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HCA 156/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 156 OF 2006

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BETWEEN

HONG JING COMPANY LIMITED
(泓景置業發展有限公司) Plaintiff

and

ZHUHAI KWOK YUEN
COMPANY LIMITED
(珠海市國源投資有限公司) Defendant

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Before: Deputy High Court Judge Saunders in Chambers

Date of Hearing: 31 August 2006

Date of Decision: 14 September 2006

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D E C I S I O N

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Background:

1. In a decision delivered on 28 April 2006, I dismissed an application by Zhuhai Kwok Yuen for an order pursuant to O 12 r 8(1)(c) discharging leave given to serve the writ out of the jurisdiction. Zhuhai

Kwok Yuen now applies to reconsider the order granting leave to serve the writ out of the jurisdiction on the grounds of material non-disclosure.

2. The order made on 28 April 2006, (the order), has not yet been perfected. On 29 May 2006, Reyes J. made an order that the order not be sealed until after the hearing of and determination of this application. There seems no doubt as to the existence of a jurisdiction to reconsider an order that has not been perfected. In *Wong Kam Hong v Triangle Motors Ltd* [1998] 2 HKLRD 330 at 336 P Cheung J said:

> "…..there is even a less expensive way of challenging the decision which seems to have been overlooked. The court has jurisdiction to reconsider and rehear the matter before the order is perfected: *Re Harrison's Shares etc*. [1955] Ch 260 and Note 32/1-6/21 of the *Supreme Court Practice*."

Re Harrison's Shares is cited for the same proposition in *Hong Kong Civil Procedure* 2006 para 42/1/19.

The exercise of the discretion to re-open:

3. Mr Warren Chan says that whether the court should exercise its discretion in favour of an applicant to re-open is determined by resolving on which side the interests of justice lie. He relies upon the following passages from *Noga v Abacha* [2001] 3 All ER 513, per Rix J at 525-526:

> "41 Nevertheless, in my judgement I am bound by the decision in *Stewart v Engel* to regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision.
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> 42 Of course, the reference to exceptional circumstances is not a statutory definition and *the ultimate interests involved*, whether before or after the introduction of the CPR, *are the interests of justice*. On the one hand the court is concerned with finality, and the very proper consideration that to

> wider discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of the drawing up of an order……." (Emphasis added)

4. Mr Edward Chan says that the matter should not be re-opened and relies upon *Hertfordshire Investments v Bubb* [2000] 1 WLR 2318 CA from the headnote:

> "An order for a rehearing should only be made on strong grounds, and that accordingly the judge had erred in giving undue weight to the prejudice to the claimant and in granting the application when the proposed fresh evidence could readily have been adduced at trial."

5. Significantly Mr Edward Chan argues that the particular point upon which it is contended there is material non-disclosure was known to Zhuhai Kwok Yuen at the previous hearing, but they neither raised nor relied upon. He says that there has been no explanation of the failure to raise or rely on the point.

6. I am of the view that the proper way to approach the matter is to first look at the matter upon which the party seeking to re-open relies, and to determine whether or not it is such an exceptional circumstance that the interests of justice require re-opening. It may well be that upon re-opening, when the matter is further examined, the decision will remain the same. In other cases the decision may be reversed.

The circumstances justifying re-opening

7. In this case Zhuhai Kwok Yuen rely upon an alleged failure by Hong Jing to make full and frank disclosure when applying for leave to serve the writ out of the jurisdiction. The argument is that there has been a material non-disclosure.

8. An application for leave to serve the writ after the jurisdiction is initially made ex parte, pursuant to O 11 r 1. Once the defendant is served he may, pursuant to O 12 r 1, file an acknowledgement of service. Such an act is a submission to the jurisdiction of the court, and will prevent the defendant from challenging the jurisdiction. Instead of filing an acknowledgement of service he may, as did Zhuhai Kwok Yuen in this case, dispute the jurisdiction under O 12 r 8(1)(c), by seeking an order discharging any order to giving leave to serve the writ on him out of the jurisdiction. In making such an application the defendant will not be treated as having submitted to the jurisdiction of the court: see: O 12 r 1(6).

