages which lies at the heart of this appeal? ... it seems unlikely that those negotiating with the employees were alert to these facts, very carefully concealed from the world. ... Neither the bank, even when fixed with such knowledge, nor Mr Naeem could realistically have supposed that such a claim lay within the realm of practical

> possibility. On a fair construction of this document I cannot conclude that the parties intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. If the parties had sought to achieve so extravagant a result they should in my opinion have used language which left no room for doubt and which might at least have alerted Mr Naeem to the true effect of what (on that hypothesis) he was agreeing."

47. But perhaps the most telling point against the Liquidators' case on this issue is the lack of certainty in application that it would bring to the construction of the exclusion clauses – where to draw the line. As I have indicated, Mr Jones placed considerable emphasis on this in his submissions. Mr Kosmin too had difficulty with it, as his various formulations in argument as to the line showed. Finally, in response to the question from the Court, "What was in the mutual contemplation of the parties as to what unknown matter would fall on the wrong side of the compromise line?", he narrowed his submission to the proposition that "in this case there is nothing to suggest that the theft of hundreds of millions of dollars by Mr Ting was within the reasonable contemplation of the parties". As Mr Jones noted, this difficulty in the Liquidators' case caused the Chief Justice considerable problems when faced with the task of formulating declarations to give effect to his ruling on construction in paragraphs 34 of and 40 his judgment (see paragraphs 29 and 31 above). To illustrate the point, I deal next with Issue 6 – the form of the Declarations.

Issue 6 **– The form of the Declaration**

48. By their counterclaim, the Liquidators sought relief in the form of a number of declarations, two in the following terms:

> "... that the claims the subject of the Hong Kong proceedings, and any other claims founded upon the breaches by Mr Ting of his fiduciary or statutory duties to Akai, are not subject to clauses 3 or 9 of the Settlement Agreement."
>
> "Further, or in the alternative, ... that Mr Ting is not entitled to rely upon the Settlement Agreement to restrain Akai from pursuing against him the claims the subject of the Hong Kong Proceedings, and any other claims found[ed] upon the breaches or fraudulent breaches by Mr Ting of his fiduciary or statutory duties to Akai."

49. The Chief Justice, when he reached the end of his judgment, was clearly uneasy about the the width of the relief sought in that form. He granted both declarations in the form sought, but subject to hearing further argument as to their breadth. This is how, in paragraph 76 of his judgement, he expressed his unease:

> "It may be that I will need to hear further argument on the exact form of the declarations. In particular the phrase 'any other claim founded upon breaches by Mr Ting of his fiduciary or statutory duties to Akai' may be too wide, and may need narrowing so that it only applies to other defalcations of a similar nature to those

alleged in the Hong Kong proceedings which were undisclosed to the Liquidators at the time of the Settlement Agreement."

50. Following further, written argument on the point and before formulating the Declarations he had decided to grant, he gave a short ruling in which he took a different course. It included the following passages:

> "6. ... I do not accept ... [Mr Ting's] contention that the declarations should be limited to breaches of duty similar to those alleged in the Hong Kong proceedings, being breaches involving the dishonest misappropriation of Akai's assets. I appreciate that I used that form of wording in my judgment [see paragraph 32 above], but it was in order to distinguish such claims from what the Liquidators admitted that they knew. I do not think it necessary or appropriate to limit the declarations in that way, the point being met by the inclusion of 'unknown'.
>
> 7. Nor do I think that the declarations should be limited by reference to specified transactions said or admitted to be known to the Liquidators at the time of the Settlement Agreement. Again, I appreciate that I initiated that suggestion, but on consideration I think that the better approach is to make a general statement of principle, and then leave the determination of what is caught by it to a case by case consideration of whatever other proceedings, if any, are brought in respect of such matters."

51. That reasoning, and perhaps a realisation of the complications of leaving too much for determination on a claim by claim basis of what the Liquidators knew at the time of the Settlement Agreement, led him to grant the following declarations, in very much wider terms than those heralded by his reasoning in paragraphs 27, 34 and 40 of his judgment and his inclination expressed in paragraph 76 of it (see paragraphs 27, 28, 31 and 32 above):

> "(i) The claims that are the subject of the Hong Kong Proceedings, and any other claims founded upon breach of his fiduciary or statutory duties which were undisclosed and unknown to Akai and its Liquidators at the time of the Settlement Agreement, are not subject to clauses 3 or of the Settlement Agreement...."
>
> (iii) Mr Ting is not entitled to rely upon the Settlement Agreement to restrain Akai from pursuing against him the claims the subject of the Hong Kong Proceedings, and any other claims founded upon breaches by Mr Ting of his fiduciary or statutory duties to Akai which were undisclosed and unknown to Akai and its Liquidators at the time of the Settlement Agreement."

