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HCA 3544/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 3544 OF 2003

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BETWEEN

JINLIN SUN	1st Plaintiff
WEN LIN (suing on behalf of the 13th Defendant, Styland Holdings Limited, and all the members of the 13th Defendant other than those who are the Defendants)	2nd Plaintiff

and

KENNETH CHI SHING CHEUNG	1st Defendant
YVONNE HAN-YI YEUNG	2nd Defendant
STEVEN WANG-TAI LI	3rd Defendant
MIRANDA CHI-MEI CHAN	4th Defendant
KERRY ZHI-KE WANG	5th Defendant
ANGELINA SWEE-YAN GOH	6th Defendant
HENRY BING KWONG CHAN	7th Defendant
SUET-MING CHING	8th Defendant
ERIK YUK-WO CHENG	9th Defendant
JOHNNY WING FAI TAM	10th Defendant
DAVID MAN-SAN LIM	11th Defendant
EDWARD SHUN KEE YEUNG	12th Defendant
STYLAND HOLDINGS LIMITED	13th Defendant

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Before: Hon Reyes J in Chambers

Dates of Hearing: 10 and 11 October 2003

Date of Judgment: 13 October 2003

J U D G M E N T

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1. By a Summons dated 25th September 2003 the Plaintiffs seek the following principal relief:-

> (1) That, until trial or further order, Mr. Darach E. Haughey and Mr. Derek Lai Kar Yan of Messrs. Deloitte Touche Tohmatsu be appointed as joint and several receivers ("the Interim Receivers") "to collect, get in and receive the assets of the 13th Defendant in Hong Kong and elsewhere, with powers to manage the said assets only to the extent necessary to preserve the same or the value thereof, and with powers to realise the same or disburse any proceeds in such amounts and at such time and for such purpose ... in pursuance of the legitimate commercial interests and needs of the 13th Defendant, or as the Court may direct, and with powers to retain and engage necessary professionals, or individuals, partnerships, associates or companies to assist the [Interim] Receiver[s] in fulfilling [their] duties... "
>
> (2) That, as soon as practicable, the 1st to 12th Defendants "deliver up to the [Interim] Receivers all effects, books and papers in their possession, custody, control or power relating to the assets of the 13th Defendant, its subsidiary and associate companies and ... provide to the [Interim] Receivers such other documents, information or assistance as they or either of them may deem reasonably necessary. "

Background

2. The Plaintiffs are shareholders of the 13th Defendant ("Styland"), which is a Bermuda-registered company listed on the Hong Kong Stock Exchange ("the Exchange"). The 1st Plaintiff controls about

8.44% of Styland's issued share capital, while the 2nd Plaintiff has a nominal shareholding in Styland.

3. The 1st Defendant was Styland's chairman and executive director. He resigned from Styland's board on 18 June 2002. He and his wife (the 2nd Defendant) control approximately 16.26% of Styland's shares. The 2nd, 4th, 8th, 10th, 11th and 12th Defendants ("the Main Defendants") have been and continue to be executive directors of Styland. The 4th Defendant personally owns about 39,288 Styland shares. The 3rd, 5th, 6th, 7th and 9th Defendants are former executive directors of Styland.

4. Between them the 1st to 12th Defendants control about 17% of Styland's issued share capital, while the Plaintiffs control about 8.5%. The balance of Styland's issued shares (about 75%) is held by the public.

5. On 8 August 2002, 3 June and 20 August 2003 Styland issued announcements informing shareholders that, in breach of the Exchange's Listing Rules ("the Rules"), it had entered into certain connected or disclosable transactions without either notifying shareholders or obtaining ratification from them as appropriate. Having read these announcements, the Plaintiffs took the view that they failed to make full disclosure of all relevant circumstances relating to the transactions. Accordingly, the Plaintiffs thought that shareholders could not properly decide whether or not to ratify any particular transaction. The Plaintiffs further believed that the failure to provide sufficient information was a breach of the fiduciary duties owed to Styland by its directors.