9. There can be no doubt that there is a duty on a plaintiff applying for ex parte leave to serve a writ out of the jurisdiction to make full and frank disclosure. No authority need be cited for the proposition. It is equally clear that the duty on the plaintiff continues through out any inter partes hearing following an application by the defendant for an order discharging the ex parte leave: see *Chu Hung Ching v Chan Kam Ming* [2001] HKEC 130 per Le Pichon JA:

> "The fact that the hearing before Chu J on 24 November was inter partes made no difference: it did not absolve or relieve the plaintiff from making full disclosure since his duty was a

> continuing one and it arose before the inter partes hearing took place."

10. The particular point of non-disclosure upon which Mr Warren Chan relies relates to a potential defence available to Zhuhai Kwok Yuen. The circumstances surrounding the proceedings are adequately set out in my judgement of 28 April 2006. Hong Jing argue that Zhuhai Kwok Yuen are in breach of an obligation under a Memorandum of Understanding, (MoU), by which it is said Zhuhai Kwok Yuen agreed not to negotiate with any other party.

11. There is no doubt that the property, the subject of the MoU between the parties was sold to another company. The circumstances in which it was sold to another company were that a public tender exercise was undertaken by Zhuhai Kwok Yuen, the result of which was that that other party was the successful tenderer. Hong Jing were aware of the public tender exercise and attended that exercise. As part of the documents signed on the day on which Hong Jing attended the public tender exercise as a document entitled: "Attachment 2 Letter of Undertaking". That document, referring to the proposed tender exercise, contains the following sentence:

> "To avoid doubt, we confirm that (Zhuhai Kwok Yuen), Zhuhai Municipal Government and Paul Hastings (Janofsky & Walker)shall not be liable to the aforesaid arrangement."

12. That document was included amongst the documents exhibited to an affidavit in support of the ex parte application for leave to serve out the jurisdiction. The copy that was exhibited was an unsigned copy. In fact, on the day of the public tender that document had been signed by a representative of Hong Jing. The material non-disclosure

relied upon by Mr Warren Chan is the fact that that document was signed, was not disclosed. The argument is that the signature to that document, containing that sentence, would constitute a defence to the writ.

13. The answer made by Hong Jing is that through an unfortunate set of circumstances the fact that the document had been signed was overlooked, as they did not have a signed copy, but that an unsigned copy, included with other signed documents, of which the relevant document was merely a part, were disclosed. Mr Edward Chan contended that it would not be difficult to argue that the absence of a signature of a single page in a bundle of otherwise signed documents would not relieve the signing party of the consequences of the unsigned document, unless it could be specifically shown, the burden being on the party, that it was not signed deliberately in order to avoid that liability.

Should the case be re-opened:

14. There is no doubt at all that material non-disclosure is a matter that is treated most seriously by the courts. That is clearly demonstrated by the consequences of a material non-disclosure in an injunction granted ex parte. Invariably, if there is material non-disclosure an interim injunction will be set aside, irrespective of the consequences: see e.g. *Chu Hung Ching v Chan Kam Ming* (supra) per Mayo J at p 1. In *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350 Ralph Gibson J said:

> "If material-non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure….. is deprived of any advantage he may have derived by that breach of duty.' See per Donaldson LJ in *Bank Mellat v Nikpour*, at p 91 citing Warrington LJ in *Kensington Income Tax Commissioner's case* [1917] KB 486 at 509."

15. It is important to remember that the non-disclosure must relate to a matter that is material. Those on the receiving end of an ex parte order cannot light upon any particular fact that has not been disclosed in order to justify the setting aside of the order. It is accordingly necessary to examine the process of granting leave to serve out of the jurisdiction to determine whether or not the matter and not disclosed, essentially a basis for a defence on the part of the defendant, was material.

16. The best statement in Hong Kong as to leave to serve out of the jurisdiction is that contained in the judgement of Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346 at 356-7, and in particular:

> "(5) There are two stages to the inquiry. The first is the ex parte stage under Order 11. I emphasise that it is ex parte on documents. The practice does not envisage oral submissions ever being made except at specific request. Order 11, rule 4(1) specifies what the supporting affidavit has to show. At that stage it seems to me that the court has to come to a provisional view (it are being an ex parte application) on three matters. The first is whether the applicant shows a prima facie case. I read the speeches in *Vitkovice* as accepting that that is the burden of that stage, it may be for the simple reason that when the court has only got one party's version before it, it can do very little more. That is how I read the speeches of Lord Simonds at p 876, Lord Radcliffe at p 884, Lord Tucker at p 891. Secondly, it has to consider the sufficiency in law of the facts alleged: for example whether the applicant brings himself within any of the sub-rules and whether the facts alleged are sufficient prima facie to establish the cause of action alleged. Thirdly, the court has to consider the facts within the limited scope available. This really comes down to considering whether the facts are sufficiently asserted in an apparently credible manner. The matter was put in this way in a case in contract by Lord Buckmaster giving the opinion of the Privy Council in *Hemelryck v William Lyall Shipbuilding* [1921] 1 AC 698 at p 701. He said:
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> > "For the purpose of exercising the discretion which is conferred by the rules to be exercised that is Order in

