

HONG KONG / JUDGMENT

RE APASTRON CAPITAL LTD

[2022] HKCFI 1567

COURT

Court of First Instance

DECIDED

26 May 2022

CASE / FILE NUMBER

HCCW290/2020

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HCCW 290/2020

[2022] HKCFI 1567

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO. 290 OF 2020

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance,
Chapter 32

and

IN THE MATTER of APASTRON CAPITAL LIMITED

Before: Deputy High Court Judge Le Pichon in Chambers

Date of Hearing: 17 May 2022

Date of Decision: 17 May 2022

Date of Reasons for Decision: 26 May 2022

REASONS FOR DECISION

This is the application by ex parte summons dated 19 October 2021 issued by Kennic Lui and Lee Lai Ha (“Ms Lee”), provisional liquidators (“PLs”) of Apastron Capital Limited (“the Company”) for directions for, inter alia the appointment of Liquidators of the Company.

At the conclusion of the hearing, the court made the following orders: (1) the PLs be appointed as the Liquidators of the Company; (2) there should not be a committee of inspection (“COI”) and the Liquidators be at liberty to seek directions on the appointment and composition of the COI if and when the need shall arise; and (3) the remuneration of the Liquidators shall be charged on time-costs basis and such remuneration shall be paid out of the assets of the Company.

I. BACKGROUND

The Company was incorporated in Hong Kong in 2016 and held Type 1 and 6 licences under the Securities and Futures Ordinance (“the SFO”) from May 2017 to September 2019. Its directors included John Carter Brookhart (“Brookhart”) and Mak Terence Chung Sing (“Mak”).

The Company’s last audited financial statements for the year ended 30 April 2019 (“AFS 2019”) reflect over \$82 million in gross revenue in the years 2018-2019 which was almost entirely offset by unspecified costs of income, administrative and other operating expenses.

Its letter dated 5 December 2019 to the Inland Revenue Department stated that the Company ceased to carry on business on 30 January 2019 and had no revenue since then.

Anglo Chinese Corporate Finance, Limited (“Anglo Chinese”) is a corporate finance advisor licensed under the SFO. Daniel Kan Pui Kei (“Daniel Kan”) and Andrew Stephen Forbes (“Forbes”) were its former employees.

Anglo Chinese brought proceedings (HCA 2954/2017) on 17 December 2017 against Daniel Kan, Forbes and others for inter alia damages for allegedly diverging Anglo Chinese’s business to the Company (“the Action”). The damages claimed includes profits alleged to be diverted to the Company of some \$56.7 million (less reasonable expenses).

Leading Mar Trading Co Ltd (“LM”) was incorporated on 31 March 2014 to carry out property advisory and other businesses of Tang Wing Yu (“Ms Tang”). She became LM’s sole shareholder on 1 April 2014.

On 18 June 2019, an Advisory Agreement was signed by Vien Liu (“Ms Liu”) allegedly on behalf of the Company and by Ms Tang on behalf of LM (“the Advisory Agreement”).

Under that agreement, LM was engaged to “collect property information” on real estate in Athens, Greece at an hourly rate of HK \$6000. LM rendered 5 invoices, each dated 17 July 2020, billing the Company in excess of \$33 million for 5539 hours of work allegedly done between 11 July 2019 and 17 July 2020 (“the LM Claim”).

LM presented a petition to wind up the Company on 11 September 2020 relying on an unmet statutory demand based on the LM Claim.

The PLs were appointed over the Company on 13 November 2020 upon the application of Anglo Chinese.

On 19 February 2021, LM applied to discontinue the winding up proceedings and on 8 March 2021 Anglo Chinese was substituted as the petitioner.

The Company was wound up on 19 April 2021 by the order of Harris J.

The first meetings of contributories and creditors were held on 9 July 2021. The contributories' meeting was inquorate and adjourned to 30 July 2021. At the request of LM the creditors' meeting was also adjourned to 30 July 2021.

The adjourned contributories' meeting was inquorate and no resolution was passed.