52. This wider form of exclusion than that for which Mr Kosmin had contended before the Chief Justice, or indeed before this Court, on the issue of construction (see paras 39 (iii) and 48 above), emboldened the Liquidators in their Notice to vary and him to maintain that, since it obliged Mr Ting to make disclosure of any and all breaches of his fiduciary duty of disclosure to Akai, and he had made none before the Settlement Agreement, this Court should set aside that Agreement in its entirety insofar as it related to him. Alternatively, he maintained, the Chief Justice should have framed his Declarations in such a way

as to set aside the Agreement to the extent that he had not, in breach of his fiduciary duty of disclosure to Akai, disclosed any such breach of duty underlying a claim, relying on a tenet of public policy articulated by Lord Millett and Walker in *In re Pantmaenog Timber Co Ltd* [2004] AC 158, at paras 64 and 77 respectively.

53. I agree with Mr Kosmin, as did Mr Jones in his submissions but for different reasons, that the Chief Justice should not have granted what was, in effect, partial rescission of the Settlement Agreement insofar as it applied to Mr Ting. Such an outcome, requiring determination on a claim by claim basis, whether it applied to him, would be the antithesis of what is required in a settlement or compromise agreement – certainty. In addition, and quite apart from considerations on Issue 2 on this aspect - permissibility in the circumstances of partial rescission (see paragraphs 55 - 68 below) – to limit the application of the exclusion clauses still further, as Mr Kosmin has suggested, to matters that were specifically disclosed by Mr Ting whether or not otherwise known to the Liquidators, goes beyond the Chief Justice's reasoning on the issues of construction, disclosure and unconscionability in his respective rulings against Mr Ting in paragraphs 37 – 40, 50 – 51 and 54 -56 of his judgment. All of them appear to turn essentially on the Liquidators' lack of knowledge at the time of the Settlement Agreement of the defalcations the Liquidators now allege against Mr Ting.

54. As it was, Mr Kosmin complained, the Declarations, if allowed to stand, would still engender a need for determination by way of preliminary issue in every individual claim of the Liquidators against Mr Ting as to the state of their knowledge of such matters at time of entering into the Settlement Agreement - the very thing, he had submitted, on the issue of construction, was insufficiently specific for such an exclusion clause involving unknown and undisclosed frauds or lesser forms of breach of fiduciary duty. If I am right, and for the reasons I have given on the issue of construction, the Court is no longer faced with this dilemma. Certainty of construction is readily achievable by giving the words "any and all past present and future claims ... on any kind or nature whatsoever whether presently known or unknown howsoever or wheresoever" their ordinary and natural meaning - *a fortiori* in their context. Accordingly. I would reject the Liquidators' case on Issue 2 – construction, leaving it unnecessary for me to rule one way or another on the form of the declaratory relief sought in their Notice to Vary.

Issue 2 – Breach of duty of disclosure.

55. The issue is whether the Settlement Agreement was voidable by the Liquidators for non-disclosure by Mr Ting of the wrong-doing alleged against him in the Hong Kong Proceedings to the extent that it would otherwise have covered such undisclosed and unknown wrong-doing. The Chief Justice, after considering such authority as there was on that issue, including a Canadian authority and a first instance English authority against Mr Kosmin's submission, expressed the view, at paragraph 45 of his judgment, that the point remained "a vexed one". However, he said that the general approach indicated by Arden LJ in the English Court of Appeal in *Item Software (UK) Ltd v Faasihi 2005] ICR 450, CA*, at paras 63 – 66, with which Mummery LJ and Holman J agreed - not a case compromise or fraud - accorded with the modern view of commercial morality, and that he could see no reason why contracts of compromise should enjoy any particular immunity from it. He went on to hold, in paragraphs 46 and 51of his judgment, that the Settlement Agreement did not do so here:

> "46. Applying that reasoning to the facts of this case, I think that had Mr Ting misappropriated funds, he obviously had no basis on which to conclude that it was not in Akai's interest to know of it, and he should have told the company at the time what he was doing. There is no evidence that he did so."
>
> "51. ... in my judgment, ... Akai and the Liquidators are entitled to avoid the Settlement Agreement insofar, and only insofar, as it would otherwise apply to any such undisclosed wrong-doing. I think that expressing it in that way gives effect to the intention of the parties as to partial invalidity as expressed in ... the Settlement Agreement itself and avoids any argument as to the need for *restituo in integrum*."