> 11 it is sufficient if there appears reasonable evidence that a contract has been made."
>
> (6) second stage which may or may not be reached, follows a proper application under Order 12, rule 8. Then the court has to consider all the evidence before it, and to determine in the light of that whether the plaintiff shows a good arguable case. That is the test laid down in *Vitkovice* at that stage. But the court's position on fact and law is the same as it was at the ex parte stage. It cannot make any findings of fact. It can certainly consider the legal sufficiency of the facts, and whether there are any legal holes or obvious failings in the plaintiff's case. It can in the words of Lord Goddard CJ in *Malik v National Bank of Czechoslovakia* (1946) 176 LT 136 cited in *Vitkovice* at p 888, "if it can see by what appears on the affidavit's that the case put up is a perfectly groundless one and one in which there is no substance at all, the court can refuse to give leave". Similarly if the case is demurrable or nearly so. But that is about the limit of the court's power and function on disputed facts under this jurisdiction. It follows that the existence of disputed facts is normally quite irrelevant to the question as to whether or not a good arguable case has been shown. Putting it in another way, the showing of a good arguable case does not postulate an Order 14 case, and is not negatived by the fact that good arguable defences may exist. The relevance of the dispute goes really to little more than the question of the suitability of the forum evidentially and it may be a factor to be brought in there. Otherwise normally speaking factual disputes are quite irrelevant."

17. In my view it is abundantly plain from the foregoing citation, that the question as to whether or not a defence is available to a defendant is, unless it is one which will show that the plaintiff's claim is perfectly groundless, quite irrelevant when considering leave to serve out of the jurisdiction, either ex parte under O 11, or inter partes, under O 12 r 8(1)(c). In neither case is the court concerned with available arguable defences.

18. Mr Warren Chan did not, and could not have argued that the fact that Hong Jing had signed the relevant document was such as to render their case groundless. The relevance, interpretation, intent, and scope of the document, in relation to Hong Jing's claim are all plainly arguable.

19. The evidence establishes that Hong Jing did not disclose to the court the fact that the undertaking had been signed. The undertaking, and whether or not it had been signed is a matter that is relevant only to issues of an arguable defence that might be available to Zhuhai Kwok Yuen. It is simply not relevant to the issue as to whether or not there should be leave to serve out of the jurisdiction.

20. If a fact that has not been disclosed is not relevant then it simply cannot be argued that it is material. That is entirely consistent with the decision in *United Links International Ltd v The Prince Co* [1994] 2 HKC 617, cited in Hong Kong Procedure 2006 para 11/1/2, where a failure by the plaintiff to disclose an allegation of fraud against it did not result in leave being set aside. The fact of an available arguable defence is not even relevant to the "weighing operation" deciding whether or not to grant the order. The decision of Keith J. A. in *New Asia Energy Ltd v Concord Oil (Hong Kong) Ltd* [1999] HKCE 604 must be seen in the light of the fact that that was an appeal in relation to the grant of an interlocutory injunction, where there is an obligation on a plaintiff to identify defences.

21. For the foregoing reasons I am satisfied that, in so far as an application for leave to serve out of the jurisdiction is concerned, whether at O 11 or O 12 r 8 stages, there has been no material non-disclosure. Zhuhai Kwok Yuen's summons must be dismissed.

22. Having determined that the matter should not be re-opened because any non-disclosure was not material it is not necessary for me to deal with the alternate argument that Zhuhai Kwok Yuen could not, in any event, rely upon any nondisclosure, because the point was known to them the previous hearing, and they elected not to rely upon it.

