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A B C D E F G H I J K L M N O P Q R S T U V

HCMP 1718/2009, HCMP 1720/2009 & HCMP 1722/2009
(heard together)

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NOS. 1718, 1720 AND 1722 OF 2009
(ON AN INTENDED APPEAL FROM HCCL NOS. 37 AND 40 OF 2005)

BETWEEN

AKAI HOLDINGS LIMITED (IN COMPULSORY LIQUIDATION) and the 2nd to 17th Plaintiffs (as identified in the Amended Writ of Summons) — 1st Plaintiff

and

HO WING ON, CHRISTOPHER and the 2nd to 20th Defendants (as identified in the Amended Writ of Summons) — 1st Defendant

and

ACCOLADE, INC — The Intervener

Before: Hon Tang VP and A Cheung J in Court
Date of Hearing: 8 September 2009
Date of Judgment: 8 September 2009
Date of Reasons for Judgment: 24 September 2009

REASONS FOR JUDGMENT

A B C D E F G H I J K L M N O P Q R S T U V

Hon Tang VP:

Introduction

1. The 1st defendant, Mr Christopher Ho ("Mr Ho"), is a Chartered accountant, and at one time, a partner in Ernst & Young. Mr Ho is also a director of the 2nd defendant The Grande Holdings Limited ("Grande Holdings"), a company listed in Hong Kong, as well as companies listed overseas including Singapore and Delaware, USA.

2. The intervener, Accolade, Inc ("Accolade") is the trustee of the Ho Family Trust which was constituted by a Trust Deed dated 31 July 1993. It is a company incorporated in the British Virgin Islands ("BVI"). The shareholders of Accolade are Dr Sabrina Ho and Ms Christine Asprey (both sisters of Mr Ho). Ms Christine Asprey is a director of Grande Holdings. According to Dr Ho, the Board of Directors of Accolade comprises Mr Alister Asprey, a former secretary for security and the husband of Ms Christine Asprey, and Ms Eleanor Crosthwaite:

> "… (who has worked with Mr Ho for years and she is now the head of the Human Resources Department and the Central Treasury Department of Grande and reports to Grande's board) and me."

and that Eleanor undertakes generally all relevant administrative matters, but in case of doubt or problems, she would seek her view, and if necessary, a decision would then be made by Accolade's Board of Directors collectively. Also according to Dr Sabrina Ho in her affirmation which was filed on behalf of Mr Ho on 14 August 2009, in or about 1993, Mr Ho transferred virtually all of his wealth to the Ho Family Trust.

3. The Ho Family Trust is in terms a discretionary trust. Mr Ho was the settler and a Memorandum of Wishes signed by Mr Ho and on behalf of Accolade, stated, inter alia:

> "During my lifetime, the Trustee should hold the whole of the capital and income of the Trust Fund for me absolutely and should in the exercise of all its powers and duties and also with regard to the management and administration of the Trust Fund and the distribution of income and capital consult with me…"

It also contained the usual provision that such wishes were:

> "… not intended to be legally binding upon nor constitute legal obligations of the Trustee."

4. The Ho Family Trust also provides for an appointer who is entitled by deed at any time and from time to time to remove any trustee of the trust and to appoint a new trustee in its place. The appointer is also entitled to nominate by notice in writing underhand:

> "a person … to be his successor as appointer".

It appears from Annexure I of the Trust Deed that the appointer was:

> "Lau Sing Hung Stephen … c/o Ernst & Young, 26/F, Great Eagle Centre, 23 Harbour Road, Wanchai, Hong Kong".

5. During the hearing, we were informed that Mr Lau has remained the appointer although he is no longer associated with Ernst and Young.

<u>The application</u>

6. This was the application by the 1st defendant Mr Ho and Accolade for leave to appeal from the judgment of Stone J given on 1 September 2009, appointing joint and several receivers over the assets of the 1st defendant and Accolade. I will refer to the Ho Family Trust assets as the assets of Accolade

because they are nominally so. Such assets include 69/70% of the shares in Grande Holdings. The beneficial ownership of such assets will have to await determination.

7. Stone J's judgment (the receivership judgment) was given on 1 September 2009 following four days of hearing which ended on 31 August 2009. Although Stone J refused leave to appeal, he granted an interim stay of the receivership order until 5 pm on Friday, 4 September 2009, so that Mr Ho and Accolade:

> "102. … will have a window 3 days in which to arrange an appellate hearing, and whom, if necessary, can mount an application for an extended stay. As far as this court is concerned, however, the end of this week is the furthest that it is prepared to extend the interim stay envelope."

8. On 2 September 2009, Accolade commenced proceedings in the BVI seeking, inter alia, a declaration that the Ho Family Trust is a valid discretionary trust as a matter of law of the BVI. On 4 September 2009, an application was made for an extension of the interim stay pending a hearing of the application for leave to appeal. The matter came before me on 4 September 2009. I extended the interim stay until 5 pm on 8 September 2009 so that the application for leave to appeal together with a stay pending appeal could be dealt by two judges. On 8 September 2009, after hearing, we refused leave to appeal. I now give reasons.

<u>The reasons</u>

9. The matter has a long history. The claim arose out of the liquidation of Akai Holdings Limited (the 1st plaintiff) and the other plaintiffs which are companies in the Akai Group.

10. The plaintiffs' claim is that as a result of a covert agreement made in November 1999 between Mr James Ting, the de facto controller of the Akai Group and Mr Ho, Mr Ho and others took control of Akai and its subsidiaries from Mr James Ting, and in so doing became de facto and/or shadow directors of the plaintiffs, and thereafter proceeded to act with blatant disregard for the interests of Akai and the Akai Group. The recoverable loss are said to be hundreds of millions of US Dollars. As Stone J described it in his judgment of 9 February 2009 ("the Mareva judgment") when he made a worldwide Mareva injunction against Mr Ho, as well as disclosure orders against both Mr Ho, and the 2nd defendant, Akai:

> "19. … had been subjected to a 'double mugging', first at the hands of Mr Ting, and thereafter, upon the latter's departure from the scene, at the hands of Mr Ho and the Grande defendants, who had removed what assets remained after the pillaging that Akai already had received at the hands of Mr Ting.

11. The Mareva injunction against Mr Ho was made on the basis that Mr Ho was beneficially entitled to the Ho Family Trust which was held 100% for Mr Ho by Accolade. The learned judge said:

> "72. … it is common ground that Mr Ho is the beneficial owner of 69/70% of Grande, and thus, if he so wishes, ultimately is able practically to ensure that Grande follows whatever course he may desire."

Indeed at the outset, Stone J said:

> "13. … (Mr Ho) is and was the majority shareholder, President, Group Chief Executive and a director of Grande …".

12. At the Mareva injunction hearings, Mr Ho, Grande Holdings and a number of the other defendants were represented by Mr Richard Snowden QC, Mr Godfrey Lam SC and Mr Abraham Chan, and that the solicitors then acting were Messrs Baker & McKenzie. The Mareva injunction was granted after

five days of hearing. However, when the hearing was adjourned part-heard on 23 December 2008 to 19 January 2009, Stone J granted an interim Mareva injunction against Mr Ho and ordered that the plaintiffs' undertaking as to damages should be fortified by the payment into court of HK$50 million within ten business days, which was complied with. The substantial fortification was presumably justified on the basis that Mr Ho's assets included the assets in the Ho Family Trust.

