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HCA926, 928 & 929/2004
(Heard together)

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

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COURT OF FIRST INSTANCE

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ACTION NO. 926 OF 2004

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BETWEEN

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STPEHEN LIU YIU KEUNG

Plaintiff

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and

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AKAN GROUP LIMITED

Defendant

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ACTION NO. 928 OF 2004

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STPEHEN LIU YIU KEUNG

Plaintiff

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and

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OPEN SHARE INVESTMENTS LIMITED

Defendant

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ACTION NO. 929 OF 2004

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BETWEEN

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STPEHEN LIU YIU KEUNG

Plaintiff

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and

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WINKO MOTOR INDUSTRIES LIMITED

Defendant

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(Heard together)

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Before : Hon Chu J in Chambers

Date of Hearing : 22 February 2005

Date of Decision : 22 February 2005

DECISION

1. The defendants in the three actions have made identical applications by summonses for stay of execution of the judgment handed down on 17 December 2004 and perfected on 28 December 2004 (“the Judgment”). Since same counsel and solicitors are involved and the arguments are essentially identical, the applications were heard at the same time.

2. There are before the court in each action two summonses for stay. The first was issued on 7 February 2005 and returnable on 13 April 2005. The second was issued on 21 February 2005 and returnable on 22 February 2005. With agreement of counsel, all summonses are heard today.

The Judgment

3. By the Judgment, final judgment was entered for the plaintiff for:

- (1) An order for vacant possession, and the respective defendants do deliver up vacant possession, of the properties in Hong Kong Parkview (“Parkview Property”) in HCA 926/2004, Dynasty Court (“Dynasty Court property”) in HCA 928/2004

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and in Altadena House (“Altadena House property”) in HAC 929/2004.

(2) A declaration that the respective tenancy agreements made between Keen Lloyd Resources Ltd (formerly Keen Lloyd Holdings Ltd) (“KL”) and the defendants in respect of the above properties are null void and of no effect as against the plaintiff.

(3) An injunction restraining the respective defendants from remaining in possession or occupation of the respective properties.

(4) Mesne profits together with interest.

Events since the handing down of the Judgment

4. Subsequent to the handing down of the Judgment, Messrs Alvan Liu & Partners (“ALP”) was instructed on 31 December 2004 to act for the defendants in the place of Messrs. Paul Chan & Co. On 3 January 2005, ALP wrote to the plaintiff’s solicitors, Messrs Simmons & Simmons (“SS”) seeking their agreement to a stay of the Judgment. SS replied on the same day refusing consent. On 11 January 2005, the defendants filed their Notices of Appeal. By a letter dated 14 January 2005, ALP made a further request to SS for a stay of execution. SS replied on 17 January 2005 that the plaintiff did not agree to stay the Judgment.

5. Meanwhile, the plaintiff had applied for and was granted leave to issue Writs of possession and *feri facias* combined.

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6. On 7 February 2005, the defendants filed the first summons for stay, returnable on 13 April 2005. On 8 February 2005, Notices to Occupier and the Writs of possession and *feri facias* combined were served by the bailiff. The defendants through ALP were further advised that the bailiff would proceed to execute the Writs on 25 February 2005.

7. On 19 February 2005, the defendants applied *inter partes* to the Duty Judge for stay of execution. The application was refused and it was pointed out to the defendants that the application should initially be made to the trial judge.

8. On 21 February 2005, ALP wrote to the court seeking an urgent appointment to hear their applications for either an interim stay or an interlocutory stay. On the same day, the defendants issued their second summons and the hearing was fixed for 22 February 2005.

The applications for stay

9. By the summonses, the defendants seek to stay the execution of the Judgment pending the determination of their appeals to the Court of Appeal. The stay is sought on the basis that their appeals are *bona fide* and arguable and that the appeals will be rendered nugatory without a stay in place.

10. The plaintiff opposes the stay on the ground that the appeals are devoid of merits and that the stay will occasion serious prejudice to the plaintiff. Alternatively, the plaintiff says that the stay should only be granted on condition that the defendants pay into court all the mesne

A profits up to date and future mesne profits pending the determination of the
B appeals.