56. Mr Jones prefaced his submissions on this issue by referring to: 1) the powerful public interest in favour of final resolution of disputes; 2) the application to compromise agreements of general contractual principles; and 3) the context of uncertainty and give-and-take in hostile negotiations the purpose of which is to bring finality to any resultant compromise. He submitted that there is no duty on a company director when negotiating, in a context such as this - a compromise agreement with his company to disclose potential and as yet unproved claims against him for fraud - and no reported authority in Bermuda, Hong Kong or England to the contrary. As to the fundamental duty of loyalty of a director to his company referred to by Arden LJ in *Item Software,* it provided no basis for the Chief Justice's decision that there was such a duty here, especially in the light of her having, at paragraph 44, left the point open and expressed the view that there should be no such duty "where that would be contrary to the expectations of the parties".

57. In summary, Mr Jones's submission was that Mr Ting did not negotiate the Settlement Agreement as a fiduciary and had no duty to disclose conduct unknown to and, as yet unproved by, the Liquidators in an agreement providing for such uncertainty in the widest terms for unknown claims.

58. Mr Kosmin initially presented the Liquidators' case on this issue as their second alternative to their case on construction – their "second port of call" if they failed on construction and unconscionability. In response to questions from the Court, he acknowledged that there was an element of duplication in the argument, if, on a proper construction of the Settlement Agreement, there was an objective understanding of the parties that it covered past fraud or possible past fraud of Mr Ting unknown to the Liquidators at the time of entering into it, whether or not disclosed by him.

59. Mr Kosmin submitted that: 1) Mr Ting owed a duty to disclose to the Liquidators any breaches by him of his fiduciary duty to Akai, including fraud, prior to and when negotiating the Settlement Agreement; and 2) his failure to disclose such breaches entitled the Liquidators to avoid the Agreement as against him, at least in respect of the undisclosed breaches. He took as his starting-point the ruling in *Item Software*, that a director of a company, as part of his fundamental duty of loyalty to the company to act in its best interests, must disclose to it any breach of that duty. He maintained that such a duty remains even when a director negotiates on his own behalf a compromise of a matter in which their interests are at odds.

60. Mr Kosmin submitted, therefore, that the Chief Justice correctly applied the *Item Software* principle to the facts of this case. He suggested that its application was consistent with the approach of the courts in a large number of authorities dealing with a variety of relationships and circumstances in which the courts have found an obligation on the part of a director to disclose his breach of duty to his company. He contrasted with the fundamental duty of a director to act in the interests of his company: 1) the allegations of fraud now made against Mr Ting in the Hong Kong Proceedings; 2) his refusal to cooperate with the Liquidators; 3) his negotiation of the release when, as he knew, the Liquidators were hampered in their investigation for want of information and were only aware of potential claims of a different kind from those now pursued; and 4) his failure to put them on notice of what they were about to give up by proposing exclusion from the Settlement Agreement of any frauds undisclosed by him.

61. In my view, the critical time at which to consider any duty of disclosure is in the two or three days towards the end of December 2002 when Mr Ting and the Liquidators were negotiating the Settlement Agreement, not any earlier such duty relating to earlier parts of the story. The first three of the four matters relied upon by Mr Kosmin - his alleged thefts from Akai, failure to cooperate with the Liquidators and forgery of the proxies for the Scheme Meeting - preceded and gave rise to the settlement negotiations. As Mr Jones put it in argument, they are all part of the background facts providing the context of the Settlement Agreement. In those negotiations, Mr Ting was plainly not negotiating with them as a fiduciary, as they well understood. Any duty of disclosure of which he could be in breach could not have arisen if my construction of the Agreement stands, namely that the objective intention – the mutual contemplation – of the parties was that, in exchange for Mr Ting withdrawing his objection to the Scheme of Arrangement, the Liquidators would give up unknown claims against him for fraudulent dealing and misappropriation of Akai's assets of whatever nature and of whatever magnitude. In such an end-game, the words in clause 3 of the Settlement Agreement, "any and all past present and future claims ... of any kind or nature whatsoever whether presently known or unknown howsoever or wheresoever", cannot or should not reasonably have been understood by the parties as leaving the Liquidators free to ignore that undertaking on later discovering undisclosed causes of action.

