

HCA 391/2017

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

HIGH COURT ACTION NO 391 OF 2017

BETWEEN

GUANGDONG YUEHE INVESTMENT 1st Plaintiff
HOLDINGS COMPANY LIMITED
(廣東粵合投資控股有限公司)

HONG KONG YAHE COMPANY LIMITED 2nd Plaintiff
(香港亞合國際有限公司)

and

HONGFAN INTERNATIONAL LIMITED Defendant
(鴻帆國際有限公司)

Before: Hon Chow J in Chambers

Date of Hearing: 3 March 2017

Date of Decision: 3 March 2017

D E C I S I O N

INTRODUCTION

1. I have before me an application by the defendant seeking to discharge an *ex parte* injunction granted by Deputy High Court Judge Lee on 20 February 2017 on the ground of material non-disclosure.

BRIEF BACKGROUND

2. In view of the urgency with which this application has come before me, I shall give a brief decision, having heard counsel for both parties.

3. Shortly stated, the plaintiffs' case is that they were the pledgees or chargees of 100,000,000 shares ("the Shares") in a listed company called Chinalco Mining Corporation International ("the Listco") provided by the defendant as security in connection with a sale and purchase transaction relating to 14,000 tons of aluminium ingots between Zhuhai Tiankai Metal Resources Company Limited ("Zhuhai Tiankai", as seller) and the plaintiffs (as buyer). I should mention that the defendant disputes the true nature of the transaction between Zhuhai Tiankai and the plaintiffs, but that dispute is not material for the present purpose.

4. The plaintiffs further allege that Zhuhai Tiankai failed to perform the sale and purchase agreement, and the defendant breached its obligations under the security arrangement, including dissipation of part of the Shares.

5. As earlier mentioned, on 20 February 2017 the plaintiffs obtained an *ex parte* injunction from Deputy High Court Judge Lee restraining the defendant from further disposing of or dealing with the Shares, as well as a discovery order requiring the defendant to disclose

A
B the current whereabouts of the Shares and details of all sales or transfers
C of, or dealings in, the Shares by the defendant. The defendant has, up to
D this date, failed to comply with the discovery order.

E
F 6. The defendant argues that the *ex parte* injunction should be
G discharged on the ground of material non-disclosure, in that the plaintiffs
H failed to disclose to the *ex parte* judge the details of a current
I privatisation plan of the Listco. It is not in dispute that on 23 September
J 2016, the Listco and Aluminium Corporation of China Overseas Holdings
K Limited (“the Offeror”) made a joint announcement relating to a proposed
L privatisation of the Listco by the Offeror by way of a scheme of
arrangement which, if carried through, would result in the purchase or
compulsory purchase of all the issued shares of the Listco by the Offeror
at the price of HK\$1.39 per share (representing a 32.4% premium over
the closing price on 14 September 2016) and that the Listco would be
delisted.

M
N 7. In the 1st affirmation of Lu Yin placed before the *ex parte*
O judge in support of the application for the injunction, there were
P references to the following matters:-

Q (1) on or about 30 September 2016, there was an announcement
R of the privatisation plan by the Offeror to acquire the shares
S of the Listco from the public, including that of the defendant
T (see paragraph 53);

U (2) from mid-October to the end of December 2016, there was
V discussion between the plaintiff and Mr Yan (of the
defendant) regarding “his Chinalco Shares which he had to
sell to China Overseas” (see paragraph 54); and

(3) on 3 March 2017 there would be a court meeting regarding the privatisation plan and also an “interim general meeting of the shareholders to approve the privatisation plan and the acquisition price” (see paragraph 40a).

8. In the skeleton submissions placed before the *ex parte* judge, the only reference to the privatisation plan was in paragraph 40 thereof, which states as follows:

“Then the news for privatisation plan of Chinalco shares by China Overseas came by end of September to mid October 2016. (Para.54, ‘LY-13’), when negotiation between Mr Yan and the Plaintiffs on the one part and China Overseas on the other, for China Overseas to pay the proceeds of sale of the 100,000,000 pledged Shares directly to the 2nd Plaintiff proceeded (including the Beijing Trip (paras.63-65) with fruitless result eventually.”

