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Errata to file. 13/3/03

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 217 of 2001

IN THE MATTER OF THE COMPANIES LAW (2001 Second Revision)

AND IN THE MATTER OF TAIT INTERNATIONAL LIMITED
(In Liquidation)

THE HONOURABLE MR. JUSTICE KELLOCK
IN CHAMBERS

APPEARANCES:

Seamus Andrews of Walkers for the Liquidators
Jeremy Walton of Hunter & Hunter for the Petitioner

Application heard July 9, 2002

SEP 10 2002
LEGAL DEPARTMENT
CAYMAN ISLANDS

REASONS FOR JUDGMENT

Kellock, J.

By summons issued November 16, 2001 the attorneys for the "Joint Provisional Liquidators" of Tait International Limited ("TIL") i.e. Ian Wight and Stuart Sybersma sought the Court's approval of their fees and expenses as Provisional Liquidators for the period of the provisional liquidation from April 25, 2001 to October 2, 2001. That summons came on before me on January 24, 2002. As I then felt that the material filed in support of the summons was inadequate, I adjourned the matter so that the Liquidator's attorneys would have an opportunity to provide further and better material. I also gave written reasons identifying the specific nature

of my concerns for counsel's assistance. Those reasons were released on January 29, 2002 and are attached hereto as Appendix A.

On July 9, 2002 I was again attended by counsel for the Provisional Liquidators and the petitioning contributory Tait Marketing & Distribution Co. Ltd. ("TMD") as well as Gordon Wilson of Deloitte & Touche the senior manager in charge of this engagement.

The Provisional Liquidators were appointed by Order dated April 25, 2001 which order was made on the strength of the petition filed by TMD on April 23, 2001 alleging, *inter alia* that TIL was insolvent and unable to pay its debts or in the alternative that it was just and equitable that TIL should be wound-up.

It appears that TIL has not been and is not now insolvent if the word "insolvent" is given its ordinary non-technical meaning. TIL has no significant creditors and consequently its assets have at all material times far exceeded its liabilities. It is said, however that TIL was insolvent in April 2001 for the purposes of the *Companies Law* because it had failed to pay a debt to TMD after the delivery of a formal demand for payment and as a consequence was deemed to be unable to pay its debts by reason of Section 95 of the *Companies Law (2001, Second Revision)*. As a result TIL was liable to be wound-up.

The winding-up was initially opposed by attorneys instructed by TIL but that opposition ceased some time before October 2, 2001 when an order was made for the winding-up of TIL and the

Provisional Liquidators were appointed to be the Official Liquidators. The winding-up Order also provided (by paragraph 2) that:

> "The reasonable and court approved costs incurred by Ian Wight and Stuart Sybersma of Deloitte & Touche as Provisional Liquidators of the company from April 25, 2001 to date (i.e. October 2, 2001) be paid out of the assets of the company."

It is therefore my task now to determine whether the fees claimed in the amount of U.S. $143,050.00 are reasonable and should be approved.

The application for court approval of these fees first came on before Graham, J. on November 26, 2001 when he made an order requiring any shareholder who objected to the Provisional Liquidator's fees to serve such objections by Friday, December 28, 2001. That Order of course, assumed that all of the shareholders would be notified of the application and provided with the opportunity to object by the deadline fixed by the order i.e. December 28, 2001. As I indicated in my Reasons of January 29, 2002 there was no evidence before me on January 24, 2002 that Graham, J.'s Order had been served on anyone or otherwise made known to the shareholders. I was orally advised by counsel that such was the case but there was no affidavit on file to establish that as a fact.

On July 9, 2002 I was referred to the affidavit sworn by Gordon Wilson on January 30, 2002 which states (in paragraph 3) that a copy of Graham, J.'s Order was "circulated...to all the shareholders and creditors of the company...".

The chart attached to the first report of the Provisional Liquidators dated June 11, 2001 indicates that TIL is owned by TMD (as to 39.12%) by ADI Corporation Ltd.(as to 31.05%) and by China Vest Ltd. and others (as to 29.83%). The chart attached to the April 30, 2002 report of the Official Liquidators contains a list of some 23 shareholders who collectively are said to own 100% of TIL shares. I was advised by a letter from Deloitte & Touche dated August 26, 2002 that "the reference to China Vest Ltd. as a shareholder in TIL is misleading. China Vest Ltd. is in fact a management company for various investment funds…".

The letter I have just referred to was accompanied by a further affidavit sworn by Mr. Wilson on August 26, 2002. This affidavit was provided in answer to my concern (expressed to counsel through the Clerk of the Court) that while Wilson's affidavit of January 30, 2002 states that a copy of Graham, J.'s order of November 22, 2001 was circulated to all of the shareholders, the affidavit did not contain by way of exhibits or otherwise the communications said to have been sent, the names of the persons who were said to have been "circulated" or the addresses to which the order was said to have been sent.

