CACV 248/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 248 OF 2000

(ON APPEAL FROM HCA NO. 2479 OF 2000)

BETWEEN

GLOBAL FAITH INVESTMENTS LIMITED Plaintiff

and

EYI INTERNATIONAL LIMITED Defendant

Before : Hon Rogers VP, Le Pichon JA in Court

Date of Hearing : 14 December 2000

Date of Judgment : 14 December 2000

J U D G M E N T

Hon Rogers VP:

This is an appeal from the decision of Deputy Judge Wong given on 14 July 2000. The application before the Deputy Judge was an application to continue a *mareva injunction* which had been granted *ex parte*. The defendant had applied to discharge it. In the result, the Deputy Judge discharged the injunction. There was thereafter an application before a single judge of the Court of Appeal which came before

Mayo VP and he granted the relief of a temporary injunction pending the appeal in terms of the *ex parte* injunction.

The matter arises in this way. The plaintiff, Global Faith Investments Limited, is a company which has four shareholders. One of those shareholders is a company by the name of Landmark Investments Trading Limited, which is the alter ego of a lady, Ms Eliza Fung. Ms Eliza Fung was a person who put the four shareholders, namely, herself and the three others, in touch with a company named EYI International Limited, which is the defendant in these proceedings.

As a result of that, an arrangement was arrived at between the four investors acting through the medium of the plaintiff and the defendant. The arrangement was that a joint venture company would be formed which would be called Essentially Yours (HK) Limited. The defendant was to put up a quarter of a million US dollars worth of material in the form of computer programs and the like, whereas the plaintiff was to put up half a million US dollars in cash to finance the company. The business of the company, Essentially Yours (HK) Limited, was to sell goods which would come from the defendant. The relationship between the parties was not all that happy. By the end of 1999, it was clear that the parties were not working well together. As a result, the defendant wrote a letter to the plaintiff on 23 November 1999 offering to buy out the plaintiff's investment in Essentially Yours (HK) Limited. The material terms of that letter are that, first, the purchase price would be half a million US dollars, which had either been paid or loaned to Essentially Yours (HK) Limited. As a requirement of that, however, the defendant made two specific stipulations : first of all, that the plaintiff and its shareholders should sign a full and final general release in favour of the Company and the defendant in regard to all claims save and except for payment of the balance of the

purchase price; and secondly, that the plaintiff and its shareholders would provide a three-year non-competition covenant in favour of the Company confirming that they will not compete with the business of the Company for three years after closing.

That was followed up by negotiations between the parties. The parties came to what is called an escrow agreement which is referred to in an escrow letter. That is undated but it is exhibited, and that reads :

> "We, the undersigned (collectively the 'Parties'), refer to the letter agreement made between EYI International and Global Faith dated 23rd November 1999 and the letter from Messrs. Liu, Szeto &Partners to Ms. Geraldine Heyman dated 1st December 1999 copies of which letters are attached to this Escrow Letter.
>
> The Parties have agreed to an escrow arrangement for the completion of the captioned transaction and hereby appoint Siao, Wen and Leung as escrow agent (the 'Escrow Agent') to hold the sum of US$500,000.00 and the Global Documents and EYI Document (as defined below) on and subject to the following terms and conditions :
>
> 1. Upon the execution of this Escrow Letter:
>
> (a) Global Faith shall deposit the following documents (the 'Global Documents') with the Escrow Agent:
>
> (i) an undated instrument of transfer and bought and sold note in respect of the transfer by Global Faith to EYI International of the Shares duly executed by Global Faith;
>
> (ii) an undated resignation letter duly signed by Mr. Chiang Mao-Hsin;
>
> (iii) undated written resolutions of the directors of the Company approving the transfer of shares, resignation of directors, cancellation of shares certificates and issuance of new share certificate duly executed by Mr. Chiang Mao-Hsin; and
>
> (iv) an undated release duly executed by Global Faith and all of its four

shareholders in favour of the Company and EYI International.

