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HCA1319/2001

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
ACTION NO.1319 OF 2001**

BETWEEN

KEEN LLOYD RESOURCES LIMITED 1<sup>st</sup> Plaintiff  
(formerly known as KEEN LLOYD (HOLDINGS)  
LIMITED)

KEEN LLOYD ENERGY LIMITED (formerly known 2<sup>nd</sup> Plaintiff  
as KEEN LLOYD INVESTMENTS LIMITED)

and

SIN HUA BANK LIMITED 1<sup>st</sup> Defendant

STEPHEN LIU YIU KEUNG and 2<sup>nd</sup> Defendant  
MATTHEW FINBARR O'DRISCOLL

Before : Deputy High Court Judge Muttrie in Chambers

Date of Hearing : 16 April 2004

Date of Ruling : 16 April 2004

Date of Reasons for Ruling : 22 April 2004

**REASONS FOR RULING**

1. By a summons dated 24 June 2003 the 1<sup>st</sup> defendant (the  
“Bank”) applied for the discharge of the injunction order dated 4 April

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2001 as varied by the order of Chung J dated 23 May 2001 (the “Injunction”). On 16 April 2004 I heard the application and discharged the injunction. I now give reasons.

2. The plaintiffs owed the Bank about \$1.6 billion. Monthly interest payable was about \$10 million. A large number of properties were charged to the Bank; I understand there were 46 in the name of the 1<sup>st</sup> plaintiff and six in the name of the 2<sup>nd</sup> plaintiff. There was a Memorandum of Agreement dated 14 April 2000 whereby the debts were to be restructured and the Bank was to withhold taking legal proceedings. In accordance with this agreement the plaintiffs were to surrender six properties to the Bank, which the Bank could sell, though the selling price should not be less than the amount shown in a valuation report made on 18 December 1999; and if any such property was sold a further property had to be surrendered, so that the Bank would at all material times be in possession of six properties. In addition, the plaintiffs were themselves to sell two properties in total per month, on terms and conditions as approved by the Bank, and apply the proceeds of sale to reduce their indebtedness to the Bank.

3. The Bank claimed that the plaintiffs were in breach of the Memorandum of Agreement, and demanded repayment of the loans. They commenced a number of High Court actions and they appointed the 2<sup>nd</sup> defendant as receiver.

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4. The plaintiffs issued the Writ and obtained the Injunction. The Injunction *inter alia* restrained the Bank, until after judgment or further order, from :

“... enforcing or taking any steps to towards the enforcement of the Charges set out in Schedule 1 to the Statement of Claim for the recovery of the Indebtedness or any part thereof.”

5. The court was concerned to maintain the *status quo* and to let the parties continue, pending trial or further order, to fulfil the terms of the Memorandum of Agreement. The court in making its decision accepted an undertaking by the plaintiffs to notify their tenants to pay their rents into designated accounts with the Bank.

6. The Bank applied for discharge of the Injunction on the ground that there had been a material change of circumstances, in particular that :

- (1) The plaintiffs had failed to sell any of the properties since the Injunction.
- (2) No rent had been paid into the designated accounts since May 2002.
- (3) The plaintiffs as mortgagors had failed to pay rates or Government rents.
- (4) The plaintiffs had delayed in prosecuting their claim, since the granting of the Injunction.
- (5) The loss of reputation and credit, considered by the court in granting the Injunction, was no longer a ground.

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7. It is not denied that the plaintiffs failed to pay rates or Government rents. It is a fact that the directors of the 2<sup>nd</sup> plaintiff, Chin (or Chun) Kam Chiu and Tsang Liu Shan have been convicted by the High Court of conspiracy to defraud, and are awaiting sentence.

8. It is also a fact that on 23 July 2003 the court ordered the winding-up of the 1<sup>st</sup> plaintiff in HCCW1134 of 2002. So we are only concerned in this application with the 2<sup>nd</sup> defendant, although obviously the conduct of both defendants over the period since the injunction is relevant.

*Failure to sell*

9. The plaintiffs have failed to sell any properties, at all, since the date of the Injunction. It is argued that the effect of the Memorandum of Agreement is that the properties were not to be sold at less than the current market rate. Though offers were received by the Bank or the plaintiffs, whenever the Bank received the offer and informed the plaintiffs, the plaintiffs through solicitors replied that the offer was at an undervalue; and whenever the plaintiffs received the offer and informed the bank, they also commented that it was at an undervalue. The value relied on by the plaintiffs was that advised by their own surveyors.

