

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2003/0012

BETWEEN:

NAM TAI ELECTRONICS, INC.

Appellant/Petitioner

and

[1] DAVID HAGUE

[2] TELE ART INC (IN LIQUIDATION)

Respondents

BANK OF CHINA

Before:

The Hon. Mr. Adrian Saunders

Justice of Appeal

The Hon. Mr. Brian Alleyne, SC

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

Appearances:

Mr. David Chivers Q.C. with Mr. John Carrington for the Appellant

Mr. Richard Hacker Q.C. with Mr. Michael Fay for Respondent No.1

Mr. Anthony Linton for Mr. Harrigan, present Liquidator of Respondent No.2

Mr. Paul Webster, QC with Mr. Paul Dennis for the Bank of China

2004: January 13; 14;

2004: April 26.

JUDGMENT

[1] **GORDON, J.A. [AG.]:** By a Summons dated 4th February 1999, the Official Liquidator of Tele Art Inc (hereafter called “Tele Art”) (then Mr. David Hague, who has since resigned with the permission of the Court) applied to the High Court of Justice for the following Orders and declaration:

“1. A declaration as to the respective priorities of the debts of Tele Art Inc (“the Company”) to the bank of China, Nam Tai Electronics, Inc (“Nam Tai”) and other creditors of the Company for the purposes of the winding

up and their respective rights to have their debts discharged out of the proceeds of the sale of the shares in Nam Tai owned by the Company (the Nam Tai Shares”).

2. That the redemption of 138,500 Nam Tai Shares by Nam Tai on January 22, 1999 be set aside and avoided and the Company be reinstated to the register of members of Nam Tai as the holder of such shares and that all certificates for all Nam Tai Shares, which are in the possession or control of Nam Tai be delivered to the Official Liquidator.
3. ...
4. That Nam Tai pay to the Official Liquidator all dividends and distributions earned by the Company in respect of the Nam Tai Shares, since the commencement of the Official Liquidator [sic] when due, all future dividends and distributions to which the Company may from time to time be entitled in respect of the Nam Tai Shares.
5. ...”

[2] By a judgment dated 2003: January 21 d’Auvergne J ruled on the various issues in the Summons and an Order deriving from the judgment was filed on 4th February 2003 which read in part as follows:

“IT IS ORDERED AS FOLLOWS:

- [1] It is hereby declared that all company property withheld by the Respondent [Nam Tai Electronics, Inc] either before or during the winding up is wrongful.
- [2] It is ordered that this property should be handed over to the Company in liquidation.
- [3] It is hereby declared that the redemption and set off of dividends of the 138,500 Tele Art Shares by the Respondent be set aside.

- [4] It is ordered that those shares be handed over to the Company in liquidation.
- [5] The Respondent shall pay costs in the sum of \$15,000 to the Company in liquidation.”
- [3] From this judgment, the Appellant, Nam Tai Electronics, Inc (hereafter “Nam Tai”), has appealed.

The History

- [4] Nam Tai is a company incorporated in the British Virgin Islands (hereafter “BVI”) under the International Business Companies Act, Cap 291 of the laws of the BVI whose shares were (are) traded firstly on NASDAQ and subsequently on the New York Stock Exchange. Nothing turns on this change of stock market.
- [5] Respondent No.2, Tele Art, is a company also incorporated under the International Business Companies Act of the BVI. Tele Art was ordered wound up by Order of the High Court of the BVI dated 17th July 1998 on the Petition of Nam Tai which was presented on the 27th June 1997.
- [6] Tele Art was found to be insolvent. Claims by creditors of Tele Art (including a claim by Bank of China) amounted to many millions of dollars and the only substantial asset in its liquidation was its holding of a significant number of shares in Nam Tai.
- [7] On the 10th November 1993 Industrial Development Authority of Ireland obtained judgment against Tele Art in the sum of US\$ 799,099.12. Some time subsequent to the judgment being obtained, a successor organization of Industrial Development Authority of Ireland, FORFAS, became the beneficiary of the judgment debt due by Tele Art. In May 1996 FORFAS obtained a Charging Order Absolute against the Nam Tai Shares in the ownership of Tele Art. The judgment

debt of FORFAS was assigned to the Nam Tai on 14th May, 1997, and hence such assignment pre-dates the petition for Winding up of Tele Art. On 10th September 1997 there was a discharge of the Charging Order by the Court and an order for sale of the Nam Tai Shares.