Mr. Wilson's August 26, 2002 affidavit contains the following:

> "4. On November 29, 2001, in order to notify shareholders and the Petitioner of the December 28, 2001 deadline and to set out the details of the fees incurred, staff working under my direction served a letter and a copy of the Liquidators' Fee Taxation Report dated November 14, 2001 on the following registered shareholders:
>
> **Shareholder** **Method of Service**
>
> ABN Amro Bank N.V. .....By Fax
>
> China Vest II LP.....By Fax
>
> China Vest II-A LP.....By Fax

China Vest II-B LP.....By Fax

Taiwan Vest NV.....By Fax

Seavi II Ltd. .....By Fax

ADI Corporation.....By Fax

Adhill LP.....By Mail

Advent International Investors LP.....By Mail

Advent Omnibus LP.....By Mail

International Network LP.....By Mail

Advent Partners LP.....By Mail

Advent Uno C.V. .....By Mail

Advent Uno S.A. .....By Mail

Johnson Chang.....By Mail

Cresentia VII, FGR.....By Mail

Istehmar International Corp. .....By Mail

Tait Marketing & Distribution Ltd – ("TMD").....By Fax

Copies of these letters are attached as Exhibit 2 and the addressee shareholders comprise 95.8% of the registered shareholders of the Company. Four shareholders, James D. Cummings, John F. Parkinson, TBM II LP and TET Co. Ltd. were not notified because the Liquidators did not have current addresses for them (earlier mail had been returned). These four have a combined shareholding of 4.2%.

The Liquidators were aware that James D. Cummings and John F. Parkinson were both ex TMD employees and that TET Co. Ltd. (TET stands for Tait Employees Trust) was managed by Alice Jeng, a former CFO of TMD whom the Liquidators understand now works for KPMG in Taipei.

Accordingly, TMD were asked to pass notification of the fees report and the deadline for response to these shareholders."

As stated earlier, Mr. Wilson is the Senior Manager in charge of the work performed by the Provisional Liquidators who are members of the Deloitte & Touche firm. I do not know why he swore on January 30, 2002 that all of the shareholders of TIL had been circulated with Graham,

J.'s order and in that way notified that if they had objections to the liquidators fees such were to be made by December 28, 2001. 95.8% of the shareholders is not all of the shareholders and I do not think this is an occasion for the application of the maxim *de minimus non curat lex*.

The company now in liquidation (TIL) is a holding company. Its assets include 49% of the shares of Tait Asia Limited ("TAL") and 100% of the shares of Tait & Company ("TCL"). I gather that TAL is a going concern and that for all practical purposes TIL's shares in TIL represent all or the bulk of TIL's assets. On the other hand, TCL no longer carries on business and presumably TIL's shares in TCL are of very little value.

The alleged debt owing by TIL to TMD which gave rise to the demand which in turn precipitated the appointment of the Provisional Liquidators was based upon a debt alleged to have been owing by TIL to TCL and the alleged assignment of part of that obligation by TCL to TMD. The circumstances leading to the petition to wind-up TIL in relation to that alleged debt are set forth in my January 29, 2002 reasons. In particular, TMD became aware that TIL was threatening to effect a share exchange transaction which, if executed, would have stripped TIL of its most valuable asset i.e. its shares of TAL. This would have made it difficult if not impossible for TMD to have realized on the debt alleged to be owing by TIL to TMD and would at the same time have significantly diminished the value of TMD's shares inTIL.

I note in passing that TMD commenced proceedings in Hong Kong against TIL to recover the alleged debt but those proceedings were dismissed on May 11, 2001 *inter alia* because the court did not believe that Hong Kong was the appropriate forum for the resolution of the dispute.

While I have said that TIL's failure to pay the debt alleged to be owing to TMD does not mean that TIL is insolvent in the popular sense it is a sufficient ground for a winding-up Order providing that the obligation was not in dispute. *Cornhill Insurance Plc.* v. *Improvement Services Ltd. and others* (1986), 1 W.L.R. 114. Jessel, M.R. said in *In Re Great Britain Mutual Life Assurance Society* (1880), 16 Chd. 246 at 253 C.A. –

> "In my opinion, it is not sufficient for the respondents, upon a petition of this kind, to say, "we dispute the claim". They must bring forward a *prima facie* case that satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding."

In this case there was, at the time the petition was presented a dispute as to the obligation upon which the petition was based. However, as the opposition to the petition originally put forward was withdrawn, the winding-up Order was made and the Official Liquidators were authorized to proceed with the liquidation of TIL. It follows that there was no-one in the case before me to take issue as to whether or not the Provisional Liquidators were properly appointed.