13. In the Mareva judgment, Stone J said in relation to Mr Ho's 1st and 2nd affirmation filed in the Mareva injunction proceedings that:

> "29. … that his two affirmations are 'thin' and unsubstantiated by relevant contemporary documentation; perhaps the fairest and most objective comment is that they do nothing to inspire confidence."

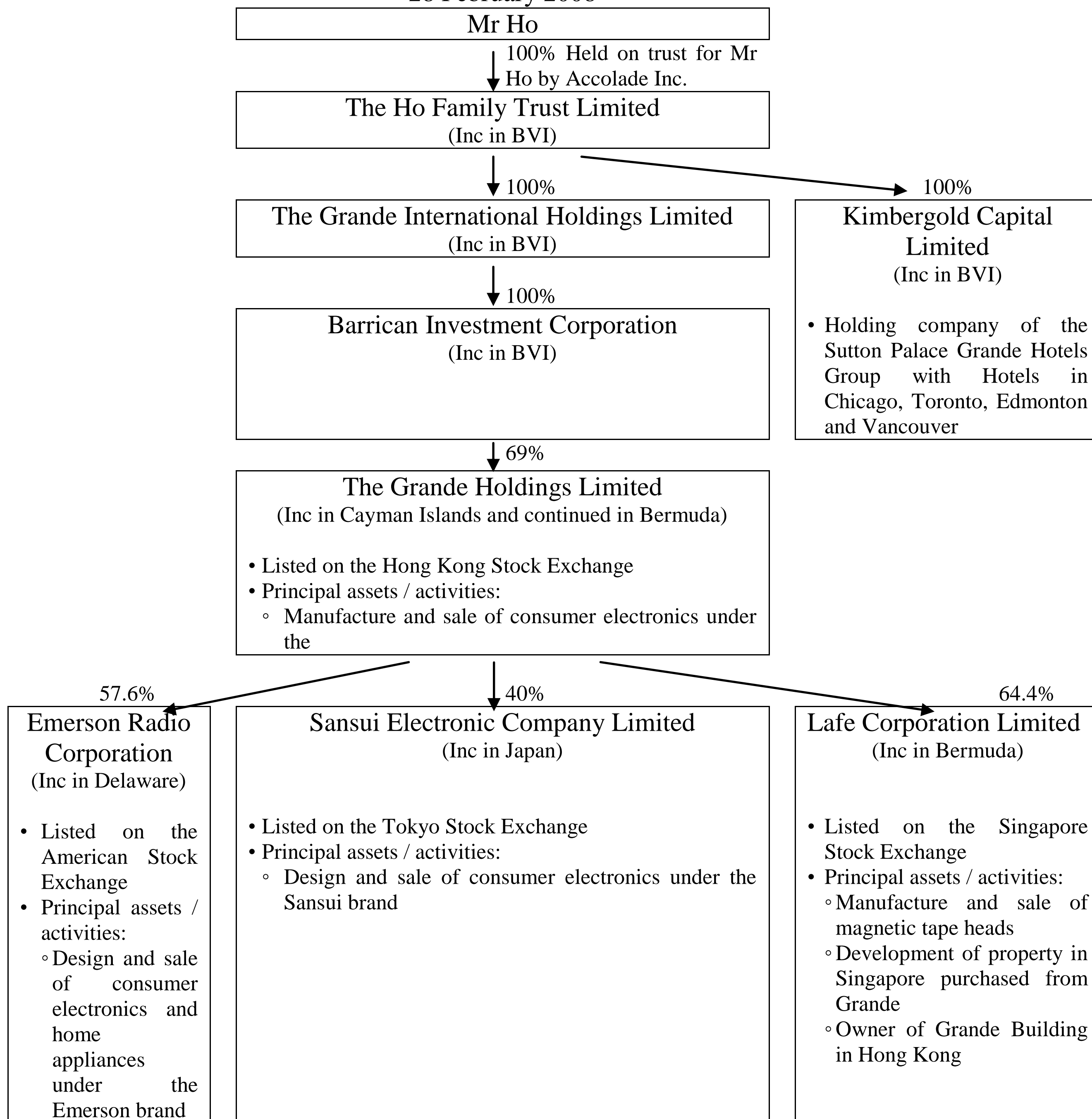
14. In relation of Mr Ho's assets Stone J said:

> "48. It is known that Mr Ho holds his private assets through opaque corporate structures in differing jurisdictions around the world, and during this hearing reference has been made to a corporate chart (at 'Annexure D' to the plaintiffs' skeleton argument) which is thought to approximate the shareholding structure in various private companies and trusts as at February 2008.
>
> ……
>
> 84. As to the position of Mr Ho, whilst the liquidators have no evidence of Mr Ho having actually disposed of his personal assets, I agree with and accept the submission that the circumstances point to the inevitable conclusion that there is a clear risk that this gentleman will do so; in fact, opined Mr Kosmin, it is not perhaps surprising that the plaintiffs are unaware of any actual dissipation of Mr Ho's assets given that they appear to be held through opaque chains of private BVI companies, and that to-date Mr Ho has made no disclosure of such holdings.
>
> 85. Nevertheless the ineluctable fact remains that in terms of these private BVI companies Mr Ho, as controller and major shareholder, must be regarded effectively as the 'puppet master', and that he remains responsible for the conduct of Grande and its subsidiaries."

15. Annexure D is produced below:

Annexure D – Structure Charts

Mr Ho's Shareholding Structure as at Immediately Prior the Lafe Distribution
28 February 2008



16. No point was taken on behalf of Mr Ho or Grande Holdings or at all during the Mareva injunction hearing that Accolade did not hold the Ho Family Trust Assets on trust for Mr Ho.

17. Stone J granted a worldwide Mareva injunction against Mr Ho up to the value of US$200 million. He also made an order for disclosure against Mr Ho.

18. Although the learned judge refused a Mareva injunction against the 2nd defendant, he said:

> "118. As an additional safeguard, I would also order that any Board Resolution expressly sanctioning disposal or distribution of Grande assets other than in the ordinary course of Grande's business must be notified by Mr Ho to the Akai liquidators 14 days in advance of such disposal. Moreover, if subsequently I were to be told that consequent upon this judgment there have been significant changes made to the composition of the Board, I should make it clear that I would be prepared to revisit the terms of this particular ruling."

19. In order to settle the terms of the Mareva order, there was a hearing before Stone J on 17 February 2009 where Mr Dobby of Messrs Lovells attended for the plaintiffs and Mr Abraham Chan for the defendants. The terms of the Mareva injunction show clearly that the assets of the Ho Family Trust were regarded as Mr Ho's assets and that they were subject to the Mareva order. For ease of reference, the order is reproduced below:

> "1. The First Defendant must not:
>
> 1.1. Remove from Hong Kong any of his assets up to the value of US$200,000,000 or its equivalent in any currency;
>
> 1.2. In any way dispose of or deal with or diminish the value of any of his assets, whether they are within or outside Hong Kong up to the value of US$200,000,000 or its equivalent in any currency; or
>
> 1.3. Use any legal or beneficial shareholder equity which forms part of his assets or cause any such legal or beneficial shareholder equity to be used so as to cause or procure the Second Defendant to dispose of any of its assets (including those assets listed in paragraph 2 of Schedule 3) other than in the ordinary course of its business save where:

1.3.1. such disposal outside of the ordinary course of business has been expressly approved by a resolution of the Board of Directors of the Second Defendant at a board meeting formally convened for that purpose as being in the best interests of the Second Defendant; and

1.3.2. the First Defendant has given the Liquidators of the First Plaintiff at least 14 days written notice of an intended disposal sanctioned in accordance with paragraph 1.3.1 together with particulars of the proposed transaction.