6. By Notice dated 30 July 2003 Styland notified shareholders of an annual general meeting ("AGM") on 26 September 2003. The Notice

stated that, in addition to receiving Styland's audited financial statements and directors' reports for the year ended 31 March 2003, the AGM would also consider the following resolution:-

> "To declare a final dividend for the year ended 31 March 2003 in a sum equal to the aggregate net book value of the number of shares in each of (i) Inworld Group Limited; (ii) Riverhill Holdings Limited and (iii) Rainbow International Holdings Limited equal to 1/50 of the number of shares of HK$0.01 each in the issued share capital of the Company at the close of business on 26 September 2003 ('the Distribution Shares') as may be determined by the directors of the Company to be distributed among the holders of shares in the capital of the Company on the register of members of the Company at the close of business on 26 September 2003 on condition that the same be not paid in cash but be satisfied by the transfer of all the Distribution Shares to such holders on the basis of and subject to th terms and conditions set out in the announcement of the Company dated 30 July 2003, provided that the approval of such final dividend and distribution shall be conditional on the ratification of the various transactions detailed in the announcement of the Company dated 3 June 2003 by the shareholders of the Company in general meeting on or before 26 September 2003, and the directors of the Company be and are hereby authorised to give effect to such distribution and transfer"".

7. Rules §14.29 requires a company to notify the Exchange as soon as possible after the terms of a connected transaction have been agreed. Within 21 days of such notification, the company must send a circular to the its shareholders and the Exchange. Such circular must at least contain the information specified by Rules §14.31.

8. Rules §14.30 stipulates that a circular must contain:-

> "full particulars of the transaction including:-
>
> (a) the date of the transaction and the parties thereto;
>
> (b) a general description f the nature of any assets concerned and, if these are shares in whole or in part, the name and general description of the activities of the company in which the shares are held or were held;

(c) the total consideration and the terms and composition thereof;

(d) the name of the connected person concerned and, where applicable, of the relevant associate;

(e) in the case of a director, the office(s) held;

(f) in the case of an associate of a director, chief executive or controlling shareholder, the nature of the relationship with such director, chief executive or controlling shareholder, his name and office(s) held; and,

(g) the nature and extent of the interest of the connected person in the transaction."

9. Rules §14.31 requires that certain "guidance points should be borne in mind in preparing circulars for connected transactions". These points are:-

"(1) the primary objective is that the circular should demonstrate the reasonableness and fairness of the proposed transaction. The balance or disadvantage to the issuer must therefore be readily apparent to enable a shareholder to reach his own conclusion on the proposal.

(2) while the ideal approach will generally involve an arithmetical evaluation by the issuer being set out in the circular, this may not be practicable in the case of a complex transaction. It is, however, essential that sufficient information is provided to enable any recipient of the circular to evaluate the effects on the issuer;

(3) in the case of an acquisition or realisation of an asset the primary significance of which is in terms of capital value (such as property) an independent valuation will be required; and

(4) notwithstanding the inclusion of an independent valuation, the circular must contain sufficient information, comment and explanation to satisfy the objectives referred to in (1) and (2) above."

10. Styland could not issue a circular in respect of the various transactions for which it wished to obtain shareholders' ratification within the time stipulated by the Rules. After much delay, it finally issued a

circular ("the Circular") on 11th September 2003. The Circular included a notice for a Special General Meeting ("SGM") to be held on 29 September 2003 for the purpose of ratifying certain connected and disclosable transactions ("the SGM Transactions") which had been the subject of Styland's previous announcements.

11. The Circular also included a resolution for declaration of a special dividend in similar terms to the final divided previously announced for consideration at the AGM, save that payment of the dividend was not conditional on ratification of the SGM Transactions. On the final dividend originally proposed, the Circular noted:-

> "[S]ince the Company was unable to despatch a circular incorporating a notice of a special general meeting of the Company for consideration of he ratification of the [SGM] Transactions to the Shareholders on or before 10th September, 2003 for a special general meeting to be held on or before 26th September, 2003, the first condition precedent to the Proposed Final Dividend cannot be fulfilled and the Proposed Final Dividend cannot be made. The Directors will propose to withdraw the resolution for approval of the Proposed Final Dividend at the annual general meeting of the Company to be held on 26th September 2003.
>
> In order to preserve the interests of the Shareholders, the Directors recommended a special dividend for the year ending 31st March, 2004 to be satisfied by way of the Distribution to replace the Proposed Final Dividend. The Proposed Special Dividend is on the same terms as the Proposed Final Dividend except that it is not conditional upon ratification of the Transactions."