[8] On October 13, 1998, the Board of Directors of Nam Tai passed a resolution to amend the Articles of Association of Nam Tai to provide a new Article 13.1 empowering Nam Tai to redeem shares of Nam Tai in the ownership of judgment debtors of Nam Tai. The new Article was registered on 23rd November 1998 with the Registrar of Companies in the BVI.

[9] The old Article 13 reads as follows:

“Subject to the provisions of the Act, any shares may be purchased, redeemed or acquired by the Company on such terms and in such manner as the directors may determine.”

The new Article (13.1) was added to the old 13 and reads as follows:

“13.1 (a) For the purposes of Regulation 13.1 of these Articles the following defined terms have the meanings indicated:

...

“Fair Market Value” of the shares to be redeemed means the product of the number of shares redeemed multiplied by the Redemption Price.

“Judgment” means a judgment (i) for a liquidated amount in a civil matter; (ii) that is final and conclusive and has not been stayed or satisfied in full; (iii) that is not directly or indirectly for the payment of taxes, penalties, fines or charges of a like nature; (iv) that is not obtained by actual or constructive fraud or duress; (v) in which the rendering court has taken jurisdiction on grounds that are recognized by the common law rules of the British Virgin Islands; (vi) in which proceedings it was obtained were not contrary to natural justice or the public policy of the British Virgin Islands; (vii) in which the Person against whom the judgment is given is subject to the jurisdiction of the court rendering the judgment; and (viii) is not on a claim for contribution in respect of damages awarded by a judgment which does not satisfy the foregoing.

“Judgment Amount” means the sum of (i) the liquidated amount of the Judgment, (ii) interest thereon at the legal rate of the jurisdiction in which it was entered from the date of such entry through the Date Fixed for

Redemption, and (iii) reasonable expenses of the Company (including its reasonable attorney fees, court costs, administration and overhead costs, and any other related expenses) of enforcing the Judgment and/or redeeming its shares to satisfy the same, less the sum of any amounts thereto fore paid on, or credited against, the Judgment.

...

"Redemption Price" means (i) if the class of shares to be redeemed is traded in the over-the-counter market in the U.S. and not in The Nasdaq National Market nor on any national securities exchange in the U.S., the average of the per share closing bid prices of the shares on the 20 consecutive trading days immediately preceding the Date Fixed for Redemption, as reported by The Nasdaq Small Cap Market (or an equivalent generally accepted reporting service if quotations are not reported on The Nasdaq Small Cap Market), or (ii) if the class of shares to be redeemed is traded in The Nasdaq National Market or on a national securities exchange in the U.S., the average for the 20 consecutive trading days immediately preceding the Date Fixed for Redemption of the daily per share closing prices of the shares in The Nasdaq National Market or on the principal stock exchange in the U.S. on which they are listed, as the case may be. For purposes of clause (i) above, if trading in the shares is not reported by The Nasdaq Small Cap Market, the bid price referred to in said clause shall be the lowest bid price as reported in the Nasdaq Electronic Bulletin Board or, if not reported thereon, as reported in the "pink sheets" published in the U.S. by National Quotation Bureau, Incorporated, and, if such shares are not so reported shall be the price of a share determined by the directors in good faith. The closing price referred to in clause (ii) above shall be the last reported sale price or, in the case no such reported sale takes place on such day, the average of the reported closing bid and asked prices, in either case in The Nasdaq National Market or on the national securities exchange in the U.S. on which the class of shares is then listed.

"U.S." shall mean the United States of America.

- (b) Without limiting the generality of Regulation 13 of these Articles, in the furtherance thereof and in addition to any other rights or remedies available to the Company at law or in equity, the Company may at any time and from time to time redeem, at the Redemption Price per share, all or any of its outstanding shares beneficially owned by any Person, or registered in the name of any Person whose name is entered as a member in the share register, against whom the Company has a Judgment. ... On the Date Fixed for Redemption the Company shall pay the Redemption Price for the shares redeemed by offsetting the Fair Market Value of the shares redeemed against the Judgment Amount. ... If the Fair Market Value of the shares redeemed is insufficient to fully

satisfy the Judgment Amount, the Company shall retain the right to pursue all of its rights and remedies otherwise available to satisfy the deficiency. If the Notice is given in the manner provided in this Regulation, whether or not the certificates covering these shares are surrendered, all rights with respect to the redeemed shares shall terminate except for the right of the Person whose shares are so redeemed to receive credit by offset against the Judgment Amount as herein provided. Unless the certificates covering these shares are received by the company at the place so designated the Judgment Amount will not be deemed to have been satisfied in full.”