2. Paragraph 1 applies to all the First Defendant's assets, including the real and personal property, whether tangible or intangible, whether or not they are in his own name or howsoever held. A restriction on the conduct of First Defendant includes a restriction on the First Defendant causing any company or trust legally or beneficially owned by the First Defendant or any company or trust controlled by the First Defendant to engage in such conduct with reference to the First Defendant's assets or liabilities in whatever form they are held.

3. This prohibition includes in particular:

3.1. The legal and beneficial shareholder equity in the companies listed in paragraph 1.1 of Schedule 3; and

3.2. The assets listed in paragraph 1.2 of Schedule 3 to the extent that they are assets of the First Defendant, or to the extent that they are assets of companies that are covered by the prohibition in paragraphs 1.3 above.

4. If the total value free of charges or other securities (‘the unencumbered value’) of the First Defendant's tangible assets in Hong Kong exceeds US$200,000,000 or its equivalent in any currency, the First Defendant may remove any of those assets from Hong Kong or may dispose of or deal with them so long as the total unencumbered value of his tangible assets still in Hong Kong remains above US$200,000,000 or its equivalent in any currency.

5. If the total unencumbered value of the First Defendant's tangible assets in Hong Kong does not exceed US$200,000,000 or its equivalent in any currency, the First Defendant must not remove any of those assets from Hong Kong and must not dispose of or deal with them. If the First Defendant has other assets outside Hong Kong he may dispose of or deal with those assets outside Hong Kong so long as the total unencumbered value of all his tangible assets whether in or out of Hong Kong remains above US$200,000,000.”

20. Schedule 3 of the Mareva injunction provides as follows:

"**<u>SCHEDULE 3</u>**

Particular Assets Subject to This Order

1. Assets of the First Defendant, Ho Wing On, Christopher ('Mr Ho')

1.1 Legal and beneficial shareholder equity in the following companies, their subsidiaries and associates:

Entity	**Place of incorporation / registration and operation**	**Percentage of equity attributable to Mr Ho**
Airwave Capital Limited	BVI	100%
Barrican Investments Corporation	BVI	100%
The Ho Family Trust Limited	BVI	100%. .
Accolade Inc	Unknown	100%
The Grande International Holdings Limited	BVI	100%
Clarendon Investments Capital Limited	BVI	100%
Kimbergold Capital Limited	BVI	91.6%
The Grande Holdings Limited	Incorporated in the Cayman Islands and continued in Bermuda	69%
The subsidiaries and associates of The Grande Holdings Limited as listed in paragraph 2.1 below.	Various	69%
Lafe Corporation Limited	Bermuda	52%
Lafe Holdings Limited	BVI	52%
Lafe (Emerald Hill) Development Pte Ltd (formerly Vigers International Properties Pte Ltd)	Singapore	52%
Grande Properties Limited	Hong Kong	52%
Lafe Peripherals International Limited	BVI	52%
Lafe Computer Magnetics Limited	Hong Kong	52%
Lafe Management Services Limited	Hong Kong	52%
Lafe Investment Limited	Hong Kong	52%

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Lafe Computer Components Limited	Hong Kong	52%
Lafe (China) Corporation Limited	BVI	52%
Bistrot Enterprises Ltd	BVI	52%
Lafe Electronic Components (Panyu) Co Ltd	PRC	52%
Lafe Technology (Hong Kong) Ltd	Hong Kong	52%

1.2 The following assets owned by Mr Ho or one or more of his wholly or partially owned companies:

1.2.1. the Sutton Place Hotel Chicago, located at 21 East Bellevue Place, Chicago, USA;

1.2.2. the Sutton Place Hotel Edmonton, located at 101235 101st Street, Edmonton, Canada;

1.2.3. the Sutton Place Hotel Toronto, located at 955 Bay Street, Toronto, Canada;

1.2.4. the Sutton Place Hotel Vancouver, located at 845 Burrard Street, Vancouver, Canada;

1.2.5. the property located at 119/119A Emerald Hill Road, Singapore;

1.2.6. The Grande Building (also known as the Lucky (Kwun Tong) Industrial Building), 398-402 Kwun Tong Road, Kwun Tong, Kowloon, Hong Kong SAR;

1.2.7. the assets listed in paragraph 2.2 below."

21. On 5 March 2009, Mr Ho filed a notice of appeal, the appeal was fixed for hearing for 21 July 2009 for two days. There was no appeal by the 2nd defendant. Mr Ho's appeal was subsequently abandoned.

22. On 17 March 2009, the 1st defendant took out what was described as "Summons to Clarify a Mareva Order". There was annexed to the summons the Mareva injunction order together with the suggested clarifications.

23. The summons was heard before Stone J on 19 March 2009. On that occasion the 1st and 2nd defendants were represented by Mr Snowden QC and Mr Abraham Chan. By a separate summons dated 6 March 2009, the 1st defendant applied for a stay of execution of the disclosure order pending the hearing of its appeal. Stone J refused a stay.

24. As Stone J explained in his reasons for decision dated 16 April 2009:

> "19. (Mr Snowden's) basic thesis was that the *Mareva* injunction should respect the fundamental principles of company law that a company is a separate legal entity and that the assets of a company do not belong to the shareholders of the company: see *Saloman v Saloman* [1897] AC 22 (HL).
>
> 20. Thus, he argued, the assets of a subsidiary company are not to be treated as assets of the parent company, and he noted that the judgment of the court upon the substantive application reflected the underlying intention that Mr Ho should be restrained from taking actions *qua* shareholder in respect of his beneficial interest in Grande."

25. In relation to the clarification summons, the learned judge refused to:

> "36. … accede to the request to modify the terms of the Order as engrossed since I did not consider any amendment as was mooted to be necessary, and accordingly this application immediately was dismissed with costs."

26. As the learned judge had refused a stay of the disclosure order, Mr Ho filed his 3rd affirmation on 31 March 2009 in purported compliance with the disclosure order. In para. 2, he disclosed assets which included two expensive cars (valued at about SGD 1,000,000) and his residence in Singapore, with a value of approximately SGD 6,726,000 (not taking into account any mortgage). It appears from his 7th affirmation, filed on 17 July 2009, that his residence was subject to a total mortgage loan of about SGD 7,326,152.32. I should add that

by his 7th affirmation Mr Ho also disclosed wines with an estimated value of about US$200,000. Mr Ho's admitted assets are insignificant in the context of the plaintiffs' claim and presumably would not justify payment of a substantial sum by way of fortification.

27. However, Mr Ho also said in his 3rd affirmation:

> "3) Without prejudice to my contention that paragraph 6 of the Order only requires me to disclose my assets (whether owned legally or beneficially) and not assets which are legally and beneficially owned by some other person or legal entity, I set out below, on a voluntary basis and to the best of my knowledge and belief, the principal categories of assets that have an estimated individual value of US$100,000 and above that are owned by a trust of which I am a named discretionary beneficiary, and/or owned by companies owned by the trust:"

28. The significance of the statement in para. 3 of Mr Ho's 3rd affirmation that the Ho Family Trust assets:

> "3) … are owned by a trust of which I am a named discretionary beneficiary …"

was not explained.

29. On 8 May 2009 there was a hearing with the judgment given on 1 June 2009 before Stone J in which he dealt with the plaintiffs' summons dated 17 March 2009 (the interrogation summons) and the plaintiffs' summons on 27 April 2009 (the specification summons):

> "… basically dealing with the plaintiffs' complaint of the inadequacy of the disclosure made so far by Mr Ho and the 2nd defendant".

