HCA1922/2001

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

ACTION NO.1922 OF 2001

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BETWEEN

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| RICHMAN RESOURCES LIMITED | 1st Plaintiff |
| KEEN LLOYD RESOURCES LIMITED | 2nd Plaintiff |

and

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| ZHANG SABINE SOI FAN also known as ZHANG SABINA SOI FAN also known as VUNDUAWE SABINE SOI FAN also known as WAN SOI FAN also known as WAN SOI FAN, SABINA | 1st Defendant |
| SHENHUA SHENG YU COAL AND ENERGY CORPORATION LIMITED (formerly known as SHUI YICK PRECIOUS METALS COMPANY LIMITED) | 2nd Defendant |
| RUI LLOYD (HOLDINGS) LIMITED | 3rd Defendant |
| SABINA ENTERPRISES LIMTIED | 4th Defendant |
| GENERATIONS INTERNATIONAL LIMITED | 5th Defendant |

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Before : Deputy High Court Judge Whaley in Chambers

Dates of Hearing : 17 – 20 and 23 – 24 July 2001

Date of Judgment : 31 August 2001

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J U D G M E N T

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1. On 28 April 2001, leading and junior counsel and their instructing solicitor attended before Suffiad J at his residence to apply *ex parte* on behalf of the plaintiffs for a *Mareva* injunction against each of the defendants. After a hearing which lasted nearly three hours, and after reading the draft Writ and Indorsement of Claim, and two draft affirmations of Chun Kam Chiu ("Chun") and hearing counsel, the judge granted the injunction sought subject to the usual undertakings by the plaintiffs to the court, including the normal undertaking as to damages for any loss which the court may subsequently find that the defendants had sustained in consequence of the injunction.

2. Upon the return day on 4 May 2001, the defendants applied for the injunction to be set aside on the ground that the plaintiffs had not fully and frankly disclosed at the *ex parte* hearing all the material facts which were relevant to their application; and in the alternative, in the event that the injunction was not set aside, that the plaintiffs be ordered to fortify their undertaking as to damages. The hearing was adjourned to 17 July 2001 and argued before me, and this is my judgment in respect of the defendants' application.

3. I should indicate at the outset that in relation to the defendants' alternative claim, the plaintiffs, while not conceding that fortification is necessary, have nevertheless consented to fortify their undertaking as to damages which was given at the *ex parte* hearing.

*THE LAW*

4. It is trite law that the applicant for a *Mareva* injunction has to establish three main matters :

(1) that the plaintiff has a good arguable case;

(2) that the defendant does have assets within the jurisdiction; and

(3) that there is a real risk of dissipation or secretion of assets by the defendants.

5. It is a "golden rule" that the applicant in an *ex parte* application is under a duty of the utmost good faith to make full and frank disclosure of all relevant matters which were known to him, and also those which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.

(See, *inter alia, Brink's Mat Limited v. Elcombe & Others* [1988] 1 WLR 1350)

6. The extent of the inquiries which it was reasonable and proper for the applicants to conduct before making the application, must depend upon all the circumstances of the case, including the nature of the case; the order sought; and the degree of legitimate urgency and the time available for the making of inquiries.

(*Brink's Mat, Ibid*, at 1356F – 1357B)

7. Mr Fung, who appears for the applicants, has submitted that the *ex parte* application "should be decided on comparatively brief evidence".

(*Derby v. Weldon* [1989] 2 WLR 276 (CA) at 283)

8. This theme was elaborated by our own Court of Appeal in *Citibank N.A. v. Express Ship Management Services Ltd and Another* [1987] 2 HKLR 1184 :

> "While the courts must be vigilant and insist that full and frank disclosure be made in grounding affidavits for *ex parte* applications for injunctions, Anton Piller Orders etc., it is essential to bear in mind the true principle upon which this rule is based. Unless the courts use the sanctions which the practice gives them only when the non-disclosure is of facts which are relevant to the *ex parte* judge's 'weighing operation', an impossible burden would be placed upon applicants and their advisers, and affidavits, *ex abundanti,* will tend to contain all sorts of facts and exhibits which are not really necessary for the proper exercise of the court's discretion when *ex parte* relief is sought.
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> (*per* Fuad JA, as he then was, at1190)
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> … it would be unfortunate if it were to be thought that in laying down the very sensible and necessary principles concerning disclosure of all material facts, the courts have intended to give active encouragement to undeserving defendants to search ingeniously for facts which a plaintiff might innocently have failed to disclose, in the hope that a judge may consider them to be material and so discharge the injunction. Commonsense must prevail. The heavy burden cast on a plaintiff must not be allowed to become so onerous as to be intolerable.
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> (*per* Macdougall J, as he then was, at 1191)
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> The cases show what are to be regarded as material facts in this context: 'all facts that are relevant to the weighing operation which the court has to make in deciding whether or not to grant the order': *per* Browne-Wilkinson, J (as he then was) in Thermax v. Schott Industrial Glass [1981] FSR 289, 298. ….. the correct test is not simply whether, if the non-disclosure had

not occurred, the *ex parte* judge would, nevertheless, have made the order, but whether the facts not disclosed, being relevant, should have been in the scales.

(*per* Fuad JA at 1190)"

9. I respectfully adopt all the aforesaid principles. I note also the following observations in the *Brink's Mat* case :

" Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical reality of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principles should be carried to extreme lengths. …

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure to refuse to continue the injunction granted by Roch J. …"

(*per* Slade LJ at 1359B – F)

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' per Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure

> which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> (*per* Ralph Gibson LJ at 1357C – F)"

10. Certain of the non-disclosures relied upon by the defendants in this application relate to the plaintiffs' alleged failure to disclose defences which had been raised by the defendants in other litigation which was already in existence at the time of the *ex parte* application. In this connection, I note Lord Denning's observation that the applicant's duty to make full and frank disclosure on an *ex parte* application includes a duty of "fairly stating the points made against it by the defendant".

