IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2006 No. 312

BETWEEN:

MR. JAMES HENRY TING
1st Plaintiff

BLOSSOM ASSETS LIMITED
2nd Plaintiff

COSTNER HOLDINGS LIMITED
3rd Plaintiff

- and -

COSIMO BORRELLI AS LIQUIDATOR OF AKAI HOLDINGS LIMITED
1st Defendant

NICHOLAS TIMOTHY CORNFORTH AS LIQUIDATOR OF AKAI HOLDINGS LIMITED
2nd Defendant

R. CRAIG CHRISTENSEN AS LIQUIDATOR OF AKAI HOLDINGS LIMITED
3rd Defendant

AKAI HOLDINGS LIMITED (IN COMPULSORY LIQUIDATION)
4th Defendant

Date of hearing: 22, 23, 24, 25, 26, 29 October 2007

Date of judgment: 5 December 2007

Craig Orr QC and Mark Diel for the Plaintiffs; and
Leslie Kosmin QC and John Riihiluoma for the Defendants.

JUDGMENT

INTRODUCTION

1. By this action the plaintiffs seek a declaration that a compromise agreement between the plaintiffs and the defendants is valid and enforceable; that certain court proceedings in Hong Kong are in breach of it; and that the defendants are not entitled to make any claims or issue any proceedings again the first plaintiff ('Mr. Ting') in respect of the affairs of the fourth defendant ('Akai'). The plaintiffs also seek an injunction to restrain the defendants from pursuing further claims against Mr. Ting in relation to the affairs of Akai, and they seek damages.

2. The action arises out of the insolvent liquidation of Akai, which is a Bermuda company, although its business was conducted in Hong Kong and the Far East. Prior to its spectacular collapse the Akai group was an electronics multi-national with assets of US $2.325 Billion as at 31st January 1999. Winding-up orders were made against it in Hong Kong on 23rd August 2000, and in Bermuda on 29th September 2000. The evidence is that, at the time of the

appointment of the Liquidators, Akai was estimated to have a net asset deficiency in excess of US $1 Billion. Its demise appears to be widely regarded as the largest corporate insolvency in the history of Hong Kong.

3. Mr. Ting is a Hong Kong businessman, and was the former Chairman and Chief Executive Officer of Akai. The second and third plaintiffs (respectively 'Blossom' and 'Costner') held 5.2% of the issued share capital of Akai, and, it is common ground, were at all material times controlled by Mr. Ting. The first to third defendants ('the Liquidators') are the current Joint Liquidators of Akai[1].

THE SETTLEMENT AGREEMENT

4. The compromise on which the plaintiffs sue was entered into in Bermuda on 30th December 2002. It came about in this way. There were insufficient funds in Akai to fund its liquidation. In order to raise funds the liquidators wished to realize the value of Akai's listing on the Hong Kong Stock Exchange, something which is permissible under the rules of that Exchange. In order to achieve this a scheme of arrangement ('the Scheme') pursuant to section 99 of the Companies Act 1981 was proposed, whereby Akai's shares, and hence its listing status, would be transferred to a third party, Hang Ten Group Holdings Limited ('Hang Ten'), for various considerations. The Scheme was complex, and its details are not germane to this action, but it was designed to realize approximately HK$46.6M for Akai - HK$12M in cash and HK$34.6M from the sale of the Hang Ten shares issued to Akai. Pursuant to section 99 of the Companies Act 1981[2], the Scheme required the approval of three quarters in value of the shareholders present and voting at a meeting convened for that purpose. Accordingly a meeting was convened in Hong Kong on 25th November 2002 ('the Scheme Meeting') to approve the Scheme.

5. The Liquidators anticipated that Mr. Ting might wish to impede the Scheme in order to starve the liquidation of funds and thereby prevent further investigation of his role in Akai's collapse. They therefore applied to the Bermuda court *ex parte* in advance of the meeting, and obtained an order that they could mark the votes of Blossom and Costner as objected to, with a view to their validity being then determined at a subsequent court hearing. At that point the sole ground of objection open to the Liquidators was Mr. Ting's alleged improper motive in causing those companies to vote against the Scheme.

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[1] The first defendant, Mr. Borrelli, replaced Mr. Fan Wai Kuen on 31st May 2005.

[2] **Power to compromise with creditors and members**

99 (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

6. At the Scheme meeting Blossom and Costner were represented by two attorneys from the firm of Andrew W. Y. Ng & Co., who were appointed as proxies to vote on behalf of the companies – Mr. Ng as proxy for Blossom, and a Mr. Lie Chi Kwan for Costner. The proxies were not marked as to how the representative should vote, but at the meeting they voted against the Scheme. Had those votes been accepted and stood they would have been sufficient to defeat the Scheme, with the result that the liquidation would have run out of money and effectively come to an end. However, the Chairman of the meeting rejected those proxies as they did not comply with the authentication requirements which formed part of the voting protocols established by the Bermuda Court for the conduct of the meeting. This was because they were simply signed by Mr. Ting on behalf of the respective companies. The directions, printed on the form, specified that in the case of a company the proxy form must either be executed under its common seal (which these were not) or under the hand of "an officer or attorney duly authorized". There was nothing to authorize Mr. Ting to sign on behalf of the companies. I will return to the details later, but it is the defendants' case in these proceedings that at that point Mr. Ting (who was in Shanghai) procured the generation of false Board Resolutions bearing his forged signature, which were then delivered to Mr. Ng while the Scheme meeting was still in progress in an attempt to validate the proxies.

7. The Liquidators then applied, by summons of 2nd December 2002, to the Supreme Court of Bermuda to disallow the votes of Blossom and Costner ('the Scheme Proceedings'). That was resisted by those companies. At the same time the Liquidators were under a deadline, in that the agreement with Hang Ten provided that it could terminate the transaction if the Scheme was not approved by 31st December 2002. The evidence (which I accept) is that that date was unlikely to be extended, due to the involvement of outside investors, and that if the arrangement with Hang Teng failed the Hong Kong Stock Exchange would not permit some other buyer to be substituted, with the result that the value of Akai's listing status would be lost.

8. At that stage the Liquidators had evidence that Mr. Ting's signatures on the Board Resolutions were forged. However, in order to facilitate an early hearing of the disallowance application, they agreed that they would confine the issues to the alleged ulterior purpose. They were then, however, unable to get the matter on for hearing – the judge first assigned recused himself after an objection from Mr. Ting and his companies; the next Judge broke her arm; and the acting judge who was found to replace her was also objected to by Mr. Ting and his companies and also recused himself. The Liquidators were, therefore, faced with the situation where they could not obtain a judicial determination of the validity of the challenged votes before the expiry of the 31st December deadline. It was against that background that the parties entered into the compromise of 30th December 2002 ('the Settlement Agreement'), which is the subject of this action.

