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HCA1743/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 1743 OF 2008

BETWEEN

BITH, LLC	Plaintiff
and	
G.C.A. FOREX CORP	Defendant

Before : Hon Chu J in Chambers

Date of Hearing : 9 & 22 December 2008

Date of Decision : 6 May 2009

DECISION

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1. By summons filed on 16 September 2008, the plaintiff applies to continue until after trial the *Mareva* Injunction granted *ex parte* on 12 September 2008 and continued on 19 September 2008 pending the determination of the summons. The defendant opposes the application and further seeks to set aside or discharge the *ex parte* Injunction.

The parties

2. The plaintiff is a company incorporated in the State of California in USA. It is solely controlled by Mr Daniel S Zaharoni ("Zaharoni"). The plaintiff is primarily engaged in real estate investment.

3. The defendant, previously known as Global Hawkins Inc, is a BVI company. It was incorporated in 2001. It is said to be a corporate vehicle for the Wong's family that comprises Mr Wong Kwok Sing ("Wong"), his sister, Wong Hin Yee, and Wong Wing Lok, the nominee shareholder and director. The defendant has no business activity in Hong Kong. The evidence before the court shows that the defendant has as its correspondence addresses, the address of its solicitors herein and also an address in Wong Tai Sin Estate, which is the residential address of the Wong's family.

4. It is the defendant's case that since about 2002, it has been engaged in financial investment, notably commodities and forex trading in the USA.

5. The defendant maintains four accounts with HSBC, including a US dollar saving account and a BusinessVantage account, also referred to as Account 3 in these proceedings.

Fraud in the USA

6. It is the plaintiff's case that it is a victim of a fraudulent scheme perpetuated in the USA involving, among others, two individuals called Henrik Sardariani ("Sardariani") and Chris Woods ("Woods") and an escrow agent called Axcess Escrow. Put briefly, in June 2007, Zaharoni was persuaded by a middleman, Michael Young ("Young"), into agreeing to make a short-term loan of US$2.5 million to Sardariani to enable him to extend the time for closing a deal to purchase a hospital in

Los Angeles. In return, Sardariani was to pay a loan fee of US$500,000 to the plaintiff.

7. On about 8 June 2007, the plaintiff signed an Escrow Funding Agreement, under which Axcess Escrow (on Sardariani's suggestion) was nominated as the escrow agent to receive and hold the money from the plaintiff and also to receive and pay out to the plaintiff the loan fee from Sardariani. Axcess Escrow also executed an Escrow Instruction acknowledging that Zaharoni had sole and exclusive discretion to give instructions to it on the handling and disbursement of the funds in the escrow account. At the same time, Sardariani also executed a personal guarantee and two trust deeds against two of his properties in favour of the plaintiff.

8. On 11 June 2007, the plaintiff deposited US$2.5 million into the account of Axcess Escrow maintained with Downey Savings and Loan Association, F.A. ("Downey Savings") on the understanding that the money would remain in the account and to be returned to the plaintiff later and that in the meantime Sardariani would pay US$500,000 loan fee into the account which would then be paid out to the plaintiff. Contrary to the agreement, Sardariani did not pay US$500,000 into the escrow account. Further on 19 June 2007, the plaintiff found out that Axcess Escrow had on 12 June 2007 acted contrary to the Escrow Instruction, caused US$1.9 million of the money deposited into its account to be transferred out to a bank account in Hong Kong and had further caused the remaining amount to be transferred to a domestic account.

9. As a result of enquiries, the plaintiff came to discover that the representations and some of the documents previously given to Zaharoni from including Sardariani, Axcess Escrow and Young were untrue or forgeries. The trust deeds given by Sardariani as securities for the transaction had also not been recorded.

10. Since June 2007, there were various communications and discussions between Zaharoni and Sardariani concerning the return of the plaintiff's money. However, nothing materialised.

11. In late June 2007, Young informed Zaharoni that Sardariani had conspired with Woods to fix the outcome of horse races in Hong Kong and that the US$ 1.9 million had been deposited with bookmakers or other individuals for this purpose. As a result of this, there were also communications between Zaharoni and Woods on the return of the plaintiff's money. But there was no fruitful outcome.