12. The Circular explained the rationale for the special dividend as follows:-

> "It was mentioned in the announcement of the Company dated 29th June, 2000 in relation to a rights issue of shares of the Company that th Group would invest approximately HK$488 million in communication, information technology and internet related business and other investments. In the past years, the Group has made investments in IGL, Riverhill and Rainbow,

> whose shares have successfully been listed on the Stock Exchange. As at the Latest Practicable Date, the Group held (i) 160,000,000 shares of HK$0.01 each of IGL (representing about 27.63 per cent of the issued share capital of IGL); (ii) 114,509,804 shares of HK$0.10 each of Riverhill (representing about 27.59 per cent of the issued share capital of Rainbow). Since the subsequent change in macro economic environment has rendered the investments unable to deliver the expected return to the Group. In view of such, the Directors propose the distribution of part of the shares in these three companies held by the Group to the Shareholders to enable them to realize the market value of such shares themselves, on the basis of one share of each of IGL, Riverhill and Rainbow respectively for every 50 Shares held on 26th September, 2003, subject as mentioned below."

13. On studying the Circular, the Plaintiffs concluded that it showed serious breaches of duty by Styland's directors which called into question their fitness to manage the company. The Plaintiffs then initiated a derivative action by Writ and Statement of Claim ("SOC") issued on 24 September 2003. On the same day, the Plaintiffs obtained an ex parte Order from Deputy Judge Muttrie preventing Styland from holding the SGM until further order. The Order also directed that the AGM scheduled for 26 September 2003 be adjourned until further order. On 25 September 2003 the Court of Appeal discharged Deputy Judge Muttrie's Order upon the 1st and Main Defendants undertaking to use their best endeavours to procure the AGM and SGM to be adjourned for 21 days. Both the AGM and SGM have been adjourned.

Summary of the SOC

14. SOC §6 pleads that, under Bermuda Law, Styland's directors owe duties at law and in equity to act bona fide in Styland's best interests; not to put themselves in an actual or potential situation of conflict of interest without the informed consent of shareholders; to conduct Styland's

affairs with reasonable skill and care; and to use reasonable endeavours to comply with the Rules.

15. SOC §§8-19 plead the several announcements issued by Styland informing shareholders of the breaches of the Rules. By allowing the Rules to be breached, Styland's directors are said to have breached the duties pleaded in SOC §6.

16. SOC §§20-23 refer to the Circular. It is said that the Circular failed to comply with Rules §§14.30 and 14.31 and consequently the duties in SOC §6. SOC §23 reasons from this that "the Company should be restrained from convening a [SGM] to consider ratification of the [SGM Transactions] ... until a receiver and manager has been appointed over the Company and who will be responsible for the Company complying fully and properly with Rules 14.30 and 14.31".

17. SOC §§24-61 deal with specific transactions mentioned in Styland's announcements of 8 August 2002 and 3 June and 20 August 2003. These transactions are said to constitute breaches in themselves of the duties in SOC §6. The transactions are also said to constitute conduct by Styland's directors evidencing:-

(1) a lack of "proper regard to good business practice or due and proper regard to the commercial viability of transactions entered into by the Company" (SOC §24.1);

(2) the desire "to benefit personally various directors of the Company and its subsidiaries and persons with whom they had personal relations" and thereby perpetrate "fraud on the minority and/or independent shareholders of the Company" (SOC §24.2);

(3) lack of "due or proper regard to [the company's] obligations as a listed company to its shareholders" (SOC §24.3); and,

(4) lack of "due or proper regard to [the directors'] legal and equitable duties to the Company" (SOC §24.4).

18. The specific transactions of Styland queried in the SOC are as follows:-

(1) The acquisition through a 100% subsidiary (Data Store) of 90% of the issued share capital of West Marton on 10 October 2000 (SOC §§26-33). No prudent board, the SOC alleges, would have invested $120,000,000 in West Marton (which was loss-making at the time with no significant assets) solely because of "the speculative state of the market for internet related stock". Further, Styland wrongly sold 10% and 20% of its holdings in West Marton to Mr Ngai and Mr W L Chan respectively, both of whom were connected persons.