30. In the course of his judgment Stone J said at para. 46:

> "46. … in fact, given the obvious approach to, and the limited content of, the disclosure as presently provided, it was difficult not to conclude that Mr Ho appears to have little interest in essaying appropriate compliance, and in lieu thereof that which has been

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> proffered to-date amounts to little more than a gesture towards going through the disclosure motions.
>
> 47. I hope that this characterisation is not unfair, but I regret that I have been driven to this opinion."

31. Stone J granted a substantial proportion of that reliefs sought by the specification summons.

32. On 15 July 2009 there was a hearing before Stone J of a summons issued by the plaintiffs' liquidators dated 6 July 2009. In the learned judge's judgment of 23 July 2009, he explained:

> "4. … In material summary this summons of 6 July 2009 seeks:
>
> (1) discovery on the part of the 2nd defendant, Grande, acting by a proper officer and with the sanction of the Board of Directors, of:
>
> (a) information and documentation (adumbrated in Schedule A of the summons) regarding the disposal of the Grande Building in Singapore, which transaction was announced on 25 June 2009 – which sale has stimulated the issuance of the present summons; and
>
> (b) detailing with particularity details of the disposal of shares in Sansui Acoustics Research Corporation, including information as to what has become of the sum of US$59.2 million received by subsidiaries of the 2nd defendant (as per the details set out in Schedule B of the summons);
>
> (2) An order that the 2nd defendant do give the plaintiffs at least 14 days' advance written notice of the date of completion of the sale of the Grand Building, 8 Commonwealth Lane, Singapore;
>
> (3) An order that the 1st defendant, Mr Ho, do file and serve an urgent affidavit on the plaintiffs providing with full particularity details of all of the dealings by the 1st defendant with his assets (as defined in paragraphs 2 and 3 of the Order of this court – 'the Mareva Order' – dated 17 February 2009, and in light of the further Order of this court dated 1 June 2009) since 19 November 2008;

(4) An order that the order of February 2009 be amended so that the undertaking in Schedule 2, para 7 thereof is varied in order that disclosure of the information to be provided pursuant to this application be made to certain specified persons only otherwise than with the written consent of the 1st and/or 2nd defendants or further order of this court;

(5) That the costs of this application be to the plaintiffs upon an indemnity basis."

33. In connection with this application, Mr Ho said in his 5th affirmation:

> "18. Recently, my attention has been drawn to the (Mareva judgment) particularly at paragraph 72 by my present solicitors and the paragraph states '… it is common ground that Mr Ho is beneficial owner of 69/70% of Grande, and thus if he so wishes …'"

and that he was very surprised by the suggestion that he was:

> "… a beneficial owner of about 70% of Grande's shareholding … which is completely contrary to my understanding and belief."

34. It is not clear whether Mr Ho meant to imply that prior to his attention being drawn to the Mareva judgment he was not aware of its content. Nor did he say when he became aware of the terms of the Mareva injunction order and if earlier what his reaction was when he discovered that the Ho Family Trust assets were made subject to the Mareva injunction.

35. Mr Ho's assertion was dealt with in Stone J's judgment of 23 July 2009:

> "The plaintiffs' summons dated 6 July 2009
>
> 47. I have earlier set out the substance of this application, which, as I have said, resulted from the belated discovery of the 2nd defendant's public announcement, at 9.39 pm on 25 June 2009, to the effect that it had entered into a contract for the sale of the Grande Building in Singapore for the sum of Sing$19.5 million (US$13.3 million approximately), and that this sale expressly had been approved by Mr Ho's company, Barrican Investments Corporation.

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48. This fact was *not* disclosed to the court or to the plaintiffs at the hearing on 26 June 2009 for the defendants' extension of time in which to file further disclosure affidavits, and when viewed in the context of discovery pursuant to the *Mareva* order of fully some five months earlier, it is fair to observe that the imparting of this information would have made a significant difference to the manner in which this court then regarded the defendants' position, the change of solicitors and counsel notwithstanding.

49. I am told that the plaintiffs first had learned of the announcement of this sale shortly after the hearing on 26 June 2009 at which the extension of time had been granted; in the circumstances I am a little surprised that the plaintiffs did not immediately return to court with this information prior to the engrossment of the order dealing with the extension of time, but for some reason this did not occur.

50. Instead, M/s Lovells took up the issue in correspondence with the defendants' new solicitors, M/s Huen Wong & Co, by letter dated Monday 29 June 2009, in which they sought a comprehensive explanation from Mr Ho regarding the terms and circumstances of the sale of the property, and further sought an undertaking that Grande would not complete the sale of the property without providing 14 days written notice to the plaintiffs.

51. On 30 June 2009 M/s Huen Wong & Co replied on behalf of Mr Ho and Grande.

52. I rarely have cause to read solicitors' correspondence, but on this occasion I have been constrained to do so, and by any standards this was an peculiar response, not only in terms of its aggressive, aggrieved and faintly hysterical tone, but because this letter raised for the first time that which Mr Kosmin has characterized as the "bizarre and extraordinary proposition" that Mr Ho was *not* the beneficial owner and controller of Grande.

53. The ineluctable fact is that this assertion was contrary to the basis of the submissions made to this court by English leading counsel, Mr Snowden QC, during argument upon the substantive *Mareva* application wherein such beneficial ownership never was disputed (indeed the now-unappealed Judgment of 9 February 2009 records that Mr Ho "is and was the majority shareholder, President, Group Chief Executive and a director of Grande"), and is wholly contrary to the manner in which the defendants' case has been conducted to-date; moreover it flies in the face of the specific content of Schedule 3 forming part of the Mareva Order – which, it will be recalled, was settled at a hearing consequent upon submissions made by junior counsel upon the defendants' behalf – and also is inconsistent with the disclosures in Grande's Annual Reports and with representations made to the Stock Exchange of Hong Kong (and, it also now seems, to

regulators in America). Quite how the Hong Kong regulators react to the revelation that factual representations as originally made on behalf of Mr Ho, and as now recorded in public filings, do not represent the true position is something which is not the immediate concern of this court.

54. This fundamental change of position as to Mr Ho's status in relation to Grande also is reflected in the affidavit evidence filed by the 1st and 2nd defendants in opposition to this summons.

55. In this connection there is affirmation evidence from Mr Adrian Ma Chi Chiu (affirmation dated 13 July 2009) on behalf of Grande and the 5th and 6th affirmations, respectively dated 13 July and 14 July 2009), from Mr Ho himself.

56. So far as he is concerned Mr Ma, the CEO of Grande, asserts that "in actual fact, Mr Ho does not have any shareholding in Grande" (para 24), that "the plaintiffs have simply no basis at all to meddle with Grande's business", and – surprisingly in the circumstances – he goes so far as to say, in my view somewhat ambitiously, that he verily believes that "the present application made by the plaintiffs is vexatious and is wholly devoid of merits".