62. In my view, if, parties enter into a compromise agreement under which A, as a matter of construction, *effectively* releases B from potential "any and all claims of any kind or nature whatsoever" unknown to A in exchange for valuable consideration from B, there is no legal room for A to avoid that contract by claiming a breach by B of a duty of disclosure as to any such claim.

63. If I am right in my view on the issue of construction, that is the position here. The Liquidators claim to avoid the Settlement Agreement has no life of its own. It falls away if they win on the construction point because, in Arden LJ's words in *Item Software*, "the law should not impose a duty of disclosure where that would be contrary to the expectations of the parties". It becomes otiose if Mr Ting loses on the construction point. Accordingly, if it had been necessary to rule on this issue, I would, for the reasons I have given, have ruled against the Liquidators.

64. Before leaving the issue of disclosure, I should mention that the Chief Justice also considered and ruled against Mr Ting on three further matters raised by Mr Ting as militating against his having had any duty of disclosure at the material

time or for its avoidability on that account. They were that: 1) he had no such duty in any event because he had resigned as a director shortly after the winding-up orders, or: 2) if he was still a director at the time, the Liquidators could not show that any disclosure by him would have prevented them from entering into the Agreement; and 3) the Chief Justice was not entitled to provide as a remedy for any such breach "partial" *restitutio in integrum.* I do not dwell long on any of these issues, since, if the first two had arisen for decision, I would have seen no basis for disturbing the Chief Justice's findings on them, and the third would not have arisen.

65. As to the first of those additional issues, the Chief Justice found as a fact that Mr Ting had not resigned, as he had claimed, before the winding-up orders - a finding, that may have been wrong in law, having regard to somewhat technical provisions in Akai's Bye-Laws. However, he added that, even if, as a matter of law, it had been open to Mr Ting to resign after the winding-up order, it would have been a meaningless act since, if a director had come under a duty to disclose his wrong-doing while a director, he could not divest himself of that duty by resignation. He also suggested that under the applicable Companies Winding-up Rules, Mr Ting had a continuing duty to the Liquidators in this insolvent liquidation. That too may be of questionable application to Mr Ting's duty of disclosure, if any, to the Liquidators at the time of the Settlement Agreement, in contra-distinction to his duty of disclosure while a director for breaches of which he could not divest himself by resignation. Given my ruling on the issue of construction and my indicative ruling on the first and substantive part of this issue, I decline to rule on the fact or effect, if any, of Mr Ting's resignation, since on my approach, it cannot affect the outcome of the appeal.

66. As to the second additional issue, the Chief Justice accepted Mr Borelli's evidence that if he had had clear and unequivocal knowledge of wrong-doing by Mr Ting of the sort now alleged in the Hong Kong Proceedings, he would have recommended the Committee of Inspection not to settle with him but to seek external funding for the continuance of the liquidation and their pursuit of him. Accordingly, the Chief Justice found that full disclosure of the sort claimed by the Liquidators would have caused them not to proceed with the Settlement Agreement, even at the risk of losing the Hang Ten transfer.

67. As to the third additional issue, I refer again to the Chief Justice's difficulties in formulating declaratory relief to give effect to his construction of the Settlement Agreement (see paragraphs 48 – 54 above). At paragraph 51 of his judgment he ruled that Akai and the Liquidators were entitled to avoid the Settlement Agreement "insofar, and only insofar, as it would otherwise apply to any such undisclosed wrongdoing". His explanation for that was, in part, that he considered it would avoid any argument as to the need for *restituo in integrum.* That qualification and explanation engendered much debate and citation of authorities by Mr Jones and Mr Kosmin on the appeal as to whether the law permitted him to order anything less than total rescission. Mr Jones maintained that, even if Mr Ting lost on the disclosure issue, *restitutio in integrum* was an all-or-nothing remedy and it was too late to order it because the Liquidators could no longer make it, in particular withdrawal of Blossom and Costner's objection to the Scheme of Arrangement, and third party rights having intervened. Mr Kosmin, on the other hand, maintained that it had been open to the Chief Justice to order partial restitution since there is ample authority to indicate that the doctrine is not always applied with full vigour as a matter of equity. He added, that, in any event, the whole of the Settlement Agreement

falls to be set aside because there is nothing to return to Mr Ting or to Blossom or Costner who, in joining him as parties to the Settlement Agreement, were simply acting as his creatures.