California proceedings

12. On 3 March 2008, the plaintiff brought a civil action in California, USA. Apart from Sardariani, Axcess Escrow and Woods, several other people and organisations implicated in the fraud were also named as defendants.

13. Prior to the litigation, the plaintiff had requested Downey Savings for information relating to where the plaintiff's money was transferred, but was refused. Downey Savings was one of defendants in the California action at its commencement. Through discovery proceeding, the plaintiff managed in May 2008 to obtain from Downey Savings the

written funds transfer request for the US$ 1.9 million. It shows that on 12 June 2007, the money was on Axcess Escrow's instruction transferred from the escrow account to the defendant's BusinessVantage account in Hong Kong. Under the column of "Other Beneficiary Information, Reference Information or Payment Instructions", there is a notation "FOR CHRIS WOODS".

14. After the plaintiff commenced the present proceedings, the plaintiff filed the Third Amended Complaint in the California proceedings. Among other amendments, the defendant was added as a defendant.

Norwich Pharmacal proceedings

15. Thereafter the plaintiff brought proceedings in Hong Kong under HCMP1575/2008 for a *Norwich Pharmacal* order against HSBC to obtain information relating to the defendant's accounts. The order was granted on 15 August 2008 and served in HSBC on 19 August 2008. On 29 August 2008, HSBC complied with the order and provided the plaintiff with the account opening documents and account statements between June 2007 and August 2008.

16. The documents supplied by HSBC show that on 13 June 2007, US$1,899,992.95 was received by the defendant's BusinessVantage account. On the same day, US$1,556,549 was transferred out of the account. Two days later on 15 June 2007, a further sum of US$342,987 was transferred out of the account.

17. In July 2008, however, two sums of US$ 1 million and US$331,692.94 were deposited into it. As at 8 August 2008, the balance of the defendant's BusinessVantage account stood at US$1,357,182.23.

Mareva Injunction

18. On 13 September 2008, the plaintiff issued the writ herein. Prior to that on 12 September 2008, the plaintiff applied and obtained *ex parte* from Fung J a *Mareva* Injunction restraining the defendant from dealing with or disposing of the funds in its HSBC accounts and its assets worldwide, up to the limit of US$2.5 million, together with an order for disclosure. As part of its undertakings for the injunction, the plaintiff undertook to "cause a stand-by letter of credit in the sum of HK$500,000.00 to be issued from a bank having a place of business in Hong Kong" and to "forthwith upon such issue, cause a copy of the stand-by letter of credit to be served on the Defendant".

19. On16 September 2008, the plaintiff issued the present summons for the continuation of the *Mareva* Injunction until after trial. By the order of Deputy Judge Au made on 19 September 2008, the Injunction was continued until after the determination of the plaintiff's summons.

The plaintiff's case

20. The claim of the plaintiff against the defendant is in conspiracy to injure and in knowing receipt of trust property.

21. In essence, the plaintiff says that the defendant is related to and/or controlled by Woods such that the defendant is either a co-conspirator. Alternatively, the plaintiff says that the defendant had knowledge of the fraud when it received the US$1.9 million from the escrow account. An important basis of the plaintiff's case is the transfer of the money from the escrow account into the defendant's account and the fact that it was stated to be for Woods.

22. It is convenient at this point to mention the document entitled "Concise Statement" which was annexed to the writ of summons. It had been placed before the *ex parte* judge and also served on the defendant. The document gives a gist of the plaintiff's claim, *albeit* not in great details. Mr Wong had explained that it was not intended to be the statement of claim; instead it was in the nature of an indorsement of claim. Nevertheless, this is procedurally unsatisfactory and although the *ex parte* application was made on urgent basis, care should be exercised in the preparation of the papers.

The defendant's case

23. The defendant does not dispute that it had received from Axcess Escrow the US$1.9 million and that it had transferred out the money received. It however denies knowing or being related to Woods or Sardariani or anyone implicated in the fraudulent scheme. The defendant says that it is a corporate vehicle for the Wong's family to make financial investments and that on this occasion, it had been used by Woods as a depository of money in return for a fee and that the transaction came about as a result of an oral request by a person called James Du ("Du").