57. For his part Mr Ho, in his 5th affirmation, seeks to uphold the sanctity (and legal effect) of the Ho Family Trust, in which, he says, his wife, daughter and himself "are all beneficiaries" (para 10), he informs the court that his brother in law and elder sister are directors of Grande (para 16) and are people of the utmost integrity who would not succumb to any outside influence, he suggests that the statement in the *Mareva* judgment of 9th February 2009 to the effect that he is the beneficial owner of 69/70% of Grande, whilst perhaps not disputed by his legal representatives at that hearing, had caused him to be "very surprised" and that this did not represent his instructions (para 18), that the corporate structure chart placed before the court at the *Mareva* hearing (Annexure D) had never been drawn to his attention – "It has only been produced to me by my present solicitors when this affirmation was being prepared" – and that the representation thereon is "completely untrue". He continues that "I do not have any beneficial interest (direct or otherwise) in Grande's shareholding" (para 22), that the allegation that he has such a shareholding "remains a mystery to me and is completely contrary to my understanding" (para 24), and that the apparently incorrect public filings in the Companies Registry represent inadvertent errors on the part of Baker & McKenzie, his former advisors and solicitors (para 29), and that he personally was not involved in the approval process for the sale of the Grande Building by Barrican Investments because he did not participate in the relevant Board Meeting of Grande, and also that he is not a director of Barrican Holdings (para 32).

58. Mr Ho's 6th affirmation of the next day follows essentially the same theme: he has never been a director and shareholder of Accolade Inc, the trustee of the Ho Family Trust, which is not controlled by him, and that he is only a member of a class of potential beneficiaries (para 5), that public corporate circulars by Lafe Corporation Limited (as exhibited by Mr Borrelli) which on their face diametrically go against his current affirmation of the position "appear to have arisen as the result of inadvertence on the part of others and escaped my attention", that he does not recall the circumstances in which these statements were actually made (para 5(4)), and that the statement in the Lafe Annual Report for 2007, which attributed to him a 100% beneficial interest in The Grande International Holdings Limited, which in turn owned a majority interest in the share capital of The Grande Holdings Limited through its wholly-owned subsidiary, Barrican Investments Corporation, are "incorrect", and that he "does not recall the circumstances in which the above statements were actually made in the above annual report" (para 5(5)).

59. Accordingly, the position now taken by Mr Ho may, I hope not unfairly, broadly be summed up thus: that in this litigation to-date his legal representatives fundamentally had misunderstood his position, and in turn have misrepresented that position to the court, and that the documents of public record as filed by his legal representatives with market regulators, the content of which demonstrate a picture wholly contrary to that now sought to be portrayed, were and are attributable to filing errors/misunderstandings on the part of Baker & McKenzie, to an erroneous understanding of Stock Exchange Codes (Code 205 having been mixed up with Code 210) and perhaps, also, can be explained by a 'deeming provision so that, as he now put it, "I am nevertheless deemed to have such interest [in Grande] given that I am a beneficiary under a discretionary trust and by virtue of the relevant statutory provisions of the SFO, but solely for satisfaction of the statutory disclosure obligations to the public investors only" (Ho 5th, para 22).

60. In response to this wholesale change of position, Mr Kosmin went to some length to remind the court of the detailed manner in which this case had developed in terms of the portrayal of Mr Ho's position; he noted also the withdrawal of his appeal against the judgment of 9 February 2009, and he also drew attention to a number of corporate public disclosure forms, in which so far as Mr Ho is concerned an antithetical position is represented; thus, for example, the Hong Kong Exchanges and Clearing Disclosure of Shareholder Interests represents Mr Ho as a Director of Grande with a 69.18 percentage shareholding, whilst in an extract from Lafe Technology Annual Accounts the following appears:

> 'Mr Christopher Ho Wing-On had a 100% beneficial interest in The Grande International Holdings Limited, which owned a

> majority interest in the share capital of The Grande Holdings Limited through its wholly-owned subsidiary, Barrican Investments Corporation…'

and in a Lafe Technology Memorandum of Understanding For Acquisition of Assets dated 25 April 2007, under the heading 'Directors' Interest', Mr Christopher Ho Wing-On is described as:

> 'a director and shareholder of the Company [and] is also a director and controlling shareholder of Grande and its subsidiaries…'

Further, in a US filing on behalf of, I believe, Emerson Corporation, the following passage appears:

> 'As the owner of approximately 67% of the share capital of Grande Holdings, Barrican Investments Ltd has the indirect power to vote and dispose of the Shares held for the account of S&T. As the sole parent of Barrican, The Grande International Holdings Ltd has the indirect power to vote and dispose of the shares held for the account of S&T. As the sole owner of Grande International, the Ho Family Trust has the indirect power to vote and dispose of the Shares held for the account of S&T. As the sole beneficiary of the Ho Family Trust, Mr Ho has the indirect power to vote and dispose of the Shares held for the account of S&T. In such capacities, Grande Holdings, N.A.K.S. and Mr Ho may be deemed to be the beneficial owners of the Shares held for the account of S&T…'

and with regard to the place of the Ho Family Trust in the scheme of things, a public release on behalf of Lafe Corporation Ltd regarding a proposed acquisition of shares reads thus:

> '**The Ho Family Trust and Christopher Ho Wing-On**
>
> HFT is a corporation incorporated in the British Virgin Islands and has its registered office at P.O. Box 438, Tropic Isle Building, Road Town, Tortola, British Virgin Islands. HFT's sole shareholder is Accolade Inc., a corporation incorporated in the British Virgin Islands which holds all the shares of HFT on trust for CWH. CWH is the beneficiary under a trust of all the shares of HFT, and is a Director and controlling shareholder of the Company'

In the same context I also have had sight of a 'Memorandum of Wishes of the Ho Family Trust', as signed by Mr Ho, paragraph 2 of which reads:

> 'During my lifetime, the Trustee should hold the whole of the capital and income of the Trust Fund for me absolutely and should in the exercise of all its powers and duties and also with regard to the management and administration of the Trust and the distribution of income and capital consult with me…'
>
> 61. The foregoing represent examples of the documentary material pointed out by Mr Kosmin which run counter to the case as now posited on oath by Mr Ho, the apparent explanation being that such information is mistaken and in clear error and/or constitutes negligent oversight by professional advisers and/or arises as the result of certain statutory deeming provisions – and that with regard to all such matters it now transpired that hitherto Mr Ho had been wholly unaware of the misrepresentations made in his name.
>
> 62. At this stage of the case, therefore, and given all that had occurred thus far in this ongoing discovery dispute, Mr Kosmin asked the court to "disregard" the evidence now recently filed by Mr Ho. In my view he was justified in so doing."

36. By the order of 23 July 2009, the 1st defendant was ordered, inter alia, by no later than 4 pm on 7 August 2009 to file and serve on the plaintiffs an affidavit providing with full particularity (and exhibiting all relevant supporting documentation) details of any and all of the 1st defendant's dealing with his assets (as defined in paras. 2 and 3 of the (Mareva order) and in light of the decision of 1 June 2009) since 9 February 2009 being the date of publication of the Mareva injunction.

37. By summons dated 28 July 2009, the plaintiff applied for the appointment of receivers over the assets of the 1st defendant herein. On 1 September 2009 following a four-day hearing, the learned judge appointed joint and several receivers, which is the subject of the application for leave to appeal before us.

38. We were told the first day of the hearing, namely, 26 August 2009, was taken up by the application of Accolade to be joined as a party to this action. Ms Audrey Eu SC and Ms Catrina Lam appeared for Accolade. The

application was made by summons dated 25 August 2009. The summons was in three parts. First, for joinder. Secondly, for the adjournment of the plaintiff's receivership summons "pending final determination" of the Accolade's application to vary the Mareva Order and 1 June 2009 order and thirdly for variation of the *Mareva* Order to permit funds to be released to Accolade for the provision of legal fees.