At the adjourned creditors' meeting, Ms Lee as chairman marked the LM Claim as objected to and allowed LM to vote, subject to its vote being declared invalid in the event of the objection being sustained under r 128 of the Companies (Winding-Up) Rules, Cap 32H ("the Rules").

LM (whose proof of debt exceeded \$33 million) voted in favour of Alan Tang and Terry Kan as liquidators. Anglo Chinese (whose proof of debt was a little over \$104,000) voted for the PLs.

The creditors resolved unanimously to appoint a COI.

The PLs have been in office for over a year and have carried out a considerable amount of work. So far they have only realised bank balances of \$5950.

II. LEGAL PRINCIPLES

(A) The court's power to appoint liquidators

Section 194 (1) of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance, Cap 32 ("the Ordinance") provides as follows:

"(1)

The following provisions have effect on a winding-up order being made—

...

the provisional liquidator shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator;

the court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, the court shall decide the difference and make such order thereon as the court may think fit;

the court may make any appointment and order as it thinks fit if the creditors and contributories of the company do not pass a resolution or do not meet...”

As no resolution was passed at the contributories’ meeting, section 194(1)(d) authorises the court to make “any appointment and order as it thinks fit”.

Even where there are such determinations, the court retains a discretion to decline to follow the will of the majority of the contributories and creditors: see *In re Johannesburg Land and Gold Trust* [1892] 1 Ch 583 at 588. The paramount consideration is what the court considers is in the best interests of all persons interested in the winding up: see *Re Akai Holdings Limited* [2001] 2 HKLRD 411 at 418B.

In the Akai case, Yuen J (as she then) held (at 418 B-C) that in deciding whom to appoint as liquidators, any appointment that would result in a saving in the time and costs of investigating the company’s affairs should be preferred.

Further, it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator: see *Re Value Food Supply Limited* [2021] HKCFI 2975 at §11 (5) per Harris J.

In that case, Harris J opined (at §12) that

“The application of these principles does not involve simply determining arithmetically which of competing candidates has got the most votes. The court can have regard to the characteristics of each creditor, which may be relevant to an assessment of the weight to be given to their views. Generally more weight will be given to the views of creditors who are independent of the ownership of the Company than those who are associated with it, because their circumstances may reasonably be thought to suggest that they will be influenced by considerations other than simply maximising the recovery for unsecured creditors.”

(B) The admission of proofs of debt at creditors’ meetings

Rule 128 of the Rules provides that:

“The chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.”

In determining an objection, the court carries out an independent assessment of whether or not the proof should be admitted or rejected on the basis of the evidence before the court. It will only “undertake a broad, macroscopic assessment”, bearing in mind that the company has very little assets at the earliest stages of liquidation: see *Re Days International Limited* [2014] 1 HKLRD 20 at §§9-10.

Rule 125 sets out the cases in which creditors may not vote and provides that “a creditor shall not vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained”.

III. THE LM CLAIM AND RULE 128

At the adjourned creditors’ meeting, the only creditors who had filed proofs of debt were LM for \$33,338,778 and Anglo Chinese for \$104,778.

The resolution put to the creditors was whether (i) the PLs or Terry Kan and Alan Tang of ShineWing be appointed joint and several liquidators; (ii) a COI be appointed; and (iii) the liquidators be entitled to remuneration charged on time-costs basis or such other basis as may be determined by the court.

The PLs did not make any determination on the validity of the LM Claim but marked it as objected to and allowed LM to vote on the resolution subject to the determination of its claim.

LM voted in favour of ShineWing. Given the size of its claim, it was resolved to appoint ShineWing as liquidators. However, that resolution was not carried into effect but deferred pending its determination by the court under rule 45 (2). The PLs thus continued in place.

As the PLs were in doubt about the LM Claim, they issued the present summons.

Ms Carol Lee, counsel for LM, submitted that in the broad and macroscopic assessment as to whether the claim is established, “the benefit of doubt should be resolved in favour of the creditor submitting the proof”, citing *GMI Technology Inc v East China Digital Technology Limited & Another*, HCMP 2036/2016, unrep., 11 August 2017 at §§11-12.

