HCIA 8/2001

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

INLAND REVENUE APPEAL NO.8 OF 2001

BETWEEN

KAIFULL INVESTMENTS LIMITED Appellant

AND

THE COMMISSIONER OF INLAND REVENUE Respondent

Before: Deputy High Court Judge Reyes SC in Court
Date of Hearing: 21 March 2002
Date of Judgment: 4 April 2002

J U D G M E N T

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1. The Appellant ("Kaifull") appeals by way of Case Stated under Inland Revenue Ordinance (Cap.112) ("IRO"), section 69(1) against a decision of the Board of Review ("the Board") dated 11 September 2000. The facts are set out in the Board's Case Stated dated 6 December 2001, a copy of which is appended to this judgment. The questions submitted by the Board for the court's opinion are in paragraph 42 of the Case Stated.

A. Background

2. On 25 January 1992 Kaifull agreed to buy a property ("the Property") known as Sun Yuen Mansion, 171-3 Thomson Road and 205-11 Johnston Road, for $97,330,000. Completion took place on 29 April 1992. On 2 June 1992 Kaifull resold the Property for $145,000,000.

3. On 11 June 1998 the Deputy Commissioner of Inland Revenue determined that Kaifull had to pay profits tax for 1992/93 on profit from the resale of the Property. Kaifull appealed to the Board. The Board by its decision of 11 September 2000 held against Kaifull.

4. Before the Board Kaifull argued that the Property was a capital (as opposed to a trading) acquisition so that profits on resale were not subject to tax. Essentially, Kaifull's case had two limbs:-

(1) The Property had initially been acquired by the group of companies to which Kaifull belonged for redevelopment and long term use.

(2) But the Property was subsequently sold because of a change in the investment plans of the group.

5. The Board concluded that Kaifull's intention at time of the Property's acquisition had been to trade the Property or possibly hold it and see what opportunities presented themselves. The acquisition was consequently (the Board thought) in the nature of trade.

6. The Board based its decision on the following matters (among others):-

(1) The agreed facts set out in paragraphs 4 to 9 of the Case Stated.

(2) The oral evidence of Mr Wan Pak Kuen ("Mr Wan"), a director of Kaifull. The Board did not find Mr Wan's testimony credible in key aspects, being unsupportable in part and ambiguous in others, especially on matters outside Kaifull's basic case.

(3) The oral evidence of Mr Michael Shing Yiu Man ("Mr Shing"), Kaifull's financial controller. The Board found Mr Shing's testimony of little use, as he only took up his post on 1 May 1993 after important events had taken place.

(4) Kaifull's failure to show on the balance of probability that its group had any real intention to redevelop the Property or part of it as headquarters as Mr Wan had alleged.

(5) Kaifull's failure to show on the balance of probability that its group had an intention to redevelop the Property, whether as an independent unit or

together with nearby properties such as the Rhenish Centre (Nos. 248-259 Hennessy Road) ("the Rhenish Centre") and Nos. 244-246 Hennessy Road ("No. 244").

(6) Kaifull's failure to establish the constituent members of the group of companies to which it claimed to belong.

7. As to paragraph 6(6) above, Kaifull had argued that its change of intention regarding the redevelopment of the Property was prompted by the desire of companies within its group to raise cash for acquiring and redeveloping certain shops and car park spaces (collectively, "the Locwood Properties") in Locwood Commercial Complex, Kingswood Villas, Tin Shui Wai, New Territories. Kaifull claimed the change of strategy was prompted by the realisation that redevelopment of the Locwood Properties would generate a better return than redevelopment of the Property.

8. The Board felt that Kaifull had not established the exact relationship between companies involved in the acquisition of the Locwood Properties (such as Joylane Limited ("Joylane"), Blockbuster Assets Limited ("BAL"), West Lion Investment Limited ("West Lion") and Berlimark Limited ("Berlimark")) and companies involved in the acquisition of the Property (such as Kaifull, Richly Properties Limited ("Richly") and Qing Yuan Enterprises Limited ("Qing Yuan")). Without knowing the precise relationships between companies within the alleged "group", the Board was not prepared to infer a close connection between the sale of the Property and the purchase of the Locwood Properties.

B. Discussion

9. By IRO section 14(1) profits tax is charged in respect of profits arising in or derived from Hong Kong from a trade, profession or business, but not on profits arising from the sale of capital assets. The definition of "trade" is wide and includes "every adventure and concern in the nature of trade" (IRO section 2).

10. Whether or not there has been an adventure in the nature of trade depends on the circumstances of each particular case. See *Marson v. Morton* [1986] 1 WLR 1343, at 1348B *per* Browne-Wilkinson VC, who went on (at 1348C-1349D) to identify certain "badges" or factors which may point to the existence of a trade.