68. Given my conclusions on the issues of construction, disclosure and unconscionability, I see no need to indicate a view on this potentially academic sub-issue. If it subsequently requires re-visiting, that will be the time to deal with it.

Issue 3 -Sharp practice or unconscionability

69. The Chief Justice held that Mr Ting could not enforce the Settlement Agreement because of sharp or unconscionable practice by him in negotiating it. In doing so, he relied upon passages from the speech of Lord Hoffmann in *BCCI,* at paragraphs 69 – 71, echoing similar propositions of Sir Richard Scott VC and Chadwick LJ in the Court of Appeal [2000] ICR 1421, at paras 32 - 33 and 80 - 81 respectively. He was the only Law Lord to venture any firm exposition of a doctrine of "sharp practice" or "unconscionability". He did so in the context of a general release, seemingly, in the following passages, limiting it to such a form of transaction. Following a reference to the House of Lords' rejection in *Bell v Lever Bros Ltd* [1932] AC 161 of the employment relationship as a contract *uberrimae fidei,* he continued:

> "69.... it was not a case which concerned a general release. A transaction in which one party agrees in general terms to release another from any claims upon him has special features. It is not difficult to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which he actually knows and which he also realizes may not be known to the other party. ...
>
> 70. In principle, I agree ... that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them I can see nothing unfair in such a transaction.
>
> 71. It follows that in my opinion the principle that a party to a general release cannot take advantage ... of what would ordinarily be regarded as sharp practice ... is sufficient to deal with any unfairness which may be caused by such releases. There is no need to try to fill a gap by giving them an artificial construction."

70. The Chief Justice took the view that in those words Lord Hoffmann had effectively established a new principle of law or equity, separate and distinct from that of breach of duty of disclosure, for avoiding or rendering contracts unenforceable, and that it extended to contracts of compromise as well as of general release. He expressed that view at paragraphs 55 and 56 his judgment:

> "55. [Counsel for Mr Ting] argues that ... [the doctrine of unconscionability] was only intended to apply to releases and not to contracts of compromise, but I do not see that there is a material distinction in this respect between the two, or that one is envisaged by the language used by Lord Hoffmann. I consider, therefore, that there is such a principle and that it was correctly enunciated by Lord Hoffmann. I have no difficulty applying it to the facts of this case. I consider those facts to be that there is a good arguable case that Mr Ting stole substantial sums from the company. If that were so, then he suppressed that when bargaining for his release, and that would amount to sharp practice. I have to express it in that conditional way because of the as yet uncertain outcome of the Hong Kong proceedings. I do not think that that detracts from the principle. He cannot now take advantage of the Settlement Agreement to avoid the litigation of the good arguable case against him.
>
> "56. I should add, for the sake of completeness of this head, that Mr Ting must also have realized that the Liquidators did not know about these matters at the time of the Settlement Agreement. That is not only because of the inadequacy of the statement of affairs and his own total of [sic] lack of any meaningful cooperation, but because Mr Borelli had set out the extent of the Liquidators' knowledge in his affidavit ... sworn in the Scheme Proceedings, and while listing various matters, including the Micromain transaction, ... it makes no mention of the subject matter of the Hong Kong proceedings or of any similar matters of outright theft by Mr Ting."

71. Mr Jones, adopting detailed submissions in the skeleton argument of Mr Craig Orr QC prepared for the appeal, submitted that:

i) the doctrine as expounded by Lord Hoffmann is limited to general releases, which do not include contracts of compromise of a dispute, as here;

ii) alternatively, the Court should not adopt Lord Hoffmann's observations as a principle of law or equity because the other Law Lords, Lords Bingham, Browne-Wilkinson and Clyde were silent on the point, Lord Nicholls, while acknowledging the existence of some remedy for "sharp practice" left open what form it might take, and it has been the subject of academic criticism;

iii) the Bermuda Court is not, in any event, bound by Lord Hoffmann's observations, any more than is the English Court of Appeal;

iv) the doctrine in this context of compromise would amount to a duty of disclosure, contrary to a long line of authority that contracts of compromise are not contracts *uberrimae fidei;*

v) it would not be in the interests of finality in an area of compromise, often achieved with difficulty in circumstances of acrimony where the relationship between the parties is bad or completely broken down;

vi) all the judges who have reportedly considered the doctrine, have confined its application to the class of release in which one party knows that the other is ignorant of a potential claim, an application not available to the Liquidators here as an alternative to their case on construction if unsuccessful;

vii) a possibility that Mr Ting was concealing from the Liquidators claims of the sort now made in the Hong Kong Proceedings was "built into" the Settlement Agreement, as was his uncertainty about how much they knew (see paragraph 46 and 13 above); and

viii) application of the doctrine to this case would, in any event, be premature since the wrongdoing claimed against Mr Ting has yet to be proved.