The work carried out by the Provisional Liquidators was carried out in order to attempt to determine the answers to three questions which are as follows:

1. Did TIL owe money to TMD?
2. Did TCL owe money to TMD?; and
3. Had TCL validly assigned the debt owing to it from TIL to TMD?

I have no doubt that the work required to determine the factual and legal issues required to answer these three questions was complex and that a great deal of work was required on the part of the Provisional Liquidators in order to address and attempt to determine the proper answer to

these questions. Mr. Wilson appeared before me on July 9 and answered my questions about the work that was done and the purpose of it. In addition, I have been provided with break-downs of the time spent, the names of the persons who did the work, their title or job description and the hourly rates charged.

Should any creditor or shareholder object to the payment of the Provisional Liquidators fees for such work out of TIL's assets, the court might have to come to grips with the question as to whether or not winding-up proceedings may be properly used to determine the questions the Provisional Liquidators have sought to determine in this case. As there are as yet no such objections and as the court's Orders appointing the Provisional Liquidators and directing the winding-up of TIL have not been attacked; it would not be appropriate to attempt to resolve that issue which should be left to be decided at another time or in another case.

In the absence of any objection to the court's approval of the Provisional Liquidator's fees, it seems to me that the court is entitled to assume that the work carried out by the Provisional Liquidators was necessary and appropriate unless the material put before the court clearly indicates otherwise. As stated in my reasons of January 29, 2002, the applicants are obliged to provide the court with proper evidence which clearly shows what was done, why it was done, why it was appropriate to do that work and what the results have been. In light of the material now before me and Mr. Wilson's answers to my questions and in the absence of any objection I can conclude that the court's "what" and "why" requirements have been met.

The remaining question is the question of the amounts charged for the work performed. According to the summary which is contained in the Fee Taxation Report dated November 14, 2001, these are as follows:

> "1.1 Summary of Fees and Charge Out Rate
>
> The professional fees of the JPL during the period from their appointment on April 25, 2001 through to the making of the order to wind up the company on October 2, 2001 amount to $143,050.
>
> These fees have been broken down into two periods corresponding to delivery of the preliminary and final report of the JPL as follows:

Period	**Date**	**Fees $**	**Hours**
Period 1	April 25, 2001 – June 13, 2001	67,532	233
Period 2	June 14, 2001 – October 2, 2001	75,518	294

> Details of the fees and hours in each category of activity are attached in appendices 1 and 2 respectively.
>
> Charge out rates applied have been as follows:

	Period up to June 30, $, per hour	**Period from July 1, $ per hour**
Partner	450	450
Principal/Director	375	375
Senior Manager	320	335
Manager	250	265

	Period up to June 30, $, per hour cont.	**Period from July 1, $ per hour cont.**
Senior Accountant	175	185
Administrative Assistants	100	110

> In line with normal practice in Deloitte & Touche, charge out rates were reviewed on July 1, 2002."

In support of the argument that these charges are reasonable, I was referred *inter alia* to the ruling of the Chief Justice dated June 28, 2001 in *In the Matter of Bank of Credit and Commerce International (Overseas) (in liquidation)* ("BCCI"). In that ruling the Chief Justice rejected the argument that the scale of liquidator's fees set by the court in 1998 should be increased as a result of inflation. In rejecting that suggestion, the Chief Justice stated that the rates applied to the BCCI liquidation were among the highest allowed in liquidations within the jurisdiction of this court. The Chief Justice quoted from a letter dated July 6, 2000 written on behalf of the Committee of Creditors (of BCCI) which stated in part that: "we are aware that court approved rates for recent liquidations are (per hour) U.S. $400 for partners, U.S. $300 for senior managers, U.S. $250 for managers and U.S. $165 for senior accountants.

The Chief Justice then said that these comments were in accord with his own understanding of the circumstances prevailing in the Cayman Islands. He made two further comments which are of significance. Firstly, he indicated that the BCCI rates were among the highest rates allowed in liquidations allowed under this court's jurisdiction and secondly he stressed the importance of maintaining a fair balance between the interests of the liquidators and the interests of the creditors in ensuring that they are given value for money.

It may be said that in this case the need to achieve a balance between the interests of the liquidators and the interest of the creditors is absent as it would appear that no creditor would be affected by the decision I have been asked to make. In addition, it has been submitted that the

shareholders of TIL who will benefit from a resolution of the dispute (i.e. TCL and TMD) should share in the payment of the Provisional Liquidators fees and no other shareholders have objected to the amounts claimed. I should also say that I was advised that the liquidators were close to resolving the issues between TMD and TCL. It was therefore said to be unfair to force the liquidators to accept less than market rates for their work or to burden the petitioning shareholder with any portion of the Provisional Liquidators fees. (I am assuming that the petitioning creditor has provided the Provisional Liquidators with some form of indemnity).