9. By the terms of the Settlement Agreement, Blossom and Costner undertook to take no further steps to prevent or hinder the sale of Akai's listing status. In return the Liquidators

covenanted not to sue or otherwise pursue any claims against Mr. Ting or either of his companies. That covenant was expressed in very wide terms. By clause 3 of the Settlement Agreement, 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 and or in connection with Akai and/or Kong Wah and/or their respective Liquidators."

The Settlement Agreement also contained, in clause 9, a provision that 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."

10. Pursuant to the Settlement Agreement Blossom and Costner withdrew their objections, and executed a consent order in the Scheme Proceedings which provided that the votes they had cast at the meeting be disallowed. As a result, the Scheme was completed and Akai received the anticipated funds.

THE HONG KONG PROCEEDINGS

11. The matter has, however, not rested there. There were proceedings between the parties in the interim, to which I will return later, when the Liquidators sought to examine Mr. Ting about the affairs of Akai. Then, on 8th December 2005, the Liquidators issued proceedings in Hong Kong (HCCL No. 42 of 2005)('the Hong Kong proceedings') against various persons and entities said to be associated with Mr. Ting, alleging that, during his time as CEO of Akai, he had used them to fraudulently divert its assets for his own use. Although not initially made a party to the Hong Kong proceedings, Mr. Ting was added by amendment on 14th March 2006. He now asserts that those proceedings are caught by and are in breach of the Settlement Agreement, and he seeks relief accordingly.

12. The claim in the Hong Kong proceedings is substantial, it being alleged that Mr. Ting misappropriated HK$407,800,000[3] from Akai. Moreover, the Liquidators indicate that it is a specimen claim, intended in part to test the enforceability of the Settlement Agreement, and that other claims are also envisaged which could total as much as much as HK $3.66 Billion[4], that being the sum they now allege Mr. Ting misappropriated from Akai. They say that this was done by the simple expedient of writing cheques to companies which he controlled, and then recording such transactions in a General Ledger Account entitled "BT Deposit" so that it appeared that the money had gone into a deposit account with Bankers Trust, when no such account existed either with that Bank or any other[5].

[3] About US $52.5M at current exchange rates.
[4] About US $471.6M
[5] See paragraphs 80 – 86 of Mr. Borrelli's first affidavit in these proceedings, where all the relevant transactions are identified.

13. The Hong Kong proceedings as presently framed concern two such transactions. It is said that on 22nd October 1997 Mr. Ting personally signed a cheque for HK $107,800,100 in favour of a company called Everwin. That company was controlled by Mr. Ting's personal secretary and assistant, a Ms. Lee. She paid the money away in two tranches to two further companies, Evora and Restex, both of which are said to be beneficially owned by Mr. Ting and under his control. It is also said that none of these companies had any commercial dealings with Akai so as to justify these transactions. This second transaction followed a similar pattern, with HK $300,000,000 being initially paid out to Everwin on a cheque signed by Mr. Ting. The funds were then disbursed, in part to Evora, and in part to purchase a property in Hong Kong in the name of a company called Ferbury, also said to be under the control of Lee and Ting. The documents in support of these various transactions are in the Vol. 8 of the Agreed Bundle and have been shown to me. It is accepted that I neither can nor should attempt to come to a concluded view about these transactions. It is enough for the purposes of these proceedings if the Liquidators have a good arguable case in respect of them, and I am quite clear that they do.

THE ISSUES

14. The Liquidators admit the fact, terms and circumstances of the Settlement Agreeement. They plead, however, that -

(i) On a true construction of the Settlement Agreement the claims in the Hong Kong Proceedings are not subject to the covenant not to sue.

(ii) The Settlement Agreement is voidable, and has been avoided, because Mr. Ting deliberately failed to disclose the defalcations which are the subject of the Hong Kong proceedings, and so was in breach of his fiduciary and statutory duties to Akai itself. They also say that the execution of the Settlement Agreement was induced by his non-disclosure, and that they did not become aware of the questioned transactions until they obtained documents from the police pursuant to orders made in May and June 2005.

(iii) Mr. Ting did not give any real or sufficient consideration for the Settlement Agreement.

(iv) The opposing votes of Blossom and Costner had been supported by a forged signature of Mr. Ting, so that their opposition to the Scheme and their opposition to the disallowance of their votes, was an abuse of process.

(v) Mr. Ting does not come with clean hands, and so should be denied any equitable relief, including the injunction he seeks.

(vi) The conduct of this action has been an abuse of process because the plaintiffs have knowingly adduced false evidence and misconducted the proceedings in various other ways. [6]

15. The defendants also counterclaim various declarations as to the inapplicability, invalidity and unenforceability of the Settlement Agreement. The plaintiffs in turn have filed a lengthy reply, in which they *inter alia* assert that the Liquidators were, at the time of the Settlement Agreement, aware of a number of "alleged questionable transactions" involving Mr. Ting; were aware that there was a warrant for his arrest; and had had access to Akai's papers and so had the means of apprising themselves of what is now alleged.

16. The primary issue in this action is, therefore, whether the ambit or enforceability of the Settlement Agreement is affected by Mr. Ting's alleged non-disclosure. But the plaintiffs also run a case that any challenge to the Settlement Agreement should have been raised in prior proceedings between the parties, and was not, with the result that the defendants have affirmed it or are now estopped or debarred from disavowing it. The defendants respond that the validity of the agreement was not a necessary issue in those proceedings; that they were unaware of the facts now alleged at that time; and that in any event public policy is against enforcing an estoppel in the circumstances alleged against Mr. Ting.

THE FACTS

17. I heard evidence from Mr. Andrew Wai Yan Ng ('Mr. Ng') for the plaintiffs, and from the first defendant ('Mr. Borrelli') for the defendants. I also heard from a handwriting expert, Dr. Strach, called by the defendants, who dealt with the alleged forgeries.

Mr. Ng

18. Mr. Ng is the proprietor of Andrew W. Y. Ng & Co., Mr. Ting's Hong Kong solicitors. He has been Mr. Ting's solicitor only since 13th October 2000, which postdates the collapse of Akai. He therefore knows nothing about the events surrounding that. Indeed, Mr. Ng appears to know very little about anything of relevance, and most of what he might know is privileged as between himself and his client, Mr. Ting. That privilege was asserted several times during his cross-examination. I draw no adverse inference from that, as that would be contrary to the pubic policy underlying legal professional privilege, but it does mean that I do not have any real evidence on many important points. In particular, I can attach little or no weight to assertions made by Mr. Ng 'on instructions', and this particularly applies to (i) paragraph 7 of his witness statement, where he puts forward Mr. Ting's assertion that he had no role in the management of Akai after 12th November 1999; (ii) paragraph 82, where he denies the alleged forgery of the Board Resolutions; and (iii) paragraph 130, where he denies the allegation of fraud made in the Hong Kong proceedings.

[6] This last was added by an amendment which I allowed during the course of the trial: see the LiveNote transcript for Friday 26th October at p. 86.