- [10] Purporting to act pursuant to the powers of redemption contained in the new Article 13.1 Nam Tai, on 22nd January 1999, redeemed 138,500 shares in itself held by Tele Art, (hereinafter “the Redeemed Shares) paying therefore by the cancellation of the judgment debt assigned to Nam Tai by FORFAS due by Tele Art. Nam Tai also claimed that it was entitled under its Articles of Association to deduct from dividends otherwise due to Tele Art on the Nam Tai shares monies due from Tele Art to Nam Tai.
- [11] By a Share Charge Agreement dated 10th November 1993 Tele Art charged 700,908 shares which it owned in Nam Tai to the Bank of China to support certain borrowings by Tele Art from the Bank of China. Details of the Share Charge were entered in the Company Register of Mortgages and Charges and filed with the Registrar of Companies in the BVI on 27th January 1994. Thus, at the date of the exercise by Nam Tai of its right of redemption Bank of China was the only registered chargee of a debt due by Tele Art (it is to be noted that the charging order based on the judgment debt had been discharged at this point). At the time of the presentation of the Petition for winding up it would appear that Tele Art was indebted to Bank of China in a sum of approximately US\$2.2 million. I hasten to add that this is not a finding of the precise sum due as this is yet to be proved. Notwithstanding the Share Charge Agreement, it would appear that at the time Tele Art was put in liquidation, it owned only some 375,787 Nam Tai shares. This figure, as I understand it, includes the Redeemed Shares.

The Issues

- [12] There would appear to be three principal issues to be decided in this appeal. Firstly, whether the redemption by Nam Tai of the Redeemed Shares is valid, secondly, if valid, whether the set-off provisions in the new Article 13.1 of the Articles of Association of Nam Tai are efficacious in the context of Tele Art being wound up, and, thirdly, whether the dividends due to Tele Art were properly retained by Nam Tai.
- [13] The classical definition of shares in a company is to be found in **Borland's Trustee v Steel Brothers & Co Limited**¹ *"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act 1862. The articles of association is one of the original incidents of the share."* Though **Borland** does not say so, it is well known law that the Articles of Association are not only *"a series of mutual covenants entered into by all the shareholders inter se"* but also are the basis of a series of mutual covenants between the individual shareholder and the company whose share he owns. Indeed, the International Business Companies Act, Cap 291 of the laws of the British Virgin Islands states just this. Section 13 (3) of the Act reads as follows: *"The articles, when registered, bind the company and its members from time to time to the same extent as if each member had subscribed his name and affixed his seal thereto..."*
- [14] Section 16 of the IBC Act gives a company power, subject to any limitations in its memorandum or articles, to amend its memorandum or articles, the effect of such amendment being from the date of registration with the Registrar of Companies. As learned Counsel for the Appellant pointed out, the fact that a shareholder of a

¹ [1901] 1 Ch 279 at p. 288

company is in receivership or suffers from any other form of disability can in no way inhibit the company from exercising what are statutory rights. The only limitation on a company's power to amend its articles is the obligation to act in the interests of the company. To quote the words of Lindley M.R. in **Allen v Gold Reefs of West Africa Limited**²:

"The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must also be exercise... bona fide for the benefit of the company as a whole."

As there was no allegation of oppression by a majority of a minority, nor that the amendment did not benefit the company, Nam Tai, as a whole, I have no doubt that the amendment of its Articles of Association by Nam Tai by the addition of article 13.1 was lawful and effective.

- [15] Given that the alteration of its articles was lawful, the issue still remains to be determined whether Nam Tai was entitled to redeem the shares held by Tele Art in Nam Tai in the circumstances of Tele Art being in receivership.
- [16] In conformity with the amended Article 13.1, Nam Tai gave notice of its intention to redeem shares in the ownership of Tele Art and did so redeem, purporting to pay therefore, as contemplated by the amended Article, by way of the cancellation of the judgment debt owed by Tele Art to Nam Tai. Thus, no actual money changed hands, but rather a debt owed by Tele Art was extinguished.
- [17] I am of the view that once it is conceded that a company may alter its articles at any time, which I have found, then it must follow logically that the company can act in pursuance of those altered articles to the extent that the contemplated act is not against the law. I am therefore of the view, and do so hold, that Nam Tai could

² [1900] Ch 656 at p.671

properly redeem the Nam Tai shares from the ownership of Tele Art. Thus from January 1999 the Redeemed Shares were transferred into the ownership of Nam Tai.