11. An important consideration is the taxpayer's intention at the time of acquisition of the relevant asset. See *Simmons v. IRC* [1980] 1 WLR 1196, at 1199A-D, *per* Lord Wilberforce. But the taxpayer's declared intention is not decisive and his actual intention needs to be determined on the evidence as a whole. See *All Best Wishes Ltd v. Commissioner of Inland Revenue* (1992) 3 HKTC 750, at 771, *per* Mortimer J.

12. By IRO section 68(4), the onus of proving that an assessment appealed against is excessive or incorrect lies on the taxpayer.

13. The court's jurisdiction to review the Board's decision under IRO section 69(1)

is limited. The Court is restricted to considering questions of law arising from primary facts found by a Board of Review.

14. Lord Radcliffe described the court's jurisdiction thus in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14 (HL), at 36:-

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

15. It is useful in this context to bear in mind the following dictum of Barnett J in *Commissioner of Inland Revenue v. Inland Revenue Board of Review and another* [1989] 2 HKLR 40 ("the *Aspiration* case"), at 57:-

> "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."

16. The five questions of law raised in the Case Stated all involve challenges along the second basis identified by Barnett J in the *Aspiration* case. It is convenient to consider those questions in a slightly different order from that in which they are posed. I therefore deal with the Board's questions in the following order: Question 2, Question 4, Question 5, Question 3 and Question 1.

Question 2

17. Question 2 runs as follows:-

> "Whether, as a matter of law and on the facts found, it was open to the Board to find that the alleged intention of the Appellant was unrealistic and unrealisable."

18. The relevant finding is at paragraph 37 of the Case Stated:-

> "The evidence produced at this hearing has failed to convince us that, on a balance of probabilities, the intention was to acquire and hold the Property either by itself or as part of the 3 Plot Site [that is, the Property, the Rhenish Centre and No. 244] or the Big Site [that is, a larger conglomeration consisting of the Property and surrounding lots], whether as a headquarters building, for rental income, or both. On the material before us, we found that if such intention had existed, this intention was unrealistic and unrealisable."

19. Mr Ho (who appeared before me (but not the Board) on Kaifull's behalf) submitted that the conclusion in paragraph 37 was unreasonable in the sense described by Lord Radcliffe in *Edwards* for the following reasons:-

(1) The alleged intention to develop the Property was realistic and realisable given the existence of a Feasibility Study and the Board's acceptance that Richly and Kaifull would have had the financial ability to carry out their professed intention through the financial backing of Qing Yuan (Case Stated, paragraph 35).

(2) If the Board considered that the absence of a contingency plan rendered the professed intention doubtful (see Case Stated, paragraph 25(3)), such conclusion was not open to it. The evidence was that Kaifull could have developed the Property for rental and use as group headquarters, even if the acquisition of No. 244 fell through. The Feasibility Study contained two options: development of the Property and development of a larger site.

> Kaifull's primary intention was to acquire all of the land within the Big Site or the three Plot Site for development. If this could not be done, it was prepared to develop the Property alone.

20. I disagree with Mr Ho. In my view there was ample basis for the Board to come to conclusion which it did.

21. That Kaifull disagrees with the Board's inferences from the evidence and believes that other inferences may just as plausibly be drawn from the available material is insufficient to establish that the Board acted unreasonably and came to a conclusion which no Board acting judicially could reasonably have made.

22. The Case Stated shows that the Board arrived at its conclusion in paragraph 37 because it found it difficult to reconcile Kaifull's professed intention with the following facts and matters (among others):-

(1) The directors' minutes relating to the acquisition of the Property neither mentioned the Big Site nor the three Plot Site.

(2) Mr Wan did not ascertain whether it was possible to acquire a government primary school which formed part of the Big Site. Without acquisition of the land where the school was situated, it was highly questionable whether the redevelopment of the Big Site was feasible or realistic.

(3) Mr Wan's explanation of the somewhat amateurish and haphazard approach to the acquisition of the land required to redevelop with the Big Site or the three Plot Site was his inexperience and lack of knowledge of the Hong Kong property market. But this (the Board observed) was no small matter; the stakes were high. The Board found it difficult to accept his explanation in the absence of cogent, contemporaneous documentary evidence.

(4) Mr Wan was unable to give any details about the alleged plans to use the redeveloped Property as headquarters. For instance, he could not say which companies were going to use the redeveloped Property as headquarters, how many employees the relevant group had, how many staff were expected to be working in the headquarters, or how much floor area would be required by the headquarters.

(5) The Feasibility Study was based on the entire floor area of the redeveloped Property generating rental income and did not take into account the use of part of the Property as headquarters.