It appears that liquidators remuneration in England is determined on the basis of either a percentage of the value of the assets realized or distributed or by reference to the time properly given by the insolvency practitioner as liquidator and his staff in attending to matters arising from the winding-up. If the liquidators are to be remunerated on a time basis there is a scale of fees laid down under the *Insolvency Rules*. It was not suggested that this scale applies to this case.

It was open to TMD to have Deloitte & Touche agree to accept whatever remuneration the court saw fit to approve as full compensation for their work should they be appointed as Provisional Liquidators or in the alternative, TMD could have sought the appointment of Provisional Liquidators who would agree to that condition. It seems to me that this is a problem which all those who seek winding-up orders face and I am unaware of any authority to support the proposition that rates in excess of the rates that this court ordinarily approves of are to be approved simply because the liquidators have seen fit to charge them. I would have no difficulty approving Provisional Liquidators fees or Official Liquidators fees if such were shown to be

charged out at market rates providing I was satisfied that the rates charged were indeed "market rates". There is no evidence before me to establish that the rates charged here are "market rates". I therefore consider that I am bound to approve only the rates accepted as usual by the Chief Justice in the *BCCI* case that is to say U.S. $400 per hour for Partner's time, U.S. $300 per hour for Senior Mangers, U.S. $200 per hour for Managers, and U.S. $165 for Senior Accountants. I note that the fees for "Principal/Director" are not to be found in the classifications referred to in the *BCCI* case. However, to be consistent with the *BCCI* decision I would reduce the rate for "Principal/Director" to U.S. $335 per hour.

Exhibit SS1-5 to the Affidavit of Stu Sybersma sworn June 6, 2002 is a letter from Walkers of the same date describing their work and the hours spent and the rates charged. It is the liquidator's obligation to submit such bills to "critical scrutiny", *Re Peregrine Investment Holdings Ltd.* (1998) 3 H.K.C. 1 *Mirror Group Newspapers Plc.* v. *Maxwell* (1998) BCC 324. If the court is not satisfied that the liquidators have subjected their attorneys bills to critical scrutiny the court will direct those bills be taxed. However, I have reviewed Exhibit SS1-5 and will approve it on the basis that the time and rates charged appear to me to be reasonable.

In light of the fact that some of the shareholders have not been given an opportunity to object to this application, I will direct that these reasons be forwarded to those shareholders who were not provided with a copy of Mr. Justice Graham's order of November 26, 2001 and given 30 days to respond. The formal order resulting from these reasons shall not be issued until proof of compliance with this direction has been filed with the Clerk of the Court.

Subject to that direction I will approve the time spent as detailed in the Fee Taxation Report provided that the rates I have fixed are applied thereto. Consequently, a further affidavit to establish the amounts arrived at after the necessary re-calculation will be required to be filed before the formal order is issued.

The miscellaneous disbursements disclosed in the Fee Taxation Report and the attorney's fees will be approved.

The costs of the appearances by counsel for the petitioning creditor and the liquidators on this application will be taxed and paid out of the assets of TIL. If counsel wishes me to fix those costs I will be happy to do so if provided with the appropriate material.

Kellock J.

Released September 10, 2002.

Appendix A

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 217 OF 2001

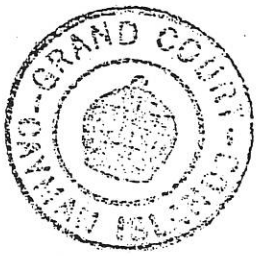
IN THE MATTER OF THE COMPANIES LAW (2001 Second Revision)

AND IN THE MATTER OF TAIT INTERNATIONAL LIMITED
(In Liquidation)

THE HONOURABLE MR. JUSTICE KELLOCK
IN CHAMBERS

Appearances:

Seamus Andrews of Walkers for the Liquidators.
Jeremy Walton of Hunter & Hunter for the Petitioner.



Application heard January 24, 2002.

Reasons for Decision

By summons dated the ------- day of November, 2001 (filed November 16, 2001), the court-appointed liquidators of Tait International Limited (hereinafter "TIL"), who were formerly the provisional liquidators, sought the court's approval of the fees and expenses of "the joint provisional liquidators" up to October 2, 2001 when the winding up order was made. The summons was returnable on November 22, 2001 and came on before my brother Graham J.