24. The defendant case is that sometime around 12 June 2007, Du, who is a chartered accountant, informed the defendant that a person called John Speidel of Speidel & Associates Inc ("Speidel") had a business friend who needed to close some investment in Singapore but did not have an account there for holding the money required to complete the deal. Du asked whether the Wong's family was willing to facilitate the remittance from the USA by allowing the use of the defendant's Hong Kong account in return for a fee. It was said that a fee of 3 % of the amount, which is US$1.9 million, would be earned, out of which 2% would go to Speidel and each of Du and the defendant would get 0.5%.

25. The defendant said it had been assured by Du that the money was clean. In particular, it was said that "the defendant took it for granted that it would not be unusual for an overseas investor making arrangement to have funds deposited in Hong Kong to be made available for use at any time before he could open an account in Singapore", and further on seeing that the money came from an account which was understood to be an escrow account, "the defendant was reinforced in its impression that the money was clean." (paras. 19 & 20 of Wong Kwok Sing's Affirmation)

26. The defendant produced a credit note issued by HSBC. It shows that on 13 June 2007, Axcess Escrow remitted US$1.9 million to the defendant and after deducting the charges and commission, US$1,899,992.95 was credited to the BusinessVantage account. The notation under Payment Detail is "For Chris Woods G C A Forex Corp".

27. According to the defendant, on 14 June 2007, it remitted US$38,000 to Speidel, being the 2% of the fee agreed to be shared. Du and the defendant each got US$9,500 as their fee for the transaction.

28. As to the balance of the funds received, the defendant said that on 13 June 2007, US$1,556,549 was transferred to the personal account of its manager, Wong Kwok Sing, at Hang Seng Bank to finance the purchase of shares by Wong. Then on 15 June 2007, Du directed the defendant to send the money back to Woods because Woods decided not to proceed with the investment in Singapore. Consequently, US$1,843,000 was returned to Woods on 15 June 2007 by two remittances to his bank account in Los Angeles. The first is a remittance of US$1.5 million from Wong Kwok Sing's Hang Seng Bank account and the second is a remittance of US$343,000 from the defendant's HSBC account.

The defendant's objections to the Mareva Injunction

29. The defendant opposes the continuation of the *Mareva* Injunction and seeks its discharge on the following grounds:

(1) The plaintiff does not have a good arguable case against the defendant;

(2) There had been material non-disclosure on the part of the plaintiff;

(3) There had been inordinate delay in applying for the injunction;

(4) The plaintiff had abused the process by using the injunction as a pre-trial attachment;

(5) The balance of convenience is against the grant or continuation of the injunction; and

(6) The plaintiff had failed to provide proper undertaking as to damages.

Good arguable case

30. For the purpose of the present application, the plaintiff does not press the conspiracy claim, relying only on the claim of knowing or unconscionable receipt of trust property.

31. In *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 CA, Hoffmann LJ identified the essential requirements for a claim in knowing receipt of trust property to be as follows:

> "For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

32. In terms of the recipient's knowledge and state of mind, dishonesty is not a necessary ingredient: *Belmont Finance Corpn Ltd v. Williams Furniture Ltd (No 2)* [1980] 1 All ER 393,405. In *BCCI (Overseas) Ltd v. Akindele* [2001] Ch 437 at 455, Nourse LJ held that the test of knowledge for knowing receipt is whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt. The unconscionability test had been adopted in Hong Kong: see *High Fashion Garments Co Ltd v. Ng Siu Tong & Ors (No 2)* [2005] 4 HKC 8.

33. The main arguments advanced on behalf of the defendant relate to whether it was in beneficial receipt of the US$1.9 million and

whether it had the requisite knowledge for affixing liability. In respect of the first point, Mr Li argued that the defendant received the money as a mere agent such that it is only a case of ministerial receipt. In *Snell's Equity* (31st Edition) at para.28-46, it is said that where a defendant merely handles trust money in a ministerial capacity as an agent, his liability is not strictly restitutionary. He would be liable to restore the money initially received by him or the amount put away by him after he has become aware that the payment would be in breach of trust. It is also suggested that a higher standard of fault, similar to dishonesty, would be required to make a defendant liable.