(b) EYI International shall deposit with the Escrow Agent:-

(i) a bank draft in the sum of US$250,000.00 in favour of Messrs. Liu, Szeto & Partners as agent for Global Faith;

(ii) the sum of US$250,000.00 (the 'Balance of Consideration'); and

(iii) an undated release duly executed by the Company and EYI International in favour of Global Faith and all of its four shareholders (the 'EYI Document').

2. As soon as is reasonably practicable after receipt of the Global Documents and EYI Documents and the sums described in 1(b)(i) and (ii) above, the Escrow Agent shall release the bank draft described in 1(b)(i) above to Messrs. Liu, Szeto & Partners and shall deposit the Balance of Consideration in an interest-bearing call deposit account in the name of Siao, Wen and Leung with Chekiang First Bank Ltd., Kowloon Branch, 300 Nathan Road, Kowloon, Hong Kong, Account No. 044-809-20-00810-5 (the 'Escrow Account')."

…"

It would appear from the evidence which has been filed that Ms Eliza Fung was well aware of the terms of the agreement which had been arrived at between the plaintiff and the defendant and indeed consented to them. All the other three shareholders duly executed the undertakings, which were requested, and the releases. There came about a dispute, however, between Ms Eliza Fung and Landmark Investments Trading Limited on the one part and the plaintiff and the other three investors in the plaintiff on the other. This culminated in an action brought by Ms Eliza Fung and Landmark Investments Trading Limited on 25 January 2000. Those two parties succeeded in obtaining an *ex parte* injunction to prevent the plaintiff in this action, Global Faith Investments

Limited, from disposing of the proceeds of sale. At the stage that that injunction had been obtained, Ms Eliza Fung and Landmark Investments Limited had not executed the undertaking. However, on 2 February 2000 at, I might say, 4:05 pm, Ms Eliza Fung filed an affirmation in which it is said :

> "I crave leave to refer to paragraph 19 of my First Affirmation. As deposed to therein, I had been reluctant to sign the Incidental Documents referred to therein to protect my own interests. When our application for injunctive relief was successful, I was advised by my legal advisers and verily believed that the Plaintiffs' interests are protected until the order for injunction is varied or discharged. As such, I executed the Incidental Documents on 28th January, 2000. There is now produced and shown to me and exhibited herewith marked EF11 a true copy of the executed Incidental Documents."

What was exhibited thereto were releases which were signed by Eliza Fung on behalf of Landmark Investments Trading Limited and the undertaking, again signed by Eliza Fung, for and on behalf of Landmark Investments Trading Limited.

On the next day, the Global Faith Investments Limited and the three other investors applied on the return date of the injunction application for a stay of those proceedings so that the matter could be taken to arbitration and for a discharge of the injunction and that was granted. It would seem that Ms Eliza Fung then lost no time in instructing her solicitors to write yet another letter, and on that very same day there was dated a letter from the solicitors in Ms Eliza Fung and Landmark Investments Trading Limited, which was addressed to the plaintiff in this case, which reads :

> "We refer to the Release and Undertaking signed by our client and sent to you undercover of our letter to you dated 29th January 2000. We are instructed that our client hereby revokes and withdraws the said Release and the said Undertaking. In the

> circumstance, we hereby demand you to return the said Release and Undertaking to us forthwith."

It should be noted that no reference has been made in any of the documents to that letter of 29 January save that it is presumed that it exists but the whereabouts of it now is unknown.

On 10 February, the copy of the Release and Undertaking, which had been exhibited to Ms Eliza Fung's affirmation, was sent by the plaintiff's solicitors to the solicitors for the defendant. Meanwhile, there had been some dispute between the plaintiffs and the defendants as to whether in the absence of Ms Eliza Fung's releases and undertakings and the release and undertaking on behalf of Landmark Investments Trading Limited, the agreement in Escrow Agreement which had been arrived at between the parties would proceed. At one stage, the plaintiff expressed its intention not to proceed with it in the absence of those documents. However, the defendant expressed itself as unwilling to allow the plaintiff not to proceed with the contract and the matter thereupon continued. Indeed, on 5 January, the solicitors for the defendants in this action wrote to the plaintiffs' solicitors saying that all matters had been complied with. On 9 March the plaintiffs in this action issued the writ.