- [18] The far more difficult question which now arises, is, in what manner can the redeemed shares be paid for and in that context the language of the new Article 13.1 needs to be examined. Article 13.1 (b) reads in part:

“the Company may at any time and from time to time redeem, at the Redemption Price per share all or any of its outstanding shares beneficially owned by a person...against whom the Company has a judgment”.

As from the 13th May, 1997, the date of the assignment of the FORFAS judgment debt from FORFAS to Nam Tai, Nam Tai was a judgment creditor of Tele Art, and upon the coming into effect of the new Article 13.1 the legal and factual environment existed for the exercise of the right of redemption thereunder by Nam Tai.

- [19] The new Article 13.1 provides for payment for the redeemed shares in this way:

“On the Date Fixed for Redemption the Company shall pay the Redemption Price for the shares redeemed by offsetting the Fair Market Value of the shares redeemed against the Judgment Amount.”

Perhaps the single most important question in this appeal is whether the terms of payment as set forth in Article 13.1 override the rules governing priorities in the payment of creditors in a bankruptcy.

- [20] Learned Counsel for the Respondent No.1 urged upon the Court that Section 178 of the Companies Act Cap 285 of the Laws of the BVI which reads as follows:

“Where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of property, effects and things in action of the company... made between the commencement of the winding up and the order for winding up, shall, unless the Court otherwise orders, be void.”

was authority for the proposition that Tele Art could not dispose of its shares in Nam Tai.

[21] In **Re Wiltshire Iron Co Ltd ex p Pearson**³ Cairns LJ said the following:

“The 153rd section [equivalent to section 178] no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis.”

I have little hesitation in following the learning contained in **Wiltshire Iron** and courts have, since that time, been jealous in guarding against improper disposal of property by a company in receivership. However, that is not the end of the story. The question must be answered what dispositions are caught by the section. In **Re Margart Pty Ltd, Hamilton v Westpac Banking Corp and another**⁴ a case from New South Wales, Helsham CJ in Eq. offered the following:

“I take the view that the phrase ‘any disposition of the property of the company’ in the context of section 368 [the equivalent section to section 178] relates to something done with the property that the company is free to deal with. I do not think that there is a disposal of property of the company when there is a dealing by someone who is really someone other than the company and who has the right to say how it is to be dealt with, and whatever interest the company has in that property gives it no control of management of the property nor the powers to interfere.”

I agree that that is the correct interpretation of section 178. In this case, Tele Art was a passive party in the acquisition of the Redeemed Shares and had no choice in the matter. Hence, it cannot be said that there was “an improper alienation and dissipation” by Tele Art of its property. Tele Art had no choice.

[22] Having said the above, however, one is yet to address the issue of whether a company by changing its Articles of Association can create a situation whereby it

³ (1868) 3 Ch App 443

⁴ [1985] BCLC 314

can, as a creditor of a company being wound up, be preferred as against other creditors in respect of any debt due to it by the company being wound up.

[23] I am of the view that when Nam Tai had the FORFAS debt assigned to it and then changed its Articles of Association as set forth above, this was part of a careful plan to redeem its shares held by Tele Art at minimal cost to itself. Absent the Petition for Winding up, this would have presented little problem. However, once the Order for Winding up was granted (which related back to the filing of the Petition) then the whole scheme of priorities came into play.

[24] In ordinary circumstances, that is to say ignoring the specific payment terms of the amended Article 13.1, there would be little doubt that upon Nam Tai exercising its right of redemption a debt would arise due from Nam Tai to Tele Art for the price of the redeemed shares. The question now arises what, if any, is the effect of the statement of off-set contained in the amended Article 13.1

[25] There was much argument in this appeal as to the nature of the right created by Article 13.1. Does Article 13.1 create an equity, or does it confer a mere right in personam? I have found the case of **Turner v Tenant**⁵ of assistance in this regard. In that case the issue was whether the language in the Articles of Association of a company created an equitable charge or not. Article 10 of the company's articles read in part as follows:

“(j) The company shall have a first and paramount lien on all shares registered in the name of each member... and upon the proceeds of sale thereof for his debts liabilities and engagements... to or with the company... and no equitable interest in any share shall be created except upon the footing that Article 6 hereof is to have full effect.”