34. Mr Wong for the plaintiff submitted, and I agree, that a major difficulty in the defendant's argument of ministerial receipt and dealing is that even accepting the entirety of its case, the defendant did not act in conformity with its duty as an agent when it transferred some US$1.5 million of the money received to the personal account of its manager. It is not the defendant's case that the transfer was with the approval of its principal. Further, the transfer was admittedly for the personal purpose of Wong Kwok Sing, thus wholly unrelated to its principal. At the very least, for this transfer, it cannot be said that the defendant dealt with the money in a ministerial capacity or as a mere agent in that in acting without instruction, the defendant was intermeddling in trust money: see *Williams-Ashman v. Price & Williams* [1942] 1 Ch 219, 225-226.

35. As to the question of knowledge, it may be proved affirmatively or inferred from circumstances. Inferences of knowledge are of particular importance where the court is concerned with the prospect of

success of establishing the requisite degree of knowledge in interlocutory proceedings: *Lewin on Trusts* (2008) 18th edition para.42-54.

36. Counsel had in the course of submissions made the point that the question of knowledge had to be seen in the commercial context or in the context of the commercial relationship between the parties, relying on Lam J's observations in *High Fashion Garments Co Ltd v. Ng Siu Tong & Ors (No 2)* and the passage in *Lewin on Trusts* at para.42-58. However, it should be noted that the defendant did not receive or deal with the US$1.9 million in the course of business or commercial transaction. Neither was there any commercial relationship between the defendant and Woods or even with Speidel or Du. The defendant did not know Woods or Speidel; there was previously no commercial or any dealing between them. Most importantly, on the defendant's case, it was merely making temporary accommodation for Woods' money and in return a fee was paid to it.

37. The undisputed facts of the case show that the defendant knew that the money originated from an escrow agent's account. Mr Li accepted that this would suggest that the money was held on behalf of someone and/or for a specific purpose. He however argued that because it was in the nature of escrow agent to hold funds for others and to distribute funds, the defendant was justified in deriving comfort from knowing that the money came from an escrow agent. I am unable to agree to the submission. In fact, Mr Wong who made the affirmation on behalf of the defendant only claimed that on seeing that the money was from an escrow account, the defendant was reinforced in its view that the money was clean, but had not elaborated on the reasons.

38. In addition, according to the Declaration made by John Speidel, they were looking for somebody doing business in Singapore who could hold the funds for Woods and release it to him when the deal was to be closed (paras.5). This was also what the defendant was told by Du. It would be plain to the defendant and from an objective point of view that the defendant did not really meet the needs of Woods. It neither did business in Singapore nor had bank account in Singapore. As matter of fact, the defendant does not even do business in Hong Kong. Further, it is obviously a cumbersome and roundabout way to finance a normal business transaction to have the funds remitted to Hong Kong only to be transmitted to Singapore at some future date. It is not really disputed by the defendant that the money could be sent directly from the USA to Singapore and with less costs and time. There is therefore no apparent need to make use of the defendant's bank account in Hong Kong. There is also no commercial reason for an investor to incur US$57,000 handling fee (3% of US$1.9 million) for an unnecessary arrangement.

39. Mr Li argued that the defendant should not be expected to be unduly suspicious, relying on the judgment of Millett J (as he then was) in *El Ajou v. Dollar Land Holdings plc* [1993] 3 All ER 717 Ch D at 739 in which it was said that in a case of knowing receipt, "a recipient is not expected to be unduly suspicious and is not to be held liable unless he went ahead without further inquiry in circumstances in which an honest and reasonable man would have realised that the money was probably trust money and was being misapplied". However, the matters highlighted above are not obscure or subtle points. On the contrary, they are fairly obvious and common sense points that should have struck members of the Wong's family who control and run the defendant. They would have

readily put any assurance from Du that the money was "clean" into doubts. They also call into question the defendant's assertion that it believed there was nothing unusual about the transaction. This is particularly so having regard to the fact that the Wong's family are said to be engaged in financial investments in the US.

40. At the same time, there is no or no proper explanation for the transfer of some US$1.5 million to the personal account of Wong Kwok Sing. Wong said it was a bridging arrangement to finance his purchase of shares. But neither his affirmation nor Speidel's declaration shows that he or the defendant knew when the US1.9 million would be needed for the deal in Singapore. The conduct of Wong or the defendant is inexplicable if indeed the defendant was (and truly believed it was) merely allowing an investor to hold funds in its bank account for an intended business deal. There are grave doubts as to the defendant has been completely forthcoming on the circumstances under which it came to receive and deal with the US$1.9 million as well as its knowledge or role in the matter.