The course adopted by the PLs was that which LM had advocated as the appropriate course required by rr 128 and 125.

Mr Simon Westbrook SC, leading counsel for Anglo Chinese, submitted that the course of action taken by the PLs was incorrect, citing *Re Days International Limited* at §§9-10 and *Re Cliftons Limited*, HCMP 276/2020 [2021] HKCFI 1193.

In *Re Cliftons*, after highlighting the significant difference in approach as expounded in (a) *Re Days* and *In re Grande Holdings Limited*, HCCW 177/2011, 5 November 2014 and (b) that in *GMI*, Linda Chan J expressed a preference for the approach in *Re Days* and *Re Grande*.

I respectfully agree that the approach in *Re Cliftons* reflects the requirement of r 125 and is consistent with the usual practice of liquidators including the Official Receiver acting as liquidators to admit a debt of \$1 for voting purposes when the liquidator considers that there is doubt about the debt or that the value had not been ascertained at the time of the creditors’ meeting. While the PLs were correct in marking the claim as objected to, they should have attributed \$1 to the LM Claim.

As Anglo Chinese submitted, had that approach been adopted, Anglo Chinese would have enjoyed a majority for voting purposes and the PLs would have been appointed as Liquidators rather than ShineWing. It would then have been up to LM to issue a summons under r 128 to challenge that decision but that did not happen.

IV. VALIDITY OF THE LM CLAIM

The following issues arise for determination: (A) whether the LM Claim is unliquidated and unascertained; and (B) whether the Company is bound by the LM Claim.

(A) ‘Unliquidated’ and ‘unascertained’ for the purposes of r 125

(1) Claims based on time-costs

Mr Jason Yu, counsel for the PLs, submitted that the LM Claim is unliquidated and for an unascertained value and is therefore inadmissible under r 125. He invited attention to clause 3 of the Advisory Agreement pursuant to which the Company agreed to pay the advisor an advisory fee of \$6000 for each hour of “Services” rendered and LM agreeing to submit to the Company an invoice with amounts due from time to time which would be due and payable upon issue.

Read literally, clause 3 appears to require the Company to pay for every single hour of services provided by LM regardless of reasonableness or justification of the time spent.

In *Re Pan Sino International Holdings Limited*, unrep., HCCW 144/2009, 27 May 2010, the court rejected a proof of debt under r 125 based on an accountant’s hourly rates on the basis that it was an unliquidated claim. It was not merely a matter of arithmetic as submitted by the accountant. Harris J explained that the assessment involves a consideration of the work done by the accountant and whether or not the number of hours claimed is justified.

Similarly, in *Re Grande (No 1)*, a case concerning fees charged by solicitors on their hourly rates, Harris J rejected their claim for fees as an unliquidated debt within r 125. The ability to calculate its value arithmetically is not determinative. He adopted the approach of Proudman J in *Truex v Toll* [2009] 1 WLR 2121 at §24 where it was stated that as a matter of principle, a claim for solicitors’ fees not as yet judicially assessed or determined is not a claim for a liquidated sum which can be the subject of the bankruptcy petition.

A solicitor’s claim is for a “reasonable sum” rather than for a liquidated sum. He will normally be required to prove the reasonableness both of the number of hours spent and of the hourly rate which he has charged. In *Turner & Co v O Palomo* [2000] 1 WLR 37 at 52B-E, Evans LJ held that where the latter is agreed, he will need to prove the former.

Ms Lee submitted that *Re Pan Sino* and *Re Grande (No 1)* are distinguishable and relied on the Court of Appeal decision in *Re Grande Holdings Limited* [2016] 1 HKLRD 435 (“the Grande CA case”), an appeal not from *Re Grande (No 1)* but another of 3 *Re Grande* cases heard on the same day.

The Grande CA case concerned the early termination of swap transactions where the termination amount initially owed by C (a company in liquidation) to ASM (the assignee of debts owed by C) was calculated by a fixed formula in the Agreement. A creditor challenged the admission of ASM's proof of debt on the basis that it was an unliquidated debt.