(*Third Chandris Corporation v. Unimarine S.A. (C.A.)* [1979] 1 QB 645 at 668)

11. In Gee, *Mareva Injunctions and Anton Piller Relief* (4th Ed.), the learned author states :

> "The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed …
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> The plaintiff must also identify any defences, which, although not yet taken, would have been available to be taken by the defendant had he been present at the application, provided that :

> (1) the defence is one which can reasonably be expected to be raised in due course by the defendant;
>
> (2) the defence is not one which can be dismissed as without substance or importance …"

(at pages 128 and 131)

*THE FACTS*

12. The aforesaid principles would clearly apply *a fortiori* to any defences which had already been raised by the defendants to the applicants' present claims which had been repeated in other proceedings which were or had been in existence at the time of the *ex parte* application.

13. To say that there is a "history" between Chun Kam Fai ("Chun"), who owns and controls the plaintiff companies, and the 1st defendant, Madam Zhang ("Zhang"), who controls the 2nd to the 5th defendants, is to considerably understate the position. Suffice to say, for present purposes, that at one time they were the best of friends who called each other "big sister" and "little brother", but then in about October 1999, they had a bitter falling out, since when they have launched numerous legal proceedings against each other. As at the date when the plaintiffs applied *ex parte* for the *Mareva* injunction in this matter, the following proceedings were then in existence or had already taken place between them :

> HCA9007/2000, in which Zhang is suing Chun for approximately US$93 million;
>
> CWU822/2000, in which Richman Resources Ltd ("Richman"), the 1st plaintiff in the present proceedings, petitioned for the winding up

of the 2nd defendant in the present proceedings ("Shenhua"), the petition being based upon a statutory demand by the petitioner for $4 million. Shenhua subsequently applied to strike out the petition, and on 25 April 2001, Maria Yuen J ordered the petition to be struck out for the reasons set out in a judgment of the same date;

HCSD40/2000, in which Richman served a statutory demand on Zhang in her personal capacity claiming payment of $21,861,937, comprising 18 debts allegedly owed by her to Richman, four of which debts overlap with Richman's claims in the present proceedings. Zhang applied to set aside the statutory demand, and on 17 July 2001 (which was the first day of the hearing in the present application), Maria Yuen J ordered the statutory demand to be set aside for reasons set out in a judgment of the same date;

HCA7392/2000, In which Zhang Sued Chun and Keen Lloyd Resources Limited ("Keen Lloyd"), the 2nd plaintiff in the present proceedings, for damages for breach of the Petroci contract.

*ALLEGED NON-DISCLOSURES*

14. The non-disclosures complained of by the defendants relate to the plaintiffs' following claims :

*I. The 1st plaintiff's (Richman's) claim against the 1st and 2nd defendants for $4 million*

15. The 1st plaintiff's case as set out by Chun in his 1st affirmation before the *ex parte* judge was that he and Zhang agreed as equal partners to finance a diamond-mining venture in Central Africa; that in pursuance of such agreement Zhang had purported to purchase a set of diamond-screening equipment for the sum of US$1.1 million, to which

Chun had agreed to contribute 50%; he proceeded to make two payments of HK$2 million each to Zhang via the account of the 2nd defendant ("Shenhua") on 11 and 22 December 1998, which were intended to constitute his or Richman's 50% of the purchase price of the equipment.

16. Mr Pow complains that at the *ex parte* hearing only the plaintiff's case (as above) was put forward, and the plaintiffs failed to make it clear that Zhang had already (in CWU822/2000) stated her position in relation to these two payments by Chun, namely that they were partial repayments by him of the US$93 million which he owed her, which was the subject of her claim against him in HCA9007/2000.

17. The applicants did make a general disclosure of the following at the *ex parte* hearing, under the heading "Full and frank disclosure" in both Chun's affirmation and counsels' skeleton argument :

> "17. The Plaintiffs' director, Mr. Chun Kam Chiu ('Chun'), was sued by Madam Zhang in two separate proceedings: HCA7392/2000 and HCA9007/2000. In these two proceedings, Madam Zhang raises two major factual allegations which may be relevant to the Plaintiffs' claims herein:-
>
> (a) Madam Zhang alleged that Chun signed a letter of guarantee dated 9 October 1998 under which Chun was liable to repay a sum of HK$93,000,000.00 to her. It was alleged that some of the payments made by Keen Lloyd and Richman were repayments of the outstanding indebtedness owed by Chun to Madam Zhang.
>
> (b) Madam Zhang also alleged that it was Keen Lloyd who was in breach of the Data Agreement with Petroci.
>
> 18. The Plaintiffs' reply to these two points are as follows:-
>
> (a) These factual issues are hotly disputed, and cannot be resolved at this stage. Chun strongly denies the

> truthfulness of the matters pleaded in the Statements of Claim and, in particular and without prejudice to the foregoing, the authenticity of the alleged letter of guarantee.
>
> (b) In any event, the defence of set off (on which Defendants may possibly seek to rely) would not assist the Defendants in the present case because such defence, if proven, would only be available against Chun suing in his personal capacity. In other words, 'mutuality', the essential element of the defence of set-off, is lacking here."

18. In addition, Chun exhibited to his affirmation the Writ and Statement of Claim in HCA9007/2000, together with the letter of guarantee which Zhang relied upon.

