



JUDGMENT

Cosimo Borelli (as liquidator of AKAI Holdings Limited)
Nicholas Timothy Cornforth Hill
R Craig Christensen now replaced by
G Jacqueline Fangonil Walsh
(as liquidator of AKAI Holdings Limited)
AKAI Holdings Limited (in compulsory liquidation)

ν

Mr James Henry Ting
Blossom Assets Limited
Costner Holdings Limited

From the Court of Appeal of Bermuda

before
Lord Phillips
Lord Saville
Lord Clarke
Dame Mary Arden
Lord Eassie

JUDGMENT DELIVERED BY
Lord Saville
On

29 July 2010

Heard on 24, 25, 26 and 27 May 2010

Appellant
Leslie Kosmin QC
Ben Griffiths

(Instructed by Withers
LLP)

Respondent
Alun Jones QC
Mark Diel (Bermuda Bar)
Rebecca Hill
(Instructed by Keystone
Law Limited,
Marshall, Diel and Myers,
Bermuda)

LORD SAVILLE OF NEWDIGATE:

1. James Henry Ting was formerly the Chairman and Chief Executive Officer of Akai Holdings Ltd, a Bermudan company originally incorporated in Hong Kong. Akai Holdings Ltd controlled a multinational group of companies specializing in electronics. The assets of the Akai group of companies were reported in January 1999 to exceed US\$2 billion. However, in late 1999 Akai Holdings Ltd collapsed with an estimated net asset deficiency of over US\$1 billion. On 23 August 2000 in Hong Kong, and on 29 September 2000 in Bermuda, Akai Holdings Ltd was ordered to be wound up.

2. The Liquidators of Akai Holdings were hampered in their investigation of the affairs of Akai Holdings Ltd by the absence of books and records; by the failure of James Henry Ting, despite many requests by the Liquidators, to provide them with any assistance; and by the fact that there were scant resources to fund the liquidation.

3. In order to raise funds, the Liquidators wished to realize the value of Akai Holdings Ltd's listing on the Hong Kong Stock Exchange. To this end the Liquidators proposed a scheme of arrangement under section 99 of the Bermuda Companies Act 1981, whereby the shares of Akai Holdings Ltd, and thus its listing status, would be transferred to a third party, Hang Ten Group Holdings Ltd. Such a scheme would raise approximately HK\$46.6 million, but required the approval of a majority in number representing three quarters in value of the shareholders present and voting at a meeting convened for that purpose; and thereafter the sanction of the Court.

4. The scheme meeting was convened in Hong Kong on 25 November 2002.

5. James Henry Ting controlled two companies, Blossom Assets Ltd and Costner Holdings Ltd, who together held 5.2% of the issued share capital of Akai Holdings Ltd. The Liquidators took the view that James Henry Ting was likely to oppose the scheme for no good reason and in advance of the meeting obtained ex parte an order from the Bermuda Court that they could mark the votes of Blossom Assets Ltd and Costner Holdings Ltd as objected to, with a view to their validity being determined at a subsequent court hearing.

6. At the scheme meeting Blossom Assets Ltd and Costner Holdings Ltd were represented by attorneys, who purported to act as proxies on behalf of these companies. However, the Chairman at the meeting rejected the authority of the proxies on the ground that their appointments as such were simply signed by James

Henry Ting on behalf of the companies, whereas they should have been executed under the seal of the respective companies or under the hand of an “*officer or attorney duly authorized*”.

7. James Henry Ting was not at the meeting but in Shanghai. On being telephoned by one of the attorneys and informed of the objection to the proxies, he arranged for someone in Hong Kong to type up purported board resolutions dated 14 November 2002 appointing the attorneys as corporate representatives of Blossom Assets Ltd and Costner Holdings Ltd; and to forge his signature on those purported resolutions.

8. The purported resolutions bearing James Henry Ting’s forged signature were delivered to the scheme meeting, which was still in progress, and through the attorneys Blossom Assets Ltd and Costner Holdings Ltd voted against the scheme. Had these votes been accepted and stood they would have been sufficient to defeat the scheme, with the result that the Liquidators would have run out of money and the liquidation would effectively have come to an end. However, the Chairman marked these votes as objected to on the grounds that Blossom Assets Ltd and Costner Holdings Ltd had voted against the scheme for improper motives and that the purported signature of James Henry Ting was suspected to be forged.