In that case, relevantly, "the amount of the debt, the subject matter of ASM's claim, was never in dispute and, indeed, had been repeatedly acknowledged by Grande both before and after its liquidation": there had been a partial payment made by Grande, the amount that Grande owed the Bank was stated by the Chairman and director of Grande in the statement of affairs and Grande's CFO had confirmed Grande's indebtedness to the provisional liquidators: see page 452 of the report at 5.2 (3).

It is common ground that the Court of Appeal's ratio is to be found in §§6.5 and 6.8 where it is stated that

"6.5 ... a more useful statement on the meaning of a debt for a liquidated sum is that it is a pre-ascertained liability under the agreement of the parties. This includes a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery.

6.8 In the present case the debt was ascertained in accordance with a contractual formula or contractual machinery. The mere fact that stochastic calculus was involved, which contained "variables the value of which change randomly, for example, floating interest rates", does not mean that the amount was not so ascertained."

The Grande CA case involved a "pre-ascertained liability" under the agreement of the parties. The Grande CA case was not an appeal from and did not impinge on or affect the reasoning in *Re Grande* (No 1) and, for that matter, in *Re Pan Sino*.

It would appear that Ms Lee regarded the agreed hourly rate as an agreed formula within the framework of §6.5 but what is missing is any "pre-ascertained liability".

Ms Lee submitted that apart from the number of hours, LM's work product (comprising photos, videos and schedules) was uploaded to the dropbox designated by the Company on a daily basis and there is no challenge that the work product does not exist.

The fact that work was performed by LM cannot somehow render the sums claimed in its invoices liquidated or ascertained. The work product it claims to have provided to the Company is no different from work carried out or services provided by an accountant or solicitor whose claims on time-costs basis remain unascertained and unliquidated until they have been assessed or determined.

Applying the *Truex* test, the sum claimed by LM does not become a liquidated sum until it has been judicially assessed or determined in an action.

(2) Implied term

Mr Yu further submitted that as the Advisory Agreement does not stipulate the minimum hours of work and there is no agreed mechanism to ascertain the number of hours that LM may justifiably charge on its work, section 7 of the Supply of Services (Implied Terms) Ordinance, Cap 457 (“the SSO”) applies, the effect of which is that there is an implied term that the Company will pay a reasonable charge.

Alternatively, such a term would be implied under common law principles.

The “Services” LM was engaged to provide is set out in clause 1 (a) of the Advisory Agreement:

“(a) Engagement. The Company hereby engages the Advisor to station its representative in Athens for the purpose of collecting property information, including but not limited to residential properties, commercial properties, land and car parks. The Advisor is obliged to contact local property agents to collect information regarding property available for sale, select appropriate properties, arrange site visit of the properties, take pictures and videos of the properties during the visit and submit such information to the Company (the “Services”).”

Pausing there, the “Services” to be provided can be said to be ‘singular’. There is no evidence from LM that it typically provides such services to its clients at those rates. It is not evident what commercial purpose it could serve or why anyone would require the information sought that is freely available online much less to pay hourly rates that match those of a highly qualified professional such as a senior solicitor or accountant.

Be that as it may, read literally, LM is given carte blanche without any constraints to decide on the number of hours of services it chooses to provide. Such a contract makes no commercial sense. There has to be an implied term to give business efficacy to it which would limit LM’s otherwise unfettered discretion to charge time in good faith and rationally. It would follow that the implied term would require justification for time spent. That necessarily renders the LM claim unliquidated.

LM sought to address the Re Pan Sino and Re Grande (No 1) line of cases as well as the implied term submission by referring to evidence which it submitted showed that the Company had expressly accepted the reported hours spent without requiring a breakdown.

Exhibited to Ms Tang’s affirmation is an email chain between Ms Tang and persons purporting to act for the Company from 18 June 2019 to 10 July 2020:

On 4 October 2019, Ms Tang informed Ms Liu that she had spent 1271 hours from 11 July 2019 to 30 September 2019 for the property information that she had uploaded on a daily basis for Ms Liu to access herself. It met with the response “Well noted with thanks”.