19. Mr Fung submitted that the aforesaid disclosures fulfilled the applicants' duty to make full and frank disclosure, and that to have gone further and provided the details of Zhang's aforesaid claims would have been to unnecessarily overload the judge with a degree of detail which was not called for or appropriate in an *ex parte* hearing.

20. Mr Pow submitted that the aforesaid disclosures in relation to HCA9007/2000 were "selective" and "minimal" and failed to do justice to :

(i) the full nature, extent and significance of Zhang's claims and Chun's "huge contingent liability" to repay her the sum of US$93,000,000 in terms of the letter of guarantee which had allegedly been signed by him on 9 October 1998;

(ii) the fact that affirmations had been filed by various witnesses in support of both parties;

(iii) the repayment arrangements which Chun had set in place, as evidenced by the fact that Zhang had been appointed by him as a sole authorized signatory on Richman's bank account, which enabled her to draw money at will from that account; and

(iv) the further fact that a "current account Sabine Wan" was maintained in Richman's accounting journals to record Zhang's drawings.

21. I agree with Mr Pow's submissions that the applicants' aforesaid disclosures were minimal and inadequate : the applicants failed to fairly and fully disclose the true nature and extent of the partial repayment arrangements which had allegedly been put in place, and which formed the core of Zhang's defence to the 1st plaintiff's claim for the $4 million in question, as also to several of the other claims against her in the current proceedings.

22. In my view the plaintiffs failed in their duty at the *ex parte* hearing to fairly state the points which were made against the 1st plaintiff's aforesaid claim for $4 million.

23. This could have been simply done by showing the judge a copy of the judgment in CWU822/2000, which dealt, *inter alia*, with the same $4 million claimed by Richman against Shenhua, and clearly identified Shenhua's defence as being that Richman's two payments of $2 million each were partial repayments by Chun to Zhang in her personal capacity of the sum of US$93 million in which he was indebted to her, which sum represented the minimum value of the diamonds which he had

allegedly received from her in October 1998 and agreed to sell on her behalf.

24. In her judgment Yuen J also listed the features of the case which she found had "thrown sufficient doubt upon the petitioner's (Richman's) allegations" and whereby Shenhua had adduced sufficient evidence in support of its case to persuade her that the alleged debt was *bona fide* disputed on substantial grounds, such that the summary procedure of a winding up petition was completely unsuitable for the determination of the dispute between the parties, and that a trial with discovery and cross-examination was the appropriate procedure for resolving such dispute.

25. I shall not repeat here the features which were identified as throwing doubt upon Richman's allegations, since it is not appropriate, for the purposes of the present application, to enter into any discussion of the merits of the disputes of fact between the parties. Suffice to say that, in my view, Yuen J's observations on the *prima facie* weaknesses of Richman's claim for $4 million were directly relevant to the weighing exercise which had to be performed by the *ex parte* judge, and should have been disclosed to him. It would have been a simple matter for the applicants to exhibit the judgment in CWU822/2000, and would not in any sense have overloaded the judge.

26. It was not sufficient to broadly point to the existence of Zhang's claim in HCA9007/2000, and Chun's defence, and state that the factual issues were "hotly disputed" and could not be resolved at that stage.

27. The only reference before the *ex parte* judge to the proceedings in CWU822/2000 was under the heading of "Risk of dissipation of defendant's assets". In paragraph 48 of his 1st affirmation Chun described how Shenhua had in CWU822/2000 obtained a validation order on the strength of a payment of $4 million into court, and had subsequently succeeded in its application to strike out Richman's petition, whereupon the judge had ordered the $4 million to be paid out from the court to Shenhua. Chun alleged that it was highly likely that Zhang would transfer such money out of the jurisdiction. A copy of the court's order was exhibited.

28. I agree with Mr Pow that by mentioning CWU822/2000 in the oblique fashion that the applicants did, it is highly likely that the *ex parte* judge did not even realize that the subject-matter of CWU822/2000 was the same as the 1st plaintiff's claim in the present proceedings for $4 million.

29. The failure to make that clear to the *ex parte* judge, and to disclose the *prima facie* "substantial grounds" of Zhang's and Shenhua's defences to Richman's such claim – which had been summarized and evaluated in the judgment in CWU822/2000 – was in my view a material non-disclosure.

*II. The 1st plaintiff's claim for US$1,035,024 against the 1st defendant*

30. The 1st plaintiff's case was described in the skeleton argument presented to the *ex parte* judge as being based upon a loan in the aforesaid amount by the 1st plaintiff to Rui Lloyd Abidjan, a company controlled by Zhang, the repayment of which was alleged to have been orally guaranteed

by her. Rui Lloyd Limited was alleged to have failed to repay such loan, and the 1st defendant was accordingly liable under her oral guarantee.

31. The complaint of non-disclosure in this respect refers to a letter of demand from the 2nd plaintiff's solicitors to the 1st defendant dated 28 June 2000, in which they demanded payment, *inter alia*, of this same amount of US$1,035,024. As described in the letter of demand, the reasons for the 1st plaintiff providing the loan on 18 March 1999 were the same as were described by Chun in his 1st affirmation, namely, to finance the importation of 51 jeeps into the Ivory Coast; however, the basis of the claim was said to be that the 2nd plaintiff had been fraudulently induced to enter into the loan agreement by the 1st defendant. There was no mention of the 1st defendant having given any oral guarantee of the repayment of the loan, and indeed there is no dispute that the existence of such an oral guarantee was asserted for the first time in the *ex parte* application.

32. On the face of it, this inconsistency undoubtedly detracted from the credibility of the 1st plaintiff's claim as put forward in the present proceedings, and it was therefore highly relevant to the *ex parte* judge's assessment of whether the 1st plaintiff was able to establish that it had a good, arguable case in respect of this claim. The failure to disclose the fact of such previously conflicting basis for this claim, was in my view a further material non-disclosure.