The application for the *ex parte mareva injunction* was made before Mr Justice Tong on 11 March. The history of the matter thereafter became somewhat checkered. The defendant is, of course, an overseas company, and the proceedings were not initially served on them. The summons to continue the injunction was issued on 14 March, and on 15 March the writ in this case reached the plaintiffs' service agents in the Cayman Islands. On 17 March the first return date after the injunction took place, the defendant was not represented. The judge adjourned the matter

but continued the injunction. On 29 March, the defendant's solicitors accepted service on behalf of the defendant.

The next return date on summons day was on 17 April. On that occasion the judge hearing the matter gave directions for filing the evidence but adjourned the case for a date to be fixed notwithstanding that the estimated hearing time was only half a day.

In doing so, it is to be noted that the judge did not follow the practice of requiring the matter to be restored on summons day either before himself or such other judge who would be hearing the summonses on summons day. Once the evidence has been completed, that is an essential step. Furthermore, by allowing the matter to be adjourned to a date to be fixed, sight was lost of the fact that had been an *ex parte* injunction, and applications to discharge an *ex parte* injunction should be heard as soon as possible. The purpose of summons day is to dispose of such applications as those to discharge *ex parte* injunctions and the matter should not be adjourned to dates to be fixed but should be heard as a matter of urgency immediately after the routine matters of summons day are completed. And if they cannot be completed on the summons day, they will have to be completed on the day following summons day or the following Monday. These matters should not be adjourned to dates to be fixed and the difficulty that is caused by so doing is exemplified in this case because the matter took the following course.

On 9 May, the defendants filed their defence. On 12 May, the defendants filed their evidence and then on 25 May, which was more than one and a half months after directions had been given on summons day, the master fixed the hearing of the discharge application and the renewal of the application for an injunction for 1 August.

The defendants then, quite rightly, took out a summons that the matter should be heard on the first available date. That summons was heard on 2 June and the order was granted. But, when the parties attended before the listing clerk on 5 June, they were offered 8 and 9 June. Both parties refused that date and there was then an application on 26 June, and the matter was heard on 27 June, and the judge hearing the matter ordered that the application should come on for hearing on 5 July. That took place but it then transpired that after all that delay, and the matter being pushed on speedily thereafter, the plaintiff was unable to instruct the counsel it wished. It had a very junior counsel. It then had to bring in, half way through the hearing, a more senior counsel who had not had a chance of considering the papers. The whole conduct of the hearing below seems to me, to have gone wrong. If the judge hearing the summons on summons day back in April had ordered the matter to be restored following summons day when the evidence had been completed, all the parties would have known that they would have had the matter heard then and there and they would have had plenty of time to be prepared for that hearing, and instruct whatever counsel would be available for that time which would presumably be 2 to 3 weeks hence. As it was, a period of some 4 months or more had been allowed to pass since the grant of the *ex parte* injunction and the matter was very unsatisfactory.

When the matter was heard before the Deputy Judge on 5 July, he reserved his decision and handed it down in writing on 14 July. His decision in essence was this : first, that there was no consideration passing to Landmark Investments Trading Limited, Ms Eliza Fung, for the release and undertaking which they had given, and therefore the release and the undertaking were not enforceable against them; and secondly, that as a result of that, and as a consequence of that, the Landmark Investments

Trading Limited and Ms Eliza Fung were able to revoke their consent to the release and the undertaking. The judge held that as a consequence, the plaintiff was unlikely to succeed in the action and it had no good arguable case. The judge went further and held that, in any event, there had been a non-disclosure by the plaintiff of the revocation of the release and the undertaking and that in his discretion the injunction should be discharged.

It seems to me that it is possible to construe the offer, which the defendants made in the letter of 23 November and the subsequent agreement which was arrived at, as one which was made to the plaintiffs and its shareholders together. The plaintiff had performed or at least part performed its part of the transaction. By executing the release and undertaking, Ms Eliza Fung and Landmark Investments Trading Limited had performed everything that was required of them under that contract. Likewise, the defendant had performed its part of the bargain as indicated on 5 January.