39. Accolade's application to Stone J was supported by 2nd affidavit of Dr Sabrina Ho in which she said:

> "I. Late Notice and Lack of Materials
>
> 3. On or about 24 July 2009, I received a letter dated 22 July 2009 from Lovells, the Plaintiffs' solicitors, enclosing by way of personal service two orders of Hon Stone J dated 17 February 2009 ('the February Order') and 1 June 2009 ('the June Order'), together with three judgments handed down by the learned judge on 9 February 2009 ('the February Judgment'), 16 April 2009 ('the April Judgment') and 1 June 2009. A copy of this letter is exhibited as 'SH-5' in my earlier affirmation filed hereon on 14 August 2009 ('my 1st Affirmation'). I understand that similar letters were sent to Ms Eleanor Crosthwaite and Mr. Alistair Asprey, the other directors of Accolade, as well as to Messrs Chui and Lau, Accolade's solicitors. This letter represents the first time the Plaintiffs or their solicitors have corresponded with Accolade or provided Accolade with any court orders and documents relating to these consolidated actions, more than 5 months after the February Order was granted.
>
> 4. Notwithstanding the delay on the part of the Plaintiffs in serving the February Order and June Order, I was nevertheless required by this letter to confirm within 48 hours of its service that I will cause Accolade to (a) desist from permitting or assisting Mr. Christopher Ho ('Mr. Ho') to breach the February and June Orders; (b) cause Accolade to observe the February Order and not dissipate the assets of the 'Ho Family Trust' ('the Family Trust'); and (c) either cause Accolade to make the same disclosure required by the February Order and June Order of the assets of the Ho Family Trust valued in excess of US$100,000 or provide the same to Mr. Ho forthwith. It appears from this letter that the Plaintiffs' demand is premised upon their allegation that 'assets of the 'Ho Family Trust' are

assets of Mr. Ho and are required to be disclosed by Mr Ho pursuant to the [February] Order' (at page 3). Various findings and observations of the Court in the February Judgment and June Judgment were referred to in the letter to support this allegation.

5. As stated in paragraph 14 of my 1st Affirmation, I have reviewed the assets listed under Clause 1 of Schedule 3 to the February Order and confirm that, with the exception of Lafe Peripherals International Limited, Lafe Computer Magnetics Limited, Lafe Management Services Limited and Lafe (China) Corporation, all of the assets listed thereunder are trust assets belong to either the Family Trust or subsidiary companies held under Accolade. Contrary to the Plaintiffs' allegation in the aforesaid letter, Mr. Ho does not have any beneficial interest or proprietary ownership in any of these assets which are trust assets belonging to the Family Trust.

6. Similarly, the June Order requires Accolade to disclose to the Plaintiffs detailed particulars in respect of trust assets belonging to the Family Trust.

7. In the circumstances, Accolade's position is that the February Order and the June Order against Mr. Ho should not have covered the trust assets of the Family Trust because those assets do not belong to him; nor does he have any control or influence over the Family Trust."

40. The learned judge permitted Accolade to be joined as a party and further authorised release of funds in order to fund the intervener's legal fees. However, he refused to adjourn the receiver's summons pending the determination of the intervener's application to vary the Mareva order of the 17 February 2009 and the subsequent order of 1 June 2009. Accolade applied for leave to appeal to this court against Stone J's refusal to adjourn. The application was dismissed by this court (differently constituted).

41. The receivership judgment was delivered on the fifth day of the hearing after the learned judge had reserved his decision overnight. He said his decision was accompanied by:

> "3. … necessarily brief reasons only. Diary difficulties, and the inevitability of urgent applications to the Court of Appeal within the next few days, mean that there is no opportunity to write a lengthy judgment; in the prevailing circumstances the court simply does not have the luxury of time."

42. The learned judge accepted the submission of Mr Kosmin QC:

> "29. … the present case is, as he puts it, 'a paradigm case' of good reason to believe that Mr Ho controls the assets in that trust, and the dispersion of those assets."

43. Stone J said:

> "30. … on the available evidence, this is the 'substantive reality': see, for example, the trenchant comments of Robert Walker LJ in *International Credit and Investment Co (Overseas) Ltd 7 anor v Adham & ors* [1998] BCC 134, at 136:
>
>> '…it is becoming increasingly clear, as the English High Court regrettably has to deal more and more often with major international fraud, that the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level…'"

44. Such drastic action may include extending a Mareva injunction over the assets of a non-party if there is good reason to suppose as against the non-party that the assets of or held by the non party would be susceptible to a procedure which would lead to satisfaction of a judgment; the width of an injunction against the non-party depends upon what it is that there is "good reason to suppose". See *Commercial Injunctions* by Gee 5th Edition at page 372. This is sometimes referred to as the Chabra jurisdiction, after the decision of Mummery J (as he then was) in *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231. Of course, in appropriate cases, ancillary orders, such as the appointment of receivers may be made to give effect to the Mareva injunction.

45. Stone J reviewed the relevant authorities in paras. 30 to 34 of the receivership judgment, including *Dadourian Group v Azuri Ltd* [2005] EWHC 1768, a decision of Edward Bartley Jones QC, sitting in the Chancery Division of the English High Court. There the learned deputy judge was concerned with the continuation of a freezing injunction against Azuri Ltd, who was not a party to the action, granted by David Richards J on 22 March 2005.

46. The learned deputy judge said after examining the authorities:

> "26 The jurisdiction to make a freezing injunction against a third party is undoubted. The jurisdiction is exercised as, in effect, ancillary relief granted by the court in aid of, and as part of, the freezing relief granted against the defendant to the substantive claim. Exercise of the jurisdiction can occur where there is good reason to suppose that the assets of the third party are, in truth, the assets of the injuncted defendant (see, eg, *SCF Finance Co Limited v Masri* [1985] 1 WLR 876 per Lloyd LJ at 884 B-F). A classic case where there would be good reason for supposing that the assets are, in truth, the assets of the defendant is where there is good reason for supposing that the assets are held by the third party on bare trust (or as nominee) for the defendant. But I would reject any suggestion that the "Chabra" jurisdiction is limited to such a case. In *International Credit and Investment Co (Overseas) Limited v Adham* [1998] BCC 134 at 136 Robert Walker J pointed out that it had become increasingly clear, as the English High Court regrettably had to deal more and more often with major international fraud, that the court would, on appropriate occasions, take drastic action and would not allow its orders to he evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy was highly prized and official regulation was at a low level. The present is undoubtedly a case of shadowy trusts and companies (although I hasten to add that I make no adverse comment, whatsoever, about the level of official regulation or level of secrecy in a country such as Liechtenstein). Robert Walker J went on to indicate that a freezing injunction may indeed, in appropriate circumstances, be justified and necessary where parties have the ability to switch real assets from one shadowy hand to another in such a way that it is difficult to keep track of where they are. That, he said, was the justification for orders which looked through offshore companies in order to find the real assets -- or which did, if you looked, pierce the corporate veil (to use that vivid, but imprecise, metaphor which is sometimes used). Robert Walker J then went on to consider the decision in *Re a Company* [1985] BCLC333 where Cumming-Bruce LJ (at 337-38) indicated that the court would use its powers to pierce the corporate veil if it were necessary to achieve