C
D *The urgency of the applications*

E 11. For the defendants, it is said that ALP had acted reasonably E
F and had at the outset endeavoured to seek the plaintiff's consent to a stay, F
G but the consent was not forthcoming. It is also said that ALP needs time to G
H prepare for the applications because of difficulties in getting instructions H
I and the documentation involved. The plaintiff, on the other hand, I
comments that the urgency of the situation has been self-created.

J 12. In my view, two points need to be made about the urgency of J
K the situation. Firstly, the plaintiff had as early as 3 January 2005 made it K
L plain that he would not consent to staying the Judgment. It is therefore L
M incumbent upon the defendants to take prompt action to make applications M
N to the court. Yet, the first set of summonses was only filed more than a N
O month later. Secondly, insofar as it is said that ALP needs time to O
P familiarize with the cases and to take instructions, it should be noted that P
Q ALP was acting for KL way back in 2003 and the Provisional Liquidator Q
of KL, acting by Mr Kenneth Yeo, had on 16 October 2003 written to ALP
to raise queries on the three tenancy agreements in issue. Only after that
and on 23 October 2003, ALP informed Mr Yeo that they no longer had
instructions.

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S *The evidence in support of the stay applications*

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13. The plaintiff takes objection to the admissibility of the two affirmations of Ng Kam Sing and the affirmation of Guo Si De filed on behalf of the defendants in support of the stay applications and also the appeal. The objection is on the basis that the deponents had not stated their residential addresses in the affirmations, contrary to the requirements of Order 41 Rule 1(4) of Rules of the High Court. Interestingly, it appears that for all the affirmations previously filed on behalf of the defendants, except those of Mr Paul Chan (who had given his office address), none of the deponents had stated their address, residential or otherwise. This was not picked up at the last hearing, probably because the affirmations were only filed that very day. Be that as it is, after taking instructions, ALP indicated that they are aware of the addresses of Mr Ng and Mr Guo. Upon ALP's undertaking to the Court given through Mr Cooney to file and serve within 3 days affidavits to correct the irregularity, the affirmations are allowed to be used for the purpose of the stay applications.

The legal principles

14. Counsel are in agreement as to the legal principles governing the grant of a stay of execution pending appeal. In summary, it is a matter of discretion: *Caine Tai Investment Co Ltd v. Ayala International Finance Ltd & Anor* [1983] 1HKC 163 at 166G.

15. In *Star Play Development Ltd v. Bess Fashion Management Co Ltd* (unreported) HCA 4726 of 2001, 7 June 2002 at paras. 6-10, cited in *Wendon Engineering Services Co Ltd v. Lee Shing Yue Construction Co Ltd* (unreported) HCCT 90 of 1999, 17 July 2002, Ma J (as he then was) held that it was ultimately a balancing exercise. The starting point at all

A times is that the successful party is not to be deprived of the fruits of his
B success. Where the merits of the appeal are strong, the balance will be
C tilted in favour of granting a stay. But in the majority of cases and where
D the appeals are merely arguable, something more has to be shown to justify
E a stay. One of the justifying circumstances is that the appeal will be
F rendered nugatory if no stay is in place. Ma J further pointed out it is
G always relevant to consider the prejudice that would be caused to the
H successful party by the stay and if necessary to impose conditions to
I minimise the prejudice so caused.

H *Merits of the appeal*

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J 16. Although a stay application is not the appropriate occasion to
K embark upon a detailed analysis of the merits and strengths of an appeal, it
L is necessary for the court hearing the application to form a preliminary
M view of the matter. This is because an arguable appeal is the minimum
N requirement for a stay application: *Star Play Development Ltd Ltd v. Bess*
O *Fashion Management Co Ltd* at para. 9(6).

P 17. In the present case, I note that the defendants had since filed
Q various new affirmations for the purpose of the appeals. Mr Fung SC has
R rightly observed that there is as yet no application to the Court of Appeal
S for admission of new evidence and the necessary materials for seeking
T leave to adduce new evidence are at the moment not present: see Order 59
U rule 10(2) of Rules of the High Court and *Ladd v Marshall* [1954] 1 WLR
V 1489. In particular, there is as yet no explanations as to why the new
affirmations and the matters raised in them, could not have been made
available at the hearing of the Order 14 applications. It is to be noted that

A there was a gap of more than 2 weeks between the service of the Order 14
B summonses and the hearing, and the defendants had no reason to assume
C that the applications would not be proceeded with at hearing.