Mr. Borrelli

19. Mr. Borrelli is now one of the Joint Liquidators, having been appointed on 31st May 2005[7], but prior to his formal appointment he had had principal day to day responsibility for the conduct of the winding up of Akai since September 2001. In particular, he had been closely involved in the negotiations with Hang Teng, the arrangements for the Scheme and the negotiation of the Settlement Agreement itself. Because of that, I consider that his knowledge at any particular time of matters relevant to the conduct of the liquidation essentially represents the knowledge of the Liquidators, even before his formal appointment as such.

20. I should say at the outset that I was impressed by Mr. Borrelli as a witness, and found him to be a witness of truth and a man of great professional integrity. Of course, I realize that general impressions are not enough, particularly in a case such as this, and I have been at pains to make sure, before accepting his evidence on any contested point, that it either accords with the contemporary documents or at least with a common-sense assessment of what is probable. He was cross-examined with considerable skill and rigour by Mr. Orr. As a result of that I was put on my guard by what I now consider to be his misleading description of the Micromain transaction in his fourth affidavit in the Scheme proceedings (for which see further paragraphs 31 – 33 below), but at the end of it I came away with the firm view that his explanations for the matters in issue were true. That particularly applies to the developing state of the Liquidators' knowledge of the extent of Mr. Ting's defalcations in respect of Akai, to which I will return.

The Alleged Forgeries

21. The handwriting expert, Dr. Strach, gave evidence on the purported signatures of Mr. Ting on the supposed Board Resolutions of 14th November 2002[8] used in an attempt to validate the Proxies at the Scheme Meeting. I have no hesitation in accepting Dr. Strach's opinion that the purported signatures of Mr. Ting are almost certainly not his. Dr. Strach's professional expertise, the clarity of his presentation and the compelling logic of his detailed observations all combine to give weight to his opinion, and, indeed, he was not challenged on his evidence at all. I also accept his evidence that the signatures appear to have been copied from one or more originals, and "have been written as attempted simulations of the style of the genuine James Ting". I therefore find that the signatures are forgeries, in that they were not executed by Mr. Ting, but were done by someone else imitating Mr. Ting's handwriting with intent to deceive people into believing that they were genuine signatures.

22. It was the plaintiff's case in the Scheme Proceedings, supported by an affidavit of 16th December 2002 from Tsui Chung Yi[9], that the Board Resolutions were genuine, and had been sent from Shanghai to Hong Kong by Mr. Ting separately from the proxies. Ms. Tsui, who is Mr. Ting's messenger in Hong Kong, tells an elaborate story about how, while the proxies

[7] He replaced one of the original liquidators, Mr. Fan Wai Kuen.
[8] The Resolutions are at Core bundle, Vol. 1, pp. 371.0 – 371.04. Each is headed "Resolution in writing of the sole director of the company".
[9] See Agreed Bundle, Vol. 6, p. 1667

were sent to a P.O. Box that she used for Mr. Ting's correspondence, the resolutions were, for some unexplained reason, sent to her old address. She says that she collected the resolutions from the P.O. Box mid-day on the 22nd November, and delivered them to Mr. Ng's office. Only then did she retrieve the resolutions from her old address, where she found them not in the post box at that address, but on a ledge used for material too large to place in the box. Having recovered them, due to the lateness of the hour she retained them over the weekend. On the Monday, the day of the Scheme Meeting, she received a telephone call from Mr. Ting, instructing her to deliver the resolutions to the meeting, which she did. The tale is implausible enough on its own, but in the light of the fact of the forgery of the signatures it is plainly false and intended to deceive the court. I find that what happened was that when Mr. Ng alerted Mr. Ting to the problem by cell-phone, Mr. Ting had some unknown person in Hong Kong type up the resolutions, execute them with a relatively plausible simulacrum of Mr. Ting's signature, and then have them delivered to Mr. Ng at the meeting. Mr. Ting then had Ms. Tsui swear a false affidavit to provide an explanation for how the resolutions came to be separately delivered to Mr. Ng, and for why they were not folded.

23. There is no evidence that Mr. Ng was a party to, or aware of, the actual forgery, but on receipt of the documents he notarized Mr. Ting's signature[10]. He said he did so because he recognized it and because Mr. Ting confirmed it to him as his on the telephone. As such it was worthless as a notarial act, and may be in breach of the Hong Kong notarial rules, but I do not need to decide that.

The Context of the Settlement Agreement

24. The context and construction of the Settlement Agreement has already been litigated in the Courts of Bermuda[11] ('the 2003 Proceedings') when Mr. Ting attempted to restrain the Liquidators seeking to examine him pursuant to section 221 of the Hong Kong Companies Ordinance (which is the counterpart of section 195 of the Bermudian Companies Act 1981). The Liquidators' argument at that time was essentially that an application under s. 221 was not a claim against Mr. Ting within the meaning of clauses 3 and 9 of the Settlement Agreement, a proposition which neither Kawaley J at first instance nor the Court of Appeal had any difficulty in accepting. In arriving at that conclusion Kawaley J heard from Mr. Borrelli and Mr. Ng. He set out at length the modern approach to contractual interpretation from the speech of Lord Hoffmann in Investors Compensation Scheme Ltd. –v- West Bromwich Building Society [1998] 1 All ER 98 at 114 – 115. He then came to the following conclusion:

> "56. Clause 3 is essentially a release, re-cast as a covenant not to sue to avoid any possible difficulties with the liquidators' pursuit of similar claims against third parties. In my view, the term "sue" is the dominant word in this clause, and "claims against" in this context must be given a similar meaning. The breadth of the language is merely reflective of that used in standard Bermuda bye-law indemnity provisions (which it

[10] In fact he placed two separate notarial certificates upon the resolutions, the first including factual assertions about Mr. Ting's authority, and the second being addressed to the authenticity of the signature and his means of knowledge of that.

[11] Civil Jurisdiction 2003 No. 412, James Henry Ting & Ors. v Nicholas Cornforth Hill & Ors.

> has never been suggested are engaged or infringed by examination, as opposed to adversarial proceedings), and is really intended to give comfort to the covenantee. This cannot be prayed in aid to change the fundamental character of the clause. Mr. Ting was obviously a natural target for any legal action on behalf of the Companies' estate, as is notoriously the case in major insolvencies where gross deficiencies of assets are found. In my view, the main objective of this clause was to protect Mr. Ting from any substantive claims against him by the liquidators, in return for his withdrawing his opposition to the Scheme which would enrich the estate with substantial funds to pursue ongoing investigations with a view to making other recoveries.
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> 57. I find that the natural and ordinary meaning of the words of clause 3 in their context do not extend to the section 221 Summonses, which do not (save as to costs) assert any claim "against" Mr. Ting at all. . . "

25. The plaintiffs rely upon that finding as to the purpose and ambit of the Settlement Agreement, and I consider myself bound by it as *res judicata* between the parties to the present action. It disposes of the defendants' narrow construction argument (for which see paragraph 35 below). However, I do not think that it precludes the defendants' wider construction argument in respect of undisclosed wrong-doing (for which see paragraphs 36 et seq. below), which was not in any sense before the learned judge on that occasion.