41. In arguing that there was nothing untoward in the defendant's receipt and dealing with the money, Mr Li submitted that the defendant's agreement to let Woods have the use of its account in return for US$9,500 was no different from the plaintiff's agreement to lend to Sardariani in return for US$500,000. It is said that if the defendant's transaction is odd, so is the plaintiff's. Likewise, if the defendant's conduct were to be criticised, the plaintiff should equally be criticised for jumping into a transaction to earn US$500,000. In my view, the comparisons are inapt. First, the plaintiff was engaged in a loan transaction; it had to put up its money as a loan, hence incurring real risks, in earning the loan fee. The

defendant, on the other hand, did not have to put up anything and was merely allowing Woods the convenience and use of its bank account. Second, the evidence of Zaharoni shows that he had undertaken a number of enquiries and investigations before agreeing to the transaction and parting with the money. In contrast, the evidence filed on behalf of the defendant does not reveal any enquiry or checking had been made to establish the source of the funds or dispel any risks associated with the receipt of the money. It was content to receive and in fact use money originating from someone that it did not know.

42. Taking the materials before the court in a round, I am of the view that there is a good arguable case for inferring on the part of the defendant the requisite knowledge for sustaining a claim in knowing receipt.

43. The defendant complained that the plaintiff had made inconsistent allegations, was making up a case against the defendant and had misled the court. It pointed out that while Zaharoni stated in his first affidavit in these proceedings that he had conversations with Woods between June 2007 and January 2008, during which Woods claimed that the plaintiff's money was with a company he controlled (which was taken to be a reference to the defendant), he had also stated in his affidavit in the *Norwich Pharmacal* proceedings that it was in about September 2007 that Woods agreed to talk to him. By then, the defendant had already parted with the plaintiff's money, hence the company that Woods referred to was not the defendant.

44. I accept there is an apparent inconsistency in the date of the conversations between Zaharoni and Woods. But I do not accept this is fatal or that it reflects badly on the plaintiff. The September 2007 date was specifically referred to by counsel in the written submissions for the *ex parte* application. The *ex parte* Judge was unlikely to be misled about the date. Mr Wong contended that the reference to June 2007 was inadvertent. I am inclined to agree. As to the fact that by September 2007, the plaintiff's money was no longer with the defendant, it may, but not necessarily, lead to the conclusion that Zaharoni's belief that Woods was referring to the defendant in his conversation with him was erroneous. It certainly does not lead to the conclusion that the plaintiff has no claim against the defendant in knowing receipt.

45. The defendant had also referred to Zaharoni's evidence that Woods had during their conversations stated that the US$1.9 million was placed with various bookies in anticipation of betting the money on fixed horse races, that Sardariani had stolen the plaintiff's money and he could not return the money to the plaintiff because it would hurt his business reputation and operations in Hong Kong. Obviously, this assertion was at variance with other assertions made by Woods as to what happened to the plaintiff's money. I do not read the plaintiff as accepting every assertion of Woods to be the truth. Indeed, the plaintiff's case against the defendant is not based solely on what Woods told Zaharoni.

46. In short, on the basis of all the evidence now before the court, the plaintiff has made out a good arguable case against the defendant in knowing receipt of trust property.

Material non-disclosure

47. I turn next to consider the objection based on material non-disclosure. The defendant had mounted a number of attacks under this heading. Before dealing with them, it is apt to note that the core question is whether the non-disclosed facts were necessary for the *ex parte* judge to properly exercise his discretion. Materiality of matters undisclosed or misstated would, if relevant, depend on the importance of the facts to the issues which were to be decided by the *ex parte* judge on the interlocutory application: *Pacific Base Services Ltd & Anor v. Silver Gain Development Ltd & Ors* [1996] 2 HKLR 26 CA, 31I. In *Hung Ka Po v. Polytek Supply Limited* (unreported) HCA9946/1991, 21 May 1992, Deputy Judge Tong QC observed that (at para.21): "The Court must also strive for a balanced approach. On the one hand, the Court must ensure that its process should not be abused by over eager *ex parte* applicants but on the other, the Court must equally guard against unmeritorious respondents from unfairly exploiting what is essentially a salutary principle designed to prevent abuse of the process of the Court." I respectively agree with this summary of the court's approach: see also *Citibank NA v. Express Ship Management Services Ltd* [1987] HKLR 1184 CA, 1990H, 1191J.