The next email of 6 January 2020 from Ms Tang

reporting on time spent from 1 October 2019 to 31 December 2019 was answered by a person named “Xi” informing her that Ms Liu no longer worked for the Company.

2 further emails sent in April and July 2020 reporting the number of hours spent on each of the 2 subsequent quarters were each met by nothing more than a “Noted” response.

No evidence was adduced to substantiate the information contained in the emails relied on which simply reported the total number of hours ‘clocked up’ per quarter. There were no detailed time records as would usually be supplied to justify remuneration based on time spent. The schedule provided of LM’s “work product” contains a description of the properties considered and a date next to the property described but provides no information of time spent.

The schedule covers the period commencing with 11 July 2019 (2 days after Ms Tang’s arrival in Athens) and ending on 16 July 2020. The LM Claim is for 5539 hours (the aggregate of the time claimed to have been spent) spanning 53 weeks. That averages out at 104.5 hours per week or approximately 21 hours per working day on the basis of a five-day working week.

Upon a closer perusal of the schedule (disregarding weekends), entries were not made every single day of the working week. Further, under clause 1 (a) of the Advisory Agreement, the Company engaged the Advisor “to station its representative in Athens for the purpose of collecting property information ...”. From the email chain, Ms Tang was that “representative”.

In her affirmation dated 10 February 2022 (“Tang 1st”) Ms Tang stated that LM’s work was “performed by me, my husband and extended family members”. LM does not explain the basis upon which the Company could be liable in respect of time spent by anyone other than the representative stationed in Athens, ie Ms Tang. There is no provision in the Advisory Agreement authorising the representative to delegate to others who could also charge at \$6000 per hour.

Beyond that, LM engaging in ‘reverse engineering’ averaged out the claimed number of hours over 427 properties, arriving at approximately 13 hours per property and, seemingly, artificially and randomly allocated time to pre-visit activities, actual visit activities and post-visit follow up activities.

LM’s submission that the responses (i.e. “noted”) in the email chain constituted an acknowledgement and acceptance of the claimed hours is simply unsustainable. There is no evidence that the recipient was aware of the matters raised in §§65-67 above when the email responses were given each within a few hours of its receipt.

In *Truex, Proudman J* held (at §30) that “an agreement converting an unliquidated debt into a liquidated one must be a binding agreement. That would mean an agreement for consideration ...”.

In my view, the email exchanges do not meet the *Truex* test. They cannot remotely be considered as creating a binding agreement since there was no consideration, quite apart from the fact that there is no evidence that Xi had authority to act for the Company.

(3) Conclusion

For the reasons set out above, I agree with the PLs that the LM Claim is unliquidated and for an unascertained value. On that basis, it is inadmissible under r 125.

(B) Whether the Company is bound by the LM Claim

(1) Actual authority

As earlier noted, the Advisory Agreement was signed by Ms Liu purporting to act for the Company. But by the date of the Advisory Agreement, the following events had occurred:

the Company had ceased to carry on business several months prior to the Advisory Agreement;

Ms Liu had ceased her employment with the Company on 31 January 2019; and

the management accounts of the Company as at 18 December 2019 obtained by the PLs show that the Company's liabilities totalled approximately \$43,000 and make no mention of the LM invoices claiming over \$7 million up to that period.

Neither Brookhart nor Mak the only directors of the Company at the time responded to the PLs' enquiries as to whether Ms Liu was authorised to enter into the Advisory Agreement. On the evidence before the court, Ms Liu could not have had actual authority to act for the Company.

(2) Apparent authority

LM relied on the letter dated 5 December 2019 to the IRD signed by Ms Liu to show that she was still the "authorised" signatory of the Company 11 months after the date the PLs and Anglo Chinese said she had resigned. The PLs submitted that as the representation was not made by the directors of the Company, it cannot be relied on as a representation of apparent authority.

According to Ms Tang, the representation was made by Ms Liu herself. She represented to Ms Tang that she held "a senior position at the Company" at a time when she had ceased to be employed by the Company.