(2) The acquisition through a 100% subsidiary (Thunderbolt) of 55% of the issued share capital of Couttias Profits from Gloria Development (owned by the 1st Defendant) on 24 November 1998 (SOC §§34-38). SOC §38 alleges that "it is to be inferred ... that [the acquisition] was in whole or in part motivated by or a consequence of the 1st Defendant's position as Chairman of the Company and/or the personal relationship between the 1st Defendant and the other directors of the Company and/or a desire to benefit him personally".

(3) The acquisition by a 100% subsidiary ("Global Eagle") of 40% of the issued shared capital of Cyber World on 13 January 2000 (SOC §§39-42). In May 2001 Global Eagle

received 39.22% of the issued capital of Riverhill Limited ("Riverhill") and became a subsidiary of Riverhill. Riverhill was then listed on the GEM on 1 June 2001. SOC §41 complains that the acquisition of Cyber World because of the drop in the market value of Cyber World's shares as at 31 March 2002 and Riverhill's poor financial performance also as at 31st March 2002.

(4) The acquisition by a 100% subsidiary ("Iwana") of 36% of the issued share capital of Inworld Holdings Limited ("Inworld") by agreement dated 5 July 1999 (SOC §§43-46). Before the acquisition Inworld was owned by Mr Ngai and Mr W L Chan. The transaction was a bad one according to SOC §45, because Inworld had no business or major assets at the time of the purchase. SOC §46 further complains that Mr Ngai and Mr W L Chan were connected persons.

(5) The loan or advance by Iwana to Mr Ngai of $107,781,438.36 (SOC §§47-51).

(6) The loan by Iwana to Inworld of $13,558,847 (SOC §§52-53). SOC §53 points out that neither Mr Ngai nor Mr W L Chan made similar contributions of capital to Inworld, even though they remained as shareholders.

(7) Loans of $6,000,000, $4,800,000 and $200,000 (made on 22 January and 31 March 1998 and 20 January 1999) respectively to Mr Ng, a director of Ever-Long Securities, a 100% subsidiary of Styland (SOC §§54-55).

(8) Various loans to other connected persons (SOC §§56-57).

(9) Payment of a commission of $3,000,000 to the 1st Defendant for introducing Companion Marble to Iwana (SOC §§58-61).

Iwana sold 15 shares in Gold Cloud to Companion Marble at $38,000,000 in October 2000. The 1st Defendant has not accounted for his commission to the company.

(10) The prayer asks for damages to be assessed, an account and interest. It seeks an order removing the 2nd, 4th, 8th, 10th, 11th and 12th Defendants from the Board. It also seeks:-

> "an order that a receiver and manager be appointed to preserve and safeguard the assets and undertaking of the Company and to manage its affairs until the members of the Company have voted at a special general meeting on resolutions to constitute a board of directors independent of the Defendants, with such directions therefore as may be necessary."

Discussion

19. Mr Harris, who appeared for the Plaintiffs, argued that the Circular in particular revealed a disturbing omission by Styland's directors to make full and frank disclosure of all relevant circumstances in connection with the SGM Transactions. That failure (Mr Harris) was not just a negligent omission. It was a deliberate attempt by Styland's board to mislead shareholders into ratifying the SGM transactions. Such motivation constituted a breach of fiduciary duty and a fraud on the directors' powers in equity.

20. That Styland's Board had a fraudulent intention is to be deduced (Mr Harris says) from the fact that originally a final dividend was proposed on condition that the SGM Transactions were approved. Mr Harris accepts that the link between the approval of the SGM Transactions and the payment of a dividend has been abandoned. But that (Mr Harris argues) was probably because Styland's directors received advice that it

would be wrong to dangle the prospect of a dividend as a "sweetener" for ratification of the SGM transactions by the shareholders in general meeting.