(6) The Feasibility Study projected a 12.97% rental yield on completion of redevelopment. This assumed a 100% occupancy rate and that no part of the Property would be used as headquarters. The actual yield should

presumably therefore have been anticipated to be less than 12.97%. On the other hand, Kaifull had to repay interest at 12% per annum. This would hardly make the proposed redevelopment a profitably attractive venture.

23. In my view, the reasons just mentioned (whether considered individually or in tandem) constitute adequate rational support for the Board's doubts regarding Kaifull's professed intention to redevelop the Property. Even on the assumption that the matters raised by Mr Ho are right, I do not see how that could so undermine the substratum of the Board's conclusion in paragraph 37 as to make the Board's decision unreasonable.

24. I would accordingly answer Question 2 in the affirmative.

Question 4

25. Question 4 runs as follows:-

"Bearing in mind that the onus of proof was on the Appellant, whether the Board erred in law by relying on two issue particularised below which were allegedly not put to the witnesses at the hearing and drawing adverse inferences therefrom:-

(a) The constituent members of the 'group' to which the Appellant belong:-

(i) The question as to which group the Appellant belonged was not put to the Appellant during the hearing.

(ii) The question of whether the ultimate holding company was Guangdong Enterprises (Holding) Ltd. ['Guangdong Enterprises'] or Qing Yuan Enterprises Ltd. was not put to the Appellant during the hearing.

(b) The existence or absence of letters to the management of Richly or the Appellant which were similar to the letter dated 4th May 1992 from the Surveyor (as referred to in paragraph 42c of the Decision or paragraph 30(3) [of the Case State]): The question of whether there were similar letters to the management of Richly or the Appellant was not put to Appellant during the hearing.

And if the Board did so err, whether such reliance and adverse inferences was fatal to the decision reached by the Board?"

The principle in Browne v. Dunn

26. As a matter of procedural fairness and practice, if a party wishes to submit that a witness's evidence is wrong for some particular reason, the witness should normally be

given a chance in the course of cross-examination to explain why his evidence is right and the particular reason being advanced against his evidence is invalid or immaterial.

27. The principle was clearly articulated by the House of Lords in *Browne v. Dunn* (1894) 6 R 67 as follows:-

Per Lord Herschell LC at 70-1:-

"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might be able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

Per Lord Halsbury at 76-7:-

"My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury

afterwards to disbelieve what they have said, although not one question has been directed wither to their credit or to the accuracy of the facts they have deposed to...."

Per Lord Morris at 79:-

"My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited, But I can quite understand a case in which a story told by a witness may have been so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was unnecessary, in order to impeach a witness' credit, that you should take him through the story which he had told giving him notice by the questions that you impeached his credit."

28. The scope of the principle has been refined over time. Two useful discussions of aspects of the principle may be found in *White v. Flower & Hart* (1988) 29 ACSR 21 (Federal Court of Australia), at 68-73 and *All Best Wishes Ltd* at 773.

29. In *White* Goldberg J (after an extensive review of authorities) concluded as follows (at 72-3, citations omitted):-

"There are two aspects to the rule in Browne v. Dunn, the first being the rule of practice that it is necessary for a party to put another party on notice of the matters on which it proposes to rely in contradiction of the evidence of that other party on its witnesses. The second aspect is what are the consequences if that rule is not observed. That aspect is not inflexible and it does not inexorably follow that if the rule is not observed the party in default is precluded from relying on evidence not put to the other party or its witnesses or from relying on inferences to be drawn from evidence which inferences have not been put to the other party or its witnesses....

The second aspect of the rule relates to the manner in which, and the extent to which, the evidence or inferences said to be relied upon in breach of the rule may be used. This aspect of the rule relates to the weight to be given to the evidence and its cogency. This second aspect does not require the rejection of evidence or an inference to be drawn from it if it is sought to use it to contradict evidence not the subject of cross-examination. Putting the matter another way a failure to observe the rule in Browne v. Dunn does not mean

> that where evidence of a witness is not the subject of cross-examination and where evidence is led in contradiction of that evidence, the court is required to accept the former evidence. It is a matter of weight for the court to take into account."

30. It is not clear from the report of *All Best Wishes Ltd* whether Barnett J's attention was specifically drawn to cases on the rule in *Browne*. Nonetheless, the following dictum of the learned judge plainly accords with common sense:-

> "A tribunal which hears oral evidence and considers documents, is not in the position (as is submitted) that it has to find what the witness says is the fact, even if he is not cross-examined, and even if he is not contradicted by other evidence. A tribunal, in those circumstances, may look at the whole of the circumstances presented to it and may find that the oral evidence is not acceptable on particular matters. Or, may find certain facts contrary to the evidence that has been given and, indeed, contrary to what appears in the documents and other material before it."