This raises the question considered in *Akai v Thanakharn Kasikorn Thai Chamkat* (2010) 13 HKCFAR 479 at §63, namely, whether a 3rd party, seeking to establish that an alleged agent had apparent authority, can rely on what the apparent agent represented (without the sanction of the principal) about his authority, so as to clothe him with the authority which he would not otherwise have.

Lord Neuberger NPJ opined (at §64) that "if the 3rd party could rely on some statement by the alleged agent, made without the authority of the principal, it would seem precious close to pulling up oneself by one's own bootstraps". He went on to add (§70) that he found it very hard indeed

"to conceive of any circumstances in which an alleged agent, who does not have actual or apparent authority to bind the principal, can nevertheless acquire apparent authority to do so, simply by representing to the 3rd party that he has such authority."

If, contrary to my view, Ms Liu was clothed with apparent authority, she had clearly acted in excess of authority in entering into the Advisory Agreement. If the 3rd party was put on notice or in fact knew that the agent was acting outside its powers and chooses not to investigate the agent's authority, the principal will not be liable: see *Incorporated Owners of Hamden Court v Mega Miles* [2015] 5 HKC 179 at §34. Recklessness and blind-eye ignorance amount to irrationality or dishonesty.

It was irrational for LM to rely on Ms. Liu's apparent authority. As earlier noted, that the Advisory Agreement to provide the "Services" could potentially expose the Company to unlimited liability is clearly out of the ordinary. There is no evidence from LM that the Advisory Agreement is typical of agreements in LM's property advisory business.

In my view, no rational person could have reached the conclusion that the transaction was for the benefit of the Company. Put differently, LM was turning a blind eye to the obvious detriment to which the Company would be exposed by entering into the Advisory Agreement.

In so far as LM relies on the indoor management rule such that it should be given the benefit of the doubt for not investigating Ms Liu's authority further, that rule applies to directors and at the time of the Advisory Agreement, Ms Liu was no longer a director. Moreover, *Turquand* cannot be used to create authority where none otherwise exists: see the *Akai* case at §59.

For those reasons, LM's reliance on actual and/or ostensible authority is wholly misplaced.

(3) Was the transaction bona fide?

It cannot be gainsaid that the Advisory Agreement and the LM Claim (collectively "the transaction") have inexplicable features. I need only highlight some of the more (adopting Mr Westwood's epithet) "bizarre" features of the transaction:

The Company entered into the Advisory Agreement 4 ½ months after it had ceased business.

Until then, the only business ever conducted by the Company was corporate advisory and financing services.

Even if (as suggested by LM) the Company was at the material time exploring alternative business opportunities (whether by itself or by cooperation with other companies) in property investments in Greece, it had had no revenue since January 2019 and had virtually no assets by June 2019 to pay for such investigation.

Over \$33 million was allegedly spent by the Company investigating several hundred properties in Athens for no apparent commercial benefit.

During the year-long engagement for LM's services, there is no evidence of any communication passing between the Company and LM relating to the information collected and supplied.

LM entered into the Advisory Agreement which exposed the Company to potentially unlimited liability under an entirely open-ended contract for services based on time-costs.

The hours claimed are manifestly unreasonable.

Instead of adducing proper time records, as noted in §67, LM's attempt to justify the hours claimed is telling because it shows the artificiality of the exercise.

The hours claimed have been inflated by work done by Ms Tang's "husband and extended family members" when the Advisory Agreement did not authorise their engagement.

During the period between 11 July 2019 and 16 July 2020 when Ms Tang was allegedly stationed in Athens to provide the Services to the Company, throughout that period she was a full-time employee of First Creative International Limited from 1 August 2018 to 31 December 2020 with her work location being in Hong Kong at a salary of \$23,000.

In view of the matters highlighted above, the transaction and its implications are so far removed from commercial reality that it is difficult (if not impossible) not to regard the transaction as having been concocted for some ulterior purpose.