10. It is true that the effect of the Memorandum was to tie the sale prices of the six surrendered properties to an agreed valuation. That did not apply to the properties to be sold by the plaintiffs. Those could be sold at any price subject to agreement by the Bank. Correspondence

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shows, in particular with respect to the properties in respect of which the offer was made to the bank, that the bank was prepared to approve it.

11. Where property has to be sold to defray debt, as here, there is in the absence of agreement no requirement that it must be sold at a particular price. As Mr Chan, SC, for the 1<sup>st</sup> defendant, has commented, the plaintiffs could have kept up their objections to selling, on the ground of undervalue, for years. The fact is that no properties have been sold, for a very long time. I do not see that the plaintiffs can rely on the depressed market in past years. Nor do I see that they can rely on a consent order of the Court of Appeal in 2002 that the Injunction remain in force, as indicating that the Bank had accepted that nothing should be done in the depressed market. Nothing was done to sell the properties, before or after that order.

12. In any event, it is common knowledge that the luxury property market has improved in the past several months. The fact that the 1<sup>st</sup> plaintiff's properties are on the market is noted but I do not see that this makes any difference; there is no evidence that this would have prevented the 2<sup>nd</sup> defendant from selling its own six properties, since the date of the winding-up order.

*Rent*

13. It is accepted that the plaintiffs complied with their undertaking to tell their tenants to pay rent into designated accounts with the bank. However, they effectively emasculated that undertaking, by insisting through solicitors that they were not required to give details of the

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properties leased, the rents, etc., receivable, and to which account they were being paid. Without that information the Bank could not know whether it was receiving the rents it was supposed to receive.

14. The plaintiffs' dispute that no rent has been paid since May 2002. They point to the fact that the Bank has not provided contemporaneous statements but only a reconstruction of the amounts received. They do not accept the accuracy of this reconstruction. They say they are themselves unable to provide evidence of rent paid because the tenants will not co-operate.

15. The fact is of course that while the plaintiffs have for a long time been demanding contemporaneous records they have never sought specific discovery of them.

16. No doubt attack is the best form of defence but the fact is that without co-operation by the plaintiffs, whether the Bank provides a reconstruction or contemporaneous accounts is immaterial. In neither case would we know whether the correct figures were paid in. In any event, zero is zero, and that is what the reconstruction shows from May 2002 onwards and there is no reason not to accept it. The plaintiffs' demands for contemporaneous records simply amount to obfuscation and delay.

*Failure to pay rates or Government rents*

17. As indicated, this is admitted.

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*Delay*

18. As I indicated, in the course of the hearing, this is not very important, because invariably there is some delay on both sides in any litigation and invariably each side tries to contend that the other’s delay is worse. But it has to be accepted that, even if the Bank has delayed later in filing its witness statements, it was the Bank which had to move the litigation along in the first place by applying for directions and obtaining “unless” orders.

*Reputation*

19. It is argued that although the directors have been convicted of fraud the 2<sup>nd</sup> plaintiff is still in existence and any further action taken against it would fatally damage what reputation it has left. However, as appeared from the preliminary application to adjourn the hearing, it appears that there is no one, save for these two directors, who can now deal with the business of the 2<sup>nd</sup> defendant. So the 2<sup>nd</sup> defendant is probably fatally damaged in any event.

20. Overall it seems to me that the evidence indicates that the defendants have simply been hiding behind the Injunction, and using spurious excuses to fail to comply with the Memorandum of Agreement, though the object of granting the Injunctions was to make such compliance possible. There is obviously a change of circumstances.

21. I considered whether the alternatives suggested by Ms Wong for the 2<sup>nd</sup> plaintiff, might be adopted. The first was that the summons

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should be dismissed on terms as to payment of past and future rent and outgoings. I could not see any point in this; given the plaintiffs' tactics since the date of the Injunction there is no reason to suppose that the terms would be met. The alternative was that the court should limit the disturbance to the Injunction to the 2<sup>nd</sup> plaintiff's six properties. Again I could not see this as a live option. The Memorandum of Agreement which the Injunction was intended to keep alive is quite obviously dead. The Bank should now be able to enforce its securities. I accepted that the situation was such that, in the words of Mr Chan, SC, it cried out for discharge of the Injunction.

(G.P. Muttrie)  
Deputy High Court Judge

No appearance from the Officer Receiver, for the 1<sup>st</sup> Plaintiff  
Ms L. Wong, instructed by Messrs Alvan Liu & Partners,  
for the 2<sup>nd</sup> Plaintiff  
Mr Warren Chan, SC, instructed by Messrs Koo & Partners,  
for the 1<sup>st</sup> Defendant  
The 2<sup>nd</sup> Defendant, in person, absent