48. As to the specific complaints made by the defendant, they are that:

(1) There was a difference on the time of the conversations between Zaharoni and Woods during which Woods stated that the plaintiff's money was under his control, as related in Zaharoni's first affidavit in these proceedings and in his affidavit in the *Norwich Pharmacal* proceedings (i.e. between June 1007 and January 2008 versus in and after September 2007).

(2) It was part of the plaintiff's case in the California proceedings that the defendant's bank account was controlled by Sardariani jointly with Woods. This was inconsistent with the plaintiff's case in these proceedings.

(3) In the Second Amended Complaint filed in the California proceedings, it was stated that Woods had diverted the plaintiff's money to intermediaries and/or other entities controlled or otherwise affiliated with him, including Carducci LLC. This was not drawn to the *ex parte* judge's attention.

(4) It was alleged by Zaharoni in the *Norwich Pharmacal* proceedings that the US$1.9 million of the plaintiff's money had been placed with bookies for fixing horse races. This was not drawn to the *ex parte* judge's attention.

(5) In the Third Amended Complaint filed in the California proceedings, a lot more allegations were made against the defendant, including it had received money from Woods as repayment of debts and the defendant had received the plaintiff's money from Axcess Escrow and Woods on their behalf and also on Sardariani's behalf. These demonstrate a change of stance on the plaintiff's part.

(6) There are possible defences to the plaintiff's claim as raised by some of the defendants in the California proceedings. Firstly, the plaintiff had alleged that Woods had claimed to Zaharoni that he did not know Sardariani had taken money from the plaintiff and that Sardariani lent the money to him on account of a promissory note. Secondly, in the defence of Ramin Mikhail (one of the recipients of the plaintiff's money), it was alleged that the plaintiff was involved in illegal money lending business. These matters were not drawn to the *ex parte* judge's attention. Additionally, it is not correct for the plaintiff to say that Sardariani did not file any defence when he had filed an Answer to the Second Amended Complaint on 18 August 2008.

(7) Before launching the *ex parte* application, the plaintiff had failed to make enquiry.

49. I will deal with the last complaint first, which is not truly a matter of material non-disclosure. While in the evidence filed on the defendant's behalf, the complaint was put on the basis that the plaintiff failed to make enquiry with the defendant, Mr Li's point in oral submissions is that the plaintiff should have made enquiry about the defendant. I do not think this is a legitimate complaint. On the evidence, the plaintiff had carried out investigations to find out information about the defendant, including conducting company search and taking out the *Norwich Pharmacal* application. As to making enquiry with or from the defendant, the plaintiff is justified not to alert the defendant and to proceed in a discreet and secretive manner having regard to the background of the case. This was also recognised by Yam J when he granted the ancillary gagging order in the *Norwich Pharmacal* proceedings.

50. Returning to the first complaint, which again is not so much a point of material non-disclosure. The full affidavit of Zaharoni in *Norwich Pharmacal* proceedings had been referred to in the affidavit of Zaharoni leading the *ex parte* application, and also made an exhibit to it. Further as noted above, both the counsel's submission and the Concise Statement that were before the *ex parte* judge had referred to the September 2007 date. The judge was unlikely to have been misled in the way contended by the defendant. It also does not have a material effect on the claim in knowing receipt.

51. Connected to this is the third complaint. The defendant's point is that the allegation that he money was with entities controlled by Woods would highlight to the *ex parte judge* the inconsistency in the plaintiff's case because according to Zaharoni's affidavit, Woods had

claimed the money to be in an offshore company controlled by him, which he understood to be referring to the defendant. The defendant also said that the judge would then consider whether the defendant was part of the fraudulent scheme and also whether it served any purpose to grant the injunction given that the defendant no longer had the money.

52. In respect of the second complaint, the defendant's argument is that if the *ex parte* judge were told about this, it would become apparent that there was no evidence to support the allegation that Sardariani jointly controlled the defendant's account and the judge would ask for evidence to substantiate the allegation and also to link the defendant to Woods. A similar argument was raised for the fourth complaint. It was said that the *ex parte* judge would consider whether there was any evidence that the defendant was a bookie and whether it had any part to play in the fixing of horse races.

