

HONG KONG / JUDGMENT

HIP HING CONSTRUCTION CO LTD v. HOLYROOD LTD

COURT

Court of First Instance

DECIDED

26 April 2007

CASE / FILE NUMBER

HCCT6/2007

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bjbj HCCT 6/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS NO. 6
OF 2007

BETWEEN HIP HING CONSTRUCTION CO. LTD Plaintiff and HOLYROOD LTD Defendant

Before: Deputy High Court Judge Muttrie in Chambers Date of Hearing: 30 March 2007 Date of
Reasons for Ruling: 26 April 2007

REASONS FOR RULING

The plaintiff was the main contractor and the defendant the employer in respect of building works at 8-12 Peak Road. There are ongoing arbitration proceedings between them arising out of two contracts. The arbitration is set down for hearing before Mr Russell Coleman SC at the end of May 2007. The plaintiff identified that the defendant was transferring units in the building complex at 8-12 Peak Road to related companies and applied for a Mareva injunction on the ground that the defendant was dissipating its assets in advance of the arbitration. On 17 January 2007, the plaintiff obtained an ex-parte Mareva injunction against the defendant restraining it from removing its assets up the value of \$85 million from Hong Kong and from disposing or dealing with any of its assets here up to that value. In particular the prohibition includes two properties at 8-12 Peak Road, namely House B and Block A2 1/f. The plaintiff has registered the order against these properties. The injunction was continued at a directions hearing on 19 January 2007 and the defendant was ordered to file an affirmation as to the value of the properties it owned. Its director, Ms Oung, filed an affirmation stating that the defendant owned House B

and Duplex B on the ground and 1st floors of Block A2. She produced valuations showing respective values of \$200,000,000 and \$125,000,000 for these properties. Before me the defendant sought to have the injunction discharged on the grounds that:

- (a) there is no real risk of dissipation of assets;
- (b) there was no full and frank disclosure by the plaintiff at the ex parte hearing;
- (c) the plaintiff offers an undertaking not to dispose of Duplex B; and
- (d) the balance of convenience is in favour of discharge. I ordered that the injunction granted by Sakhrani J on 16/3/07 be continued, until the Defendant pays and satisfies any sums which the Arbitrator orders it to pay to the Plaintiff up to and including his final Award in the Arbitration: Provided that, in the event that the Arbitrator makes no award in favour of the plaintiff herein the injunction be discharged forthwith on the handing down of his final award; and subject to the following amendment, namely the insertion in Paragraph (1)(b)(1) of the Order dated 17 January 2007 after the words Duplex B of the words (including private garden, bay window, AHU area and flat roof) . I now give reasons. Dissipation of Assets The defendant says that it had various complicated loan arrangements which culminated in a loan from the International & Commercial Bank of China (Asia) Ltd. This last loan had to be paid off before 21 July 2006. The defendant could not find one single bank to redeem this loan, so it transferred flats in Blocks A1 and A2 to associated companies, which in turn mortgaged them to different banks. That was its reason for the transfers rather than dissipation. It is argued that if the defendant had intended to dissipate its assets it would have made the transfers in one go rather than in batches. Further it is said that there must be solid evidence to show a real risk of dissipation. The onus is of course on the plaintiff to prove the risk. The simple fact is that the only assets the defendant owned, prior to the transfers, were the various properties at 8-12 Peak Road. Insofar as it transferred the properties to related companies, it made them unavailable to satisfy any award which the plaintiff may obtain against it in the arbitration. The defendant's evidence is that the transfers were made in pursuance of a rather complicated set of financial arrangements, by which the related companies would obtain loan facilities from individual banks for the properties, because the plaintiff itself could not find a bank which would singly finance it to redeem an existing loan. That may be, but the defendant's intention is irrelevant; what matters is that the properties were transferred out of the control of the plaintiff itself, and to that extent its assets were dissipated. Full and Frank Disclosure Material facts are all facts that are relevant to the weighing operation which the court has to make in deciding the point before it. : per Browne Wilkinson J in *Thermax Ltd v. Schott Industrial Glass Ltd* [1981] FSR 289. The defendant makes various allegations of failure to disclose. The plaintiff deals with them in the second affirmation of Mr Chu Tat Chi dated 26 March 2007. The defendant complains that the plaintiff did not disclose that it knew that the defendant required finance for the property. I do not see that this is material, and in any event the plaintiff did identify that the defendant had financed the properties. It further alleged that the defendant was not in a healthy financial position, and it would follow that the only way in which the defendant