The exercise of the discretion to grant leave to serve out of the jurisdiction:

23. In an application for leave to serve out of the jurisdiction the plaintiff must establish first that the case is one which falls within one of the various subparagraph s of O 11 r 1. In my judgement of 28 April 2006, I held that Hong Jing had plainly brought themselves within the provisions of both r 1(1)(b) & (p). The effect of O 11 r 4(2) is that having established that the case falls within one of the subparagraphs of r 1, the applicant must then satisfy the court that it is a proper case for the exercise of the discretion to grant leave. In my judgement of 28 April 2006, I did not directly address this issue. I now do so.

24. The basis upon which the court proceeds in this respect is to consider first whether there is a serious issue to be tried, so as to enable it to exercise its discretion to grant leave, and then to consider the exercise of that discretion with particular reference to the principle of *forum conveniens*, with regard to the principles enunciated in *The Spiliada*: (*Spiliada Maritime Corp v Consulex Ltd, The Spiliada* [1986] AC 460).

25. Under those principles the burden is on the plaintiff to show that leave should be granted, with the court being required to consider both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff when deciding whether to exercise the discretion

to grant leave. Accordingly the plaintiff is required to show not merely that Hong Kong is the appropriate forum for the trial of the action but that it is clearly the appropriate forum.

26. Mr Warren Chan relied upon a number of factors to contend that the system of law with which the MoU had the closest and most real connection was Mainland China. Zhuhai Kwok Yuen is a company incorporated in Zhuhai, and has no place of business in Hong Kong. Hong Jing is a company incorporated in Macau and has no place of business in Hong Kong. All of the negotiations leading to the MoU were conducted in Zhuhai, on the part of Zhuhai Kwok Yuen, by officials of the Zhuhai Municipal Government. The MoU was signed in Zhuhai. The real substance of the MoU is the sale and purchase of three properties two of which are in Zhuhai, the other in Macau. It is right that these are all factors which point to the Mainland, and particularly Zhuhai, as being the appropriate forum for the action.

27. Were the action simply an action for a sum of money it would be difficult for Hong Jing to contend that Hong Kong is the appropriate forum for the action. But the action is not a simple action for money. It is an action for the acceptance of a secret commission in Hong Kong by the solicitors and agent for Zhuhai Kwok Yuen. It is an action in which it is contended that a breach of a fiduciary duty owed to the plaintiff took place in Hong Kong. The action is not merely an action for a sum of money, it is an action for a specific sum of money in which Hong Jing claim a proprietary right. That sum of money is in Hong Kong, and is presently restrained by injunction. Where there is a breach of a fiduciary duty, the defendant holds money received by it, in breach of that duty, as a trustee

for the beneficiary. By being able to allege that relationship, Hong Jing are able to bring a proprietary claim in respect of the specific sum of money held in Hong Kong.

28. Having regard to all of the circumstances I am satisfied that the fact that this is an action for a specific sum of money, located in Hong Kong, in which a proprietary right is claimed, renders Hong Kong clearly the appropriate forum for the action.

29. For that reason I exercised my discretion to permit service out of the jurisdiction.

Costs:

30. There will be an order nisi that the Zhuhai Kwok Yuen must pay Hong Jing's costs on the application to re-open the O 12 r 8 proceedings.

Payment into court of the restrained sum:

31. Hong Jing has, by a separate summons, sought an order that the sum restrained by the injunction, $171.99 million, be paid into Court, and that Zhuhai Kwok Yuen, whether by itself, its agents or solicitors be restrained from dealing with the said sum or any part thereof until the final disposition of the Action, or until further order. Alternatively, an order is sought that the sum be paid into an interest-bearing account opened in the joint name of the plaintiff's and defendant's solicitors. Mr Warren Chan took no part in dealing with this summons.

32. I am told by Mr Edward Chan that Hong Jing would be quite satisfied with the interest that may be achieved by the payment of the funds into court. In those circumstances there will be in order that the sum of $171.99 million restrained by the Injunction Order dated 21 January 2006, the paid into Court pending the final disposition of the Action, or until further order.

33. The application is for the joint benefit of both parties and generated no argument. Costs on the summons will be plaintiff's costs in the cause.

(John Saunders)
Deputy High Court Judge

Mr Edward Chan, SC, leading Mr Patrick Chong, instructed by Messrs K.C. Ho & Fong, for the Plaintiff

Mr Warren Chan, SC, leading Mr Liu Man Kin, instructed by Messrs Paul Hastings, Janofsky & Walker for the Defendant