9. By summons dated 2 December 2002 the Liquidators applied to the Bermuda Court to disallow the votes of Blossom Assets Ltd and Costner Holdings Ltd cast at the scheme meeting. The summons was opposed by these companies.

10. By this stage time was running short. Hang Ten Group Holdings Ltd had the right to withdraw from the scheme if it was not approved by the shareholders of Akai Holdings Ltd by 31 December 2002; and the Hong Kong Stock Exchange would not allow the substitution of another buyer of the Akai Holdings Ltd shares. Thus it was likely that if this deadline of 31 December 2002 was not met, the scheme could not be implemented.

11. Although by this stage the Liquidators had evidence that the signatures on the Board resolutions were forgeries, in order to facilitate an early hearing of the summons they agreed to confine the issue to the question whether the votes of Blossom Assets Ltd and Costner Holdings Ltd against the scheme had been cast for an improper purpose. However, in the meantime James Henry Ting continued to oppose the scheme. He denied that his signatures were forged and to that end procured his messenger in Hong Kong to swear an affidavit falsely asserting that the resolutions and signatures were genuine.

12. The judge first assigned to hear the summons recused himself after objection by James Henry Ting and the two companies. The replacement judge then broke her

arm and was unable to hear the case; while the acting judge found to replace her also recused himself after further objections by James Henry Ting and his companies. The upshot was that the Liquidators were faced with the fact that they were unable to obtain a judicial determination of the validity of the challenged votes by 31 December 2002; and so stood to lose the value of the Hong Kong Stock Exchange listing of Akai Holdings Ltd and thus funds to continue the liquidation.

13. It was in these circumstances that the Liquidators, Akai Holdings Ltd, James Henry Ting, Blossom Assets Ltd, Costner Holdings Ltd and another company in liquidation (Kong Wah Holdings Ltd) entered into what was called a Settlement Agreement dated 30 December 2002.

14. Under the terms of this agreement James Henry Ting and his two companies agreed to withdraw their opposition to the scheme and so to advise the Bermuda Court, while the Liquidators agreed, among other things, as follows:

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

9. Akai, Kong Wah and the Liquidators shall immediately cease all further investigations with a view to or in connection with issuing legal proceedings and/or making claims against Mr Ting.”

15. On the same day James Henry Ting and his two companies withdrew their objections to the scheme and signed a consent order disallowing their votes against the scheme, which was then sanctioned by the Supreme Court of Bermuda. On the following day the scheme was completed and the Liquidators received payment.

16. In 2003 the Liquidators sought orders to examine James Henry Ting in Hong Kong pursuant to section 221 of the Hong Kong Companies Ordinance. James Henry Ting commenced proceedings in Bermuda seeking to restrain the Liquidators from examining him, on the grounds that any such examination was contrary to the Settlement Agreement. Both Kawaley J and the Bermuda Court of Appeal rejected this argument, holding that such an examination was not a claim within the meaning of that agreement.

17. In the summer of 2005, the Liquidators obtained access to material that had been seized by the Commercial Crime Bureau of the Hong Kong Police in the course of their investigations into the affairs of Akai Holdings Ltd. The Liquidators formed the view that this material revealed substantial misappropriation by James Henry Ting of funds of Akai Holdings Ltd.

18. On 16 February 2006 solicitors acting on behalf of the Liquidators wrote to James Henry Ting asserting that the Settlement Agreement or the Liquidators' undertaking under that agreement not to make claims against him was unenforceable or voidable.

19. In this letter the Liquidators put forward a number of grounds in support of this assertion. They contended that there was no consideration for the Settlement Agreement, since the opposition to the scheme by James Henry Ting through his two companies was not put forward in good faith, but was motivated solely by his desire to obtain a release from claims against him personally; that on its true construction the Settlement Agreement did not cover claims relating to or arising out of his positions and conduct as Chairman, Chief Executive Officer or director of the Akai group of companies; that his failure to make full and frank disclosure to the Liquidators of numerous breaches of his fiduciary duties as a director, including "*massive*" misappropriations of property belonging to the Akai group of companies for his own benefit and that of his associates, rendered the Settlement Agreement voidable and enabled the Liquidators to set it aside; and that he applied illegitimate pressure on the Liquidators to enter into the Settlement Agreement, by (among other things) causing his companies to oppose the scheme knowing that the deadline was fast approaching, so as to be able to demand a release from claims against him in return for the withdrawal of that opposition, which amounted to economic duress and also rendered the Settlement Agreement voidable.