In my view, therefore, there was consideration which flowed to Ms Eliza Fung and Landmark Investments Trading Limited and those parties could not, thereafter, revoke their agreement to the release and the undertaking which had been given. This matter, however, cannot be decided today but it seems to me that it is arguable when the matter comes to trial that they did receive consideration in the benefit to the plaintiff which was agreed to and consented to by them.

Turning to the question of the failure to disclose the revocation of the consent to the release and the undertaking, I would draw attention to two matters. Although there was no mention in the affidavits founding the application before Mr Justice Stock as to the revocation or purported revocation, we have been shown a copy of the plaintiff's

skeleton arguments on that occasion. The counsel who had been engaged in the action which Ms Eliza Fung and Landmark Investments Trading Limited had brought against the plaintiff and the other three investors was aware of the possibility that there had been such a letter of revocation, and in his skeleton argument he referred at paragraph 2.2.1 to :

> "P has not provided a written release from one of its directors, Eliza Fung. Although she signed a release D has only been given a copy, which P exhibited to her affirmation in proceedings she commenced against P. She may have purported to retract the release."

There was at least in that some indication of the possibility that there had been a revocation.

Furthermore, there are some extenuating circumstances to the extent that the solicitor acting on behalf of the plaintiff has subsequently to the hearing before the deputy judge but prior to the application before Mayo VP filed an affidavit, in which he explained that he was incapacitated at the time because he had injured his leg and was therefore not present in the office when the affidavits were prepared, which founded the application for an *ex parte* injunction. The failure to find that document was perhaps explained by the fact that it had been placed in the file which related to the action which had been brought by Ms Eliza Fung and Landmark Investments Trading Limited.

I would not disturb the exercise of the judge's discretion to discharge the injunction for failure to disclose the material evidence, specifically the revocation, whether effective or not, of the release and undertaking. On the other hand, clearly the judge's mind was not directed to the question of whether the *mareva injunction* should be regranted. He had already decided that the plaintiff's case was unarguable and even if it

was directed to a question regrant, he clearly must have approached the question on the basis that the plaintiff's case would be unarguable. In those circumstances, it appears to me that it is open to this Court to reconsider the matter.

One aspect of the case which, in my view, is clear is that because the defendant company is situated outside Hong Kong in a jurisdiction which could be said to be renowned for shelf companies and companies where it is difficult to ascertain the identity of those behind them it would perhaps be difficult to secure any satisfactory compensation. Clearly if the money which is at present apparently still retained by the solicitors is released, the chances of the plaintiffs successfully recovering in the action should they succeed would be remote. I would, therefore, be disposed to restore the injunction, it having been technically discharged because of material non-disclosure.

I appreciate that this is an exceptional course but, in my view, the circumstances of the case and in particular the two factors specifically mentioned in the counsel's skeleton argument and the extenuating factors relating to the solicitor would justify that in the circumstances of this case. In those circumstances I would propose that this appeal should be allowed and the injunction restored.

There would then follow consequential orders which would include the release of the money paid in as security for the costs of the appeal. However, our attention was drawn to an order of Master Cannon dated 8 November 2000 in which the plaintiff had been ordered to provide security for costs in the sum of $170,000 within 28 days. That period has recently expired but the balance of the money on deposit or the bulk of money which has been placed on deposit as security for costs for this

appeal can automatically be transferred and treated as security for costs which had been ordered by Master Cannon and the balance released.

Hon Le Pichon JA :

I agree with the judgment of the Vice-President and have nothing to add.

(Anthony Rogers)
Vice-President

(Doreen Le Pichon)
Justice of Appeal

Mr Jonathan Harris, instructed by Messrs Alvan Liu & Partners, for the Plaintiff/Appellant

Mr Charles Sussex, instructed by Messrs Clarke & Kong, for the Defendant/Respondent