31. Given the above-mentioned dicta, the following propositions appear to demarcate the bounds of the rule in *Browne*:-

(1) The general principle is that, where an attack on a witness' evidence is to be made, notice should normally be given to the witness in cross-examination of the nature of the attack if such is not otherwise obvious.

(2) There is no breach of the principle if the witness knew or ought to have known that his version of events was being challenged or that adverse inferences might be drawn against him.

(3) Even if the procedural rule is transgressed, it does not inexorably follow that matters which have not been put to a witness in cross-examination cannot be relied on. It may be a question of the weight to be given to a witness' testimony taking into account all the available evidence. Thus, for example, a witness' evidence may be so incredible as to be incapable of belief or his evidence may be unsupported or contradicted by known facts and contemporaneous documents.

(4) The principle does not inflexibly require every point which might be used against the witness to be put to him. There can no hard-and-fast rule. The paramount consideration is fairness to the witness. In essence, the principle is breached if in all the circumstances an omission to cross-examine on a specific point is unfair to a witness.

32. Further, in the context of an appeal by way of Case Stated, a breach of the principle in *Browne* on one or more specific points may not be fatal to the Board's

decision. Thus, it may still be that while it is unsafe for a Board of Review to rely on specific points because the same were not put to a witness, the remaining point or points on which the Board wishes to rely in arriving at its conclusion are individually or collectively sufficient to support its decision. In such case it would still not be possible to attack the Board's decision as unreasonable.

Question 4(a)(i) and (ii)

33. The question of the group to which Kaifull belonged (that is, Question 4(a)(i)) may be sub-divided into two components. There is firstly the question of the identity of the group which allegedly acquired the Property for redevelopment and long term use. There is secondly the question of the group which bought the Locwood Properties. Kaifull's case depends in part on Kaifull establishing on the balance of probability that the group which acquired the Property is the same as that which bought the Locwood Properties.

34. Insofar as the first component of the Kaifull group question is concerned, it seems to me that the matter was put to Mr Wan when he was given the opportunity to identify the constituent members of the alleged group. See, for example, the following exchange with Mr Wan:-

> "CHAIRMAN: When you say 'group', what group do you mean? Could you elaborate more on what is the size of your group of companies?
>
> A: Qing Yuan Enterprises Limited. In Bundle A1, from N01 to N04.
>
> CHAIRMAN: So how many companies will there be under this Qing Yuan group? How many employees in Hong Kong in 1991?
>
> A: I am not clear. I am only responsible for Richly Properties.
>
> CHAIRMAN: Did you have an idea of how big a premises this company required in Hong Kong? The size of the premises that was required for the group's headquarters?
>
> A: (In Cantonese)
>
> CHAIRMAN: Yes, in 1991 or '92.
>
> A: Maybe ten thousand square feet.
>
> CHAIRMAN: Are you estimating now or did you know at the time how big a premises was required by the group?
>
> A: I am not clear but I was instructed by the directors in Qing Yuan Enterprises and the directors of Richly because I have no idea of how many

companies are there in the group and how many employees the group had."

35. From the Chairman's questions, it ought to have been apparent to the witness that the Board was unclear about the constitution of the group of companies to which Kaifull alleged it belonged.

36. Further, given that:-

(1) Mr Wan was a director of both Richly and Kaifull (Richly's subsidiary) and a 30% shareholder in Richly (Qing Yuan holding the other 70%);

(2) as director, Mr Wan had responsibility for operations, in particular decision-making and marketing;

(3) Mr Wan prepared the Feasibility Study for the redevelopment of the Property; and

(4) the redevelopment of the Property allegedly envisaged using some of the land as group headquarters,

the Board was entitled to find Mr Wan's ignorance as to details of Kaifull's group surprising and so a factor undermining the credibility of his evidence.

37. As for the second component of the Kaifull Group question, it was admitted (Agreed Fact (9)) that West Lion was "a company related with Richly". But what does it mean to be a "related" company? A company may be related to another because (say) one or more shareholders or directors are the same. Does that necessarily mean that the companies belong to the same group?

38. In his skeleton argument, Mr Ho suggested that if A controlled both Company B and C, Company B and C "can be" in the same group. In oral argument, perhaps thinking that "can be" was not enough to render the Board's decision unreasonable, Mr Ho modified his position by amending "can be" to "must be". In my view, the amended proposition has only to be stated to be seen as unsustainable. The revised proposition is too extreme.

39. The word "related" is not a term of art. It often appears in accounting records of a company when describing (for example) amounts due from or to that company by a "related" company. But the term can presumably be used in other contexts with its precise meaning dependent on a particular situation.