Graham J. ordered that the petitioner, (Tait Marketing and Distribution Co. Ltd., "TMD") and any other shareholders of the company were to serve any objections to the provisional liquidators' fees they might have by December 28, 2001 (TIL has several large shareholders, TMD being the largest single registered shareholder.) The liquidators were entitled to respond to such objections by January 11, 2002. Graham J. then adjourned the application until January 24, 2002 when it came on before me.

The November 2001 application was supported by the affidavit of Stu Sybersma sworn November 16, 2001 and in particular exhibit SS-1 thereto being a "Fee Taxation Report".

In preparation for the hearing of this application I obtained the court file which contains the petition filed April 23, 2001 and the supporting affirmation of Chen Hsueh Huei (a resident of Taiwan). There is a second Chen affirmation in the file. As I have said, the file contains the affidavit of Stu Sybersma (one of the liquidators) in support of the fee approval application but not the exhibit, i.e., the fee taxation report, and I was not provided with a bundle. I was also able to find the reports of the provisional liquidators dated June 11, 2001 and September 21, 2001.

Unfortunately none of the exhibits to the Chen affidavits were in the file or otherwise available. As I have said, no bundle had been provided. Consequently, the analysis which follows is more or less a 'stab in the dark'.

I asked the Court staff to obtain for me a copy of the fee taxation report on the theory that it would contain all the information the court would require to determine whether or not the fees and expenses ought to be approved. When the fee taxation report arrived I of course examined it carefully. It does not (at least alone) begin to satisfy the court's requirements (see *In re: High Risk Opportunities HUB Fund Ltd.* Cause No. 521 of 1998, September 22, 2000, Sanderson J.)

In the absence of a bundle and in the absence of any of the Chen exhibits I could not properly prepare for the hearing of the application. At the opening of the hearing on January 24th, I first of all advised counsel that there was no evidence that Graham J.'s order had been served on anyone or otherwise made known to the shareholders nor was there any evidence of objections. I was told that the provisional liquidators' fees had been the subject of correspondence which counsel then sought to hand up to me. I declined this

offer and advised counsel that the rules concerning evidence on motions were clear and ought to be observed, particularly when, as in this case, at least one of the letters was long and full of detail which I ought not to have been asked to attempt to absorb "on the fly".

Counsel took the position that Graham J. intended, when making the order of November 22, 2001, to approve the liquidators' fees and expenses subject only to being satisfied that the persons interested in this liquidation did not have any objections. Counsel assured me that this application was not to be regarded as a "taxation" despite the title to exhibit SS-1 to Mr. Sybersma's affidavit, (which is entitled "fee taxation report"). I was not provided with any authority in support of that submission nor could counsel articulate exactly what the court's proper function was when faced with an application of this kind. I find that not only surprising, but unacceptable.

I have since consulted Mr. Justice Graham who assures me that he had no intention of "rubber-stamping" the application. He advised me that had the application come on before him on January 24, 2002 he would have proceeded to hear it and to then decide whether or not the liquidators' fees were reasonable and proper whether or not there were objections thereto. I

advised counsel that I was prepared to adjourn the application for a few days, explaining that I assumed that the liquidators were intimately familiar with the nature, and more importantly, the reasons for the work they had performed and sought compensation for. I therefore assumed that the proper affidavit material could be prepared in short order. I have since been advised by the listing officer that the application has been put off until April 2002 and I must therefore conclude that my assumptions were incorrect.

Both counsel seemed to be of the opinion that because no one had appeared to oppose the fee application the court should treat the matter as some sort of consent application. They were very clearly upset (if not annoyed) when I advised them that I proposed to adjourn the application. I will therefore set forth in more detail the reasons for the adjournment and my views as to what the law requires applicants such as TIL to provide by way of evidence in support of all applications for the court's approval of liquidators' fees and expenses.

The remuneration of provisional liquidators is the subject matter of paragraph 2256 in the volume on Companies in 7(3) Hals 4th Ed. The relevant statement is as follows:

> "The remuneration of the provisional liquidator, other than the official receiver, must be fixed by the court from time to time on his application. In fixing his remuneration, the court must take into account:
>
> (1) the time properly given by him, as provisional liquidator, and his staff in attending to the company's affairs;
>
> (2) the complexity, or otherwise, of the case;
>
> (3) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
>
> (4) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and,
>
> (5) the value and nature of the property with which he has to deal."

In the *High Risk Opportunities* case referred to earlier, Sanderson J. put the matter this way at page 9 of his reasons:

> "What the Court has not been given, is sufficient detail to allow it to determine if these amounts charged are reasonable. The fees incurred may be quite reasonable. They are definitely quite significant but in order to be found to (be) reasonable the liquidator must provide the court with sufficient information to allow it to gauge their reasonableness. What is required will vary depending on the circumstances of each case. In

this case, however, the least that the court requires for the period in question is;

1. a description of what work has been done and the relative complexity or sophistication of the work;

2. the number of hours expended and the respective hourly rates;

3. an explanation as to why the work was necessary and what it was intended to achieve;

4. what has in fact been achieved as a result of the work performed. In particular what work has the liquidator done that has resulted in assets being realized and disposed of to the benefit of the estate and how has that work effected the prospects of realizing further assets."