could finance the properties was by way of mortgage. In any event, what was important at was the question whether the defendant was dissipating its assets so as to leave a risk that if the plaintiff obtained an award in the arbitration, it would not be satisfied. The defendant gave no evidence that it had assets other than its property. The plaintiff's knowledge of the defendant's financial state would be irrelevant. Then the defendant further complains that the plaintiff did not disclose the value of House B and Duplex B, which are free from incumbrances. The plaintiff ought to have known, even without a professional valuation, that the value of these properties was much more than \$85 million. If the plaintiff had estimated a value, it is difficult to see how this would have assisted the court. In any event, the Mareva injunction restrains the removal or transfer of assets up to \$85 million, so the actual value, even if professionally estimated, would not have assisted the court. Finally the defendant complains that the plaintiff did not disclose that House B is a detached apartment and specifically designed to be the residence of the director, Ms Oung. Again I do not see how this would have assisted the court, if the defendant had known it. The fact that Ms Oung wanted to live in House B would not have stopped the defendant from transferring it to some other related company; she would still be able to live in it, but the dissipation of the defendant's assets would be the same. It is also argued that the plaintiff misled the court by alleging that the defendant's case was that Block A1, Block A2 and the Podium required to be demolished, when only Block A2 was affected and by alleging that the units in Blocks A1 and A2 had been sold or transferred when in fact they had been transferred within the group of companies and no new owners were involved. I do not see that this can be right on either count. The plaintiff did summarise the defendant's defence; see the skeleton argument used by counsel at the ex parte hearing. Perhaps the word blocks was used but reference was made to the decision of Barma J dated 16 December 2005 (Exhibit CC-8) where the defence is referred to. As to the transfers, transfer to related companies is no different, when it comes to enforcement of a judgment, from transfer to strangers. The Undertaking The defendant has offered an undertaking not to dispose of Duplex B. The plaintiff takes the position that an undertaking is all very well and good, but it cannot be registered, and if it is breached, while the person who gives it may be punished for contempt, the undertaking is of itself of no real value against the property. The defendant also argues that any alienation may be struck at as a fraudulent preference under section 266 of the Companies Ordinance if the defendant is wound up. Again this is all very well and good but it is hardly real protection. While an undertaking may be regarded as equivalent to an injunction, (see Commercial Injunctions, 5th Ed., by Steven Gee, paragraph 19.005) this is really only so as against the individual rather than the property. I cannot say that the plaintiff is wrong to reject the undertaking on this ground. In fact it appears from the second affirmation of Mr Chu Tat Chi that the plaintiff put forward alternative proposals, namely a mortgage or charging order over Duplex B, the defendant's provision of a suitable bond with a value of \$85 million in favour of the plaintiff or the payment into court or of an escrow amount of \$85 million. Any of these would, in my view, have been more reasonable than the proposed undertaking. Balance of Convenience The period concerned is relatively short. I do not see that anything has really changed since the ex parte hearing; the defendant has not made out any better

case on the balance of convenience. It seemed to me that the balance of convenience was in favour of maintaining the injunction pending the outcome of the arbitration hearing and I so ordered. (G.P. Muttrie) Deputy High Court Judge Mr Manzoni, instructed by Messrs Cordells, for the Plaintiff Mr Walker Shum, instructed by Messrs Yam & Co., for the Defendant PAGE - 1udk 1udk H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G hca.dot setup Microsoft Word 9.0 u=N Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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