40. Similarly, the word "group" is not a term of art. Section 2 of the Companies Ordinance (Cap. 32) defines "group of companies" for the purposes of that statute as "any 2 or more companies or bodies corporate one of which is the holding company of the other or others". While that definition may accord with what one commonly understands by the expression "group of companies", it does not mean that the words can only bear such

meaning whatever the context.

41. Nonetheless, assume (as the evidence in this case suggests) that Mr Wan is a responsible director or controlling mind of Richly and West Lion insofar as the sale or purchase of real property is concerned. That cannot be enough to put Richly and West Lion in the same group for the purpose of establishing a link between the sale of the Property and the purchase of the Locwood Properties.

42. That is because, to my mind, Kaifull must show a substantial match between the beneficial interests behind Kaifull and the sale of the Property on the one hand and those behind West Lion and the acquisition of the Locwood Properties on the other. It is possible for West Lion to have bought the Locwood Properties on behalf of different beneficial interests from those behind Kaifull, despite the fact that (for whatever reason) both the interests behind Kaifull and those behind West Lion employ Mr Wan as director and give him authority to buy and sell properties for their respective accounts. It is hard to see how the Kaifull line and the West Lion line of companies could each belong to the same group if substantially different interests benefit from the sale of the Property on the one part and the redevelopment of the Locwood Properties on the other.

43. If Kaifull is to say that its group changed its mind and sold the Property because a better deal for its group suddenly came up in the form of the Locwood Properties, it is incumbent on Kaifull to show by cogent evidence that there is some significant nexus between the interests behind the purchase of the Locwood Properties and those behind the sale of the Property. It is not enough to establish a commonality of managing directors. It is emphatically not enough for Kaifull simply to point to an acceptance by the Revenue that Richly was "related" to West Lion. The question is not whether the companies were "related", but how precisely they were related.

44. Mr Ho argues that the Board did not cross-examine Mr Wan on the constituents of the group responsible for the purchase of the Locwood Properties. Mr Ho says that had Kaifull known of the Board's concerns, it could have applied for an adjournment to gather more evidence to address the point worrying the Board.

45. Mr Ho's argument ignores the burden imposed on Kaifull to establish its case. It is not for the Board to signal the weaknesses of Kaifull's evidence or help Kaifull make good breaks in its chain of proof. In short, it is not for the Board to teach Kaifull how to argue Kaifull's case. That forms no part of the rule in *Browne*.

46. If one moves on to Question 4(a)(ii), on the specific issue whether the ultimate holding company of the group was Guangdong Enterprises, Kaifull relied on Note (8) to its Audited Financial Statement for the year ended 31 December 1992. That note stated as follows:-

> "ULTIMATE HOLDING COMPANY
>
> The directors consider the ultimate holding company at 31st December 1992

to be Guangdong Enterprises (Holdings) Limited, incorporated in Hong Kong."

47. The following exchange took place with Mr Wan in relation to Guangdong Enterprises:-

"CHAIRMAN: .... So this is the only document [that is, Note (8)] which you can show to prove that the ultimate owner of Kaifull is Guangdong Enterprises?

A: Not for sure but I believe the auditor has documents to have these sentences here.

CHAIRMAN: Yes, but here it only says that the directors consider the ultimate holding company to be Guangdong Enterprises. So on the face of this document the auditor appears to only accept the directors' word rather than any further documents.

A: I am not sure for the details."

48. Again it should have been apparent to Mr Wan from the Chairman's questions that the Board was sceptical about the weight to put on Note (8) as a piece of evidence.

49. Mr Ho argues that the Board was wrong in paragraph 20(2) of the Case Stated to query the link between Guangdong Enterprises and Kaifull. He goes so far as to suggest that no other evidence apart from Note (8) was necessary as Note (8) would have answered the Board's doubts. I disagree.

50. Note (8) consists of a hearsay statement attributed by the auditors to the directors of Kaifull. Mr Wan is one such director. But when invited to elaborate on the statement, he admitted to being unsure of the details and vaguely suggested that the auditors must have documents to substantiate what they on the face of Note (8) learned from Mr Wan.

51. By any objective measure, Mr Wan's oral testimony on Guangdong Enterprises measured against the available documents can hardly be said to be impressive. In my view, the Board was entitled after consideration of the totality of the evidence to harbour doubts as to the connection between Kaifull and Guangdong Enterprises.

52. In summary, there has been no failure to comply with the rule in *Browne v. Dunn* in respect of the issues raised in Question 4(a). Mr Wan had notice of the Board's scepticism as to the constitution of Kaifull's group and the position therein of Guangdong Enterprises.

53. In any event the Board was entitled to assess the reliability of Mr Wan's statements as to the constitution of Kaifull's group and Guangdong Enterprises' role

against available documents, known facts and even Mr Wan's other testimony. Given conflicts between Mr Wan's statements and the documents and among Mr Wan's own statements, it was not unreasonable for the Board to come to the conclusions which it did as to the elusive nature of the alleged Kaifull group.