The Liquidators' Knowledge

26. It is the defendants' case that at the time of the Settlement Agreement the Liquidators did not know of the alleged defalcations which are now the subject of the Hong Kong proceedings. Mr. Borrelli says that they were thinking in terms of Mr. Ting bringing about the collapse of the Akai group by bad management rather than outright theft, and that the Liquidators did not have any evidence of the latter until they obtained access to material seized by the Commercial Crime Bureau of the Hong Kong police in the course of their investigations into the collapse of Akai, and that that was not until the Hong Kong court ordered the release of those documents to the Liquidators in May and June 2005[12]. It was, they say, only then that they became aware of the theft of Akai's assets by Mr. Ting using the expedient explained in paragraphs 12 and 13 above.

27. I find as a fact 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[13] (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

[12] See paragraphs 71 to 79 of Mr. Borrelli's first affidavit in these proceedings
[13] See Core Bundle, pp. 109 – 116.

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.

28. Nor do I understand it to be contended that the Liquidators were in fact aware of these particular transactions. The plaintiffs' case is that, even if the Liquidators were not in fact aware of the actual transactions which are the subject of the Hong Kong proceedings, they were aware that Mr. Ting was alleged to have been guilty of defalcations of a similar character, and they point to certain other transactions of which the Liquidators were aware at the time, and references in the contemporary documents to Mr. Ting 'looting' the company, and so on. The defendants' case on the extent of the Liquidators' knowledge is set out at paragraphs 39 to 45 of Mr. Borrelli's witness statement in these proceedings. To the extent that Mr. Borrelli was not himself formally a Liquidator at the time, I nevertheless consider that he was so closely involved with the liquidation that, in the absence of some real evidence to the contrary, his knowledge can be taken to be theirs for these purposes. His evidence is essentially contained in paragraph 44 –

> "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."

29. Mr. Borrelli was cross-examined at length on that, and on various statements made by himself and others at the time of the Settlement Agreement, and leading up to it, to suggest that he and the Liquidators in fact believed that Mr. Ting had been stealing from the company. The point that the plaintiffs seek to make on this is that if the Liquidators believed that, even if they did not know the precise details, then the Settlement Agreement should be taken as embracing all such matters.

30. Two examples will suffice. References to "looting" largely derive from a set of US proceedings issued in the state of New York on 6th March 2002, and subsequently referred to in an article in Business Week in August 2002, of which Mr. Borrelli was aware at the time. Those proceedings allege that Mr. Ting and other individual "conspired and intentionally engaged in a scheme to loot the assets of the Debtors in disregard to their fiduciary duties". Mr. Borrelli's view on that is that the language used was forensic hyperbole, and that the proceedings themselves were speculative and did not disclose a sustainable case, a view which he feels has been born out by the event. While I obviously cannot try those proceedings simply in order to test that view, having read the pleadings themselves I see no reason not to accept it. It is also noteworthy that those proceedings concern unrelated transactions, which have nothing to do with the defalcations alleged in the Hong Kong proceedings (which, if true, would amount to dishonesty of a much more direct kind).

31. The other example is the transaction for which Mr. Ting was eventually prosecuted, the charges being laid on 2nd May 2003, after his voluntary return to Hong Kong on the 30th April of that year. On 30th June 2005 he was found guilty of two counts of false accounting (although that conviction was subsequently set aside on appeal on a misdirection, and a retrial ordered). The charges concerned the accounting for the supposed acquisition by Akai of a 50% interest in a company called Micromain Systems for HK $300M. It was not alleged in the criminal proceedings that Mr. Ting had stolen the money supposed to have been used to acquire that interest. The case was essentially that the same HK $100M had been cycled around three times, on each occasion coming back into Akai[14], and that this was done to inflate Akai's assets and to forestall creditors.

32. In his witness statement in these proceedings Mr. Borrelli said:

> "I did not believe in December 2002 that the Micromain transaction involved a misappropriation of Akai's funds. I now understand that the transaction involved circular payments of HK $100 million of Akai's funds, which created the impression that Akai had made an investment of HK $300 million in Micromain when no such investment ever occurred."

However, in the Scheme Proceedings Mr. Borrelli had sworn an affidavit[15] in which he set out for the court examples of transactions involving Mr. Ting which the Liquidators wanted to investigate if they had sufficient funds, the purpose at that stage being to substantiate Mr. Ting's ulterior motive for procuring the opposition of Blossom and Costner to the Scheme. The description of the transaction which Mr. Borrelli gave then does not include anything about the inflation of assets and deceit of creditors – what he now refers to as "window-dressing" – but rather seems to suggest that the payment of $300M had in fact taken place and that the Liquidators would have a civil claim against Mr. Ting in respect of it. Mr. Borrelli was cross-examined on this[16], and asserted that he knew in 2002 that the money had not in fact left Akai; that he had initially believed the transaction to check kiting and that it has been reported to the Commercial Crime Bureau on that basis; and that he subsequently came to believe that it was 'window-dressing'. In particular he maintained that he knew as early as September 2001, when he first became involved, that the $300M had made its way back to Akai.

33. I accept Mr. Borrelli's evidence that he always thought of this transaction as a circular one and not as a theft or diversion of the funds. That appears to have been the view of the Provisional Liquidators as early as January 2001, as appears from a report of 30th January of that year to the Bermuda Official Receiver. There is no reason to think that that view ever changed, because when Mr. Ting was eventually charged in May 2003, he was charged with false accounting and not theft. That must mean, I think, that paragraphs 58 to 63 of Mr. Borrelli's fourth affidavit in the Scheme proceedings were misleading, to the extent that they

[14] Or rather into Semi-Tech Global Company Ltd., as Akai was then known.
[15] See Mr. Borrelli's 4th affidavit of 2nd December 2002, at paragraphs 58 – 63 (Agreed Bundle, vol. 3, pp. 744 - 746)
[16] See the transcript for 25.20.07, beginning at p. 142.

plainly suggest at least the possibility that the funds had been misappropriated and omit the circularity of the transaction and the window-dressing explanation . I doubt if that was done to deceive, not least because the proceedings were *inter partes*, but it does mean that I have treated Mr. Borrelli's other evidence with more caution that might otherwise be the case.

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[17]. 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, 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.

THE LEGAL ISSUES

1. CONSTRUCTION

35. The defendants run a narrow construction argument based on the principle that a compromise or release given in respect of particular proceedings should be limited to those proceedings, and they point to the recitals to the Settlement Agreement itself, which largely concern the Scheme Proceedings. I do not accept that argument. I think it is precluded by the findings of Kawaley J in the 2003 Proceedings (see above), which I consider binding. Even if his findings were not binding, for instance because they were strictly *obiter*, I would nevertheless have found that the Settlement Agreement from its terms and context, was (subject to the following paragraphs of this judgment) intended to compromise all claims against Mr. Ting relating to the collapse of Akai, and was not limited to claims arising out of or relating to the Scheme Proceedings.