53. The common thread in these complaints of the defendant is that the plaintiff runs inconsistent or different cases in the California proceedings and in these proceedings and that there is little or no evidence to support the claim against the defendant. The materiality of these matters, even assuming they were indeed omitted from the evidence and materials before the *ex parte* judge, must be assessed by looking at the emphases and issues at the *ex parte* stage. The crucial evidence and the crux of the plaintiff's case at the *ex parte* stage is that the plaintiff is the victim of a fraudulent scheme involving Sardariani, Axcess Escrow, Woods and others, that a substantial portion of the plaintiff's money had gone from the escrow account into the defendant's account and stated to be for Chris Woods, that the defendant and the persons who control it were all

unknown to the plaintiff and that there was apparently no legitimate reason or purpose for the defendant to be in receipt of the money and to be dealing with it. It must be apparent to the *ex parte* judge that the plaintiff's case is that Sardariani, Axcess Escrow and Woods (and others) are co-conspirators in the fraud. It would equally be clear to him that by that stage, the plaintiff's money had gone out of the defendant's account. Thus viewed, the above complaints of the defendant, whether considered individually or collectively, could not be said to be material or important to the exercise of the judge's discretion.

54. In the case of the fifth complaint, it was in connection the allegations raised in the Third Amended Complaint in the California proceedings, which the defendant said was not substantiated by the evidence. This document was only available after the *ex parte* hearing and has no relevance to whether the plaintiff had properly discharged its duty of full and frank disclosure at the *ex parte* stage.

55. I move to the sixth complaint that relates to the defences or allegations raised in the California proceedings. The plaintiff had indeed made a mistake over whether Sardariani had filed a defence. However, the defence did not raise any substantial matters and did not differ significantly from that of Woods. There is also no basis to conclude that it was not an inadvertent error but was a deliberate concealment. As far as the defences put up in the California proceedings are concerned, the plaintiff had made a general reference to them in the affidavit. In respect of Woods' claim that Sardariani gave him the money on the strength of a promissory note, Woods expressly denied having the conversation and also the contents. This being the case, it could not amount to any possible

defence, whether on the part of Woods or the defendant. As for Mikhail's defence, his primary case is that he was not aware of the theft of the plaintiff's funds and that he was the rightful recipient of the money. As an alternative, he contends that it would amount to illegal lending to receive US$500,000 for a one-month loan of US$2.5 million because it would mean exorbitant interest. Obviously, this is an issue of California law and for the US court to decide. It will not automatically become a possible defence for the defendant to the plaintiff's claim against it. Indeed, there is no elaboration on how this may affect the defendant's position. It is only put on the basis that the *ex parte* judge ought to know about this. This is hardly sufficient to support a challenge based on material non-disclosure.

56. To sum up on this heading, it cannot be said that the plaintiff had not put forward a balanced or fair case at the *ex parte* stage. Neither can it be said that the plaintiff had not placed before the *ex parte* judge all the relevant and material evidence and considerations. I do not accept that the plaintiff had failed to discharge its duty of full and frank disclosure.

Delay

57. I turn next to the objection that there was inordinate delay in seeking the injunction. The defendant said that the plaintiff should not have waited until 12 September 2008 when it already knew in May 2008 that the money was transferred to the defendant. The plaintiff had explained that because it had no presence in Hong Kong, it had taken some time to obtain proper legal representation in Hong Kong and then to bring the *Norwich Pharmacal* proceedings. It was afterwards that it obtained information about the defendant.

58. There were some four months between the time when the plaintiff had the fund transfer request, which shows that the money had been remitted to the defendant and the application of the *Mareva* Injunction. Although one may say the plaintiff could have moved more swiftly, I do not consider it was guilty of undue or inordinate delay in light of its explanations.

59. Mr Li submitted that the *Norwich Pharmacal* proceedings were not necessary or that the plaintiff should not apply for the *Norwich Pharmacal* order before seeking the injunction. I agree with Mr Wong that the plaintiff cannot be criticised for taking the prudent course of obtaining more information about the defendant, including its place of incorporation and the people in control of the company, before proceeding to apply for a *Mareva* Injunction.