*III. The 1st plaintiff's claim against the 1st defendant forUS$160,000 (equivalent HK$1,240,000)*

33. The 1st plaintiff's case as summarized in counsel's skeleton submissions which were presented to the *ex parte* judge was that on 2 June 1999, the 1st plaintiff agreed to advance a loan in the sum of US$160,000

to Zhang, and pursuant to her direction it paid such sum into the bank account of the 2nd defendant; the 2nd defendant has subsequently failed to repay such loan.

34. In his 1st affirmation, Chun stated that the reason Zhang requested the loan was to discharge the customs and import taxes payable upon the importation of the 51 jeeps into the Ivory Coast; and that in response to her request, the 1st plaintiff drew a cheque for HK$1,240,000 which was at her direction made payable to the 2nd defendant.

35. By contrast, in his affirmation dated 29 September 2000 filed in HCA9007/2000, in support of his application to strike out Zhang's Statement of Claim, Chun stated that the aforesaid sum had been appropriated by Zhang, acting in her capacity as an authorized sole signatory on the 1st plaintiff's account, by signing and issuing a cheque on behalf of the 1st plaintiff for the said sum, made payable to the 2nd defendant, without the approval of 1st plaintiff and without Chun's knowledge and consent.

36. Chun's aforesaid allegations in HCA9007/2000 contradicted his assertions as to the basis of this claim as put forward to the *ex parte* judge, a conflict which, on the face of it, detracted from Chun's credibility and the credibility of the 1st plaintiff's case in relation to this claim. As such it also was relevant to the weighing exercise which the *ex parte* judge had to perform, and the failure to disclose the existence of such conflict was, in my view, a further material non-disclosure.

37. Furthermore, in HCSD40/2000, Zhang had filed an affirmation in support of her application to set aside the statutory demand

which had been issued against her by Richman (which demand included the sum in question of HK$1,240,000); Zhang denied that she owed Chun the said sum, and stated that the true facts were that Chun had asked her to assist him by using Shenhua's account in the Standard Chartered Bank Limited to remit on Richman's behalf the said sum to Rui Lloyd Abidjan, since Richman's banker, Sin Hua Bank Limited, did not have any arrangements with the banks in Abidjan. Zhang affirmed that she had agreed to assist him, whereupon on 2 June 1999, a deposit of $1,240,000 was made to the 2nd defendant's bank account, and on the same day a telegraphic transfer in the sum of US$160,000 (the equivalent of HK$1,240,000) was remitted by the 2nd defendant in favour of Rui Lloyd Limited, being a reference to Rui Lloyd Abidjan.

38. Zhang annexed to her aforesaid affirmation the relevant documents which supported her allegations, including the relevant Richman journal voucher dated 3 June 1999 which described the transaction as : "Fund paid on behalf of Johari Development (Cash Adv. Rui Lloyd in Abid.)" She affirmed that Johari Development was a subsidiary of the 1st plaintiff.

39. There is no dispute that Zhang's defence as set out by her in HCSD40/2000 was not disclosed nor even mentioned to the *ex parte* judge. Mr Fung submitted that there was no obligation to do so, since Zhang had been unable to produce any documentary evidence in support of her bare assertion that Rui Lloyd Limited (Abidjan) was beneficially owned or controlled by Chun.

40. This however misses the point that, irrespective of the merits of the factual dispute, the applicants were clearly obliged, under their duty

to make full and fair disclosure, to disclose to the *ex parte* judge the existence of Zhang's aforesaid defence to the claim of $1,240,000, which had been carefully documented by her in HCSD40/2000. Their failure to do so was in my view a further material non-disclosure.

41. I note further in this connection that Chun squarely alleged in his 1st affirmation that Rui Lloyd Limited was a company registered in the Ivory Coast, and beneficially owned and controlled by Zhang. However the relevant company search documents have now been produced by the defendants in these proceedings, and they show that Chun was the majority owner and controller of Rui Lloyd Limited (Abidjan). The plaintiffs in turn dispute the authenticity of these company search documents. The matter can only be resolved at trial.

*IV. The 1st plaintiff's claim against the 1st defendant for HK$12,479,360*

42. The 1st plaintiff's case as presented to the *ex parte* judge was that Zhang had persuaded Chun to invest in a joint venture with her in diamond trading, whereunder Zhang would purchase diamonds from various suppliers on behalf of the 1st plaintiff, and would subsequently sell the diamonds, depositing the proceeds in the 1st plaintiff's account. In pursuance of these arrangements Chun had given Zhang a cheque book of the 1st plaintiff's containing some blank cheques which had been signed by him : every time Zhang needed to issue a cheque to purchase diamonds on behalf of the 1st plaintiff as aforesaid, she had to first obtain Chun's permission to do so. Around 4 February 1999, Zhang showed Chun an invoice in the sum of $12,479,360, at the same time representing that it was in respect of diamonds which she had purchased on behalf of the

1st plaintiff. Relying upon such representation, Chun had approved the purchase and authorized Zhang to issue a cheque to pay the said invoice. He subsequently discovered that Zhang had issued a cheque on behalf of the 1st plaintiff in the amount in question, but instead of using it to pay for the purchase of the diamonds, she had simply deposited the sum into Shenhua's account.

43. The defendants' complaint in this connection is that Chun gave a different version of this transaction in his affirmation which he had filed in HCA9007/2000. In that affirmation he dealt with the matter in a brief and summary fashion : he alleged that Zhang had appropriated the said sum by virtue of her being an authorized sole signatory to issue cheques on behalf of the 1st plaintiff, which she took advantage of to sign and issue a cheque drawn on the 1st plaintiff's account, made payable to the 2nd defendant, without the approval of the 1st plaintiff and without Chun's knowledge and consent.