54. I would accordingly answer Question 4(a) in the negative.

Question 4(b)

55. The issue raised by this question relates to a letter dated 4 May 1992 ("the surveyor's letter") from Mr Francis Lau ("Mr Lau"), (Kaifull's estate agent and surveyor) to Qing Yuan.

56. The letter runs as follows (in an agreed translation):-

> "Re: <u>The disposal of Sun Yuen Mansion and Rhenish Centre</u>
>
> When our company acquired the captioned properties on your company's behalf, the original plan was to keep on acquiring building at 244-246 and to consolidate them for the redevelopment as headquarter for your company and to promote the city re-development of Hong Kong; that are in accordance with the state policies and will bring about a huge return for your company as well. As your company has changed the strategy, the captioned promises are to be sold shortly. The sharp rise in the market value of office building site recently is just a beginning, the peak will come at the end of this year or mid next year. (This forecast has been mentioned to your company when we strongly recommended your company to buy the captioned properties last year). It is regretted that your company is going to dispose those properties so soon. As your company acquired these properties for just about 4 to 5 months but still can make a good return, your decision is still a reasonable one.
>
> After phone conversation with all of you, our company and I, being the person-in-charge, will start drafting the tender documents for the sales of the captioned premises for the perusal of the solicitor, Wan Ka Suen. It is expected that these documents can be submitted for your company's approval by the end of this week or next Monday. The tender will commence on 15th of this month and last until 12 noon on June 12. The deal will be completed before end of June. During the tendering period, should there be any tendering price over Two Hundred and Ten Million, I will discuss with you whether to sell the properties by private dealing instead. (The tender documents will expressly indicate that the owner has the right to sell before the closing of the tender).
>
> Our company and I had good relationship with Richly and Qing Yuen City since our acquaintance. It is our pleasure to bring a good return to your

> company as expected when acting as your agent in the acquisition and disposal of the captioned properties."

57. In paragraph 30(3) of the Case Stated the Board noted that it found the surveyor's letter to be of limited value as evidence. This was because it raised more questions than it answered. The letter's motivation (the Board felt) was unclear. The Board was puzzled as to why the letter was addressed to Qing Yuan rather than Kaifull or Richly and as to whether there had been similar letters to Kaifull or Richly and (if so) why these had not been produced.

58. Mr Ho argues that the surveyor's letter should have been given due weight by the Board. In asking whether there were similar letters to Kaifull or Richly, the Board (Mr Ho suggests) was asking irrelevant questions. More pertinently, if the Board had reservations about the surveyor's letter, those should have been put to Mr Wan. The omission to put the Board's doubts about the letter deprived Kaifull of an opportunity to explain its case. This (Mr Ho submits) means that the Board's decision was fatally flawed.

59. I disagree. The surveyor's letter was put forward by Kaifull as evidence of its original intention to redevelop the Property for long-term use. Kaifull knew that the alleged original intent was under challenge. The Board did not have to take the surveyor's letter at face value. On the contrary, the Board was entitled to read the letter and assess whether and (if so) to what degree the letter corroborated Kaifull's case.

60. It was not for the Board to debate with Mr Wan the weight to be attached to the surveyor's letter. Nor was it for the Board to point out to Kaifull or its witnesses precisely where and why the documentary evidence tendered by Kaifull in support of its case was unconvincing. The rule in *Browne* does not import an obligation on a tribunal to tell a party in what respects documents adduced as evidence support or undermine a witness' assertions.

61. In wondering to itself why no letters of a similar nature to the surveyor's letter written to Qing Yuan, the Board was doing no more than muse on the curious circumstance that a surveyor should write (in discursive, long-winded fashion) about the sale of a property to the holding company of the holding company of the owner of the property, rather than directly to the holding company of the owning company or even the owning company itself.

62. Further, given the letter was written by Mr Lau and the real issue is what Mr Lau wanted to record or accomplish by writing the letter, it is difficult to see how Mr Wan could give any helpful evidence as to Mr Lau's thought processes. If there was anything to be put to a witness about the letter, the logical person to put questions about its contents would have been Mr Lau not Mr Wan. But Kaifull opted not to call Mr Lau as a witness on its own behalf.

63. Finally, it is far from clear that the surveyor's letter, even taken at face value, is

strongly supportive of Kaifull's case. For example, the surveyor's letter refers to the preparation of a tender for the sale of the Property, with the tender period to run from 15 May to 12 June. The evidence before the Board was that in late May 1992 Kaifull received an offer from Winway Properties Limited ("Winway") to purchase the Property. According to Messrs Kwan Wong Tan & Fong (Kaifull's representative), such offer was "a very attractive unsolicited offer". If the surveyor's letter is right, tender for the sale of the Property must have commenced in mid-May. The attractive offer from Winway would not then have been "unsolicited", but must have arisen in response to Kaifull's invitation for tenders.