I initially intended to attach as a schedule to these reasons a chart showing the members of the TAIT group of companies (which of course includes TIL) and their relationships *inter se*. Unfortunately, the Chen affirmation seems to be contradicted in part by the charts contained in the provisional liquidators' reports and the chart which was an exhibit to the Chen affirmation was not available to me. The petition was brought by Tait Marketing Distribution Co. Limited ("TMD"). TMD was incorporated in or is otherwise governed by the laws of mainland China according to some of

the documents appended to the provisional liquidators' reports. The petition sought a winding up order against TIL which is a Cayman Islands company. The petition was sought on the basis that

> "9. TIL is insolvent and unable to pay its debts.
> and
> 10. Further or alternatively, in the circumstances it is just and equitable that TIL should be wound up."

I was told (and I should say told quite emphatically by Mr. Walton that TIL was not insolvent). I did not inquire, as I should have done, why if that was the case, the petition so alleged. I cannot tell whether Graham J. was so advised when he made the order of June 15, 2001 appointing the provisional liquidators.

The Chen affirmation made in support of the petition indicates that TIL is indebted to TMD by reason of the fact that it is the assignee of a debt in the amount of $169.5 million Taiwanese dollars (1US $ = NT (new Taiwan) $33).

This NT$169.5 million debt is said to have been owing by TIL to Tait and Company Limited ("TCL") by reason of an "inter-company loan". TCL was

apparently incorporated under the law of Hong Kong. This alleged obligation was assigned by TCL to TMD, firstly informally and subsequently by a written transfer agreement. Paragraph 4 of that agreement is as follows;

> "4. This agreement and every provision thereof shall be governed by and construed in accordance with the laws of the Republic of China. All disputes, controversies or differences which may arise between the parties which cannot be amicably resolved within a reasonable period of time shall be presented to the Taipei District Court for resolution"

What this was intended to mean is not obvious, particularly in the light of the fact that the law of mainland China in relation to the transfer of a chose in action may or may not exist. Whether there is such a law does not seem to matter as it appears to apply only to the amicable resolution of disputes unless of course the Taiwanese Court is required to apply the law of mainland China. Unless the Taiwanese/China relationship has recently

undergone a dramatic change I would be surprised if the court in Taiwan did apply Chinese law, even if the court could discover what it was.

Mr. Chen does not mention this paragraph. He says that the transfer agreement is governed by Taiwanese Law and that a Taiwanese lawyer has opined that it is valid. The Chen affidavit then recites that TMD made a statutory demand on TIL demanding that TIL pay TMD NT $169.5 million. This demand was met by a letter from TIL's attorneys disputing the existence of this indebtedness.

Mr. Chen then says that TIL had threatened to effect a share exchange by which a number of TIL's shares would be re-purchased in exchange for shares in a subsidiary of TIL, which is a Cayman Islands company know as TAIT Asia Limited ("TAL"). Because virtually all of the profitable business carried on by subsidiaries of TIL is carried on by subsidiaries of TAL the share exchange would strip TIL of its assets. This transaction would make it difficult or impossible for TMD to collect the NT$169.5 million and would also significantly diminish the value of the shares of TIL which TMD owns.

Mr. Chen's affirmation then recites that in December 2000 TMD commenced an action in Hong Kong against TIL and TCL and that an interim world-wide Mareva injunction had been granted against TIL in that proceeding. It is clear from Chen's affirmation that TMD feared that this injunction might be discharged whereupon there would be a real risk that TIL might then dispose of its TAL shares.

The Chen affirmation concludes with the following two paragraphs:

> "49. In these circumstances, it is essential that TIL's business and undertaking be maintained and protected from jeopardy pending the hearing of the Petition, so that the value of TIL as a whole will not be prejudiced.
>
> 50. Accordingly, I ask this Honourable Court to appoint Provisional Liquidators for the purpose of preserving the estate and effects of TIL."