36. However, the defendants also maintain a wider construction argument, that such a compromise or release should not be construed as applying to any undisclosed wrongdoing of the party benefiting from the release. This argument is closely related to other arguments asserting that Mr. Ting was a under a fiduciary duty to the company to disclose his wrong-doing and that such a compromise or release is unenforceable in respect of undisclosed wrong-doing. These may all be different ways of cutting the same cake, but, insofar as it is framed in terms of construction, the argument is derived from the judgment of the House of Lords in BCCI v Ali [2002] 1 AC 251, and is one of two distinct principles which Mr. Kosmin seeks to derive from that case.

37. In respect of the construction argument, Lord Bingham identified the following principle:

[17] See e.g. the transcript for 25.10.07 at pp. 166, l. 4 – 168, l. 13; and pp. 170, l. 20 – 171, l. 17.

> "10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the courts 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."

His Lordship then considered the cases at length, and then, in paragraph 17, said –

> "But I think these 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, as my noble and learned friend, Lord Hoffmann, forcefully points out, 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 party, knew or could know that he had."

The reference to the knowledge of both parties in that last sentence may appear to limit the principle, but in my judgment it is merely an application of a more general principle to the facts of that particular case. The general principle is as stated in Lord Bingham's paragraph 10.

38. I do recognize that not all their Lordships followed this approach. Lord Browne-Wilkinson agreed with Lord Bingham, but Lord Nicholls had a different approach, which really turned on the principle underlying the defendants' narrow construction argument in this case:

> "28. . . . However, widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release *should apply only to claims, known or unknown, relating to the particular subject matter.* . . . [29] . . . But, although expressed in different words, 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." [My emphasis]

39. Lord Hoffmann dissented on this point, and I read Lord Clyde as preferring Lord Nicholls approach, defining the "particular subject matter" in that case as the termination of employment, although in paragraph 86 he also attached weight to the unknowability of the claim under consideration:

> "Even without formulating any definition of the present scope of the agreement, it seems to me that if the parties had intended to cut out a claim of whose existence they could have no knowledge they would have expressed that intention in words more precise than the generalities which they in fact used."

40. Nevertheless, I accept Lord Bingham's approach as constituting the *ratio* of the case. Applying it 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.

2. WHETHER SETTLEMENT AGREEMENT VOIDABLE

41. This head of the defendants' case involves a complex of interrelated arguments relating to Mr. Ting's failure to disclose the alleged defalcations which now form the subject of the Hong Kong proceedings, and all the other similar matters also alleged against him. I have divided up these issues into a consideration of (i) whether he was under a duty as director to disclose his own wrongdoing at the time of the Settlement Agreement, and if so what were the consequences of that; and (ii) whether sharp practice in relation to the obtaining of a general release will avoid it.

(i) Did Mr. Ting owe a duty of disclosure to the Liquidators when negotiating the Settlement Agreement?

42. The Liquidators rely upon the judgment of the English Court of Appeal in Item Software (UK) Limited v Fassihi [2005] ICR 450. It is easiest to take the ratio of that case from the headnote:

> ". . . a director of a company was subject to a fundamental duty of loyalty requiring him to act in what he, in good faith, considered to be the best interests of the company; and that, as, on the facts, there was no basis on which the defendant could reasonably have concluded that it was not in the claimant's interests to know of his breach of duty, he could not fulfill his duty of loyalty except by telling the claimant about his setting up a new company to acquire the contract for himself."

43. In arriving at that conclusion the court distinguished, on various grounds, a long line of cases beginning with Bell v Lever Bros. Ltd. [1932] AC 161, HL and including Horcal Ltd. v Gatland [1984] BCLC 549, CA. The plaintiffs argue that, whatever the extent of the duty of loyalty, it does not apply to the negotiation of a contract of compromise, where the director is plainly acting in his own interest, and they rely upon those cases distinguished in Item Software, and in particular upon the following by Goff LJ in Horcal Ltd. v Gatland (*supra*):

> "For the respondent Mr. Powles submitted, as a general proposition, that, putting fraud on one side, there is no general duty on directors or employees to disclose a breach of duty on their part. As I understood his argument he recognised that in the case of fiduciaries, such as directors, if they have failed to account for secret profits which they have made, then their failure to account must necessarily involve in consequence a failure to reveal a breach of duty which had given rise to that duty to account. Mr. Powles in his argument put in the forefront of the authorities on which he relied a dictum of Lord Thankerton in *Bell v Lever Brothers* (1932) AC at page 231, a dictum with which Lord Blanesburgh appears to have agreed (see page199 of the report).

> There is, in my judgment, much force in Mr. Powles' submission. Indeed Mr. Thoresby's argument, that a director is under a duty to disclose any breach of duty on his part before an agreement of the kind in the present case was entered into, could lead to the extravagant consequence that a director might have to make what Mr. Powles has called a 'confession' as a prerequisite of such an agreement. But, in my judgment, it is not necessary to decide in this case whether Mr. Powles' submission is correct, because, as I read the judgment of the judge, having regard to the facts found by him, no breach of duty was committed by the respondent in this case, before the termination agreement was made on 24.7.78, which he would have had to disclose if any duty of disclosure then rested upon him."

44. As Arden LJ noted in Item Software, that is *obiter* as it was not necessary for the decision. Nevertheless, she did appear to endorse Goff LJ's comment, stating that it –

> ". . . expresses the philosophy that the law should not impose a duty of disclosure where that would be contrary to the expectation of the parties. It would be difficult to disagree with the logic and good sense of this approach."

On the other hand she plainly had doubts whether that should extend to "fraudulent concealment": see Ibid. paragraphs 56 and 61. Indeed, when read in context, it is also plain that Goff LJ himself was not addressing cases of fraud, because the submission he was considering was predicated upon "putting fraud on one side".

45. The point remains a vexed one, and I was shown both Canadian and English authority to the contrary, and in particular Re a Company (No 533 of 2004) [2004] EWHC 638. However, I accept the reasoning in Item Software as set out in paragraphs 41 to 44 of the judgment of Arden LJ, with whom the other members expressly agreed on this point. I consider that that accords with the modern view of commercial morality, and, in that regard, I respectfully adopt Arden LJ's analysis of the policy considerations in paragraphs 63 to 66 of her judgment. Once the principal is accepted, I do not see why contracts of compromise should enjoy any particular immunity from it. That applies *a fortiori* to outright theft of the company's property.

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.