D 18. However, for the purpose of the applications, I will proceed
E on the assumption that the defendants will be able to adduce the new
F evidence. Notwithstanding that, in considering whether there is an
G arguable appeal, the court is necessarily looking at the grounds stated in
H the Notice of Appeal. The new evidence will also have to be viewed in
the context of the Grounds of Appeal.

I 19. Insofar as the defendants are appealing against the refusal of
J adjournment, it would appear that this part of the appeals was lodged
K without reference to the two affirmations of Paul Chan, which were the
L only materials before the court for the purpose of the adjournment
M applications, and upon which the court's discretion was exercised. Mr
N Cooney informed me that neither ALP nor him had sight of the
O affirmations until this hearing. The affirmations have now been included
P in the plaintiff's hearing bundle. This is a surprising situation, given that
Q the main ground of appeal in this regard is that the court's discretion was
exercised wrongly. I would additionally point out that there was no
indication at all at the adjournment application that the new affirmations
that the defendants now seek to adduce would be forthcoming.

R 20. As to the part of the appeals relating to the Judgment, Mr
S Fung SC had given an analysis of their merits in his skeleton submissions.
T I am in agreement with it. So far as Ground 4 is concerned, it is in direct
U contradiction to the Court of Appeal's decision in *Tan Eng Guan v.*
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Southland Co Ltd [1996] 2 HKLR 117. As for Ground 5, notwithstanding the new affirmations, it remains the position that there is no primary documents evidencing the movement of funds and the making over of the loans for which the tenancy agreements between KL and the defendants, and in the case of Open Shares, its assignor, were created. In the case of Ground 6, there is nothing before the court to indicate what the “other grounds” are that justify the cases proceeding to trial.

21. In my view, the appeals are fraught with difficulties. At best, they are barely arguable.

The appeals rendered nugatory?

22. All the defendants contend that without a stay, their appeals would be rendered nugatory. Evidently, the defendants are focusing primarily on the part of the Judgment on delivery up of vacant possession and the injunctions restraining them from remaining in possession or occupation of the three properties. The defendants have not adduced any evidence to support this contention in relation to the monetary part of the Judgment.

23. In the case of Akan Group Limited (“Akan”), the tenancy agreement in question is due to expire on 19 April 2005, which is less than two months away. In all likelihood, the appeals will not be heard and determined before the end of the tenancy agreement. The contention that without a stay, the appeal by Akan will be rendered nugatory is irrelevant. Further, any damages of Akan, if a stay is not imposed, will be minimal

A when compared to the prejudice occasioned to the plaintiff by a stay, to
B which I shall return to deal with. C

D 24. As for Open Share Investments Limited (“Open Share”) and
E Winko Motor Industries Limited (“Winko”), their case is that they will
F suffer loss if they have to vacate the properties in that they cannot set off
G the rentals under their respective tenancy agreements against the
H indebtedness due from KL. It is also said that damages will not be an
I adequate remedy because KL is in liquidation. J

K 25. The reality however is that Dynasty Court property is only
L used occasionally by Mr Guo and his guests when they happen to visit
M Hong Kong. That is the extent of the prejudice to Open Share, if there is
N no stay. O

P 26. In the case of Winko, the reality is that it has allowed Mr
Q Chun (or Chin) and his family to use the Altadena House property.
R According to Ng Kam Sing’s affirmations, Mr Chun is the chairman of KL
S responsible for the business of Winko, hence he has been given
T accommodation benefits. At the same time, however, Mr Ng said that Mr
U Chun had since November 2001 ceased to be a director of Winko, and that
V Winko is not a subsidiary or related company of KL, which is clearly
incorrect since Mr Ng accepted that Winko is wholly owned by KL.
Plainly therefore, Winko has allowed the Altadena House property to be
used by Mr Chun, in his capacity as the chairman of KL when KL, on
Winko’s case, is its debtor. In the final analysis, the so-called set-off
arrangement will appear to be no more than an accounting exercise on
paper. In substance, the benefits of the tenancy agreement go to Mr Chun

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and his family. There is nothing in the evidence to explain why Winko should be conferring accommodation benefits on the chairman of its debtor and further on his family after Mr Chun has been imprisoned. The suggestion that Winko stands to suffer loss or prejudice without a stay, in my judgment, is simply ludicrous.