20. In March 2006 the Liquidators joined James Henry Ting as a defendant to proceedings in Hong Kong, in which they alleged that he had misappropriated some HK\$407.8 million from Akai Holdings Ltd and concealed this misappropriation through false accounting.

21. On 13 October 2006 James Henry Ting, Blossom Assets Ltd and Costner Holdings Ltd commenced the present proceedings in Bermuda against the Liquidators, seeking a declaration that the Settlement Agreement was valid and binding and an injunction to restrain the Liquidators from prosecuting the proceedings in Hong Kong against James Henry Ting, on the grounds that such proceedings were contrary to the Settlement Agreement.

22. After a trial lasting six days and on 5 December 2007 the Chief Justice of Bermuda gave judgment refusing to grant James Henry Ting and his companies any relief, but instead made Declarations in favour of the Liquidators. James Henry Ting's lawyer gave evidence at the trial, but James Henry Ting did not himself give evidence.

23. The Chief Justice decided that the claims made in the Hong Kong proceedings (and any similar undisclosed defalcations) were founded upon breaches by James Henry Ting of his fiduciary or statutory duties to Akai Holdings Ltd, which were undisclosed and unknown to the Liquidators at the time of the Settlement Agreement and which were accordingly not subject to clauses 3 and 9 of that agreement; that the Settlement Agreement was voidable for non-disclosure by James Henry Ting of the wrongdoing alleged against him; that the Settlement Agreement was unenforceable by James Henry Ting by reason of his "*sharp practice*" in not revealing his knowledge of the claims now alleged against him when negotiating the Settlement Agreement; and that in any event the Court would have refused to enforce the Settlement Agreement in respect of the Hong Kong proceedings because James Henry Ting had come to court with "*unclean hands*," having concealed what, if true, was his fraud and dishonesty and having resorted to forgery and false evidence in an attempt to validate the proxy votes of his two companies.

24. On 28 November 2008 the Court of Appeal for Bermuda, by a majority (Auld JA and Zacca JA), reversed the decision of the Chief Justice. In the view of that Court, the relevant clauses of the Settlement Agreement read in the context in which the agreement was made were wide enough to cover the claims made in the Hong Kong proceedings; that James Henry Ting owed no duty of disclosure to the Liquidators at the time of negotiating the Settlement Agreement, especially in view of the words "*known or unknown*" in clause 3 of that agreement and the suspicions held at the time by the Liquidators of the *bona fides* of James Henry Ting; that the "*sharp practice*" relied upon by the Chief Justice also fell away for the same reasons; and that since the effect of the Settlement Agreement was to wipe the slate clean, the doctrine of "*clean hands*" was inapplicable. It was only on the last of these points that Ward JA dissented.

25. The matter now comes before the Board by way of leave granted by the Court of Appeal.

26. There are two findings of fact by the Chief Justice, which in the view of the Board are of particular importance, in addition to his finding that James Henry Ting had resorted to forgery and the provision of false evidence in order to defeat the proposed scheme.

27. The first of these is that James Henry Ting, through “*a long process of evasion and prevarication*” deliberately avoided providing the Liquidators with any meaningful information about the Akai Group of companies. The evidence reveals that he failed to attend meetings with the Liquidators and failed to respond to inquiries by the Liquidators for information; and further failed to provide any explanation for the fact that the books and papers of Akai Holdings Ltd for the three years preceding the collapse were missing. The Chief Justice described James Henry Ting’s Statement of Affairs made in December 2000 as “*woefully inadequate*” and rejected any suggestion that James Henry Ting had at any stage co-operated with the Liquidators.