21. For the purposes of these interlocutory proceedings, I am prepared to assume that the Plaintiffs have an arguable case that Styland's directors have not made full and frank disclosure of all relevant circumstances in connection with the SGM Transactions in the announcements issued by Styland and in the Circular. I am also prepared to assume that such failure constitutes a breach of fiduciary obligation on the part of Styland's board and that such breach constituted a fraud in equity. But, even if that were all assumed in the Plaintiffs' favour, I do not think that the appointment of an interim receiver is a relevant or effective remedy in the circumstances of this case.

22. The Plaintiffs do not suggest that Styland's assets are currently at risk. Styland currently has substantial assets. It is solvent. The Plaintiffs cannot point to any impending transaction which will have the effect of diminishing its assets unless restrained. The highest that Mr Harris can put his case is that as a result of conduct by Styland's directors in 1998, 1999 and 2000 there has been "dissipation" of Styland's assets in the past. From this Mr Harris invites the Court to deduce that assets are now at risk because the company has been badly run in the past.

23. But the SGM transactions that form the core of the Plaintiffs' complaint were entered into some time ago. The initial failure to notify the SGM transactions to shareholders also happened some time ago. No complaint is being made of more recent business transactions of Styland's Board. There is no evidence of bad deals being entered into by the Board in say 2002 or 2003 necessitating the appointment of a receiver by way of

urgent relief to stem further losses. Consequently, there is no reason to appoint a receiver to manage Styland's business in place of its current directors pending the trial of this action.

24. No doubt conscious of the difficulty of seeking appointment of a receiver in the wide terms of the Summons, Mr Harris submitted that I could appoint a receiver with limited powers under High Court Ordinance (Cap.4) ("HCO") s. 21L. HCO s. 21L provides:-

> "(1) The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.
>
> ...."

The Court's power to appoint receivers (Mr Harris suggested) being wide, an appointment could be confined to such powers as circumstances might warrant. Here it might be appropriate, as an alternative to the conventional powers sought by the Summons, to restrict any receiver's powers to the extent necessary to ensure that a circular with adequate information was provided to shareholders in relation to the SGM Transactions and a proper SGM convened on the basis of such circular.

25. Mr Whitehead, who appeared for the 1st and Main Defendants and Styland, questioned whether I had jurisdiction to appoint a receiver on the alternative basis advanced by Mr Harris. He stressed that neither Mr Harris nor he could find any Hong Kong or Commonwealth authority where a receiver had been appointed along the lines sketched by Mr Harris.

26. I shall assume, without deciding, that I have the power to appoint a receiver along the restricted lines put forward by Mr Harris. Even then I do not think that this would be am appropriate case in which to exercise such power. This is because there would be little point in appointing such an interim receiver here. Two factors lead me to this conclusion.

27. First, where a director has failed to make full and frank disclosure to shareholders in connection with a transaction X, an apparent ratification of X by the company in general meeting is ineffective to absolve the director from breaches of fiduciary obligations in connection with X. Where then is the need for the appointment of a receiver now, before determination of the rights and wrongs of the Plaintiffs' complaint at trial, in order to ensure that full and frank disclosure is made? The SGM may or may not ratify the SGM Transactions if held now. If it does ratify the SGM Transactions and if the directors have not made proper disclosure as alleged by the Plaintiffs, the position of any shareholder (including the Plaintiffs) is not compromised. The directors would remain unabsolved for their past wrongs and the company could still take action against them.

28. Mr Harris accepts this analysis in part. But, he says, it would be harder to right the directors' wrong if the SGM goes ahead and, through misinformation, the SGM transactions are ratified. At that stage, it would be difficult (Mr Harris claims) to persuade the Court that the Circular had been misleading. The Plaintiffs would constantly be met with the refrain that the company in general meeting ratified the SGM Transactions. I do not accept this reasoning. The Plaintiffs would have precisely the same task (namely, that of persuading the Court that the Circular is insufficient

or misleading in its disclosure) whether such case were advanced before or after an SGM which apparently ratified the SGM Transactions.

29. Second, Styland has appointed a committee to look into the transactions which form the subject matter of the Plaintiffs' complaint. Mr Whitehead informed me that, until such committee has completed its investigation and made its report, Styland will not proceed to hold an SGM for the ratification of the SGM Transactions. Before the committee reports, Styland only intends to hold its adjourned AGM and to put the question of the special dividend to its shareholders in an SGM. In light of this development, I do not see the necessity of appointing an interim receiver with limited powers to duplicate what the independent committee is supposed to do.