64. Accordingly, I would also answer Question 4(b) in the negative.

65. Given how I have answered Questions 4(a) and (b), it is unnecessary to answer the final part of Question 4 which asks whether, if it erred in law in respect of the issues in Questions 4(a) and (b), the Board's error was fatal to its decision. For completeness, I record my view that the issues raised in Questions 4(a) and (b) relate only to some, but by no means all, the grounds on which the Board relied in coming to its conclusion. Even if one were to disregard the Board's doubts about the identity of Kaifull's group, the Board's uncertainties over the position of Guangdong Enterprises and its scepticism over the surveyor's letter, in my view the Board's decision could still not be regarded as so unreasonable that no rational tribunal could arrive at the same conclusion.

Question 5

66. This question asks:-

> "Whether the Board erred in law in failing to advise the Appellant of the significance of the following 2 issues:-
>
> (a) The question of the 'group' of companies to which the Appellant belonged.
>
> (b) The existence or absence of other letter similar to the letter dated 4th May 1992 from the Surveyor (as referred to in paragraph 42c of the Decision or paragraph 30(3) above).
>
> And if the Board did thereby err, whether such error was fatal to the decision reached by the Board?"

67. It will be apparent from my discussion of Question 4 that I would answer both parts (a) and (b) of Question 3 in the negative.

68. The Board has no obligation to advise witnesses or parties of the weight it intends to place on different pieces of evidence or of the Board's view on the importance of any issues in the case before it. This is a matter of practicality and common sense.

69. The Board is entitled to keep an open mind throughout the entire proceedings right up to the close of final submissions. The Board is not required to keep some sort of running tally of the weight being accorded by it to pieces of evidence as the hearing proceeds and to inform the witnesses and parties accordingly from time to time. Indeed the Board will rarely be in a position properly to weigh the taxpayer's evidence until after completion of evidence-taking and final submissions.

70. It is for the taxpayer on whom the probative burden rests to get its tackle in order and ensure that at all times during the hearing it presents comprehensive and cogent evidence, whether live or documentary, in support of its case.

Question 3

71. Question 3 runs as follows:-

> "On the finding by the Board that the Appellant failed to prove that Joylane, BAL, West Lion and Berlimark were part of the same group of companies as the Appellant, whether the Board erred in law in relying thereon in deciding that the Appellant failed to prove the claimed 'change of investment' from the Property to the Locwood Properties? And if the Board did so err, was such error fatal to the decision reached by the Board?"

72. Ms Cheng (who appeared before me (but not the Board) on the Revenue's behalf) now accepts that Berlimark never belonged to the West Lion or Kaifull group of companies, but was instead a subsidiary of the Yaohan group of companies. The Yaohan group sold the Locwood Properties to the West Lion group of companies. She does not accept that the Board would have realised or known this at the time of the hearing.

73. Mr Ho also points out that West Lion in fact never acquired an interest in BAL or Joylane until 12 June 1992, shortly after Green Light (a Yaohan company) agreed to purchase the Locwood Properties. Thus, on the assumption that the West Lion and Kaifull group of companies are one and the same, neither BAL nor Joyland could have become members of that group until 12 June 1992. Before then those companies belonged to what might be called the Bullfrog Limited ("Bullfrog") group of companies. See Agreed Fact (9) and paragraph 9 of the Case Stated.

74. At paragraph 28 of the Case Stated the Board grapples with the problem (discussed earlier in this judgment) of discerning a nexus between the West Lion group of companies and the Kaifull group of companies. The Board writes:-

> "What was crucial here was who was the controlling 'mind' of (i) Joyland, (ii) its holding company, BAL, and (iii) BAL's holding company, West Lion (in other words, the chain of companies mentioned in paragraph 4(9) above) and who was the ultimate beneficial owner or controlling 'mind' of Berlimark? Were Joylane, BAL, West Lion and Berlimark within the same group of companies as the Appellant? If we were to accept the 'change of

> investment' argument of the Appellant, they had to be within the same group of companies."

75. I note in passing that the Board appears to equate the "controlling mind" of a company with the company's ultimate beneficial interests. That is, strictly speaking, inaccurate. A director or company board may decide and control an organisation's day-to-day actions without necessarily holding the ultimate beneficial interest or indeed any beneficial interest in the company. Conversely, a majority shareholder may leave the decision-making of his company to the board of directors and exercise little or no control over its day-to-day affairs. I do not think that the inaccuracy is material to this appeal. It is clear from the context that the Board has correctly reasoned that Kaifull must show some significant identity between the ultimate beneficial interests behind the purchase of the Locwood Properties and the sale of the Property.