Article 6, to which reference is made, basically stated that the company was entitled to treat the registered holder of a share as the absolute owner thereof, and except as required by statute or court order was not bound to recognize any mortgage or charge in relation thereto. The Court was in no doubt that such

⁵ [1938]1 Ch 593

provisions in articles create an equitable charge in favour of the company. Extrapolating therefrom, unless the language in the Articles of Association is clear in establishing an equitable charge, rights therein given are mere rights in personam. The jurisprudence was followed in **Champagne Perrier-Jouet S.A. v H. H. Finch Ltd**⁶.

- [26] This leads to a further examination of the language of Article 13.1 of the Articles of Association of Nam Tai to determine whether a lien has been created by Nam Tai over its shares. I am of the view that there is no clear expression of the imposition of a lien over its shares by Nam Tai, even in the event of Nam Tai having a judgment against a shareholder. The clear purport of Article 13.1 is simply to give Nam Tai a right to redeem, which it may or may not exercise at its pleasure. I therefore hold that Nam Tai's right against the Nam Tai Shares was a mere right in personam, and not an equitable charge. For a company to create a lien over its own shares securing monies owed to it by a shareholder would require clear and unambiguous language.
- [27] Reverting, therefore, to the issue of the debt owed by Nam Tai to Tele Art, being the price of the redeemed shares, I hold that this debt cannot, in the circumstances of the winding up of Tele Art and based solely on the authority of Article 13.1, be satisfied by the off-set of the judgment debt owed by Tele Art to Nam Tai pursuant to the amended Article 13.1. To permit this would be to allow Nam Tai to gain an illegal preference as an ordinary creditor of Tele Art. To make it clear, the redemption must be paid for by a method other than the cancellation of the judgment debt under the powers granted by Article 13.1.
- [28] Such a finding as above does not, however, fully dispose of the matter. There is the further question of whether Nam Tai can offset its debt arising from the redemption of the shares against the debt due from Tele Art under the assigned judgment pursuant to the rules of insolvency. We heard considerable argument on

⁶ [1982] 3 All ER 713

this point, but I believe that the matter is of some simplicity. In the case of ***In re Milan Tramways Company. Ex parte Theys***⁷ the Earl of Selbourne L.C. expressed the issue with great clarity and simplicity:

“ Now under sect. 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes to prove a debt against a bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance to be proved against the estate, or paid to the estate as the case may be. Applying that rule here we have only to deal with the original creditor. He proved for a debt against which there was no set off, for if there had been the amount of his proof would have been diminished. The proof was made subject to diminution if it should afterwards appear that there was some other dealing between the company and the creditor before the liquidation which would diminish the amount of the proof. The right to the debt proved may be assigned. Suppose after the proof is made it is assigned to some one who is indebted to the company, can that person set off the debt proved against the claim which the company has against him? In my opinion, clearly not.” (my emphasis)

The jurisprudence was followed in the Australian case of ***Hiley v The Peoples Prudential Assurance Company Limited (In Liquidation)***⁸ where Latham CJ said:

“the rights of the parties are to be taken and ascertained as at the time of liquidation. Unless at that time there existed mutual rights the enforcement of which would result in mutual liabilities the section [dealing with set off] cannot apply.”

[29] At the date of the filing of the winding up petition against Tele Art, there was a debt to Nam Tai (the assigned judgment debt) but there was no debt owed by Nam Tai to Tele Art. That latter debt arose in January 1999, some year and a half after the filing of the Petition and six months after the Winding up Order. Thus, at either of the two relevant dates, there was no debt by Nam Tai in favour of Tele Art which could have been used as a set off against the judgment debt. I am of the view, and do so hold, that a creditor of a company being wound up cannot set off obligations post dating the winding up to the company against obligations pre existing the

⁷ (1884) 25 Ch.D. 587

⁸ (1938) 60 CLR 468

winding up from the company. Nam Tai is therefore indebted to the Liquidator of Tele Art for the “Redemption Price” of the shares redeemed.