30. Mr Harris queries the "independence" of the committee. He complains that it is being appointed by the very directors whose wrongdoing is under scrutiny. But I think it is more reasonable and appropriate to see who is appointed to the committee and how such appointees carry out their task, rather than to interfere in a public company's conduct of its own affairs by the appointment of an interim receiver.

31. I am fortified in my conclusion on this point by *Prudential Assurance Co. Ltd. v Newman Industries Ltd.* [1982] 1 Ch 204. At 221G - 222A, the Court of Appeal made the following observation (obiter):-

> "[W]e do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of 'fraud' and 'control' are fact, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a

> prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception the rule in *Foss v Harbottle*. On the latter issue, it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting."

32. I appreciate that the quoted passage was said in the context of a Court determining whether a plaintiff could bring a derivative action. Nonetheless, I believe that the passage can apply by analogy here. I refer specifically to the suggestion in the passage that, where the Court is presented in an interlocutory application with a dilemma whether or not to treat a plaintiff's allegations of "fraud" and "control" as true, it may often be better to allow a meeting of shareholders to proceed and see what happens at that meeting. In other words, the Court should hesitate to appoint an interim receiver or grant some other interim relief, without some evidence that a meeting has actually been (as opposed merely to, "could potentially be") manipulated by wrongdoers. The Court's caution arises from its reluctance to interfere, unless necessary, with the day-to-day administration of a company's affairs. By analogy, in the present situation, it seems more practical and effective for the committee appointed by Styland to conduct its investigation, for Styland to decide whether to seek ratification of the SGM Transactions from the company in general meeting in light of the committee's report, and for the Plaintiffs to argue their case at any SGM which takes place following the committee's report.

Balance of convenience

33. In exercising its jurisdiction to appoint receivers under HCO s. 21L, the Court applies the principles in *American Cyanamid* by analogy. See *Re Niceline Co. Ltd.* [2003] 2 HKLRD 725, at 737 (§53). Even if I

thought that the appointment of an interim receiver could possibly be an effective measure to address the Plaintiffs' complaints, I would still refuse to make such an appointment on the balance of convenience.

34. The Court first examines whether, if the Plaintiffs were to succeed at trial, they would have suffered loss, as a result of the non-appointment of an interim receiver, which could not be adequately compensated by a money payment from the Defendants. Here the Plaintiffs bring their action on behalf of the company and shareholders and ask for damages to be assessed. The complaint is presumably in respect of loss flowing from mismanagement by Styland's directors. Damages should prima facie be an adequate remedy. There is no evidence that the Defendants would not be able to pay any damages assessed.

35. If damages are sufficient compensation for the Plaintiffs, one would not normally proceed further. Interim relief should be refused at that stage. But assume that I am wrong in my conclusion on the first head of *American Cyanamid*. The Court then assesses whether, if the Defendants were to succeed at trial, they would have suffered loss, as a result of the appointment of an interim receiver, which could not be adequately compensated by a money payment from the Plaintiffs.

36. Here, Mr Whitehead was at pains to stress that the appointment of an interim receiver (whether with general or limited powers) could be fatal to Styland. He cited in support the following dictum of the Supreme Court of Victoria in *Bond Brewing Holdings Ltd. v National Australia Bank Ltd.* (1990) 1 ACSR 445, at 456-7:-

> "The appointment of a receiver is one of the oldest remedies of the Court of Chancery, and a very useful remedy it is. But its very efficacy means that a corresponding caution must attend its

