HCA 2479/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 2479 OF 2000

BETWEEN

GLOBAL FAITH INVESTMENTS LIMITED Plaintiff

and

EYI INTERNATIONAL LIMITED Defendant

Before: Deputy High Court Judge W. Wong in Chambers
Date of Hearing: 5 July 2000
Date of Decision: 14 July 2000
Date of Reasons for Decision: 14 July 2000

REASONS FOR DECISION

FACTS

The Plaintiff and the Defendant are at all material times the shareholders of Essentially Yours (HK) Ltd ("EYHK") each holding 475 ordinary shares representing 47.5% of the issued capital.

The Plaintiff company consists of four shareholders namely:- Well Luck International Holdings Ltd, Tryful Luck Investments Ltd, Micro International Group Ltd and Landmark Investments Trading Ltd.

By an agreement made on 24 November 1999 the Plaintiff agreed to sell and the Defendant agreed to purchase the Plaintiff's entire shareholding in EYHK at a price of US$500,000. The agreement provided, inter alia, the following terms:-

(a) the Plaintiff and its shareholders would sign a general release in favour of EYHK and the Defendant with regard to all claims they have against the company save and except the price for the shares;

(b) the Plaintiff and its shareholders would provide a three year non-competition covenant in favour of EYHK confirming they would not compete with the business of EYHK.

The Defendant had deposited US$500,000 with its then solicitors Messrs Siao, Wan & Leung.

By an undated letter signed by the Plaintiff and the Defendant, they agreed to appoint Messrs Siao, Wan & Leung as escrow agent to hold onto the sum of US$500,000 pending completion of the sale. This letter was not signed by Messrs Siao, Wan & Leung. The said sum of US$500,000 was subsequently transferred to Messrs Clarke & Kong Solicitors for the Defendant.

It was a term of the aforesaid letter that the transaction should be completed by 25 January 2000 and that time was of essence.

On 23 December 1999 by letter the Plaintiff's solicitors informed the Defendant that Landmark Investments Trading Ltd had not executed the necessary documents but the transaction should go ahead. It was rejected by the Defendant by fax transmission on the same date.

By another letter dated 5 January 2000 the Plaintiff through its solicitors determined the said agreement. The Defendant by fax rejected the determination of the agreement.

On 10 February 2000 by a without prejudice letter the Plaintiff's solicitors informed the Defendant that Landmark Investments Trading Ltd had executed the release and undertaking and enquired the Defendant about the Sale and Purchase of the shares in light of a change of circumstances.

On 28 February 2000 by letter the Plaintiff alleged that it had complied with its obligations under the agreement.

After some correspondence the Plaintiff instituted the present proceedings by an ex parte Mareva Injunction on 11 March 2000 and obtained an order from Hon. Stock J to restrain the Defendant from disposing of the US$500,000 the money which is now held by the Defendant's solicitors.

GOOD ARGUABLE CASE

The Plaintiff can only have proprietary interest in the sum of US$500,000 if it were able to perform its obligations under the agreement.

Had the Plaintiff performed its obligation under the Agreement?

It was a term of the agreement that the Plaintiff and its shareholders had to sign a general release in favour of EYHK and the Defendant and to provide a three year non-competition covenant in favour of EYHK.

As can be seen from the letter of 23 December 1999, the Plaintiff's solicitors informed the Defendant that one of its shareholders Landmark Investments Trading Ltd had not executed the necessary documents. So the Plaintiff was not able to fulfil the terms of the agreement.

On 10 February 2000 the Plaintiff's solicitors informed the Defendant that Landmark Investments had executed the release and undertaking, and enclosed copies of those documents to the Defendant. Copies of those documents showed that they were not under seal in the form of Deeds. It does not seem that from those documents that there was any consideration. The Plaintiff's solicitors were aware that those documents should be by deed as by the letter dated 24 January 2000 they reminded the Defendant that the release and undertaking required execution under common seals.

So the purported release and undertaking by Landmark Investments had no legal effect.

Even assuming that those documents had legal effect, prior to 10 February 2000, Landmark Investments had already revoked and withdrawn the release and undertaking and the revocation had already been communicated to the Plaintiff's solicitors by letter dated 3 February 2000. So at the time of the ex parte application, the Plaintiff was in effect not in a position to perform its obligations under the agreement.

Further by 28 February 2000 when the Plaintiff said it had complied with its obligation, it was two months late and the agreement stipulated that time was of essence.

For those reasons it is unlikely the Plaintiff will succeed in its claim for the performance of the agreement and the Plaintiff does not have a good arguable case.

Material Non Disclosure

The Plaintiff's claim is that it was ready and able to perform the obligations under the agreement. The 1st affirmation of Chiang Mao-Hsin in support of the ex parte application at para. 17 said that:

> "The Plaintiff had fully complied with its obligations under the Sale Agreement, under cover of a letter dated 28 February 2000 all documents which the Plaintiff was obliged to tender under the Sale Agreement were re-delivered to the Escrow Agent."

Mr Chiang however did not mention or omitted to mention that Landmark Investments had already revoked or withdrawn its release and undertaking,

a fact which Chiang had notice by reason of the letter of 3 February 2000 from solicitors for Landmark Investments to the Plaintiff.

In *Citibank N.A. v. Express Ship Management Services Ltd and Another* [1987] HKLR 1184, Fuad JA as he then was quoted Brame-Wilkinson J in *Thermax v. Schott Industrial Glass* [1981] FSR 289 "Facts are material, should be disclosed, in this context if they 'are relevant to the weighing operation which the court has to make in deciding whether or not to grant the order."

In *Brink's Mat Ltd v. Elcoupe (C.A.)* [1988] 1 WLR 1350, it was held:

> "On any ex parte application it was imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such enquiries as more reasonable and proper in the circumstances."

In the present case the affirmation of Chiang disclosed that the Plaintiff had <u>fully complied</u> (my emphasis) with its obligations under the Sale Agreement without disclosing that Landmark Investments had already withdrawn or revoked its release and undertaking would certainly have influenced any judge to grant the order with the omission.

In my judgment this is a material fact which being known to Chiang ought to be disclosed as it would go to the weighing operation at the ex parte hearing. The Plaintiff has therefore not made a full and frank disclosure.

CONCLUSION

Since the Plaintiff has not made out a good arguable case nor had it made full and frank disclosure of material facts, the ex parte Mareva Injunction should be set aside and I so order. Damages, if any, the Defendant may have suffered by reason of the ex parte application be assessed by the Registrar. Order nisi that the costs of this application and the application before Hon. Yuen J be the Defendant's.

(Wesley Wong)
Deputy High Court Judge

Mr Peter Graham, instructed by Messrs Alvan Liu & Partners, for the Plaintiff

Mr W Clarke, of Clarke & Kong, for the Defendant