28. The second finding of particular importance is that James Henry Ting procured the opposition to the scheme by Blossom Holdings Ltd and Costner Assets Ltd “*solely so as to defeat [the scheme] with the desire and intention of thereby depriving the Liquidators of funds with a view to preventing any further investigation of his conduct of the affairs of the company.*” In other words, James Henry Ting’s opposition was not made in good faith, but for an improper motive. It was not suggested that in these circumstances the Court (had the matter got that far) would have done other than to disallow the votes against the scheme.

29. The situation facing the Liquidators in late December 2002 was that without realizing funds through the scheme there was unlikely to be any prospect of continuing to investigate the failure of Akai Holdings Ltd. The Chief Justice found that the Liquidators believed that James Henry Ting had resorted to false accounting in order to make Akai Holdings Ltd appear solvent; and also had suspicions that James Henry Ting might have misappropriated some of Akai’s assets, but that the Liquidators had no evidence that this was the case, and neither believed nor had any grounds for believing that James Henry Ting had misappropriated assets on a massive scale. The Liquidators did believe (correctly) that James Henry Ting had resorted to forgery and the provision of false evidence in an attempt to defeat the proposed scheme. But since it became impossible to obtain the sanction of the Court for the scheme before the deadline of 31 December 2002, the Liquidators were faced with the stark choice of either giving up the scheme and thus, in all probability, the liquidation and any chance of recouping money for the creditors, or making a deal with James Henry Ting in order to obtain the withdrawal of his companies’ opposition to the scheme.

30. James Henry Ting’s price for a deal was the agreement of the Liquidators not to investigate further his conduct of the affairs of Akai Holdings Ltd or to make any claims against him. Thus the choice facing the Liquidators was between two evils, either to abandon the scheme and thus any real prospect of funds to continue the liquidation, or to agree not to make any claims against James Henry Ting in relation to his conduct of the affairs of Akai Holdings Ltd.

31. In the view of the Board the Liquidators had no reasonable or practical alternative but to make a deal with James Henry Ting. Put colloquially James Henry Ting had the Liquidators over a barrel. The failure of Akai Holdings Ltd was generally regarded as the largest or one of the largest corporate insolvencies ever to take place in Hong Kong. The Liquidators considered that there might be grounds for seeking to recoup some at least of the losses from the auditors. To abandon the scheme meant in effect the end of any real chance of the Liquidators recovering anything from the collapse of Akai Holdings Ltd.

32. In the view of the Board James Henry Ting's failure to provide any assistance to the Liquidators; his opposition to the scheme; and his resort to forgery and false evidence in order to further that opposition amount to unconscionable conduct on his part. Against the background of his failure to co-operate with the Liquidators, as it was his duty to do under the winding up rules of both Hong Kong and Bermuda, had he not opposed the scheme for purely personal and selfish reasons, in the process using forgery and false evidence, then there would have been no need for the Settlement Agreement. In other words, by agreeing to withdraw the opposition to the scheme James Henry Ting did no more than he should have done from the outset, had he acted in good faith rather than in an attempt to avoid responsibility for his conduct of the affairs of Akai Holdings Ltd.

33. In such circumstances the Board considers that it would offend justice nevertheless to permit James Henry Ting to call in aid the Settlement Agreement in order to defeat claims made by the Liquidators against him relating to the affairs of Akai Holdings Ltd. Those claims include claims (which the Chief Justice found to be well arguable) that he had misappropriated for his own benefit very large sums from Akai Holdings Ltd.

34. An agreement entered into as the result of duress is not valid as a matter of law. Duress is the obtaining of agreement or consent by illegitimate means. *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653; *Universal Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366. Such means include what is known as "economic duress", where one party exerts illegitimate economic or similar pressure on another. An agreement obtained through duress is invalid in the sense that the party subject to the duress has the right to withdraw from the agreement, though that right may be lost if that party later affirms the agreement or waives the right to withdraw from it.

35. The Board is of the view that in the present case the Liquidators entered into the Settlement Agreement as the result of the illegitimate means employed by James Henry Ting, namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims

against him arising out of that conduct. As the Board has already observed, by adopting these means James Henry Ting left the Liquidators with no reasonable or practical alternative but to enter into the Settlement Agreement.