47. However, Mr. Ting maintains that, whatever his duty as a director may have been, he had resigned as a director of Akai shortly after the winding-up orders, thereby divesting himself of any duties that he may have owed. The factual premise for that is an undated letter addressed to the Board and said to have been delivered on 13.10.00[18]. I do not accept that as true, as the evidence for it comes from Mr. Ng "on instructions". Given Mr. Ting's penchant for the creation of false documents to suit his purpose, I would require independent evidence before I would consider accepting it. Moreover, the content of the letter is not compatible with the

[18] The letter is at p. 47 of the Core Bundle. The evidence on this comes from Mr. Ng's affirmation of 16th December 2002, paragraph 20 – see Agreed Bundle, Vol. 5, p. 1172. For his cross-examination on that, see transcript, 23rd October, pp. 132- 6.

situation at the time, as it asks for a replacement to be appointed and so is predicated upon the continued operation of the Board. That letter was followed by a "Notice of Change" which was lodged with the Hong Kong Companies Registry to record the resignation. It is dated 19th October 2000, but was stamped as received by the Hong Kong Companies Registry on 4th November 2000[19]. However, given that I find that he had not effectively resigned, I do not think that is of any effect, although it does demonstrate that in late 2000 Mr. Ting was taking steps to divest himself from any responsibility as a director[20]. In any event, the defendants say that as a matter of law it is impossible to resign as a director after a winding-up order, but produce no direct authority on the point. It is, they say, in any event a meaningless act. I agree with that. It seems to me, moreover, an implausible proposition that if a director came under a duty as a fiduciary to disclose his own wrong-doing while a director, that he could somehow divest himself of that duty by resignation.

48. In the context of the liquidation of an insolvent company, there are additional grounds for considering that the duty to disclose survives resignation. For instance, rule 34(2) of the Bermuda Companies (Winding-Up) Rules 1982[21] imposes a 'duty' on former directors to give the Official Receiver on request "all information that he may require". Hong Kong has similar provisions in its Rule 39(2), and it has other provisions imposing a similar duty upon persons who make or are liable to make the Statement of Affairs: Hong Kong rules 35(2) and 41.

49. I hold, therefore, that whatever the effect of Mr. Ting's purported resignation it had no effect to abrogate or diminish his fiduciary duty, deriving from his directorship, to disclose to the company any and all breaches or wrong-doing committed while he was a director. I also hold that he was under a co-existent statutory duty to disclose them to the Liquidators. I find therefore that Mr. Ting was under a positive duty to disclose any wrong-doings by him committed when he was a director; that that duty survived any resignation; and that it applied to him at the time of the negotiation of the settlement agreement.

50. What is the effect of that? The plaintiffs argue that the Liquidators still have to show that full disclosure would have caused them to act otherwise than they did. I have some doubts about whether that is right in the case of breach of duty, but accepting for the sake of argument that it is necessary for the defendants to demonstrate reliance, in the sense that full disclosure would have caused the then Liquidators to act otherwise, then I accept Mr. Borrelli's evidence that it would. He said that if he had then had clear and unequivocal

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[19] See Core Bundle at pp. 59 – 61. This Notice is in fact signed by Mr. Ting *qua* director, which must itself give rise to doubts as to its validity as he claims to have already resigned by then, although I cannot determine that without expert evidence of Hong Kong law.

[20] Mr. Ting also maintains that he was only a non-executive director from 12th November 1999, when he handed over control of the company to Grande Group Limited. I do not think that it is material for these proceedings, but for what it is worth I also accept the defendants' case that the Management Agreement said to effect that was only executed after the commencement of the liquidation.

[21] Rule 34(2) provides – "The Official Receiver may from time to time interview any such person as is mentioned in section 168(2), (a), (b), (c) or (d) of the Act for the purpose of investigating the company's affairs, and it shall be the duty of every such person to attend on the Official Receiver at such time and place as the Official Receiver may appoint and give the Official Receiver all information that he may require." Section 168(2)(a) includes persons who "have been officers of the company;".

knowledge of actual wrongdoing of the sort alleged in the Hong Kong proceedings, he would have recommended to the Committee of Inspection to forego the Hang Teng transaction and go out and attempt to raise external funding, and that in his opinion there was a good chance that such funding would have been available to pursue such defalcations even though it was not available to pursue uncertain claims against third parties.[22] I accept that evidence from him. I find, therefore, that full disclosure would have caused the Liquidators to refuse to enter into the Settlement Agreement, even at the risk of losing the Hang Ten sale.

51. It follows, in my judgment, that 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 that way gives effect to the intention of the parties as to partial invalidity as expressed in clause 11 of the Settlement Agreement[23] itself, and avoids any argument as to the need for *restitutio in integrum*.

(ii) Sharp Practice

52. Separate from, but related to, the question of a director's duty of disclosure is the question whether any release which is obtained by sharp practice, including the suppression of material facts, is sustainable, at least insofar as any undisclosed wrongdoing is concerned. In this respect the Liquidators argue that "Mr. Ting procured the Settlement Agreement through sharp practice and it would be unconscionable in circumstances of the present nature to allow him to rely on it". This is closely allied to the argument based on failure to disclose. They rely on what may be called the second principle in BCCI v Ali (*supra*). In approaching the general release that had been bargained for and given in that case their Lordships identified two issues – (1) an issue of construction (being whether the court should construe the general words used so as to include the particular claim) which I have dealt with above; and (2) whether, if the words were construed so as to include the claim, the court should allow the party seeking to enforce the release to rely upon a construction which had that effect. Their Lordships, with the exception of Lord Hoffmann, found that, on a true construction, the release did not apply to the particular claim in that case, and, because of that, the majority did not go on to consider the second limb. Only Lord Hoffmann did that, although having done so he came to the conclusion it did not apply on the facts of that case.

53. Although the majority in BCCI v Ali did not consider this second limb in detail, Lord Nicholls' touched upon it, and clearly accepted that such a principle exists:

> "32. Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without

[22] See Transcript, 26.10.07, pp. 22 – 29, particularly p. 29 at ll. 10 – 23.
[23] "11. If any provision of this Settlement Agreement or part thereof shall be deemed invalid or unenforceable by the Courts of any competent jurisdiction, the remaining part of such provision and/or this Settlement Agreement shall remain in full force and effect."

> disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."

He then went on to consider the facts of the case before him, and said:

> "33. . . . In these circumstances there can be no question of the bank having indulged in anything approaching sharp practice in this case. This being so I prefer to leave discussion of the route by which the law provides a remedy where there has been sharp practice to a case where that issue arises for decision. *That there is a remedy in such cases I do not for one moment doubt.*" [My emphasis]

54. It was left to Lord Hoffmann to flesh that out. While recognizing that his observations do not reflect the view of the majority, I also note that that is not because they disagreed but because they did not feel it necessary to consider this principle.

> "69. . . . 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. There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a suppressio veri or suggestio falsi. On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon* 1 Eden 64, 69, where he said: "no rule is better established than that every deed obtained on suggestio falsi, suppressio veri, is an imposition in a court of conscience."
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> 70. In principle, therefore, I agree with what I consider Sir Richard Scott V-C [2000] ICR 1410, 1421 to have meant in the passage in paragraph 30 of his judgment which I have quoted (ante, paragraph 11), and with Chadwick LJ, 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.
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> 71. It follows that in my opinion the principle that a party to a general release cannot take advantage of a suggestio falsi or suppressio veri, in other words, 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."