> justice, irrespective of the legal efficacy of the corporate structure under consideration."
>
> "30 For my part, I do not believe it is necessary to establish beneficial ownership in a strict trust law sense. Clearly, if assets are held on a bare trust then the Chabra jurisdiction can be exercised. But, in my judgment, even if the relevant defendant to the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the Chabra jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to, the assets. The important issue, to my mind, is substantive control. The view expressed in Gee on *Commercial Injunctions* 5th Edition 2004 at 13.007 is that if a network of trusts and companies has been set up by a defendant to hold assets over which that defendant has control and that this has, apparently, been done to make himself judgment-proof, then such would be an appropriate case for the granting of freezing relief against a relevant non-party. I agree. What needs to be considered is the substantive reality of control, not a strict trust law analysis as to whether the third party is a bare trustee. Thus, in my judgment, placing assets in a discretionary trust would not prevent the Chabra jurisdiction being exercised against that discretionary trust if the substantive reality were that the relevant defendant controlled the exercise of the discretionary trust. Any other analysis 'would entirely defeat the ability of the English courts to take drastic action and would allow the court's orders to be evaded by manipulations, entirely contrary to the court's powers and duties as identified by Robert Walker J in *International Credit and Investment Co (Overseas) Limited v Adham* (above). Whether this be described as identifying the discretionary trust as a 'sham', as piercing the corporate veil, or as seeking to identify a controlled discretionary trust as a bare trust does not, to my mind, particularly matter. Certainly, at the interim stage, all that matters is to ascertain whether there is good reason to suppose that the relevant defendant controlled the assets in the discretionary trust."

47. *International Credit and Investment Co (Overseas) Limited and Anor v Adham and Ors* [1998] BCC 134, is a decision of Robert Walker J (as he then was). It was concerned with a property. On the Sunday before the Monday when the sale of the property was to be completed, Robert Walker J granted an ex parte order appointing receivers in respect of, inter alia, that property. The claim against the substantive defendant in that case concerning alleged and proven fraud against BCCI was started in 1992. But the property had for at least a decade before 1991 been registered in the name of Ghaith

International. The learned judge accepted for the purpose of application that Ghaith International was the beneficial owner of the property. The learned judge, however, continued the receiving order. He said the Mareva injunctions against the relevant defendants were directed:

> "… not only to assets directly in the beneficial ownership of those who were enjoined, but also to the assets of companies which they directly or indirectly controlled."

48. It is true that there is as yet no claim made against Accolade, although one cannot rule out the possibility of a claim against Accolade on the basis that if Accolade was indeed the beneficial owner of the Ho Family Trust, Mr Ho acted as its servants or agent in the alleged fraud. However, for the present purpose, it is sufficient if there is good reason to suppose that Mr Ho has substantive control over the Ho Family Trust Assets. The nature and degree of control may have to be investigated in due course. (Mr Kosmin suggested as a possibility, in execution of judgment.) It is sufficient for the present purpose that for all intents and purposes, Mr Ho has represented to the whole world that he was the beneficial owner of the trust. Also notwithstanding the assertion that Accolade and its directors actually managed and controlled the trust, there has been no explanation how it was that the trust was silent all these years about Mr Ho's representation that he was the beneficial owner of the trust. These may have to be properly investigated in due course.

49. Ms Eu's principal submission is that Stone J ought to have granted an adjournment: His failure to do so meant that Accolade had not been given a proper opportunity to defend its rights.

50. In this context, she submitted and I agree, that she is not precluded by the refusal of leave to appeal for case management reason by this court (differently constituted) on 27 August 2009. According to Ms Eu, the

watershed date was 5 August 2009, when the receivership summons was brought to the attention of Accolade's solicitors by letter dated 4 August 2009, from Mr Ho's solicitors enclosing also the application documents. Accolade complained that although the trust had been disclosed to the plaintiffs as early as 14 July 2009, the plaintiffs had chosen not to serve the summons or the related papers on Accolade as trustees of the Family Trust until 12:30 pm, Monday, 24 August 2009. Also that the plaintiffs had not served the February and June orders on Accolade, its directors and its solicitors until they were disclosed in Messrs Lovells' letter of 22 July 2009 more than five months after February order was granted. Ms Eu explained that Accolade acted expeditiously thereafter by applying for a Beddoe order on 20 August 2009, and for an order that Accolade as trustee of a family trust may be at liberty to take such steps in the consolidated actions as are necessary to protect the assets of the Ho Family Trust. The order was granted by Reyes J on Monday, 24 August 2009.

51. Dr Sabrina Ho claimed that Mr Ho had no control over the family trust. Dr Ho noted the Memorandum of Wishes and clause 11 of the Memorandum of Wishes and said in her first affirmation:

> "21. Further, I recall that about four years ago, Mr Ho sought my consent to add a little girl as a beneficiary to the Family Trust. Given the privacy of the matter, I do not wish to go further into the details. I noted the far-reaching and devastating effect of Mr Ho's request to his own family; and then firmly decided to reject his request. Nevertheless, Mr Ho continued with his request for some months. My relationship with him then was quite tense. At one point, I even threatened that if his request continued, I might even consider removing him as a beneficiary under the Family Trust. At the end, Mr Ho dropped his request, the matter was then finally resolved and my relationship with Mr Ho was gradually restored.
>
> 22. As regards the businesses of the underlying shareholding owned by the Family Trust, I would generally rely upon Eleanor to inquire with the management of the relevant

> company. I might seek the views of Mr Ho in relation to the business which involves him, (e.g. Grande and Lafe, given that he is the chairman of the companies). However, I primarily rely upon the professional judgment of the management personnel of the relevant companies for any decision for the management and operations of the Family Trust and its underlying assets.
>
> 23. By reason of the facts as deposed to above, I strongly deny that Mr Ho has any control of the Family Trust.

52. However, Dr Ho also said:

> "24. In or about March 2009, Mr Ho briefly mentioned to me a court order against him in favour of Akai's liquidators for disclosure of his assets. However, he did not touch upon the details. He asked me not to worry and he would take care of his own matters. He also mentioned that the order did not involve the Family Trust. I trusted that he would be able to handle the matter and did not follow up with it further.
>
> 25. In early May 2009, the Family Trust received a letter from Mr Ho dated 30 April 2009 asking for release of information on virtually all of the assets owned by the Family Trust. I was surprised and pressed Mr Ho for details. He then explained the background and provided me with a copy of the February 17 Order; and urged the Family Trust to assist in releasing the information as sought. Afterwards, the Family Trust sought legal advice. Following the views of Senior Counsel, the Family Trust then decided not to accede Mr Ho's request and refused to release the information as sought. Now produced and shown to me marked 'SH-4' are copies of Mr Ho's letter to the Family Trust dated 30 April 2009, his written reminder dated 7 July 2009; and the reply from the solicitors for the Family Trust to Mr Ho dated 15 July 2009. However, given the privileged nature of the relevant Senior Counsel's views, I am not prepared to disclose the details. For the avoidance of doubt, nothing herein should be construed as a waiver on my part or on the part of the Family Trust of the privilege regarding the Senior Counsel's views."

53. Accolade's position is that the February order and June orders should not have covered the trust assets of the Ho Family Trust and that is why they asked that those orders be varied.

54. But I have to say that her assertions raised more questions than they purported to answer. For example, when did Accolade become aware of Mr Ho's public assertion that he was the beneficial owner of the shares in Grande Holdings? Ms Christine Asprey was a director of Grande Holdings as well as Accolade. Didn't she know? Did she tell her husband or her sister? What about Ms Eleanor Crosthwaite? Did she know? Was any action taken to correct Mr Ho? If not, why not? Since Dr Ho was provided with a copy of the Mareva order in May 2009, why was no application made to vary that order? Did their lawyers not find out how it was that the Ho Family Trust Assets become subject to the Mareva order? Why was there no application at the time for a variation of the Mareva injunction?