27. In any case, when the alleged tenancy agreements were created, all defendants clearly knew that the properties were mortgaged to the Bank and that KL was financially unsound, which was the very reason for the creation of the tenancy agreements. It follows that the defendants must be aware of the risks of the Bank exercising its rights under the mortgages against KL. The defendants ought further to have appreciated that, even if the Bank, exercising its rights as mortgagee, were to permit the defendants to remain in possession or occupation of the properties, the defendants would not be able to set-off the rentals against the debts allegedly owed by KL. Further, the defendants would have to pay the Bank for their occupation and use of the properties. It is to be noted that it is not the defendants' case that they knew from the outset that the Legal Charges in question are liable to be set aside. Thus analysed, the loss or prejudice that the defendants say they stand to suffer if the Judgment is not stayed, must be within the contemplation of the defendants when they entered into the tenancy agreements.

28. As to the defendants' case that the Legal Charges in question are liable to be set aside for fraudulent misrepresentation, one must not lose sight of the fact that any right of setting aside is that of KL and not of the defendants. KL is in liquidation. The liquidators have taken no step to dispute the validity of the Legal Charges. There is also no evidence that

A the liquidators share the views and arguments of the defendants. At best,
B there is only a draft affirmation of Mr Chun in which it is said that the
C liquidators are awaiting counsel advice before deciding whether to be
D joined as a plaintiff to HCA 1299 of 2004, which was brought by Keen
E Lloyd Energy Limited. The suggestion that the plaintiff's appointment as
F the receiver of the properties will cease with the setting aside of the Legal
Charges is therefore rather speculative.

G 29. On the other hand, there is clear evidence from the plaintiff as
H to his loss. The plaintiff has since late 2003 sought to recover possession
I of the properties. The accrued rental up to date is no less than \$10,125,000
J (\$2,625,000 from Akan, \$2,700,000 from Open Share and \$4,800,000
K from Winko) and further rental is running at \$315,000 per month. As
noted before, there is no evidence to explain why the monetary part of the
Judgment should be stayed.

L 30. In the circumstances, to give recognition of the plaintiff's
M rights under the Judgment, any stay of execution must be granted on terms.
N It is an appropriate condition to have the accrued rental or mesne profits
O brought into court and for the future mesne profits to be paid into court
monthly.

P 31. The defendants have, however, through Mr Cooney offered
Q the following alternative terms:

- R (1) Shares in a UK company called Arko Holdings plc equivalent
S to the rental payable in future be deposited with and held by
T ALP, upon ALP's undertaking to the plaintiff not to release
them to the defendants without order of the court.

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(2) The defendants pay into court the future rentals 14 days after the end of each month, on the assumption that rents under the tenancy agreements become due in arrears on the last day of the month.

32. The first alternative is plainly unacceptable since there is no information on the UK company, the identity of the owner(s) of the shares and the value of the shares.

33. As to the second alternative, it is also unacceptable. As said before, there is no justification for withholding the payment of accrued mesne profits under the Judgment. Accordingly in the absence of reasons, the payment of future mesne profits is hardly sufficient to safeguard the plaintiff's position and entitlements under the Judgment.

Conclusion

34. For the above reasons, the defendants' applications for stay of execution of the Judgment have to be dismissed. The two summonses in each of the three actions are dismissed with costs to the plaintiff against the respective defendants, to be taxed if not agreed.

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

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Mr Patrick Fung SC instructed by Messrs Simmons & Simmons for the plaintiff in HCA 926, 928 & 929/2004.

Mr Nicholas Cooney instructed by Messrs Alvan Liu & Partners for the defendants in HCA 926, 928 & 929/2004.

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