55. Mr. Orr argues that that 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 lack of any meaningful co-operation, but because Mr. Borrelli had set out the broad extent of the Liquidators knowledge in his affidavit of 2nd December 2002 sworn in the Scheme Proceedings, and while listing various matters, including the Micromain transaction which I have dealt with above, it makes no mention of the subject matter of the Hong Kong proceedings or of any similar matters of outright theft by Mr. Ting.

3. ALLEGED ABUSE OF PROCESS IN OBSTRUCTING THE SCHEME

57. The defendants argue that the attempt by Mr. Ting, acting through his creature companies Blossom and Costner, to obstruct the Scheme for his own personal ends, was abusive. The Plaintiffs counter that it is not, as the companies could do as they wished with the votes associated with their property, but that in any event that is one of the issues resolved by the Settlement Agreement and cannot now be re-opened.

58. In respect of the factual premise for the defendants' argument, I find as follows. I think it more probable than not that Mr. Ting procured Blossom and Costner to oppose the Scheme solely so as to defeat it and with the desire and intention of thereby depriving the Liquidators of funds with a view to preventing any further investigation of his conduct of the affairs of the company. To the extent that it may be suggested that he in fact opposed the scheme because of the inadequacy of the price which the shareholders would receive, I reject that suggestion. Given the sums involved, the fact that the shares were otherwise worthless and the absence of any alternative purchaser, the likelihood of it being true is so small that it cannot stand up on its own, and there is no evidence from Mr. Ting himself to save it. The plaintiffs do put forward a report from Menlo Capital Ltd. of 16th December 2002[24] which they obtained to support their case that the price being offered to the shareholders was inadequate. However, having heard Mr. Borrelli's evidence concerning the existence of guidelines issued by the Hong Kong Court limiting the amount properly payable to shareholders of an insolvent company for the company's listing status, and having heard his evidence on the inadequacies of the Menlo report[25], I do not think that a better price was ever possible. Moreover, given that the report was prepared after the event, I consider that it was obtained with the sole intention of camouflaging Mr. Ting's real motives.

59. However, I think that that the plaintiffs' argument that this was one of the matters compromised by the Settlement Agreement, is correct. The defendants were set to argue this issue in the Scheme Proceedings and they then had all the information relating to it that they

[24] Core Bundle, vol. 1, p. 459.
[25] See Transcript for Thursday 25th October 2007, at pp. 16 – 28.

have now. If the Settlement Agreement stands then this argument must inevitably fail. If the Settlement Agreement is void or unenforceable, then the defendants do not need this argument. It is, therefore, unnecessary to decide in these proceedings what the effect of Mr. Ting's motive was, and as it represents a difficult and uncertain point of law I think it better not to attempt to do so.

4. CONSIDERATION

60. The defendants contend that there was no consideration for the Settlement Agreement. To the extent that it is said that Mr. Ting gave no consideration, that is easily met, as the plaintiffs argue, by the fact that Blossom and Costner were also parties to the Settlement Agreement and can, if necessary, enforce it on his behalf. However, the defendants also contend that Blossom and Costner's opposition to the Scheme was (for the reasons set out above) an abuse of process, and that the withdrawal of an abusive application cannot constitute good consideration. The defendants rely in this respect on the following from Chitty on contracts, 29th ed., 2004 at para. 3-050:

> "A compromise of a claim which is legally invalid and which is either known by the party asserting it to be invalid or not believed by that party to be valid is not contractually binding. This rule can be explained either on the ground that merely making or performing a promise to give up a worthless claim cannot constitute consideration for the counter-promise, or (preferably) on grounds of public policy. As Tindall CJ said in Wade v Simeon: "it is almost contra bonos mores and certainly contrary to all the principles of natural justice that a man should institute proceedings against another when he is conscious that he has no good cause of action"

61. However, I do not think that that avails the defendants here. They knew all the circumstances which they now rely upon as making the objection an abuse of process, whether it be the ulterior motive for making it or the forgery. More importantly, as I note above, it is by no means clear law that such an ulterior motive would invalidate the objection. There are arguments either way[26], and the attempt to declare the votes of Blossom and Costner invalid on the grounds of an ulterior purpose was by no means guaranteed of success. It seems to me that the abandonment of an arguable point is capable of constituting good and sufficient consideration for a compromise.

62. I do not think, therefore, that I need go on and consider the other arguments on consideration, and in particular the difficult question of what the effect of the words "for good and valuable consideration, the sufficiency of which is hereby mutually acknowledged" would have been had there in fact been no consideration.

5. LOSS OF RIGHT TO SET THE SETTLEMENT AGREEMENT ASIDE - CONDUCT OF 2003 PROCEEDINGS, AFFIRMATION ETC.

63. The plaintiffs raise various arguments that the Liquidators are in some way now estopped from questioning the validity of the Settlement Agreement because they failed to do so in earlier proceedings between the parties. I do not, with respect, think that there is anything in

[26] See for instance the Opinion of Benjamin Yu & Roxanne Ismail of 17th December 2002, in Vol. 10, Tab 2.

this. The Liquidators won the 2003 proceedings on the narrow point that the section 221 application was not, on a true construction, caught by the Settlement Agreement. They had a clear and straightforward point which was fatal to the plaintiffs' claim, and were not compelled by any reason of public policy to detract from that, or to encumber or lengthen those proceedings by taking all the points which might have been available to them.

64. The plaintiffs also pray in aid the fact that the Liquidators appear to have conceded the existence and validity of the Settlement Agreement in those proceedings, and that that in some way estops them from challenging it in the future. I am bound to say that I doubt that, for it is hard to see how the plaintiffs have relied upon any such concession to their detriment. To the extent that the Courts, both here and in Hong Kong may have done so by taking the Settlement Agreement into account when considering whether the section 221 application was oppressive, there are two points to make. The first is that the plaintiffs have done nothing to demonstrate that there is anything in the answers in fact given on the section 221 which the defendants will or may use on the trial of the Hong Kong proceedings. Second, and more important in my view, is the fact that the trial court can well use its own powers to control its proceedings to exclude any evidence which has been obtained in circumstances to make reliance on it oppressive.

65. In any event, the question really involves the same issue of the extent and timing of the Liquidators knowledge which I have already resolved in their favour. If they did not know that they had grounds to avoid or set aside the Settlement Agreement then there is no meaningful way in which they could have waived reliance on those grounds. For that, and for the other reasons given above, I do not think that the Liquidators are now estopped or debarred by waiver, affirmation, *res judicata* or otherwise, from challenging the Settlement Agreement, and it is not an abuse of process for them to do so.