As paragraph 50 clearly states, TMD sought the appointment of provisional liquidators "for the purpose of preserving the estate and effects of TIL" and that became the liquidators' mandate. The court has not given any other directions. In particular, neither the provisional liquidators nor the official liquidators were directed to duplicate the work of the Hong Kong court or act as a mediator or arbitrator of the TMD/TIL dispute. Although the

winding up was sought on the bases that TIL was insolvent and alternatively that it was "just and equitable" to do so, the Chen affirmation seems to show that TIL was not insolvent. If Hong Kong is the proper forum for resolving the dispute and it is in fact being resolved there, why are the provisional liquidators engaged in what appears to be a duplication of the problem-solving process in which the Hong Kong court is engaged? It appears to me that the provisional liquidators have done little else and on the statements contained in their own reports, they do not understand how the TMD/TIL dispute can be resolved unless TMD and the other shareholders of TIL can reach an agreement. I agree and I am therefore unable to understand why the provisional liquidators have been doing what they appear to have been doing.

If the dispute is resolved in the Hong Kong litigation (which is the forum TMD has chosen) or resolved by agreement, the work performed by the provisional liquidators will have been a complete waste of time and money.

If the Hong Kong proceedings have been decided in favour of TIL the same result follows.

In either case both TMD and TCL will be bound by the decision of the Hong Kong court.

I could find no mention of the status of the Hong Kong litigation in the provisional liquidators' September 2001 report. I did note that at page 41 of the report they say "if appointed official liquidators our intention would be to obtain a legal opinion on the validity of the transfer agreement", which they say is governed in accordance with the law of the Republic of China. But what will that opinion contribute to the resolution of this dispute? I do know that Mr. Chen has said that the validity of the transfer agreement is to be determined in accordance with the law of Taiwan and it expressly provides that the dispute is to be determined in a Taiwanese court.

In order to approve the provisional liquidators' fees, the court must know not only what those liquidators have done but why they have done it. This is by no means the only aspect of the liquidators' reports I had difficulty understanding, but it points to a vital issue in the fee approval application.

Based on the authorities referred to earlier in these reasons, it seems to me that before the court should be asked to approve liquidators' fees and expenses every effort should be made by the applicant to provide the court with proper evidence which clearly (emphasis added) shows what was done, why it was done, why it was appropriate to do that work, and what the results have been.

As far as I can tell, hundreds of hours of work have been performed but I am uncertain as to what the purpose of a great deal of that work was. The problem may be exacerbated because I do not know what work the liquidators have been engaged in since September 2001 or whether there is any reason to assume that it is worthwhile.

In 1880, Jessel, M.R. said in reference to a winding up case before the English Court of Appeal;

> "If the matter had been before me ... I should have examined the Petitioners and their solicitors in the box *viva voce*, and I should have endeavoured in that way to ascertain under what circumstances the petition was actually presented. It is not always possible for a Judge to get behind the scenes, but I have occasionally been able to do so by adopting

> that course." (*In re Great Britain Mutual Life Assurance Society* (1880) 16 Ch. D. 246 at p. 254)

I was unable to adopt that course in this case because I did not have a complete record. Indeed the information provided can best be described as fragmentary. Neither liquidator was present and their counsel as well as counsel for TMD were apparently unaware of the requirements the applicant was obliged to satisfy.

I take the view that in this case, if not in others, one of the liquidators should attend these applications, and as well, applications for approval of liquidators' reports so that the enquiries the Master of the Rolls had in mind in 1880 can be undertaken in 2002 and in the future.

It seems to me that the liquidators are running a risk that their fees will not be approved in this case at all unless the Court is made aware, and very soon, what they are doing and why and the court can conclude that it is all worthwhile.

What the liquidators seem to have done is this.

Based on Mr. Chen's affirmation in support of the petition, they seem to have collected and examined documents (including the affidavits filed in Hong Kong) and interviewed people. This seems to have been done in aid of deciding whether or not TIL is indebted to TMD as Chen claims. In addition, the liquidators seem to have been keeping an eye on TAL's business operations. They report that TAL's businesses are humming along satisfactorily.

In this case the liquidators were nominated by TMD but now owe a fiduciary duty to TIL (7(3) Hals 4th ed., para 2327). Liquidators must maintain an even and impartial hand between all creditors and shareholders. (I am told that in this case there are no creditors other than TMD which is also a shareholder)

The liquidators' first report adds little to the information contained in the Chen affirmation. The report concludes:

> "There is sufficient evidence based on the information which we have reviewed to date to conclude that in all likelihood valid inter company debts do exist."

This is hardly a surprise and the report does not suggest what, if any definite steps can or will be taken which might resolve the TMD/TIL dispute. There is no reference, as I have said, to the status of the Hong Kong litigation.

To some extent the September report covers the same ground as the earlier report. The "dispute" (which the provisional liquidators were attempting to resolve) is defined in the second report in exactly the same language as in the first as follows:

> "The main issues are summarized as follows:
>
> 1. The quantum and justification for the amount owed by TIL to TCL.
>
> 2. The quantum and justification for the amount advanced by TMD to TCL.
>
> 2. The enforceability of the assignment of TCL debt due from TIL to TMD.
>
> 4. The method by which this dispute should be resolved."