76. But how, Mr Ho asks rhetorically, can Kaifull show that Joylane, BAL and Berlimark belonged to the West Lion or Kaifull group of companies before the decision to buy the Locwood Properties? BAL and Joylane did not become part of the West Lion group until after the decision to buy the Locwood Properties, when Bullfrog was transferred to West Lion. Berlimark, on the other hand, has never formed part of the West Lion group. Paragraph 28 of the Case Stated therefore displays (Mr Ho submits) a fundamental misconception which renders the Board's decision untenable.

77. I disagree. The burden was on Kaifull to establish a clear link between the beneficial interests behind the West Lion group and the Kaifull group. It was not for the Board to read or second guess Kaifull's mind as to the role played by Joylane, Berlimark, BAL and Bullfrog in the acquisition of the Locwood Properties.

78. The Board was presented with the names of a number of companies said to be involved in the sale of the Locwood Properties. The precise role or ownership of such companies was never clarified to the Board beyond the matters contained in the Agreed Facts and paragraph 9 of the Case Stated. How, for instance, was the Board to know who beneficially owned Bullfrog and the Bullfrog line of companies at any given time? I am told by Mr Ho that Bullfrog was transferred from Yaohan to West Lion. That information does not seem to have been communicated to the Board.

79. If there was no explanation or evidence as to the beneficial interests behind Joyland, BAL and Berlimark before, during and after the acquisition to acquire the Locwood Properties, it is hard to see how the Board can be faulted for being puzzled as to the companies' affiliation to some group or another at any relevant time. Kaifull has only itself to blame for any confusion on the Board's part to understand the true position due to Kaifull's failure to adduce sufficient cogent evidence or explanation.

80. Nor should any confusion on the Board's part as to the role of Joyland, BAL and Berlimark obscure the need on Kaifull's part to establish a link of beneficial interests between West Lion and Kaifull at the very least. The failure to establish such a link would be fatal to Kaifull's case, regardless of what the Board may rightly or wrongly have

conceived in relation to Joylane, BAL or Berlimark.

81. In any case, even if the Board erred in respect of Joyland, Berlimark and BAL, for the reasons already canvassed in this judgment, there remained ample basis for the Board to find as it did that Kaifull's alleged intention in acquiring the Property was not made out.

82. I would answer Question 3 in the negative. There was no error in law. If the Board misapprehended the roles played by Berlimark, BAL and Joylane, that was due to Kaifull's failure to adduce enough evidence to cover those points. In any event, if there was an error of law, it could not have been fatal to the Board's decision.

Question 1

83. The question is as follows:-

> "Whether as a matter of law and on the facts found, it was open to the Board to conclude that the intention of the Appellant in acquiring the Property was for a trading purpose and that the profits arising from the sale of the Property were properly assessable to profits tax?"

84. It will be evident from the foregoing discussion that I would answer Question 1 in the affirmative.

85. By way of footnote, I record that during the hearing Mr Ho invited me to find that the Board's decision was flawed because it failed to attach proper weight to a number of miscellaneous factors.

86. The key points raised by Mr Ho have been covered above. Minor points raised by Mr Ho were as follows:-

(1) The Board should have attached some weight to the treatment of the Property profits in Kaifull's audited accounts.

(2) The Board should have attached some weight to the formal written offer made by Kaifull to the owners of No. 244.

(3) The Board should not have treated the short time period for which the Property was held by Kaifull as having material significance.

(4) The fact that no concrete steps were taken to implement redevelopment immediately after the Property was required should not have been treated by the Board as a significant factor.

(5) Any difference in scale of investment between the Locwood Properties and the Property should not have been regarded as a significant factor.

87. On Mr Ho's minor points, I agree with Ms Cheng that it is not the court's function to review the weight attached to particular pieces of evidence, provided I am satisfied that overall the Board's decision is not unreasonable. I am so satisfied. The points which Mr Ho raises seem to me merely to be matters of emphasis and de-emphasis over which differing Boards of Review may reasonably differ.

Conclusion

88. Kaifull's challenge to the validity of the Board's decision has failed on each point raised. I accordingly dismiss Kaifull's appeal. I also make an order *nisi* that Kaifull pay the Revenue's costs, to be taxed if not agreed.

(A.T. Reyes, SC)
Deputy High Court Judge

Representation:

Mr Ho Chi Ming, instructed by Messrs Tsang, Chan & Woo, for the Appellant

Ms Yvonne W.S. Cheng, instructed by the Department of Justice, for the Respondent