72. In summary, Mr Jones submitted that the Settlement Agreement was not the sort of bargain to which a doctrine of "sharp practice" or "unconscionability" applied, and that, in any event, on a proper construction of it, the Liquidators knew or should have known they might be giving up claims of the sort and size now made in the Hong Kong Proceedings.

73. Mr Kosmin placed great weight on what he saw as the generality of application of the doctrine as expressed, not only by Lord Hoffmann in *BCCI*, but also in passages to which he referred from the judgments of Sir Richard Scott VC and Chadwick LJ in the Court below. He urged the correctness of the Chief Justice's application of it to the facts of this case on the basis that it would be unconscionable to allow a releasee to take advantage of a releaser's ignorance of his true rights. He added that, whether it is described as a duty of disclosure arising in the context of a general release or a covenant not to sue, or a finding that it would be unconscionable for the non-disclosing party to rely on a general release procured in circumstances of non-disclosure, the effect is the same.

74. Beyond such general propositions, Mr Kosmin did not go. He did not consider them in the context of a ruling against the Liquidators on the construction of the contract, to which this argument was advanced as an alternative, or the implications for this alternative of such a finding - one of a common understanding between the parties that clause 3 of the Settlement Agreement would exclude claims of the sort and size in the Hong Kong Proceedings arising out of matters whether or not known to the Liquidators at the time of the Settlement Agreement. His submission was little more than a summarised re-run of his argument on breach of duty of disclosure, and it suffers, quite apart from a number of the arguments advanced by Jones, from the same basic defect. The answer to it is inextricably bound up in the determination of the proper construction of the contract and that the fact that Mr Ting was possibly concealing from them such grounds for claims against him was built into the Agreement.

Issue 4 - Unclean hands

75. The Liquidators maintain that, if they fail on all other grounds, they should at least be able to rely on the equitable maxim that he who comes to equity must come with clean hands to stave off any injunctive relief to enforce the Settlement Agreement in the Hong Kong Proceedings. The Chief Justice, when faced with that point, doubted – rightly in my view - whether it added anything to their

argument on unconscionability. As he had found in favour of them on the issue of construction and - subject to the correctness of the partial declaratory relief granted - possibly contingently on breach of duty of disclosure and unconscionability, it was not necessary for him to decide the issue. However, at paragraph 69 of his judgment, he stated that, had it been necessary, he would, in the exercise of his discretion, have had no hesitation in refusing injunctive relief:

> "... equity should not assist a person in the circumstances of Mr Ting by enforcing a contract such as the Settlement Agreement in order to prevent the proper trial of a good arguable case of fraud and dishonesty which, if true, he would have concealed. I also think that Mr Ting's conduct in procuring the forgery of his signature and the subsequent generation of false evidence to support the forgery, would also amount to a lack of clean hands within the strict meaning of that expression, those acts being sufficiently connected with the events leading up to the Settlement Agreement. ..."

76. Mr Jones' response to this indicative ruling was that it was wrong in principle and that this Court should accordingly exercise its discretion to grant the injunctive and declaratory relief sought in these proceedings. The Chief Justice, he submitted, erred in failing to recognise that a finding that Mr Ting had come to his court with unclean hands could not stand as an alternative to a potential finding that the Settlement Agreement, on its proper construction, is valid and enforceable. He should not, therefore, have relied for the purpose on his view of the alleged fraudulent and obstructive conduct of Mr Ting, including the forgery, preceding the Settlement Agreement, all such conduct itself the subject matter of the compromise reached in it.

77. Mr Kosmin, in response, focused on the conduct of Mr Ting in the proceedings before the Chief Justice, in particular his adherence to his earlier denial of forgery. The fact that such conduct preceded the Settlement Agreement was, he maintained, nothing to the point, since Mr Ting had relied before him upon the same forgeries. Mr Kosmin also relied upon, the falsity of evidence tendered on Mr Ting's behalf in the Bermuda Scheme Proceedings and his non-disclosure of the transactions subsequently found in the BT Ledger Account (see paragraph 22 above).

