HCIA 2/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 2 OF 2001

BETWEEN

BRAND DRAGON LIMITED (IN MEMBERS' VOLUNTARY LIQUIDATION) AND HARVEST ISLAND INTERNATIONAL LIMITED (IN MEMBERS' VOLUNTARY LIQUIDATION) — Appellants

AND

THE COMMISSIONER OF INLAND REVENUE — Respondent

Coram: Hon Chu J in Court
Date of Hearing: 26 November 2001
Date of Judgment: 30 November 2001

J U D G M E N T

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1. This is an appeal against the decision of the Inland Revenue Board of Review ("the Board") whereby two assessments for profits tax as determined by the Commissioner of Inland Revenue ("the Commissioner") were confirmed.

The Background

2. The appellants are companies incorporated in Hong Kong. As a result of four lots of land acquired by them separately in 1992 and 1993 and disposed of jointly in 1993, they were assessed to be liable for profits tax. In the case of Brand Dragon Limited ("Brand Dragon"), the assessment was issued on 20 January 1997 and the amount of profits tax assessed to be payable is HK$2,764,156. As for Harvest Island International Limited ("Harvest Island"), the assessment was issued on 19 March 1997 and the tax payable is HK$1,122,244. The appellants objected to the assessments. By two Determinations issued on 26 February 1999, the Commissioner confirmed the assessments. The appellants appealed to the Board and the appeal was dismissed. The appellants now appeal by way of case stated against the decision of the Board.

The Facts

3. The salient facts as found by the Board can be summarized as follows:

(1) Brand Dragon and Harvest Island were joint venture vehicles used by Mr Vincent Cheung ("VC") and Mr Edwin Cheung ("EC") in their joint ventures in respect of the four lots of land in question.

(2) The four lots of land involved are Inland Lots Nos.4888, 4889, 4890 and 4891 at Nos. 28, 30, 32 and 34 Clarence Terrace ("the Combined Premises"). The first two lots ("the First Premises") were acquired by Brand Dragon whereas the other two lots ("the Second Premises") were acquired by Harvest Island.

(3) VC and EC, through their nominees, each held 50% of the shares in Brand Dragon and in Harvest Island. EC was a director of both Brand Dragon and Harvest Island. VC, through his nominees, was also represented on the board of directors of the two companies. VC and EC were effectively the controlling minds of the appellants.

(4) Brand Dragon purchased the First Premises by an agreement for sale and purchase dated 21 February 1992. The vendor was not the registered owner of the First Premises. Under the sale and purchase agreement, the purchase was conditional upon the vendor obtaining within six months a declaration from the court that the First Premises became vested in him by reason of the doctrine of adverse possession. The completion date was postponed to allow the vendor more time to obtain the declaration from the court, which was eventually granted on 1 October 1992 under HCA4441/1992. The transaction was completed on 26 October 1992.

(5) The sale and purchase agreement for the purchase by Harvest Island of the Second Premises was dated 3 March 1993. Prior to this, the vendor had already contracted to sell the Second Premises to a Goldenfix

Properties Ltd ("Goldenfix"). Disputes, however, arose as to the due execution of one of the assignments in the chain of title of the property. This led to the issue of a vendor and purchaser summons and resulted in a judgment dated 19 March 1993 given by Godfrey J (as he then was) in favour of Goldenfix. The judgment was followed by a Memorandum of Discharge dated 7 June 1993 given by Goldenfix. In the sale and purchase agreement made between Harvest Island and the vendor, the purchase was conditional upon several conditions, including the registration of the judgment and the vendor using its best endeavours to produce documentations that were almost identical to those which Godfrey J had in his judgment considered to be sufficient evidence of due execution. The purchase by Harvest Island was completed on 7 June 1993.

(6) The purchase of the First Premises was financed by shareholders' loans. As to that of the Second Premises, it was partly financed by shareholders' loans and partly by a loan from Shanghai Commercial Bank Limited under a loan agreement dated 7 June 1993 made between Brand Dragon and the bank. The loan agreement covered a $18 million loan for the acquisition of the Second Premises and another $18 million loan for the construction costs of the Combined Premises. The loan agreement provided for the loans to be repaid by 30 September 1995 or three months after the issue of occupation permit in respect of the new building to be erected on the Combined Premises, whichever was earlier.

(7) At the time of acquisition, there were old buildings on the First and Second Premises and most part of them were let out. The total monthly rental income was $15,829 and $15,660 respectively.