> employment. Where a receiver is sought to protect property of which no one is in actual possession, no one will be ousted by the appointment and probably no great harm will be done. But where the subject matter is in the defendant's hands he may suffer an irreparable wrong by being dispossessed and of course this danger will weigh with a judge from whom the remedy is sought. The appointment of a receiver which is to be, so to speak, at the expense of the defendant's possession and without his consent is step never to be taken without proper consideration of the defendant's position.... Where a receiver is sought, not merely of a particular asset of the defendant, but of all his assets, particular caution is required and where, as in the present case, the receiver is to possess himself of and to manage the assets and undertaking of a collection of companies which, whether they are solvent or not, are in a very large way of business, very great circumspection is required. Of course in a strong enough case the court might, without warning to a trading company, divest it of control of its undertaking and assets. But it must always be borne in mind that the appointment of a receiver in such a case authorises an irresistible invasion and that even if the army of occupation is withdrawn after only a short time things may never be the same again. Rights of property and the company's privacy are violated. Only the most pressing need can warrant such an invasion without notice. Quite apart from the taking out of the companies' hands of control of their assets and the management of their businesses, there was in the present case the added consideration (which will not infrequently be present where a receiver is appointed to a company) that the making of the order might well have most serious legal consequences for the companies or for related companies having regard to the terms of securities given by them. And in addition to the legal consequences there was the commercial consideration that, as *Picarda, Receivers and Managers* p. 4 has observed, the receiver is often seen not as the company doctor but as the undertaker, so that a blow is truck to the standing and credit of the defendants."

37. I agree with Mr Whitehead. The appointment of an interim receiver is likely in my judgment to lead here to irreparable loss on the part of the Defendants. For example, the company could well be perceived by the outside world as having fallen on bad times and even as having become insolvent. That would have an inevitable effect on Styland's share price with consequent loss, not just to the shareholders such as the 1st and 2nd Defendants, but also to shares held by members of the public. Further, the reputations of the Styland's existing directors may be irretrievably

tarnished in the eyes of others by reason of the appointment of receivers to take over management of the company from them. On this ground, an interim receiver should be refused.

38. I also note that I have doubts as to the effectiveness of the Plaintiffs' undertaking in damages since their combined shareholding only amounts to some 8.5% of Styland. The possibility of a further undertaking from a Mainland company was raised by the Plaintiffs at the hearing before me. But I place little (if any) weight on such possibility, given that no details of the Mainland company were provided by the Plaintiffs. The possibility was merely raised by production of a fax from the Mainland company to the Plaintiffs' solicitors without any supporting affidavit. The company claims to hold 84,390,000 Styland shares worth $2,400,000. But it is unclear to what extent such shares are or are not currently encumbered.

39. Assume that the 3rd limb of *American Cyanamid* needs to be considered. If damages would adequately compensate neither plaintiff nor defendant, the Court should attempt to preserve the status quo. Here it seems to me that preserving the status quo means leaving control of Styland's assets in the hands of its present management, rather than in the hands of a receiver to be appointed by the Court. This is especially the case where the Plaintiffs cannot identify any impending action by the Defendants which places Styland's assets in immediate jeopardy.

40. The 4th limb of *American Cyanamid* allows the Court to consider special factors. Here the appointment of a committee by Styland to look into the SGM Transactions and the fact that, in the absence of full disclosure, a meeting would not absolve the directors of wrongdoing in any

event, are factors which militate against the appointment of an interim receiver as I have discussed above.

41. Where the 1st to 4th heads of *American Cyanamid* prove inconclusive, a Court is entitled to consider the relative merits of the case. There was some consideration by counsel before me of the substantive merits of the action. For example, there was argument over whether the Plaintiffs were entitled to bring a derivative action at all. There was also debate over whether, in assessing the degree of full and frank disclosure made in the Circular, the Court should assume that shareholders are largely apathetic or reasonably sophisticated. I do not think that it is necessary or advisable for me to consider the strengths and weaknesses of the parties' positions in these interlocutory proceedings. Applying the 1st to 4th limbs of *American Cyanamid* individually and cumulatively, I have come to the firm conclusion that an interim receiver should not be appointed.

Conclusion

42. The Plaintiffs' Summons is dismissed. I shall now hear the parties on costs and other consequential orders.

(A.T. Reyes)
Judge of the Court of First Instance
High Court

Mr Jonathan Harris, instructed by Messrs Alvan Liu & Partners, for the Plaintiffs.

Mr Robert Whitehead SC and Mr Benjamin Chain, instructed by Messrs Y S Lau & Partners, for the 1st, 2nd, 4th, 8th, 10th, 11th, 12th and 13th Defendants.