44. This summary version by Chun in HCA9007/2000 is broadly consistent with the 1st plaintiff's case as it was presented before the *ex parte* judge; there is no contradiction, and in my view there was therefore nothing therein that was relevant to draw to the attention of the *ex parte* judge, and no substance in Mr Pow's submission that Chun was deliberately misleading the *ex parte* judge by "hiding" his aforesaid assertions in HCA9007/2000.

45. The defendants' allege however that the applicants were guilty of a further material non-disclosure in relation to this claim of $12,479,360, as also in relation to their further claims for $1,560,000 and $2,772,720, in

that they failed to disclose to the *ex parte* judge Zhang's specific defence to these claims which had been set out by her in HCSD40/2000.

46. These sums were all alleged by the 1st plaintiff to have been cheque payments which Chun had authorized on behalf of the 1st plaintiff as payment for diamonds which Zhang claimed to have purchased on the 1st plaintiff's behalf, which cheques she had subsequently fraudulently converted to her own use, instead of using them to pay for the diamonds. The cheques for $12,479,360 and $2,772,720 were alleged to have been paid into the 2nd defendant's account, while the cheque for $1,560,000 was alleged to have been paid by Zhang directly into the 5th defendant's account.

47. In her affirmation in HCSD40/2000, Zhang alleged that the aforesaid sums, which she admitted receiving from the 1st plaintiff, were not related to diamond purchases by her at all, but were partial repayments by Chun of his indebtedness to her in the sum of US$93,000,000 (the subject of Zhang's claim against Chun in HCA9007/2000). She referred to the Writ and Statement of Claim which had been filed in HCA9007/2000, in terms of which she had already given credit to Chun for the sum of $12,479,360 as a partial repayment of his aforesaid indebtedness to her. She further made it clear that she would be amending the pleadings in HCA9007/2000 to give further credits for the sums of $2,772,000 and $1,560,000.

48. At the *ex parte* hearing, the applicants made no reference to the existence of Zhang's aforesaid specific defences to these claims for $12,479,360, $1,560,000 and $2,772,720, which she had already set out in HCSD40/2000.

49. I have already referred to the inadequacy of the applicants' general disclosures under the heading "Full and frank disclosure", in the *ex parte* hearing, in particular in relation to HCA9007/2000. Mr Fung submitted that Zhang's purported defence (of partial repayment by Chun) was not credible on various grounds, which I again refrain from setting out here, since I am not concerned in this application with any adjudication of the merits of the factual disputes between the parties.

50. Suffice for present purposes to say that in my view, Zhang's aforesaid defence of partial repayment to these three claims, as it had been set forth by her in HCSD40/2000, cannot properly be described as being devoid of merit, and can only be resolved at trial. In my view, the existence of such a defence was undoubtedly relevant to the weighing operation by the *ex parte* judge, and the applicants' failure to disclose the existence and nature of it was a further material non-disclosure.

## *V. The 2nd plaintiff's claim against Zhang and the 3rd defendant for Damages*

51. A further claim by the 2nd plaintiff was against Zhang and the 3rd defendant for damages, in relation to which Chun provided fairly detailed facts in his 1st affirmation in the *ex parte* application. He alleged that Zhang had been instrumental in persuading him to invest in oil-exploration projects in the Ivory Coast, following which on 14 July 1999, the 2nd plaintiff had concluded "the Data agreement" with Petroci Exploration Production SA ("Petroci"), in terms of which the 2nd plaintiff was obliged to purchase seismic data from Petroci in relation to three designated sectors of oil fields, before Petroci would begin exploration and subsequently production of oil from these sectors. Chun alleged that

notwithstanding the payment of US$1,074,487 to Petroci in terms of the agreement, Petroci had failed, in breach of its contractual obligations, to provide the seismic data to the 2nd plaintiff. Chun subsequently discovered that Zhang had procured Petroci to breach the Data agreement by substituting the 3rd defendant (a company controlled by her) for the 2nd plaintiff for the purposes of the oil-exploration projects.

52. Zhang had already in HCA7932/2000 instituted proceedings against Chun and the 2nd plaintiff in relation to the same Petroci contract, claiming damages against them for the loss of profits and/or revenue which she would have earned if the 2nd plaintiff had not allegedly breached its contractual obligations to Petroci. The existence of these proceedings were duly disclosed at the *ex parte* hearing, and in addition the judge was informed that the 2nd plaintiff denied that it was in breach of the agreement, and that "the factual issues are hotly disputed and cannot be resolved at this stage. Chun strongly denies the truthfulness of the matters pleaded in the Statement of Claim, and in particular and without prejudice to the foregoing, the authenticity of the alleged letter of guarantee". (The letter of guarantee, it must be recalled, was in reference to HCA9007/2000, and had nothing to do with the Petroci matter).

53. The defendants' complaint in relation to this aspect of the case is essentially that the applicants failed to inform the *ex parte* judge that Petroci had already initiated arbitration proceedings against the 2nd plaintiff in Paris, in which Petroci claimed damages against the 2nd plaintiff on the basis that the 2nd plaintiff had breached the Data Agreement, more particularly in that it had only paid Petroci $1,050,000 of the $7,000,000 which it was contractually obliged to pay within 10 days of signing the

Agreement. Petroci claimed to have fulfilled all its obligations in terms of the agreement.

54. Mr Fung canvassed before me the merits of the underlying factual disputes between the parties in order to demonstrate that the 2nd plaintiff's case is a strong one on the merits. The temptation to canvass the merits on an application of this nature is constantly present, however it is important to eschew such temptation, since it does not directly address the real issue, namely whether the plaintiffs, irrespective of the strengths or weaknesses of their case on the merits, was or was not guilty of material non-disclosures at the *ex parte* hearing.

55. In his 3rd affirmation, which was sworn for the purpose of the present application, Chun admitted that he was, at the time of the *ex parte* hearing, fully aware of the existence of the arbitration proceedings which had been commenced on 17 April 2000; and that he had been advised by the plaintiffs' solicitors that because neither Zhang nor the 3rd defendant were parties to those arbitration proceedings, it was not necessary to disclose the existence of such proceedings to the *ex parte* judge.

56. The existence, however, of the arbitration proceedings, which had been initiated by Petroci on the basis that it was the 2nd plaintiff who had breached the Data agreement, was substantial evidence which supported Zhang's allegations in HCA7392/2000 that it was the 2nd plaintiff who had breached the Data agreement, and militated against the strength of the 2nd plaintiff's claim in the present proceedings for damages against Zhang for wrongfully procuring Petroci to breach the Data agreement.

57. As such it was undoubtedly relevant to the *ex parte* judge's assessment of the "good, arguable" nature of the 2nd plaintiff's case on this aspect, and therefore relevant to the weighing operation which he had to perform, and should have been disclosed to him. In my view the failure to do so was a further material non-disclosure.

58. Mr Pow further submitted that the applicants should in addition have exhibited to the *ex parte* judge Petroci's Statement of Claim and the 2nd plaintiff's Defence and Counterclaim in the arbitration proceedings. This however might have tended to overwhelm the judge with too much detail; it would have sufficed to summarize the existence, nature and state of the arbitration proceedings, which could have been done quite shortly and without overwhelming him.

*CHUN'S ALLEGED INVOLVEMENT IN ZHANG'S PERJURY*

59. The applicants' placed considerable emphasis at the *ex parte* hearing upon Zhang's self-confessed perjury which she had committed in HCB472/1989. (Zhang had been declared bankrupt by the court on 10 April 1991 in HCB472/1989; the official receiver subsequently issued further proceedings against her in HCB472/1989, whereupon in four separate affirmations Zhang claimed that she was not the person who had thus been declared bankrupt, and that it was a case of mistaken identity. Le Pichon J (as she then was), after fully investigating the matter, found that Zhang was indeed one and the same bankrupt. Subsequently on 15 June 2000, Zhang was charged with having committed perjury in the bankruptcy proceedings, pleaded guilty to the charge, and was sentenced to four months' imprisonment, suspended for two years.)

60. It is entirely understandable that the applicants should have placed such emphasis upon Zhang's admitted perjury : her credibility was highly relevant to the issues before the *ex parte* judge, both in relation to the merits of her defences to the various claims against her, and in particular in relation to the risk that the defendants would dissipate their assets in order to defeat any judgment which the plaintiffs might obtain against them.

61. The defendants, however, complain that it was misleading for Chun to seek to capitalize upon Zhang's perjury without disclosing at the same time that he had filed two affirmations in support of Zhang's perjured allegations in HCB472/1989, in the first of which, describing himself as an old friend of hers from the time of their attendance at the same primary school in China, he affirmed that the appearance of the bankrupt as depicted in a photograph on her Hong Kong Identity Card which had been exhibited in the proceedings, bore no resemblance to her appearance in 1987, and that he verily believed that the bankrupt and the applicant "were and are two different persons".

62. In his second affirmation, Chun described how he had used his contacts with the authorities in Guangdong to seek to locate the real bankrupt, following which a person who had admitted to being the bankrupt in question had been located in Guangdong (Notwithstanding this evidence, and for the reasons which were fully set out in her judgment in HCB472/1989, Le Pichon J found against Zhang that she was indeed the bankrupt in question).

63. Chun has claimed, in his 3rd affirmation filed in these proceedings, that, far from knowingly assisting Zhang in her perjury (as

submitted by Mr Pow), he was positively misled by her into believing that she was not the bankrupt, and it was on that basis alone that he had deposed that she was not the bankrupt, and had attempted to assist her to prove such. These are matters which can only be resolved at trial.

64. Mr Pow submits, with some justification, that the heavy emphasis laid by Chun upon Zhang's perjury in the bankruptcy proceedings, without disclosing his own active involvement in supporting her denials that she was the bankrupt, is yet another example of the lack of fairness and candour which he displayed in the *ex parte* proceedings.

65. Whether Chun's active collaboration with Zhang in denying that she was the bankrupt was innocent or not, it would no doubt have been wiser for him to disclose such involvement to the *ex parte* Judge, rather than seek to justify it *ex post facto*, after it had been revealed by the defendants in the present proceedings. His omission to do so, however, does not constitute a non-disclosure for present purposes.

*FINANCIAL POSITION OF THE 2nd PLAINTIFF*

66. In his affirmation filed in the *ex parte* hearing, Chun deposed to the financial strength of the 2nd plaintiff as a guarantee of its ability to honour the plaintiffs' undertaking in damages. He stated, *inter alia*, that "the portfolio of real properties owned by Keen Lloyd in Hong Kong exceeds $3 billion at present market values … as shown in its Annual Returns dated 4 July 2000, Keen Lloyd has a fully paid-up share capital of $1.3 billion, an amount well in excess of the much smaller amount of $734,120,000 in debt owed by Keen Lloyd on mortgages and charges …".

67. In his 4th affirmation, which was filed in these proceedings in response to an affidavit of the defendants' solicitors, Chun exhibited a surveyor's report which listed 75 properties owned by Keen Lloyd as at 31 March 2000, with a total market value of $1.5 billion — in contrast to his earlier suggestion that the value was $3 billion. Further land searches which were conducted by the defendants' solicitors disclosed that 15 of these 75 properties had in fact been sold. Chun thereupon filed a 5th affirmation in which he stated that his original assertion that the 2nd plaintiff's portfolio of properties was worth in excess of $3 billion was an innocent error on his part, and that he had intended to say $300 million instead $3 billion.

68. Mr Pow has submitted that this was yet a further example of Chun deliberately misleading the *ex parte* judge. In the absence of *viva voce* evidence and cross-examination, I am not in a position to investigate the circumstances in which this error came to be made : this can only be done by the trial judge, if he considers it appropriate to do so.

*BONA FIDES OF THE PLAINTIFFS' LEGAL REPRESENTATIVES*

69. Mr Fan Siu Yau, a partner in the firm of solicitors representing the plaintiffs, affirmed that he had attended the *ex parte* hearing, together with a trainee solicitor and senior and junior counsel. The application lasted from 4:15 p.m. to 7:10 p.m.

70. He deposed that the background to the application was complicated, with numerous other sets of litigation in existence, and the relevant documentation filling many box files :

> "I believe, and do still believe, our role was to set out the material matters genuinely relevant to whether or not a *Mareva* injunction should be granted, including any defences that we could foresee would be raised by the defendants. I was conscious of the need to present a matter with a complicated history in a digestible form. My experience is that a hearing of say, two hours, would be quite a lengthy hearing for an *ex parte* injunction, and I believe if we had put all the peripherally relevant documents before the judge, he would have been in a quite impossible position and submerged in a tide of paper … I confirm that counsel for the plaintiffs were not supplied with a copy of the judgment of Yuen J and I genuinely considered it was sufficient to put the order in evidence. I deny absolutely that there was any intention to conceal this or indeed to suppress any evidence probably so-called. Nevertheless, I believe that counsel instructed by my firm were presented with a fair overall view of the matters sufficient for the purposes of the *ex parte* application and in particular for the purpose of alerting the *ex parte* judge to any defences it was apparent the defendants would be likely to raise to the plaintiffs' claims …"

71. There is no doubt that the background facts to the *ex parte* application were complicated, and I agree entirely with Mr Fan's wish to present it to the judge in a digestible form. It is inevitably a matter of judgment as to how much of the background material and which parts of it to bring to the *ex parte* judge's attention. A sometimes difficult balance has to be struck between not overwhelming the *ex parte* judge with too much information, while ensuring that he is apprised of all relevant matters. Where the matter is as factually complicated as the present one was, this will usually inevitably mean that a greater quantity of information will require to be disclosed than would be necessary in a simpler case. Simplification is highly desirable; over-simplification, however, which may have serious consequences, has to be avoided.

72. I accept, for present purposes, that the applicants' legal representatives acted completely *bona fide* at all times material to the

*ex parte* application. I have no reason to think otherwise, on the material before me.

73. Nevertheless, the question of whether the applicants failed to disclose material matters which should have been disclosed to the *ex parte* judge must be looked at in the round, and objectively, by reference to all the information which was available to the applicants at the time, and the information which was in fact disclosed. Having conducted such an exercise in the instant case, I am of the view that the applicants failed in their duty to make full and frank disclosure of all material matters to the *ex parte* judge, in the respects which I have indicated above.

*THE PLAINTIFFS' APPLICATION FOR A FRESH INJUNCTION*

74. The plaintiffs have applied, in the event that the injunction is set aside for non-disclosure, for a fresh injunction to be granted on the same or similar terms — subject to fortification of the plaintiffs' undertaking in damages.

75. The defendants, for their part, while opposing any re-grant of the injunction or grant of a fresh injunction should the original injunction be set aside, submit that if a fresh injunction is in the event granted, it should be made subject to fortification of the plaintiffs' undertaking in damages. The plaintiffs consent to fortify their initial undertaking.

76. The judgments of the Court of Appeal in *Bebhenani v. Salem (Note)* [1989] 1 WLR 723 provide an authoritative guide to the circumstances in which it is appropriate, having discharged a *Mareva*

injunction for material non-disclosure, for the court to then immediately re-grant substantially the same injunction.

77. Woolf LJ (as he then was) quoted from the judgment of Balcombe LJ in *Brink's Mat v. Elcombe* [1988] 1 WLR 1350 as follows :

> " The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained. … But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include the liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained. … I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon L.J. in the *Lloyds Bowmaker* case, at p. 1349C-D, that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction." (727F - 728A)

78. In relation to the question whether the non-disclosures in question were innocent or not, Woolf LJ noted :

> "… In the majority of cases the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision as to whether or not there has in fact been bad faith. … (at 728H)
>
> …
>
> In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of fresh injunctions, it is most important that the court assesses the degree and extent of the culpability with regard to the non-disclosure, and the importance

> and the significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. (at 729E)
>
> …
>
> I sought to indicate earlier that in my view there is a considerable public interest in the court ensuring that full disclosure is made on ex parte applications of this sort. If it is to be sufficient to outweigh that public interest to point to the harm that could befall plaintiffs if an injunction is not re-granted, then the whole policy which has been adopted by the court in this field in my view would be undermined. Injunctions in the nature of *Mareva* and *Anton Piller* orders should not be granted unless the plaintiff can show a substantial case for saying that unless they are granted they will be under serious risk of assets which might otherwise be available to meet the judgment being dissipated or evidence which might otherwise be available disappearing. … (at 734G)
>
> …
>
> … If the right approach is one which requires the court to measure the materiality of the non-disclosure looked at cumulatively, then it cannot be right just to sweep that aside on the basis of the strength of the plaintiffs' case against the defendants. In my view it is important that this court should uphold the policy which I detect indicated by the cases to which I have made reference, … (at 735E)
>
> …
>
> Nourse LJ noted :
>
> … all three members of this court defined an innocent non-disclosure as one where there was no intention to omit or withhold information which was thought to be material …
>
> (at 736E)"

79. In the present case, to the extent that the material which should have been disclosed was in the applicants' possession at the time of the application, their failure to disclose it is, in my view, properly described as being deliberate, in the sense of being a conscious decision not to disclose it. However, I have no basis to hold, on the information

before me, that Chun or his legal advisors believed that any of the information which was not disclosed was material — in other words, that there was any intention to deliberately mislead the court. That is a matter which could only finally be decided by the trial judge after hearing oral evidence and cross-examination.

80. Its suffices to say that, looking at the materiality of the non-disclosures cumulatively, they were in my view undoubtedly sufficiently serious that the injunction which was granted must be discharged forthwith.

*RISK OF DISSIPATION OF THE DEFENDANTS' ASSETS*

81. At the *ex parte* hearing, the plaintiffs relied on the facts that Zhang does not ordinarily reside in Hong Kong; does not have a residential address in Hong Kong; and that she was in possession of three Zairean and probably one Portuguese passport. It was further submitted to the judge that :

> "There is solid evidence to show that there is a real and imminent risk that the defendants are now intending and/or may be in a process of disposing and/or realising their assets and transferring the proceeds out of the jurisdiction."

82. This was a reference to "two recent developments" deposed to by Chun in his 1st affirmation :

(i) the fact that a listed company in Hong Kong had, on 16 November 2000, announced that it had agreed to acquire 90,000 shares of the 2nd defendant from the 5th defendant for a total consideration of HK$126 million. Chun commented as follows :

> "This transaction suggests that steps may have already been taken by Madam Zhang to dissipate her assets and/or remove them from the jurisdiction."

(ii) The order of Yuen J, following her striking out of Richman's petition in CWU822/2000, that the $4 million which the 2nd defendant had paid into court as a condition of being granted a Validation Order, be paid-out from court to the 2nd defendant.

83. Chun commented in regard to this :

> "… it is highly likely that Madam Zhang may arrange for the payment out very soon and transfer the monies out of this jurisdiction."

84. Great emphasis was (understandably) laid upon Zhang's "extreme dishonesty", with particular reference to her perjury, which she subsequently admitted, in the bankruptcy proceedings. The judge's attention was drawn to authority to the effect that :

> "… If there is dishonesty or suspicion of dishonesty, that will be an important ground on which *Mareva* relief can be obtained."

85. While Zhang's character, and in particular her self-confessed perjury are undoubtedly relevant to the question of the risk of dissipation of the defendants' assets, it is by no means decisive. It is relevant to note that her perjury conviction occurred in June 2000, while the plaintiffs' application for a *Mareva* injunction was only made some 10 months later, on 28 April 2001.

86. There is no dispute that since the *ex parte* hearing, the proposed acquisition of the 2nd defendant's shares by a listed company in

Hong Kong has fallen through, so that any risk of dissipation which arose from that impending sale, as it was relied upon at the *ex parte* hearing, no longer exists.

87. In relation to the return of the $4 million to the 2nd defendant, I agree with Mr Pow's submissions that, on a proper analysis, the return of that $4 million to the 2nd defendant does not pose a risk of dissipation, bearing in mind that the 2nd defendant had voluntarily paid that sum into court in the first place in order to obtain the Validation Order, so as to enable it to continue doing business uninterrupted by the winding-up petition in CWU822/2000. If there was any intention to dissipate such assets, it is highly improbable that the 2nd defendant would have made such payment into court in the first place.

88. Furthermore, I am satisfied that on the evidence, the 2nd defendant is a substantial company with a $30 million paid-up share capital, and that it is carrying on a substantial business in steam coal trading.

89. In all the circumstances, and having regard to the principles enunciated in *Bebhenani v. Salem(ante)* it would not, in my view, be appropriate to grant a further injunction to the plaintiffs, either in the terms which were granted by the *ex parte* judge or at all. The plaintiffs' application for a re-grant or the grant of a fresh injunction, stands dismissed.

90. Subsequent to the hearing, my attention has been drawn by the plaintiffs' solicitors to the fact that Zhang was ordered by Registrar C. Chan on 27 July 2001 in HCA9007/2000 to provide security

for costs in the sum of HK$630,000 within 14 days of that date, and in the event of default, Zhang's claims against the defendant Mr Chun Kam Chiu, do stand dismissed without any further order. A subsequent application by Zhang's solicitors to extend the time for payment of the security ordered was on 11 August dismissed with costs. The result is that Zhang's claims in HCA9007/2000 stand dismissed, in terms of the earlier order of 27 July 2001.

91. These developments have no material bearing upon the present application, in my view, neither to the issue of whether there were any material non-disclosures at the *ex parte* hearing, nor to the issue of the present risk of dissipation of the defendants' assets.

92. In the event I order as follows :

(1) that the *Mareva* injunction which was granted *ex parte* on 28 April 2001 against each of the defendants and continued by further order of 4 May 2001 be forthwith discharged;

(2) that the plaintiffs' application that a further injunction be granted is dismissed; and

(3) I make an order *nisi* that the plaintiffs are to pay the defendants' costs of this application, as also of the costs which were reserved on 18 May 2001.

( B.W.K. Whaley )
Deputy High Court Judge

Mr Daniel Fung, QC, SC, leading Mr Peter Graham and Mr Kenny Liu, instructed by Messrs Alvan Liu & Partners, for the Plaintiffs

Mr Jason Pow, instructed by Messrs Iu, Lai & Li, for the Defendants