(8) After the acquisition of the First Premises, Brand Dragon, through its architect, had twice submitted plans for redevelopment of the Combined Premises. The first submission made on 3 November 1992 was not approved. A second submission was made on 4 January 1993 and approval was issued on 2 February 1993. On the day Harvest Island completed the purchase of the Second Premises, an agreement was made between Brand Dragon and Harvest Island for the joint development of the First and Second Premises based on the approved plan. By November 1993, vacant possession of all the units on the First Premises was obtained by Brand Dragon.

(9) By an agreement dated 23 September 1993, Brand Dragon and Harvest Island sold the Combined Premises to a company called Town Trip Limited. By a Confirmatory Assignment dated 3 November 1993, the Second Premises were assigned and confirmed into Harvest Island. The sale of the Combined Premises was completed on 6 April 1994.

(10) Brand Dragon and Harvest Island became dormant after the sale of the Combined Premises. By special resolutions passed at extraordinary members meeting on 27 and 28 December 1996 respectively, it was resolved that the two companies be wound up voluntarily and liquidators were appointed.

4. A chronology of the major events appears as follows:

12 November 1991	Incorporation of Brand Dragon
20 February 1992	Application for Business Registration Certificate by Brand Dragon
21 February 1992	Date of the sale and purchase agreement of the First Premises
1 October 1992	Order in HCA4441/1992
26 October 1992	Completion of the purchase of the First Premises
2 February 1993	Approval of building plans for the redevelopment of the Combined Premises
4 March 1993	Incorporation of Harvest Island
19 March 1993	Judgment of Godfrey J
31 March 1993	Harvest Island applied for Business Registration Certificate
3 May 1993	Execution of the sale and purchase agreement by Harvest Island in respect of the Second Premises
7 June 1993	(a) Memorandum of Discharge given by Goldenfix in respect of the Second Premises
	(b) Completion of the purchase of the Second Premises by Harvest Island
	(c) Agreement to redevelop the Combined Premises signed by Brand Dragon and Harvest Island
	(d) Loan Agreement with Shanghai Commercial Bank for acquisition of the Second Premises and redevelopment of the Combined Premises

23 September 1993	Agreement to sell the Combined Premises to Town Trip Limited
3 November 1993	Confirmatory Assignment for confirming and assigning the Second Premises to Harvest Island
25 November 1993	Repayment of the $18 million loan for acquisition of the Second Premises
6 April 1994	Completion of the sale of the Combined Premises to Town Trip Limited
27 December 1996	Special resolution for the voluntary winding-up of Brand Dragon
28 December 1996	Special resolution for the voluntary winding-up of Harvest Island

The Issue and the Board's Decision

5. Under section 14 of the Inland Revenue Ordinance, Cap.112, profits tax is chargeable on every person carrying on a trade, profession or business in Hong Kong in respect of the assessable profits arising in or derived from Hong Kong from such trade, profession or business. Profits arising from the sale of capital assets is not taxable. The issue in this case is whether the First and Second Premises were acquired by the appellants as capital assets so that the profits on the disposal of them is not liable to profits tax.

6. There is no dispute that the relevant principles for determining whether an asset is acquired for trading or for investment purposes are those stated in *Marson v. Morton* [1986] 1 WLR 1348, *Lionel Simmons Properties Ltd v. CIR* (1980) 53 T.C. 461, 491G and *All Best Wishes Ltd v. CIR* (1992) 3 HKTC 750, 771, and which the Board has set out in paragraphs 42 to 44 of the Stated Case.

7. The ultimate question, as identified by the Board, is to ascertain the intention of the appellants at the time of acquisition of the First and Second Premises, whether the properties were acquired with the intention of disposing of it at a profit, or were they acquired as an investment. The onus is on the appellants to prove that the acquisitions were for investment purposes, and that the assessments appealed against were incorrect or excessive : section 68(4) Inland Revenue Ordinance.

8. The Board decided the issue against the appellants. Its decision, as summarized in paragraph 62 of the Stated Case, is as follows:

> "After assessing and weighing all the evidence, we are of the view that the Appellants have failed to discharge their burdens of proof. We do not

believe that the Appellants had thought that they had unsaleable titles to the Combined Premises at the time of their respective acquisitions. We are of the view that the First Premises was purchased because of its redevelopment potential and that the Second Premises was purchased with a view to amalgamating the two into a larger site which makes them even more attractive for redevelopment purpose. We are unable to conclude from the evidence that the Appellants would have redeveloped the Combined Premises themselves, or if they did, whether they would have rented out the redeveloped building. We dismiss both appeals and confirm the Determinations."

The Opinions of Law

9. Five questions of law were stated for the opinions of this court. They are as follows:

(1) Whether the Board misdirected itself by equating the intentions of EC and VC with the intentions of the appellants when the relevant intention was the intention of the appellants.

(2) Whether the Board:

(i) ignored the separate legal personality of the appellants;

(ii) wrongly considered the ability of the beneficial owners to fund the project in question instead of the ability of the appellants to fund the same;

(iii) in the absence of any allegation of sham, bad faith or assessment under section 61 of Cap.112, lifted the corporate veil to treat each of the appellants as no more than an instrumentality of the beneficial owners;

(iv) failed to reverse the burden of proof in the present case;

and thus erred in law.

(3) Whether the Board in identifying that the *'crux of both appellants' appeals rests on the premise that because the titles to the First Premises and the Second Premises were defective (due to separate reasons), there was no possibility of resale for profit'* misdirected itself as to the issues to be decided in the appeal.

(4) Whether the Board misdirected itself by finding that the Bank Loan Agreement *'points to a trading intention'* when, in the appellants' argument, the Agreement was at best neutral in determining intention.

(5) Whether, upon the facts found and upon identifying the crucial question, the Board arrived at conclusions no tribunal properly directing itself could have reached."

Preliminary Point and Hearing Bundles

10. The appellants initially raised a preliminary point of estoppel which does not form part of the Board's Stated Case. Mr Thomson for the appellants, upon learning that the point had been raised but abandoned by the appellants at the hearing before the Board, rightly accepts that it is not open to the appellants to raise it at the appeal and does not pursue it.

11. The appellants had submitted for the purpose of this appeal three hearing bundles bound in two volumes. They contain, apart from the Stated Case, documents that were before the Board and correspondence with the Board. Mr Li for the Commissioner, rightly in my view, takes issue with the submission of these documents, pointing out that the Stated Case does not involve any challenge to the factual findings of the Board. Mr Thomson helpfully indicates that he does not seek to refer to or rely on these documents, save in relation to four pages of them. Mr Li is contented with that. In the end, the appeal proceeds solely on the basis of the Case Stated, since the four pages of documents have not been referred to.

The Relevant Principles

12. It is useful at the outset to remind oneself of the nature of this appeal and the principles upon which the court operates on a case stated by the Inland Revenue Board of Review. *In CIR v. Inland Revenue Board of Review and Aspiration Land Investment Ltd* (1988) 2 HKTC 575 at 594, Barnett J observed that:

> "The decision of a Board of Review is like a pyramid. At its base is a number of blocks consisting of primary facts found by the Board upon evidence presented to it. Above these is another line of blocks, consisting of inferences drawn from the primary facts. At the apex of the structure lies the Board's final conclusion based upon the primary facts and inferences.
>
> The final conclusion may be attacked in three principal ways. First, it can be impugned upon the basis that the Board has misdirected itself, for example, upon the burden of proof, or by misinterpretation of a statute. Second, an inference or inferences or the final conclusion may be attacked upon the basis that the primary facts do not admit of an inference drawn from them, or that the primary facts or inferences, or a combination, do not admit of the final conclusion. Third, one or more findings of primary fact may be attacked upon the basis that there was no evidence upon which they could be found. Alternatively, it may be contended that the Board should have made findings of other relevant facts. If the applicant is successful in displacing any of the

> blocks below the final conclusion or is successful in inserting additional blocks of fact, the structure may be so distorted that the final conclusion must topple and will be set aside by the court."

13. In the present case, the case stated by the Board does not involve any challenge to the findings of fact it made. The challenge of the appellants is directed at the inferences the Board drawn from the primary facts and the ultimate conclusion based upon these inferences. It is therefore not permissible at this appeal to seek to attack the findings of the primary facts. Further, this court should only intervene where the decision of the Board is inconsistent with a true and reasonable conclusion on the facts found: *Edwards v. Bairstow* [1956] AC 14, 36.

14. With these principles in mind, I now turn to deal with the five questions of law raised. Mr Thomson has grouped the five questions into two categories. The first relates to what he describes as attempt to lift the corporate veils. The second category concerns misdirections as to the issues and the inferences to be drawn from the facts.

The 1st Category : Questions 1 and 2

15. This category covers Questions 1 and 2. Essentially the appellants' complaint is that the Board has ignored the separate legal personality of the appellants and had equated the intentions and financial ability of EC and VC with those of the companies.

(1) The intentions of EC and VC

16. At paragraph 8 of the Stated Case, the Board found as a fact that EC and VC were effectively the controlling minds of both appellants. It went on to state that:

> "For the purpose of this appeal and in this decision, the intention of VC and EC and the intention of either or both appellants are treated as the same and used interchangeably."

17. Mr Thomson argues that it is erroneous to equate the intentions of VC and EC with the intentions of the appellants when VC himself was not a director and that there were board minutes from which the companies' intentions can be readily ascertained.

18. It is common ground that the relevant intention is that of the appellants. But given that the appellants are not natural persons, their intention can only be inferred and defined from the acts and intentions of their controlling minds. In *IRC v. Brebner* [1967] 2AC 18, Lord Pearce when dealing with an argument that, in deciding whether a reduction of capital was for tax advantage, the object of a company should be separated from the object of its directors or shareholders, observed that (at p.27 D-E):

> "The 'object' which has to be considered is a subjective matter of intention. It cannot be narrowed down to a mere object of a company divorced from the directors who govern its policy or the shareholders who are concerned in and

> vote in favour of the resolutions for the increase and reduction of capital. For the company, as such, and apart from these, cannot form an intention. Thus the object is a subjective matter to be derived in this case from the intentions and acts of the various members of the group. And it would be quite unrealistic and not in accordance with the subsection to suppose that their object has to be ascertained in isolation at each step in the arrangements."

19. In my view, it must be permissible for the Board to look at the intentions and acts of its controlling minds in ascertaining the purpose and intention of a corporation. In this case, the Board has found that EC and VC were the controlling minds of the appellants. The Board has also found that the appellants were the corporate vehicles for the joint ventures between EC and VC and that EC and VC acted by consensus. That being the case, the Board is entitled to refer to the acts and intentions of EC and VC when assessing what were the intentions of the appellants, and not to differentiate between the intentions of EC and those of VC. The fact that VC was not a director is immaterial. The Board has found that the other directors were the nominees of VC.

20. As to the board minutes of the appellants, the Board had made reference to them, but came to the view that they were of no probative value for the reasons given. The Board pointed out that they were paper minutes drafted by VC or his staff and were self-serving.

21. Mr Thomson takes exception with the Board's view and treatment of the board minutes. In my view, while the board minutes afford some evidence as to the professed intentions of the appellants, it is neither conclusive nor decisive of the issue. The Board is entitled to look at all the surrounding circumstances, including acts done, and is not in any way bound to accept the contents of the board minutes : see *All Best Wishes Limited v. CIR* (1992) 3 HKTC 750,771. It is within the power of the Board, after considering all the relevant circumstances, to reject the board minutes or to refuse to attach any weight to it.

22. Mr Thomson further argues that though the Board may look at the intentions of the controlling minds, the Board cannot treat the intentions of the controlling minds as being interchangeable with the intentions of the appellants. I do not agree. Once the Board came to the view that the board minutes have no probative value, the Board was only left with the acts and intentions of EC and VC in ascertaining the intentions of the appellants. It is not a matter of lifting the corporate veil, but is a pure question of evaluating the evidence and drawing the necessary inferences from the evidence accepted by the Board.

(2) Lifting the corporate veil

23. The appellants complain that the Board had in a number of ways disregarded the corporate veil and had treated the corporate entities as mere instrumentalities of EC and VC. The complaint is principally directed at paragraphs 53 and 56 of the Stated

Case. In those two paragraphs, the Board commented on the lack of sophistication in the contents of the Redevelopment Agreement between the appellants and the absence of a feasibility study on the redevelopment, as being consistent with the lack of documentation between EC and VC and the casual manner adopted by them in respect of their joint venture. The Board went on to say that they were not satisfied that there is sufficient evidence to show that EC and VC would have funded the redevelopment themselves.

24. For my part, I do not read these paragraphs as demonstrative of a disregard of the corporate veil or as indicative of the Board having lifted the corporate veil. As Mr Li rightly observes, many of the Board's findings show clearly that the Board was fully aware and conscious of the separate legal personality of the appellants. The references to EC and VC are inevitable having regard to the fact that they were the ultimate beneficial owners and had control of the affairs of the appellants.

25. The issue of the financial ability of EC and VC is a relevant matter that the Board was called upon to deal with. The appellants' case is that the First and Second Premises were acquired for long-term investment. The immediate question that springs to mind is the financial ability of the appellants to finance the redevelopment of the Combined Premises as a long-term investment. The sources of finance identified before the Board were shareholders' loans and the bank loans of $36 million. The financial ability of the beneficial owners, namely, EC and VC, is therefore highly relevant. Not only that, the appellants' case before the Board is that EC and VC had the necessary financial ability to fund the redevelopment with or without the support of the bank. Evidence on the income of EC and VC was therefore adduced before the Board. In the circumstances, it is not an error for the Board to consider and comment on the financial ability of EC and VC. Neither can the Board be criticized for equating the financial ability of EC and VC with that of the appellants. The Board had not lost sight of the separate legal personality of the appellants, nor had it pierced the corporate veil, by looking at the financial ability of EC and VC and expressing reservations on it.

The 2nd Category : Questions 3, 4 and 5

26. The second category of questions relate to Questions 3, 4 and 5 stated by the Board.

(1) Defective Titles

27. In paragraph 48 of the Stated Case, the Board stated that 'the crux of both appellants' appeals' is that the titles to the First and Second Premises were defective so that there was no possibility of resale for profit. The appellants say that this is a misdirection as to the questions involved. It is argued that the question of defective title is only one of the matters that go to support an intention to acquire and develop the First and Second Premises as long-term investment. The important question is not whether the titles were defective, but whether the appellants thought they were defective and how that perception operated on their minds as to the use to be put to the First and Second Premises.

28. The starting point is to recognize that, at the hearing before the Board, one of the two grounds of appeal put forward for the appellants was that the titles were defective at acquisitions so that there was then no possibility of resale for profit. The issues of defective titles and the implications were very much at the forefront of the appeal before the Board. The description of these issues as the 'crux' of the appeal may well have led the appellants to think that these were the only matters to be considered by the Board. In reality, however, the Board's deliberations were not confined to these issues. As the Stated Case shows, the Board did consider other aspects and matters put forward by the appellants in support of the professed intentions. In paragraph 52 of the Stated Case, the Board said:

> "It follows that we reject the Appellants' main contention that resale was not a possibility due to the defects in title. This does not dispose of the matter. We have to consider all the other evidence presented to us to come to a conclusion on the intention of the Appellants."

It then proceeded to other relevant matters including the financial and redevelopment arrangement and the financial ability of the beneficial owners as well as the evidence adduced by the appellants. The Board did not just pay lip service to its duty to consider all the evidence presented before it.

29. Insofar as the relevance or significance of the issue of defective titles is concerned, the Board did accept that at the time of the making of the sale and purchase agreements of the First and Second Premises, the titles to these properties were defective. The Board, however, observed that, in both instances, the purchases were made conditional upon steps being taken to rectify the defects or to make the title marketable. In the case of the First Premises, completion was postponed so as to afford the vendor more time to cure the defects, despite that Brand Dragon had an option not to proceed with completion. The Board did not accept that Brand Dragon would have proceeded with completion if the defect in title was not cured. As for the Second Premises, steps had been taken to ensure that the title could not be readily challenged and the Board found that it would be difficult for a potential purchaser to challenge the title with the steps taken. On these basis, the Board concluded that resale of the First and Second Premises for profit was not impossible and could not be ruled out as a possible use of the properties intended by the appellants.

30. The Board had therefore adopted a reasoned and proper approach to the arguments raised by the appellants on this issue of defective title. It did inquire into the appellants' perceptions of the titles of the properties and also of the potential use of the properties. The Board did not misdirect itself.

(2) The Bank Loan Agreement

31. One of the other matters taken into consideration by the Board in ascertaining the relevant intention of the appellants is the loan agreement entered into with Shanghai Commercial Bank. The Board observed that the agreement had no reference to

long-term financing and use of rental income to repay the loans, but instead provided for the establishment of a stakeholders account for keeping future sale proceeds and for the repayment date to be three months after the issue of the occupation permit of the redeveloped building or 30 September 1995, whichever was earlier. The Board was of the view that the loan agreement 'painted a picture of the possibility of the appellants selling the redeveloped combined premises', and rejected the argument that the agreement was in a standard format. The appellants submit that the Board should not have relied on the agreement nor its provisions in that the provisions are standard terms and their inclusion is entirely neutral.

32. The provisions identified by the Board may well be the standard terms in a building mortgage, but that does not mean that their inclusion in the agreement is irrelevant or of no significance. As the Board pointed out, 'boilerplates are normally used as the skeleton to flesh out individual terms tailor made to specific loans and specific clients.' There is no evidence or explanation as to why the appellants agreed to the inclusion of these terms in the loan agreement. Further, the terms of a contractual agreement are meant to be observed. In this case, the appellants were required by the terms of the loan agreement to repay the loans within three months after the issue of the occupation permit or by 30 September 1995, which was less than 2½ years from the date of the loan agreement. The fact that the arrangement was not for long-term financing and that repayment was packed to the issue of occupation permit are highly relevant. The appellants, as would any reasonable borrower, must be concerned about the prospect and the resources for repaying the loans. They would not have accepted the terms of repayment, however standard they may be, unless they had some confidence in meeting the repayment date. By agreeing to a repayment date packed to the issue of occupation permit, the appellants can properly and reasonably be taken to be expecting to receive some form of income shortly after the redeveloped building was ready for occupation. That was consistent with an intention to dispose of the redeveloped Combined Premises. On the other hand, had the intention been to hold and rent out the redeveloped building, one would have expected the repayment to be in some way packed to rental income from the redeveloped building.

33. It is argued that the appellants could arrange for re-financing, such as fresh mortgages, to meet the repayment obligations. But there was simply no evidence to such effect. In addition, there was no provision in the loan agreement that permits extension or restructuring of the facilities upon the expiry of the repayment date.

34. In my view, the loan agreement and its provisions are relevant matters which the Board is entitled to take into account in ascertaining the intentions of the appellants at the time of requisitions. The conclusion that the loan agreement points to a trading intention is also justified.

(3) Edwards v. Bairstow : The wrap-up question

35. The appellants' contention under Question 5 is that the Board had reached a conclusion, which no tribunal properly directed could have reached. A number of errors

were relied upon in support of this contention, many of them had already been discussed in the preceding part of this judgment. There are only three remaining matters that need to be dealt with here.

36. The first concerns the evidence of EC as to the intentions of the appellants. It is submitted that the Board had failed to make any specific finding in respect of his evidence and had given no reason for not accepting his evidence. It is plain from the decision of the Board and the reasons given for it that the Board did not accept EC's evidence that the appellants acquired the First and Second Premises for long-term investment. The Board came to this view after considering and evaluating the other evidence and matters before it. It is not necessary for the Board to resort to discussions on the manner or demeanour of EC in giving evidence if it had other objective criteria to go by in testing the veracity of EC's evidence. Upon the facts found by the Board, this is not a case where no tribunal, properly instructed, would have rejected EC's evidence.

37. The second matter relates to the Board's observations on the Redevelopment Agreement as being amazingly simple and lacking in sophistication. It is argued that this is irrelevant consideration. I do not agree. The lack of sophistication in the documentation is indicative of the arrangement being a brief and transient one. It tends to show that the redevelopment expedition between Brand Dragon and Harvest Island was intended to be for a short term, as opposed to a long-term investment.

38. The last matter turns on the onus of proof. The appellants argue that the Board, in rejecting the board minutes and other evidence adduced by the appellants and describing them as self-serving, was in effect accusing the documents and evidence as being shams. In such a case, the burden is on the Commissioner to prove that these are shams. I am unable to accept this argument. The onus of proof is on the appellants to show that the assessments are incorrect or excessive. In considering whether the appellants have discharged the burden, the Board is bound to assess and test the matters and evidence presented by the appellants. It must be stressed that the Board is not bound to accept all the evidence and materials placed before it or to attach any or full weight to them. When the Board decided not to accept some or part of the evidence adduced, it did not have to be on the basis that they were shams or fraudulent. Take the example of the board minutes, the Board had pointed out in paragraph 57 of the Stated Case that the contents of the minutes were clearly contrary to the evidence of the EC and the other objective evidence, namely, the level of rent deriving from the properties.

39. In short, the conclusions of the Board are supported by the findings of fact. They had also been explained by the reasons set out in the Stated Case. It cannot be said that no tribunal, properly directed on the law, would have come to the conclusion that the Board did in relation to the issue of the intentions of the appellants.

Conclusion

40. The answer to each of the five questions of law stated for the opinion of this court is 'No'. The appeal is accordingly dismissed. There will also be an order *nisi* that

the appellants pay the respondent the costs of this appeal, to be taxed if not agreed.

(C. Chu)
Judge of the Court of First Instance
High Court

Representation:

Mr Neil Thomson, instructed by Messrs Vincent T. K. Cheung, Yap & Co., for the Appellants

Mr Herbert Li, Senior Government Counsel, for the Respondent