[30] I now turn to the issue of dividends. At paragraph 24 of “The Second Affidavit of David R. Hague in Support of Summons”, Mr. Hague, the then Liquidator, asked that the Court order that Nam Tai “pay to the Official Liquidator all dividends and distributions earned by the Company [Tele Art] in respect of Nam Tai shares since the commencement of the liquidation and all future dividends and distributions when due.” In the Summons to which reference was made at the beginning of this judgment, para 4 is in the following terms:

“That Nam Tai pay to the Official Liquidator all dividends and distributions earned by the Company in respect of the Nam Tai Shares, since the commencement [sic of the winding up to the] Official Liquidator when due, and all future dividends and distributions to which the Company may from time to time be entitled in respect of the Nam Tai shares”. The Learned Trial Judge in dealing with this issue said the following: “This Court further declares the redemption and set off of dividends of the 138,500 Tele Art shares be set aside and should be handed over to the company in liquidation.”

[31] As I read the Summons, the Court is being asked to declare that dividends and distributions on all Nam Tai shares in the ownership of Tele Art be paid to the Official Liquidator, and not just those appurtenant to the Redeemed Shares. As I found that the Redeemed Shares (the 138,500 shares) were in the ownership of Nam Tai since January 1999 (see para 17 above) the issue relates to those shares in the ownership of Tele Art and not in the ownership of Nam Tai and the Redeemed Shares prior to January 1999.

[32] Article 85 of the Articles of Association reads as follows:

“85. The directors may deduct from the dividends payable to any shareholder all such sums of money as may be due from him to the Company”

[33] None of the parties addressed the Court at any length on this subject. In the Court below, and in his Skeleton Argument, counsel for the Appellant rested his claim for

any dividend payments allocated to the Nam Tai shares to be made to Nam Tai on the above quoted Article. In Palmer's Company law, 25th Edition at Paragraph 6.808 the following learning appears:

"In English law a company has, in the absence of special contract, no lien on the share of a member; but the articles of a private company may, and usually do, provide that the company shall have a first and paramount lien on the shares of each member for his debts and liabilities to the company, whether matured or not...

"In England any lien thus created takes effect as an equitable charge created in favour of the company by covenant of the shareholder..."

In **Turner v Tenant** quoted above the language which gave rise to the creation of a lien on the shares was very specific. In this case Article 85 of the Nam Tai Articles of Association is not so specific. In the ordinary course of business, there is no doubt that Nam Tai could deduct sums owed to it by a member from dividends due to that member. However, I am of the view that once the Winding up of Tele Art commenced, for the Liquidator to be bound by a lien on dividends, such lien must be in language brooking no ambiguity. Any ambiguity will, in any case be interpreted in the context of the 'contra proferentum' rule. I hold that Article 85 does not create a lien on the dividends declared by Nam Tai on shares held by Tele Art and those dividends are due and payable to the Liquidator within the limits set forth in paragraph 31 hereof.

- [34] The final issue to be decided is that raised by Ground 4 of the Appellant's Grounds of Appeal, namely that the learned trial judge erred in finding that the Bank of China was a secured creditor in the absence of any evidence that the purported charges are valid in accordance with the laws of Hong Kong. It would seem to me that by paragraph 1 of the Summons where the Official Liquidator requests the Court to declare "the respective priorities of the debts of Tele Art to the Bank of China, Nam tai and other creditors of the company for the purposes of the winding up..." the question of the validity of the Bank of China charge is placed squarely before the Court. If it is the contention of the Appellant that there is something wrong with the charge according to Hong Kong law, then the Appellant should have adduced evidence that would have enabled the Court to support that view.

They did not. In the circumstances I see no reason to disturb the learned trial Judges finding that Bank of China is a secured creditor of Tele Art.

Conclusion

[35] I find the redemption by Nam Tai of 138,500 shares of Nam Tai which were in the ownership of Tele Art to have been efficacious. I find that Nam Tai owes the Liquidator of Tele Art the “Redemption Price” of the redeemed shares. I find that dividends declared on Nam Tai shares whilst they were in the ownership of Tele Art are due and payable to the Liquidator, and, finally, I find no reason to disturb the finding of the Court below that Bank of China is a secured creditor of Tele Art.

Costs

[36] In the Court below the learned trial Judge awarded costs to the Respondent in the sum of \$15,000.00. As there was no appeal against costs, I award costs of 2/3 of that sum, that is \$10,000.00, to the Respondent.

Michael Gordon Q.C.
Justice of Appeal [Ag]

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal