

CACV 2268/2001

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

CIVIL APPEAL NO. 2268 OF 2001
(ON APPEAL FROM HCA 1922 OF 2001)

BETWEEN

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

and

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 LIMITED 4th Defendant

GENERATIONS INTERNATIONAL
LIMITED 5th Defendant

Before: Hon Mayo VP, Yeung J and Stone J in Court

Date of Hearing: 9 April 2002

Date of Judgment: 9 April 2002

J U D G M E N T

Hon Mayo VP (giving the judgment of the Court):

1. This is an appeal from a judgment of Deputy High Court Judge Whaley when he discharged a *Mareva* injunction which had been granted *ex parte* by Suffiad J. He did so on the ground of material non-disclosure. However it should be added that it is apparent from a perusal of his judgment that he was satisfied that there had been no intention on the plaintiffs' behalf to deliberately mislead the court. He declined to grant a fresh injunction as he was of the view that the 2nd defendant was a substantial company carrying on business in Hong Kong and that a *Mareva* injunction was superfluous as there was insufficient evidence of a risk that its assets would be dissipated.

2. Initially the appeal was against the whole of the judgment. However shortly prior to the hearing of the appeal the plaintiffs' solicitors stated that the appeal would be confined to the issue as to whether in all the circumstances the Judge should have granted a fresh injunction notwithstanding the material non-disclosure.

3. In this connection an application has been made by the plaintiffs to adduce further evidence.

4. The additional evidence that it is sought to adduce relates to matters which have arisen subsequent to Deputy Judge Whaley's judgment.

5. The evidence in question is contained in an affirmation of Mr Fan Sai-yan the solicitor having the conduct of the litigation on behalf of the plaintiffs.

6. It is however necessary to consider this application in the context of the overall background of this litigation.

7. Mr Chun Kam-chiu is a director and shareholder of the 1st and 2nd plaintiffs and the Judge was satisfied that he effectively owned and controlled these companies.

8. By a similar token the 1st Defendant effectively owned and controlled all of the other defendants.

9. What is clear from the papers is that there is extensive litigation involving Mr Chun and the 1st defendant.

10. In his judgment the Judge refers to three High Court actions and an attempt by the 1st plaintiff to wind up the 2nd defendant, all of which were independent to the instant action. This action involved a joint partnership between Mr Chun and the 1st defendant relating to a diamond-mining venture in Central Africa.

11. The issues in dispute between the parties were wide ranging and it is perhaps not surprising that having regard to all of the relevant issues that (as is now conceded) Mr Chun's legal advisors failed inadvertently to disclose all of the material matters.

12. What was known at the time of the hearing before the Judge was that the 1st defendant had a somewhat chequered history. On

15 June 2000 she pleaded guilty to perjury and received a suspended sentence of imprisonment. She was also a bankrupt from April 1991 to April 1999. This is of relevance when the balance is being weighed in deciding whether there is a risk that assets may be dissipated if the injunctive relief being sought is not granted.

13. It is pertinent to add that the 1st defendant has remained without the jurisdiction of this court since January 2001. She has not given instructions to the solicitors who have represented her in the various actions she and her companies have been involved in, and in the present case an order was made enabling her solicitors to cease acting in the matter. One consequence of this is that no one has appeared to represent the 1st defendant and her companies in this appeal.

14. Mr Fan's affirmation refers to other actions the 1st defendant and her companies are engaged in, and the fact that orders were made in these actions which were detrimental to her interests possibly as a result of her failure to instruct her legal advisors.

15. Perhaps more important than this Mr Fan's affidavit refers to judgments which have been entered against some of the defendants by third parties which appear to have remained unsatisfied.

16. Amongst these was HCA 5038 of 2001 which was brought by the landlord of the 2nd defendant for possession of the business premises used by them. Mr Fan affirmed that it was evident from the information which was available to him that the 2nd defendant had ceased business activities in Hong Kong. This evidence is in direct conflict

with the Judge's finding that the 2nd defendant appeared to be in a substantial way of business here.

17. Mr Lin who represents the plaintiffs submits with some justification that the Judge was in error in making the finding he did.

18. As has been indicated, the evidence which the plaintiffs seek to adduce relates to matters which have arisen subsequent to Deputy Judge Whaley's judgment. We are satisfied on the authority of *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1997] HKLRD 1341 that in a situation such as the one which arises in the present case the test to adopt in determining whether or not leave should be granted to adduce additional evidence is less stringent than the test laid down in *Ladd v Marshall*.

19. In the circumstances of the present case we are satisfied that leave should be granted to adduce this additional evidence and we so order.

20. Once this evidence is adduced there can only be one result of this appeal.

21. It is clear that a fresh injunction should be granted.

22. When the defendants applied to set aside Suffiad J's *ex parte* injunction the ground of the application was confined to the issue of non disclosure. It was not contended by the defendants that the plaintiffs had no arguable case, or that the balance of convenience militated against the grant of the injunction. It would appear that these issues were not in contention.

23. From the additional evidence, which is uncontroversial, it would appear that the 2nd defendant is anything but a substantial entity. Having regard to what has already been said about the 1st defendant clearly there must be a grave risk that if a fresh injunction is not granted assets will be dissipated. In fairness to the learned Judge below, had he known what the future would hold it is highly probable that he would himself have had little hesitation in granting a fresh injunction.

24. Finally there is a further matter which is of crucial importance. Mr Lin advised us that yesterday a default judgment has been entered against all defendants in this case. One consequence of this is that the protection which needs to be afforded to the plaintiffs should be extended from the date of judgment unto the time when such judgment be satisfied, if indeed it ever is.

25. For the reasons we have given we allow this appeal to the extent we have indicated. We will hear counsel on the question of costs and also on the format of the order to be made.

(Simon Mayo)
Vice-President

(Wally Yeung)
Judge of the Court of
First Instance

(William Stone)
Judge of the Court of
First Instance

Mr Kenny C.P. Lin, instructed by Messrs Alvan Liu & Partners, for the
Plaintiffs.

1st – 5th Defendants in person (absent).