

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: Hon Yuen J in Chambers

Date of hearing and Decision: 27 June 2000

Date of handing down of Reasons for Decision: 28 June 2000

REASONS FOR DECISION

On 26 June 2000, a date was fixed for the hearing of an Inter
Partes Summons on 28 June 2000. On 27 June 2000, the Plaintiff

applied on an urgent basis for that date to be vacated. At the end of the hearing, I gave an order vacating the date and said I would give the reasons for my decision in writing.

Procedural history

On 9 March 2000, the writ in this action was issued. On 11 March 2000, the Plaintiff obtained an ex parte Mareva injunction against the Defendant. The sum 'frozen' is US\$500,000.

An Inter Partes Summons was issued on 14 March 2000 for the continuation of the injunction. On 17 March 2000, the Summons Judge continued the ex parte order in the absence of the Defendant. The Defendant company is a company incorporated in the Cayman Islands and service had not then been effected on it.

On 29 March 2000, a notice to act for the Defendant was filed.

On 7 April 2000, the summons was restored before the Summons Judge who adjourned the hearing of the Inter Partes Summons to a date to be fixed in consultation with counsel's diaries with half a day reserved, and ordered that the injunction be continued until disposal of the Inter Partes Summons or further order. He further gave directions that the Defendant file and serve evidence in opposition within 28 days, and that the Plaintiff file and serve evidence in reply within 14 days thereafter.

On 12 May 2000, the Defendant filed its evidence in opposition. The deadline for the filing of the Plaintiff's evidence in reply was therefore 26 May 2000. No evidence in reply has so far been filed, nor has there been any application for an extension of time.

On 25 May 2000, Master Poon fixed 1 August 2000 for the hearing of the Inter Partes Summons.

On 31 May 2000, the Defendant issued a summons for an order that the date fixed (1 August 2000) be vacated and that the Inter Partes Summons be refixed for hearing at "the earliest possible date".

On 2 June 2000, I gave an order in terms of the Defendant's Summons on the ground that the hearing of a summons, at which an interlocutory injunction may be continued or discharged, should be given priority.

On 5 June 2000, the parties attended before the Listing Clerk, when they were informed that a date on 8 June or 9 June 2000 was available. However, this was declined, not only by the Plaintiff's solicitors, but also by the Defendant's solicitors.

On 26 June 2000, the parties attended again before the Listing Clerk, when they were informed that a judge would be available on 28 June 2000.

Grounds for Plaintiff's application to vacate date

The day after the date was fixed (i.e. 1 day before the scheduled hearing) the Plaintiff asked for an order to vacate the hearing date. There were 2 grounds for the application:- (i) the affirmation in reply was not yet ready and (ii) its counsel was not available.

It is clear to me that unavailability of counsel is not a sufficient ground on which a court should exercise its discretion to vacate a date for the hearing of a summons at which an injunction may be continued or discharged.

The grant of an injunction is one of the most powerful weapons of the court, and it can seriously affect the normal business operations of the party restrained. It would not be right for a party at the receiving end of an injunction to be kept away from a hearing merely because his opponent prefers to retain his original counsel.

In the present case, there are (so far) only 2 substantive affidavits - the Plaintiff's 1st affidavit in support of the ex parte injunction and the Defendant's affidavit in opposition. The evidence is not insubstantial, but it is not overwhelming. There is at the Bar a large pool of experienced and competent counsel available who would, in my view, be able to get this case up within one clear day. The unavailability of the counsel who had been retained is not, therefore, a ground for vacating the date.

The other ground was that the Plaintiff's evidence in reply is not yet ready. A day before the Defendant's evidence was served, i.e. on

11 May 2000, Mr Chiang of the Plaintiff (who had made the affidavit in support of the ex parte order) left Hong Kong and he has not returned. This was notwithstanding the fact that the evidence in reply was ordered to be filed by 26 May 2000 and no extension has been sought. Mr Chiang is due to return on 29 June 2000.

The Plaintiff's solicitor has said on affirmation that a draft affidavit in reply has been prepared, but it has not yet been approved. It had been thought that there would be enough time before 1 August 2000 for Mr Chiang to return and approve the draft, and then for an application to be made for leave to file it out of time.

I have to say that the Plaintiff and its advisers have no-one to blame but themselves for the difficulty they have found themselves in. It might have been, when the date for the hearing was fixed at 1 August 2000, that they thought they could comfortably wait for Mr Chiang's return before getting his affirmation in reply filed. But when the order of 2 June 2000 was made for the hearing to be refixed to the earliest possible date, they should have immediately seen to the approval and filing of Mr Chiang's affirmation in reply.

In an age of electronic mail (or at least fax machines), legal advisers cannot be heard to say that a draft could not be sent to client for approval within 3 weeks. Clearly therefore, whilst the Plaintiff would be prejudiced if the hearing were to take place on 28 June 2000 before its evidence in reply could be filed, the Plaintiff (or its legal advisers) would have been the sole author of its misfortune. Moreover, it would have been open to the Plaintiff to apply to the judge hearing the Summons for

leave to adduce a faxed copy of the affirmation pending delivery of the hard copy, or to apply for an adjournment of the Summons.

Grant of application to vacate date

However, what caused me to grant the order vacating the date was the Defendant's own conduct in declining the earlier dates offered on 5 June 2000. Mr Clarke, the Defendant's solicitor, said that they had declined those dates (8/9 June 2000) because there was insufficient time since 2 June 2000 to prepare for the case. But its evidence had been filed on 12 May 2000 and no evidence had been filed by the Plaintiff in reply.

If the Defendant says that it could not prepare the case in the 3-4 days between 5 June and 8/9 June 2000 (let alone the 6-7 days between 2 June and 8/9 June 2000), it lies ill in its mouth to say that the Plaintiff must prepare the case in the 2 days between 26 June and 28 June 2000.

In my view, procedural fairness requires that a litigant who had sought and obtained an order for "the earliest possible dates" to take up those dates when offered by the Court. He cannot pick and choose. He cannot waive compliance with the order when the date offered does not suit himself, and then insist on strict compliance with the order when it does. This is especially so when his insistence on strict compliance might lead to substantive prejudice being suffered by the other party as in this case. A party would be justified in feeling aggrieved if dates are fixed accommodating one party but not the other.

Order

In the light of the above, in the exercise of my discretion, I ordered that the hearing fixed for 28 June 2000 be vacated. This order does not otherwise affect the Order of 2 June 2000, especially since Mr Kenny Lin, counsel appearing for the Plaintiff today, has indicated that the Plaintiff will be proceeding immediately with an application for leave to file the evidence in reply out of time.

I ordered that the costs of the application of 27 June 2000 be reserved to the judge hearing the Inter Partes Summons.

(MARIA YUEN)

Judge of the Court of First Instance
High Court

Mr Kenny Lin instructed by Alvan Liu & Partners for Plaintiff
Mr W.S. Clarke of Clarke & Kong for Defendant