6. ABUSE OF PROCESS IN THE CURRENT PROCEEDINGS

66. It is said that various matters in the conduct of these proceedings amount to an abuse of process such that they should be stayed or that relief should be refused. The matters relied upon were pleaded by an amendment I allowed at trial, and include (i) the adducing of false evidence in respect of the validity of Mr. Ting's signature on the resolutions, including the use of Ms. Tsui's false affidavit; (ii) the stratagem of not calling Mr. Ting, but relying only on Mr. Ng's evidence, with his ability to duck in and out of the protection of privilege when it suited his principal; and (iii) the failure to disclose to the court, on the application for leave to serve out of the jurisdiction, that Mr. Ting was to be retried on the criminal charges in Hong Kong, and in the meantime was only released on bail, the conditions of which would prevent him attending and giving evidence in Bermuda.

67. The traditional definition of abuse of process is when proceedings are brought for an ulterior purpose in the sense of "an object not within the scope of the process"[27]. I do not

[27] See Metall & Rostoff v Donaldson [1990] 1 QB 391, at 469 – 70, per Slade LJ.

think that that can be said of these proceedings: the enforcement of the Settlement Agreement to restrain hostile proceedings is plainly within the scope of the process, and there is no ulterior or hidden motive. The defendants counter that there is abundant authority that the categories of abuse are not closed,[28] and they argue that it is abusive if the conduct of the plaintiff is such as to make a fair trial of the matter impossible.[29] Accepting that principle for the sake of argument, I do not think that that is the case here. The defendants were aware from the outset of the real position in respect of the false evidence and the failure to disclose, and have been able to counter them. In the case of the failure to disclose, the Courts have developed a separate but related principle that material non-disclosure on an *ex parte* hearing may lead to the leave given being set aside, but the defendants made no such application in this case. As to Mr. Ting's absence, the Court is well able to deal with that by an appropriate assessment of the weight to be given to what evidence there is, and the defendants are not thereby precluded from getting a fair trial. I therefore reject the arguments based on the alleged abuse of process in the present proceedings.

7. UNCLEAN HANDS

68. The defendants also rely upon the equitable maxim that he who comes to equity must come with clean hands. It goes to the injunction sought by the plaintiffs to restrain the defendants from pursuing the Hong Kong proceedings, because an injunction is an equitable remedy. In the circumstances of this case I doubt if this general principle of equity adds anything to the second principle in BCCI v Ali (*supra*) as set out in the speech of Lord Hoffmann. If there is a difference it may be that, under BCCI v Ali, the Settlement Agreement is itself unenforceable as a matter of law, while under the unclean hands principle the court simply declines to enforce it as a matter of discretion, which would have ramifications for the Counterclaim.

69. 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.

70. The plaintiffs argue that that would be pointless, because they would still have their legal claim for breach of the Settlement Agreement, and could recoup any financial award made against Mr. Ting in the Hong Kong action from the Liquidators by way of damages. Refusing

[28] See e.g. Johnson v Gore Wood & Co. [2002] 2 AC 1 at 22, per Lord Bingham, citing Lord Diplock in Hunter v Chief Constable of West Midlands Police [1982] AC 529 at 536.
[29] They cite Andrea Madras v Nomura International Plc [2006] EWHC 748 at [27].

to enforce the Agreement by injunction would, therefore, simply give rise to a circuity of action and would be futile. That, in my judgment, fails to take into account another fundamental principle, this time of the common law, that an action cannot be founded upon an illegality[30]. While I do not think that I should be expressing a final view on the outcome of any such future action, I think its sustainability sufficiently in doubt for me to disregard the prospect at this time.

8. SECTION 98(2) COMPANIES ACT 1981

71. Finally, the defendants rely upon section 98(2) of the Companies Act 1981. This was a late point. It is short, but if right, fatal to the plaintiffs' claim. The sub-section provides:

> "(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."

72. The wording of this provision is very wide. On the face of it, it would appear to apply to a compromise or release of any such liability, but on a closer reading I do not think that it does. I was not shown any authority to support such a proposition, and in the absence of it, I think that the section applies to prospective arrangements (whether in the bye-laws or in a contract of employment), and not to those entered into *ex post facto*. I think that 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 defendants 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 wrong-doing.

73. I do not, therefore, need to go on and decide the plaintiffs' constitutional argument that the section infringes the right of free association, but I am bound to say that I do not see how this provision can engage that particular constitutional right.

CONCLUSIONS

74. The alleged defalcations which are the subject matter of the Hong Kong proceedings was not disclosed at the time of the Settlement Agreement, and was otherwise unknown to the Liquidators. As a matter of strict construction, therefore, I find that the subject of the Hong

[30] Ex turpi causa non oritur actio

Kong Proceedings, and any similar undisclosed defalcations, are not subject to clauses 3 or 9 of the Settlement Agreement. I also consider that Mr. Ting was under a continuing duty to disclose such matters, and that had he done so the Liquidators would not have entered into the Settlement Agreement. I therefore consider that it is void in respect of the subject matter of the Hong Kong proceedings and any similar undisclosed defalcations. Separate and distinct from the question of duty, I also find that it was sharp practice for Mr. Ting to bargain for the Settlement Agreement without disclosing those matters, particularly when he must have known that the Liquidators were unaware of them. The effect of that, in my judgment, is to render the Settlement Agreement unenforceable in respect of them. Were I wrong on both of those points, I would nevertheless have refused to enforce the Settlement Agreement in respect of the Hong Kong proceedings as a matter of discretion, on the grounds of Mr. Ting's wrong-doing. I therefore dismiss the plaintiffs' claims, and find for the defendants in the action.

75. The defendants counterclaim the following:

> (i) A Declaration 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.
>
> (ii) Further, or in the alternative, a Declaration that the Settlement Agreement is voidable at the election of the defendants as against Mr. Ting and has been avoided as against Mr. Ting.
>
> (iii) Further, or in the alternative, a Declaration that Mr. Ting provided no real or substantial consideration for the Settlement Agreement and the Defendants are therefore not bound by the Settlement Agreement as against Mr. Ting.
>
> (iv) Further, or in the alternative, a Declaration 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 upon the breaches or fraudulent breaches by Mr. Ting of his fiduciary or statutory duties to Akai.

76. It may be that I will need to hear further argument on the exact form of the declarations. In particular the phrase "any other claims founded upon the 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[31]. Subject to that, I grant declaration (i). In respect of (ii) I would, as indicated in

[31] It may be possible to do that by reference to the transactions listed in paragraph 86 of Mr. Borrelli's first affidavit in these proceedings.

paragraph 51 above, prefer to say something along the lines that the Settlement Agreement is voidable and has been avoided only insofar as it would otherwise apply to the subject matter of the Hong Kong proceedings and other similar undisclosed defalcations. I reject the defendants' arguments on consideration, and therefore refuse the declaration sought in (iii). I grant that in (iv), subject again to the same point as to its breadth.

77. I will hear the parties on costs. I also invite submissions on the wording of the declarations. I would be happy to entertain those in writing if that better suited the convenience of overseas leading counsel.

Dated this 5th day of December 2007

Richard Ground
Chief Justice