36. A submission that the Liquidators were estopped from denying the validity of the Settlement agreement as a result of the proceedings in 2003 was abandoned during the course of the hearing before the Board, though it was submitted that the Liquidators affirmed or acquiesced in that agreement by not then claiming to avoid it. It was further submitted that the Liquidators should have made such a claim at the first opportunity, namely when they had received the money from the scheme and so were no longer under the alleged duress.

37. The Board do not accept these submissions. The fact that in the 2003 proceedings the Liquidators argued (successfully) that the Settlement Agreement did not cover the examination of James Henry Ting under the Hong Kong Companies Ordinance without claiming to avoid that agreement did not, in the view of the Board, amount to accepting its validity. Furthermore, there is nothing to suggest that the lapse of time, or the conduct of the Liquidators at any stage after they had made the Settlement agreement, led James Henry Ting to believe that the Liquidators were accepting that the Settlement Agreement was binding on them. The Board has found nothing to suggest that because the Liquidators took no steps to escape from the Settlement Agreement until they had obtained evidence that James Henry Ting had misappropriated large amounts from Akai Holdings Ltd, it would somehow be unjust or inequitable for them then to take the point. In short, the Board considers that there is nothing to support the submission that the Liquidators affirmed or acquiesced in the validity of the Settlement Agreement.

38. There was a further submission to the effect that since duress rendered a contract voidable and not void, and since in the present case the parties could not be put back in the position they occupied before the Settlement Agreement was made, the Liquidators were precluded from avoiding that agreement. Rescission, it was submitted, is an all or nothing process; a contract cannot be rescinded in part because this would amount to the Court making a new bargain for the parties, which it has no power to do.

39. The main difficulty with that submission in the context of a case like the present is that it necessarily relies on the unacceptable proposition that because the parties cannot be restored to the position created by the illegitimate means employed by James Henry Ting, which resulted in the Settlement Agreement, the Liquidators are bound by that agreement. In truth the avoidance of the Settlement Agreement by the Liquidators did not amount to making a new bargain for the parties, but instead put the parties in the position they would have occupied had James Henry Ting not resorted to illegitimate means in order to secure the Settlement Agreement.

40. It was also submitted that the Settlement Agreement was so widely drafted that it excluded the right of the Liquidators to withdraw their agreement, even on the basis that it had been procured by illegitimate means. The Board reject this submission, which necessarily involves a further unacceptable proposition, namely that it is possible, by the use of illegitimate means, to obtain a binding agreement from which the party subject to the duress cannot withdraw.

41. In the view of the Board it may well be the case that the Settlement Agreement does not bind the Liquidators for another reason. As already observed, the price exacted by James Henry Ting was in return for his agreement to withdraw his and his companies' opposition to the scheme. But as the Board has already pointed out, there were no *bona fide* grounds for opposing the scheme, so in truth all he was offering to do was to cease acting in bad faith and to do what he should have done in the first place. In such circumstances it is difficult to see what consideration James Henry Ting gave for the undertakings he abstracted from the Liquidators. However, it is unnecessary to express a concluded view on this point.

42. For the reasons that the Board has given it has concluded that the Settlement Agreement does not prevent the Liquidators investigating James Henry Ting's conduct of the affairs of Akai Holdings Ltd or from making claims against him relating to that conduct. In other words, James Henry Ting cannot rely on the provisions of the Settlement Agreement to the contrary effect.

43. The Liquidators advanced a number of other grounds in support of their argument that James Henry Ting could not rely upon the Settlement Agreement to defeat the claims advanced against him. Much of the hearing before the Board was devoted to a consideration of these grounds, some of which entailed consideration of a substantial number of authorities on important, difficult and complex questions relating to the fiduciary duties of directors and the nature of compromises and releases. In view of the conclusion the Board has reached, it is not necessary to express any view on these other ways in which the Liquidators sought to meet James Henry Ting's reliance on the Settlement Agreement.

44. The Board will humbly advise Her Majesty to allow the appeal, to order that the respondents pay the costs of the appellants, both before the Board and below, and to declare that James Henry Ting, Blossom Assets Ltd and Costner Holdings Ltd are not entitled to rely upon the Settlement Agreement in order to defeat any claims advanced by the Liquidators, Akai Holdings Ltd or Kong Wah Holdings Ltd.