55. The evidence also showed that between 14 July 2003 and 14 July 2009, the holding in Grande Holdings had increased from 302,067,713 shares to 317,303,800 shares, namely from 65.63% to 68.94%. The shareholders' shareholding disclosure of interest filed with the Hong Kong Exchanges and Clearing Limited up to and including 23 March 2009 described Mr Ho as the controlling shareholder of the relevant control corporation Airwave Capital Limited and his control was stated to be 100% and that the number of shares involved in a long position were 321,569,822. At that time they were reporting a purchase of 166,000 shares and that the relevant code describing the capacity in which the shares were held was 205. The next time shares were purchased appeared to be 30 April 2009. On this occasion, however, the name of the control corporation was stated to be the Ho Family Trust Limited and the controlling shareholder Accolade and that the long position was stated to be 321,581,822 shares. The purchase was reported on 30 April 2009. There was no evidence to show who supplied the money for the purchase of all these shares. Nor who decided on the purchases.

56. On an interlocutory basis, there is ample reason to suppose that the trust assets were at least in the control of Mr Ho. I do not accept Ms Eu's claim that they had not had sufficient time to defend the application for the appointment of receivers. Even on Dr Ho's case Accolade became aware of the terms of the Mareva injunction in May 2009. Ms Eu suggested that no application was made earlier because Accolade had not received any advice to do so. We simply do not know what is the position. A reasonable person in the position of Accolade would not have waited until August before applying to the court to be joined as a party, if it takes the view that properties beneficially belonging to it had been wrongly included in the Mareva injunction against a person who had no beneficial interest in them. Whilst it is important that a litigant must be given an opportunity to defend, how much time should be made available for the purpose must depend on the circumstances of the case. We are concerned with ancillary orders which are required in order to give effect to the Mareva injunction, it is important for the court to ensure that its orders are obeyed and that its remedies are effective. In all the circumstances, I believe the order of the learned judge refusing an adjournment of the hearing of the receiver application is not one which could possibly be successfully challenged.

57. Ms Eu also complained that the learned judge had decided in his judgment that the trust assets are beneficially the assets of Mr Ho. Thus, she submitted, unless leave to appeal is granted, Accolade would be bound by the holding. In this respect, she referred to paras. 38 and 69 of the learned judge's judgment:

> "38. I also note that whilst Ms Eu persuasively argued for an *SCF v Masri* [1985] 1 WLR 876 type of preliminary issue into 'ownership' of assets now regarded by this court to belong to Mr Ho – as my earlier judgments indicate, I have little doubt but that this is the case – but in this particular factual matrix I do not think that the ordering of such an issue would achieve anything save for massive further delay and yet more disputes as the adequacy of disclosure.

> ……
>
> 69. I also accept that if the Receivers find evidence that companies specified in the receivership order are not assets of Mr Ho, then variation immediately can be sought."

58. With respect, I do not agree. The learned judge was dealing with an interlocutory application and he made no final determination. Nor do I believe the passages relied upon had the effect contended for. It is true that in para. 69, the learned judge said:

> "69. … if the Receivers find evidence that companies specified in the receivership order are not assets of Mr Ho, then variation immediately can be sought."

59. But it does not follow, as Ms Eu seemed to suggest, that if the receivers did not find such evidence or had found evidence to the contrary, the opinion of the receiver would be binding on Accolade or on the court.

60. The case of *SCF Finance Co v Masri* [1985] 1 WLR 876 was relied on to support the submission that the ownership of the trust assets should be tried as a preliminary issue before any injunctive or other relief should be granted in respect of them. But *Masri* is not authority that prior to the granting of injunctive or other ancillary relief over property in the name of a non-party, there had to be a trial of a preliminary issue. Indeed, quite the opposite. In *Masri* the plaintiff had obtained a Mareva injunction against the husband who was found to have no asset. The court then granted a Mareva injunction up to the extent of £400,000 in respect of the money in the wife's bank account. The wife contended that on her assertion that she was the beneficial owner of the money in her account, the court ought to refuse a Mareva injunction in relation to her account. That argument was rejected at the hearing and on appeal. The decision was that where the court decides not to accept the assertion of the wife without further inquiry, it may order an issue to be tried

between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, depending, in each case, on what is just and convenient. In that case, the Mareva injunction against the wife was allowed to be continued pending the determination of the issue.

61. Ms Eu also submitted that the learned judge has failed to fully considered the impact of the receivership including its stigma. She referred to the judgment of Kwan J in *Tan Man Kou and Anor v Chime Corporation Ltd and Ors*, HCMP 4146/2001, unreported, dated 25 June 2003. It is quite clear that the learned judge was fully aware of that decision and that he had considered whether any lesser or less intrusive remedy was suitable in the particular circumstances of the case.

62. In the course of the submission, Ms Eu suggested that as an alternative to the appointment of the receivers the appointer might be persuaded to appoint a trust corporation in the place of Accolade as trustee of the family trust. It was suggested that the appointer might be persuaded to do so. Ms Eu submitted that time should be given, may be only one or two days, so that there should be a clear answer on one way or the other. If this was a genuine alternative, it is perhaps a bit surprising that it should be suggested so late in the day. I do not believe the appointment of new trustees is a suitable alternative to the appointment of receivers. The wide powers necessarily given to the receivers are not the powers which a trust corporation can be expected to exercise.

63. Nor would I grant an adjournment for the possibility to be explored. In the circumstances of this case, I do not believe any further delay could be tolerated.

64. Ms Eu also submitted that the fortification of $50 million is inadequate. I do not know the basis upon which the fortification was fixed at HK$ 50 million, except that it was probably not based on the negligible personal assets which Mr Ho had admitted to. Ms Eu suggested that the fortification should be in the sum of USD 200,000,000. There is no real basis for this figure and this can only be viewed as a last ditch attempt to stop the appointment of receivers.

65. Mr Sussex SC, appearing for the 1st defendant, submitted that the learned judge was wrong insofar as it was of the view that there had been dissipation of assets, for example, he submitted that the sale of the Grande Building in Singapore was merely a substitution of a building for cash. But cash is easier to dissipate than a building. But the complaint goes beyond the mere sale. The plaintiff liquidators complained of the way in which the transaction was put through in order to avoid giving 14 days' prior notice to the plaintiffs' liquidators under the Mareva order. That complaint appears to be well founded.

66. Mr Sussex also submitted that the learned judge erred in thinking that there had been dissipation of assets by Sino Bright. He submitted that the evidence shows that there had been no such dissipation. It is unnecessary for me to go into detail regarding Sino Bright. Suffice it for me to say, that on all materials before the learned judge, I do not believe that there is any reasonable prospect, in the circumstances of this case, for the receiving order to be discharged. This is a case which cries out for the appointment of receivers.

67. For the above reasons, I dismissed the application for leave to appeal with costs.

Hon A Cheung J:

68. I agree.

(Robert Tang)
Vice-President

(Andrew Cheung)
Judge of the Court of First Instance

Mr Leslie Kosmin QC and Ms Linda Chan, instructed by Messrs Lovells, for the Plaintiffs

Mr Charles Sussex SC and Mr Colin Wright, instructed by Messrs Huen Wong & Co, for the 1st Defendant

Ms Audrey Eu SC and Mr Douglas Lam, instructed by Messrs Chui & Lau, for the Intervener