Abuse of process

60. The defendant also made the objection that it was upon learning there was money standing in the defendant's HSBC accounts that the plaintiff applied for the *Mareva* Injunction with the objective of using it as a form of pre-trial attachment. The defendant said this amounts to an abuse of process because at the same time the plaintiff is suing the defendant in the California proceedings.

61. It should be recognised at the outset that the defendant only raised this point in the context of how the court should exercise its discretion over whether to continue or discharge the injunction. In this context, it is sufficient to make three points. The first is that the money was received and paid out by the defendant through a bank account in Hong

Kong. The plaintiff has a legitimate interest in commencing proceedings against the defendant in Hong Kong. The second point is that the mere bringing of parallel proceedings in another jurisdiction is not vexatious where there were substantial benefits to the plaintiff. In *Merrill Lynch International Bank Ltd v. Wallace* [1997] 3 HKC 776, 784B, Barnett J, following the English cases, held that it was legitimate for interlocutory relief to be granted and maintained even though the court granting that relief may not be the one to enter final judgment. The third point is that with the Civil Justice Reform, it is within the court's jurisdiction to grant *Mareva* Injunction in aid of foreign proceedings.

62. It follows that it cannot be said that the plaintiff is clearly misusing the court process to achieve an outcome that is not properly available to it. The fact that there are funds in the defendant's account, which may be available for attachment of any judgment obtained in the California proceedings, is not a factor weighing against the continuation of the *Mareva* Injunction.

Balance of convenience

63. On the issue of balance of convenience, the defendant says that as it is engaged in investment business, it will suffer irreparable loss and damages if it cannot have the use of the funds in its accounts. From the disclosure made by the defendant in compliance with the disclosure order, the defendant has assets in the region of HK$1 million. It also appears from the affirmation of Wong Kwok Sing that the profits made by the defendant from investments between 2003 and 2008 amounted to about US$1 million. These are indicative of the extent of losses and damages that the defendant may suffer with the continuation of the injunction. This is

not to mention the volatile nature of the investment market in general and the current global economic and financial conditions in particular.

64. On the other hand, the defendant is a BVI company and is said to be merely a corporate vehicle for the Wong's family to make financial investment. The only assets known are the sums of HK650, 000 and US$67,000 in its accounts. It is a real concern that if the injunction is discharged, it may practically mean that the plaintiff's claim will be defeated.

The plaintiff's undertaking

65. This brings me to the defendant's criticism of the standby letter of credit put up by the plaintiff for the purpose of the undertaking as to damages. The defendant is correct in pointing out that exhibit DZ-6 to Zaharoni's first affidavit in these proceedings is not a draft standby letter of credit, as indicated in paragraph 34 of the affidavit, but is only the application form for letter of credit. This mistake, though could have been avoided, does not cause any real prejudice to the defendant.

66. With regard to the letter of credit that was eventually issued on 17 September 2008, I do not agree that it is invalid for the purpose of the undertaking as to damages because it was made out in favour of the Registrar of High Court. The plaintiff's undertaking was given to the court. As to the fact that it was only for an amount of HK$500,000, that was the amount ordered by the *ex parte* judge on the materials available before him. The defendant has not asked to increase the fortification.

67. In all the circumstances of this case, the balance of convenience lies in favour of continuing the *Mareva* Injunction.

Conclusion

68. For the above reasons and analysis, the defendant's opposition to the continuation of the *Mareva* Injunction and the application for its discharge fails. However, in light of the fact that the plaintiff only proceeds on the claim in knowing receipt for the purpose of the injunction, the order should only be up to the limit of US$1.9 million. Accordingly, I will grant the plaintiff's summons and continue the *ex parte* Order until after trial or further order of the Court, but with the variation that the assets to be restrained be limited to US$1.9 million.

69. Applying the normal rule of costs follow event, I make an order *nisi* that the defendant pays the plaintiff the costs of the plaintiff's summons, to be taxed if not agreed.

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

Mr Anson MK Wong and Mr Alan Kwong instructed by Messrs V Hau & Chow for the Plaintiff.

Mr C Y Li instructed by Messrs Alvan Liu & partners for the Defendant.