9. The defendant complains that the plaintiffs failed to disclose the following material facts or matters to the *ex parte* judge:-

- (1) The offer price of HK\$1.39 was higher than the closing market price of the Listco shares on 17 February 2017, being a date mentioned in paragraph 40a of Lu Yin’s first affirmation. Indeed, the offer price was not mentioned at all.
- (2) The rationale behind the privatisation plan, as disclosed in the public announcement.
- (3) The defendant had given an irrevocable undertaking to the Offeror to exercise all voting rights in favour of the privatisation plan.

10. Mr Ng (for the defendant) submits that the injunction granted would have the effect of rendering the defendant being unable to

perform the irrevocable undertaking to the Offeror, and that is a fact which ought to have been disclosed to the *ex parte* judge. Mr Ng also submits that the injunction might cause harm or prejudice to third parties, including the Offeror and other public shareholders of the Listco, because (i) while the defendant's inability to vote may not be critical to the voting result at the shareholders' meeting, it could not be said with any certainty that it would have no impact, and (ii) the Offeror could be put to expenses and inconvenience in seeking to complete the purchase of the Shares (or such part thereof as currently still being held by the defendant).

DISCUSSION

11. The principles relating to material non-disclosure are well settled. I need only refer to the recent decision of Deputy High Court Judge Kwok SC in *Universal Experts Group Ltd v Zechin Technology Co Ltd*, HCA 2613/2016 (24 October 2016), as follows:-

"11 A party making an *ex parte* application has the duty to make full and frank disclosure on all material matters. The primary duty is to disclose on affidavit evidence. The duty is not discharged by making partial disclosure on oath or deposing to half truths...

12 In other words, the court is entitled to assume that the applicant acts with utmost good faith, failing which the position of the *ex parte* judge would be extremely difficult, if not impossible.

13 In *Standard Charter Securities Limited (formerly known as Chin Tung Limited) v Arthur Lai and others*, HCA 2757/1993, 28 April 1993, Woo J (as he then was) referred to *Gee on Mareva Injunctions and Anton Piller Relief*, 2nd Ed, where at p 81, the learned author stated:

"... Accordingly, it is of the utmost importance that the plaintiff carefully considers the nature of the cause of action and the facts on which it is based before formulating the application. A thorough check should be made to ensure

that all defences actually raised by the defendant are identified and fairly summarised in the affidavit.”

12. In my view, while disclosure of the details of the privatisation plan, including those matters specifically relied upon by the defendant, might not ultimately have caused the learned Deputy Judge to refuse to grant the injunction sought, they are certainly matters relevant to the weighing process which the Deputy Judge would take into account when deciding whether to grant an injunction, and if so, on what terms.

13. I do not accept the plaintiffs’ contention that full and frank disclosure had been made regarding the details of the privatisation plan. Mr Chang argues that the plaintiffs were mere pledgees or chargees, and not shareholders of the Listco, and therefore would not have detailed knowledge of the privatisation plan. However, the privatisation plan was publicly announced, and the details thereof could easily have been obtained from carrying out an internet search on the website of the Stock Exchange of Hong Kong.

DISPOSITION

14. Material non-disclosure having been established, I see no good reason not to discharge the injunction or to re-grant the injunction (which Mr Chang did not ask for). Accordingly, the *ex parte* injunction granted by Deputy High Court Judge Lee on 20 February 2017 is discharged. I shall now hear the parties on the question of costs.

[After oral delivery of the decision in court, Mr Chang on behalf of the plaintiff applied for a re-grant of the injunction, on the ground that the material non-disclosure was innocent and not deliberate.]

15. In view of (i) the possibility of third party interests being affected by the injunction, (ii) the plaintiffs' insistence that they had made full and frank disclosure, and (iii) the absence of any evidence to explain the non-disclosure (and thus I am not in a position to find that the non-disclosure was innocent or not deliberate), I am not prepared to re-grant the injunction.

16. The costs of and occasioned by the defendant's application to discharge the *ex parte* injunction shall be to the defendant, to be taxed forthwith if not agreed.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Geoffrey P Chang, instructed by Patrick Mak & Tse, for the 1st and 2nd plaintiffs

Mr Ernest Ng, instructed by Alvin Liu & Partners, for the defendant