The liquidators' September 2001 report concluded as follows:

> 1. As to issue 1, "... although we are inclined to consider this debt [ie, TIL owed TCL US$8,004,699 at December 31, 2000] to be

valid; in the absence of an agreement between the parties our final determination will require legal advice." (I should say again that it is not clear to me how legal advice would resolve the issue in the absence of the agreement of the parties)

2. "We conclude that in all likelihood debt exists between TCL and TMD." (ie, TCL owed TMD NT$222,700,000 as at June 30, 2001)

3. The liquidators refrained from comment on the enforceability of the assignment as they had not yet obtained legal advice. (As noted earlier they indicated that they require an opinion based on the law of the Republic of China as to the validity of the assignment)

4. No comment whatever is made on this issue.

Again there is no indication what if any steps (other than taking of legal advice) are contemplated which would hold out a realistic prospect of resolving any of the issues in the absence of the agreement of the parties to the dispute. As I have said no comment whatever has been made as to how the disputes might be resolved. However the September report makes it clear that although TIL's assets are illiquid they are substantial and TIL is not insolvent.

I must at this point repeat what I have said before. The record before me is fragmentary and without a complete record I cannot conclude that the work of the provisional liquidators is not worthy of remuneration. I can say that if the complete record does not satisfactorily answer the "what" and "why" questions it is likely, if not probable, that the liquidators fees' (all of them) will have to be borne by TMD.

There is a very serious question in my mind and that is why the petition was not opposed. A disputed debt is not usually taken to be a proper reason for a winding up order (See *Re Lympne Investments Ltd.* (1972) 2 All ER 385). In addition it seems to me that a Mareva injunction in the Cayman Islands based on the order granted in Hong Kong would have preserved TIL's assets and made a winding up unnecessary. The existence of such an alternative is a ground upon which the Court can refuse to make such an order.

Again I do not know what information was put before the Court or what submissions were made by counsel.

Even if the liquidators "decide" the dispute between TMD and TIL, will that end the dispute and if so why would anyone want TIL to be dissolved? I

have no reason to believe that liquidators can resolve the dispute and the liquidators seem to view this as a problem as well.

In conclusion I will return to the fee taxation report itself.

This document shows that the liquidation work has been priced at fixed rates for partner, principal/director, senior manager, manager, senior accountant and administrative assistants. The qualifications possessed by these classifications is not stated.

For the period April 25, 2001 to June 13, 2001 the fees total CI$67,532.50, of which only CI$1,850.00 was earned by anyone below the rank of senior accountant. Only CI$1,093.75 has been changed for the work of senior accountants.

The fee is therefore made up of work done by partners, senior managers and managers. Who the managers were managing is not stated. If the managers were managing senior accountants and administrative assistants, about CI$43,000.00 has been charged for managing people who did less than CI$3,000.00 worth of work. All of the work has been divided into

categories, some of which are not informative, eg, "appointment issues", "appointment notification." The appointment issue category seems to involve discussions with the petitioning creditor (TMD) concerning Deloitte's fees and the nature of the indemnity required to be given by the petitioner. That can be described as Deloitte's efforts to obtain the engagement, ie, the business, and would have been absorbed by Deloitte as business development expense had the firm not been chosen by TMD.

Appointment notification seems to include sending notices to TIL's shareholders, banks and "other relevant parties". That, which would appear to be largely a mechanical exercise, is charged out at CI$1,980.00 of which partner time accounted for CI$1,500.00. I must say that I have a lot of difficulty understanding why a great deal of the work could not have been adequately performed by employees whose chargeable time could be billed at less than CI$265.00 per hour. I have not seen the Hong Kong affidavits which the provisional liquidators reviewed, but I would have thought that junior accountants or administrative assistants could have prepared summaries for review by more senior people or the liquidators' attorneys, presuming of course that it was necessary to do that work in the first place.

I gather that the appendices to the fee taxation report where generated from dockets kept by the various time-keepers which I assume would provide some indication of exactly what the individual time-keepers were doing. Those dockets were not produced. I do not intend to say that a judge reviewing the material filed in support of the liquidators' fees would wish to review all of those dockets in detail. I do say that the judge would wish to be able to examine those dockets on a random basis in determining whether it was safe to conclude that the overall changes were reasonable. In addition, the availability of the dockets would allow the judge to determine whether the review of affidavits was carried out by the appropriate people and in a reasonable time.

In conclusion I should also point out that the rates which the liquidators seek, eg, CI$450.00 per hour for partners' work, has already attracted some adverse comment from the members of this Court.

Kellock, J. (Actg)

Judge of the Grand Court

Dated 29th January, 2002