78. The issue of unclean hands, as of non-disclosure and unconscionability, is bound up with the very subject matter of clause 3 of the Settlement Agreement, if the facts relied upon in support of it are covered by the Agreement. See e.g. *Radhakreshnan v Universty of Calgary Faculty Association* [2002] ABCA 182, per Cote J at para 47. The effect of the compromise, if valid and applicable to the claims in the Hong Kong Proceedings is to wipe the slate clean, to borrow the words of Lord Nicholls in *BCCI*, at para 23.

79. In my view, and if my construction of the Settlement Agreement is correct, there is no basis on which I could properly conclude, in relation to these proceedings and to the enforcement of that Agreement, that Mr Ting has come to the court with unclean hands, whatever else might be said about other earlier alleged conduct of his proved or unproved, known or unknown at the time – certainly not such as to lead me in the exercise of my discretion, to prevent him from enforcing it.

Issue 5 – Section 98(2) of the Bermuda Companies Act 1981

80. Finally, there is the second question raised by the Liquidators in their Notice to Vary. It is whether they can, as a further alternative, rely upon section 98(2) of the Bermuda Companies Act 1981, which renders void, inter alia, any contract between a company and an officer of the company exempting the officer from liability for fraud or dishonesty in relation to it. The provision reads as follows:

> "(2) Any provision, whether contained in the bye-laws of a company or in any contract or arrangement between the company and any officer ... exempting such officer ... from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company, shall be void. Provided that-
>
> (a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and
>
> (b) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such officer ... against any liability incurred by him in defending any proceedings, whether civil or criminal in which judgment is given in his favour or in which he is acquitted or when relief is granted to him by the Court under section 281."

81. The Chief Justice held, at paragraph 72 of his judgment, that, although the wording of the provision is very wide, it did not apply to a compromise or release from any such liability. He held, in the absence of any cited authority to the contrary, that is applies to prospective arrangements, whether in company bye-laws or in a contract of employment, but not to those made after the event to which they related. He said:

> "I think this flows from the use of the expression 'which ... would otherwise attach'. In a case such as the present, assuming for the moment that ... [the Liquidators] have a good case in the Hong Kong proceedings, the liability for any wrongdoing had already attached at the time of the Settlement Agreement: it attached at the time of the wrongdoing. I think, therefore, that the prohibition is on giving directors immunity for anything they may do in the future, not on compromising past wrongdoing."

82. Mr Kosmin submitted, in an argument premised on the Liquidators having entered into a void settlement agreement on this account, that section 98(2) must, on the plain and natural meaning of its wording, apply to an agreement, whether with prospective or retrospective effect, since the provision contains no limitation as to timing. A construction giving it only prospective effect, he submitted, would allow Mr Ting to benefit from his own sharp practice, which would run contrary to the spirit as well as the letter of the provision.

83. Mr Kosmin sought to draw strength for that submission from Canadian and Australian authorities in different terms and from a commentary in *Gore-Brown*

on Companies (45th Ed), at paragraph 17(5), on the similar, though broader provision in section 232 of the United Kingdom Companies Act. The Canadian authority to which he referred, *Tongue v Vencap Equities Alberta Ltd* (1994) 17 Alta LR (3d) 103, at 139 and, on appeal, (1996) 39 Alta LR (3d) 29, at paras 26 to 29, and the Australian authority, *Eastland Technology Australia Pty v Whisson* (2005) 223 ALR 123, at paras 38 and 39, concerned very different provisions, *Eastland*, in any event, supports in large measure the Chief Justice's construction of the provision that the thrust of such provisions is prospective rather than retrospective. Such a construction seems to be of a piece with the general approach in England of commentators, practitioners and reform bodies concerned with corresponding, though immaterially broader, provisions in UK companies legislation over the years. Any other approach would deny a company or its liquidators of the opportunity, when circumstances commercially dictate, to act in its best interests by compromising disputes with directors or other officers whom they know or suspect have been fraudulent in their conduct of its affairs.