V. BIAS

LM submitted that the PLs are not suitable liquidator candidates and that there are real reasons to believe that they are not independent and impartial in duly discharging their duty to protect the interest of LM as creditor in the liquidation; or at least there is an appearance of lack of the necessary independence and impartiality on their part.

The thrust of LM's allegations is that the PLs are funded by Anglo Chinese and that the PLs did not treat the LM Claim fairly, keeping LM in the dark for months.

Anglo Chinese confirmed that the PLs were and are funded by them. In *Re Akai Holdings Limited* [2001] 2 HKLRD 411, Yuen J noted (at 422E-F) that it is well-established that the fact that a creditor is funding the liquidation is not a reason for criticism, citing *Re Allebart Pty Ltd* [1971] 1 NSWLR 24 at p. 28 where the court held that

"where a company is being wound up and it has no assets, or insufficient assets, to enable the due processes of liquidation to be carried through, a creditor is to be encouraged, rather than criticised, in making funds available to the liquidators."

That approach was recently followed in the *Re Value Food* case: see §25 above.

The allegation of bias or perceived bias concerns Anglo Chinese's summons dated 16 June 2021 for an order under section 186 of the Ordinance to continue the Action against the Company ("the 186 application"). LM's complaints are threefold: (i) despite the PLs' assertion of adopting a "neutral position", it turned out to be a "non-objection" stance; (ii) the PLs failed to notify LM about the 186 application when they knew of LM's interest at the latest by 9 July 2021 which was before the 186 order was made; and (iii) PLs' scepticism of the LM Claim.

In my view, those matters could not have given rise to perceived bias on the part of the PLs.

The evidence is clear that between 3 December 2020 and 3 March 2021, the PLs sent 7 letters to LM all of which went unanswered. Meanwhile on 19 February 2021 LM applied for leave to discontinue the winding up proceedings.

Upon receipt of the 186 summons on 16 June 2021 (due to be heard on 6 July 2021), as the Company had no funds to become substantially involved in the Action, the PLs gave instructions to their former solicitors to request that their attendance be excused. Their former solicitors made the request to the court by letter dated 24 June 2021, noting that the PLs had no objection to the 186 application.

LM was informed on 2 July 2021 of the 1st meeting of creditors to be held on 9 July 2021. The very first communication from LM to the PLs was LM's letter submitting a proof of debt received on 8 July 2021. In the preceding 7 months LM had chosen to ignore the PLs' letters and chasers. In those circumstances, it is hardly surprising that PLs had no inkling that LM wished to be updated on any matter regarding the liquidation.

Although LM latched on to the reference in the decision dated 14 July 2021 of Mr Recorder Manzoni SC that the Company considered it "appropriate" for leave to be given, there is no evidence that the PLs had ever so indicated to the court. LM was informed of the PLs' neutral stance in the Action on 23 August 2021.

Be that as it may, it is a matter of no consequence since the Action is 'fact heavy' and would have carried on in any event because there are other defendants. It is not understood how LM could have been prejudiced.

Finally, I would observe that had the PLs been biased, they would not have adopted LM's proposal at the adjourned creditors' meeting to mark the vote as objected to and allowed LM to vote which, for the reasons explained above, turned out to be incorrect.

VI. ORDERS

For the reasons set out above, the court made the orders set out in §2 above.

On the question of costs, there is to be an order nisi of costs in favour of the PLs and Anglo Chinese, with certificate for counsel, such costs to be summarily assessed and payable forthwith.

As the PLs and Anglo Chinese have lodged their respective statements of costs, I direct that LM lodge its objections within 14 days of these Reasons, and the PLs and Anglo Chinese their respective replies (if any) within 7 days thereafter.

(Doreen Le Pichon)

Deputy High Court Judge

Mr Jason Yu, instructed by Mayer Brown, for the Provisional Liquidators

Mr Simon Westbrook, S.C., instructed by MinterEllison LLP, for Anglo Chinese Corporate Finance, Limited (Substituted Petitioning Creditor)

Ms Carol Lee, instructed by Winston & Strawn, for Leading Mar Trading Company Limited
(Creditor)

Attendance of the Official Receiver was excused

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