84. All that Mr Kosmin was able to extract from the authorities turned out to be a re-hash of his arguments on disclosure, unconscionability and unclean hands, and a disregard of their unavailability as alternatives to the Liquidators' case on construction if it went against them. As the Chief Justice aptly put it, Mr Ting's section 98(2) liability had already attached to him at the time of his wrong-doing, and section 98(2) did not click again on the parties entering into a compromise agreement with those acting for Akai, on its terms and in its context, releasing him from that liability. The commentary in *Gore-Brown*, on which Mr Kosmin relied, turns in part on the same point, knowledge or no knowledge of a company of any fraud or dishonesty on the part of the officer to whom it provides or purports to provide an indemnity.

85. Accordingly, I would also dismiss this application in the Liquidators' Notice to Vary.

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86. In result, I would:

i) allow Mr Ting's appeal on the issue of construction so as to hold that the Settlement Agreement bars the claims in the Hong Kong Proceedings and, in accordance with its terms, any other claims that the Liquidators might seek to make against him, including in respect of any alleged fraudulent or other dishonest conduct, of whatever nature or seriousness, by him arising out of or in connection with Akai and/or Kong Wah and/or their respective Liquidators and whether or not known by or disclosed to them at the time of the Settlement Agreement.

ii) in the exercise of the Court's discretion, issue grant declaratory relief to restrain the continuance of the Hong Kong Proceedings as against Mr Ting, in terms to be settled after hearing representations from the parties; and

iii) make no order on the first application of the Liquidators in their Notice to Vary, and dismiss the second application in that Notice.

Signed

Auld, JA

Zacca, JA

I have had the advantage of reading in draft the judgment of Auld JA and I agree with his decision and reasons.

Signed

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Zacca, JA

Ward, JA

I have had the advantage of reading in draft the Judgment of Auld JA and I agree with the statement of the law in paragraph 35 and its application to the facts of this case. The words of the Settlement Agreement in paragraphs 3 and 9 should be given their plain ordinary meaning without any gloss.
I should like to add a few words on the topic of the grant of injunctive relief.

In his judgment of 5th December 2007 at paragraph 69 on the subject of unclean hands, the Chief Justice stated:

> "If it had been necessary for me to decide the case on this point, I would in the exercise of my discretion have had not the slightest hesitation or difficulty in saying that equity should not assist a person in the circumstances of Mr. Ting by enforcing a contract such as the Settlement Agreement in order to prevent the proper trial of a good arguable case of fraud and dishonesty which, if true, he would have concealed. I also think that Mr. Ting's conduct in procuring the forgery of his signature, and the subsequent generation of false evidence to support the forgery, would also amount to a lack of clean hands within the strict meaning of that expression, those acts being sufficiently connected with the events leading up to the Settlement Agreement. I would, therefore, on either or both of those grounds have refused to enforce the Settlement Agreement by injunction in any event."

There is a prima facie case that the conduct of Mr. Ting in the collapse and subsequent winding-up of Akai Holdings Limited militated against the grant of injunctive relief.

Apart from the forgery of his signature on the authorizations given to his solicitors Messrs. Ng and Lie with the intention of frustrating the implementation of the Scheme of Arrangement by authorising Blossom and Costner to vote

against the Scheme at a Special General Meeting convened in late November 2002, as a director, former Chairman and Chief Executive Officer of Akai he had refused to render any assistance in the orderly winding-up of the company. He gave no explanation, as a director to the liquidators, of the disappearance of over US $2 billion in gross assets within twelve months, nor any explanation for the estimated net asset deficiency in early 2000 of over US $1 billion. The missing books and records relating to 3 years prior to the collapse of the company were unaccounted for. He refused to attend meetings of Akai's creditors and adopted a "strategy of obstruction, obfuscation and delay." In the end he placed himself out of the reach of the Liquidators by relocating to China.

I understand very well the reasoning of the Chief Justice that a Court of Equity should not be seen to be assisting a litigant who behaves in such a manner. His conduct was reprehensible.

On the other hand it may be said that these were the very things which the Settlement Agreement sought to address and it is not for the Court to tell litigants the type of agreements they should make.

There are two separate concepts here. Conduct vis-à-vis the Liquidators and conduct vis-à-vis the Court. The Settlement Agreement addresses the former but not the latter. And it is the conduct vis-à-vis the Court that gives rise to the unclean hands principle. The Liquidators may be said to have agreed to wipe the slate clean, the Court did not.

For my part I do not think that the Chief Justice exercised his discretion improperly and apart from giving the correct construction to the clauses 3 and 9 of the Settlement Agreement I would make no further order.

Signed

Ward, JA