

HONG KONG / JUDGMENT

HYPERMAX LTD v. GARWIN ENTERPRISES LTD

COURT

Court of First Instance

DECIDED

5 February 2007

CASE / FILE NUMBER

HCA2418/2006

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bjbj HCA 2418/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2418 OF 2006

BETWEEN HYPERMAX LIMITED Plaintiff and GARWIN ENTERPRISES LIMITED Defendant and
HO KAI CHEUNG 1st Third Party NG MEI FA 2nd Third Party

Before: Mr Recorder J Fok, SC in Chambers Date of Hearing: 5 February 2007 Date of Judgment: 5
February 2007

J U D G M E N T

This is an application for summary judgment by the Plaintiff. The Plaintiff claims against the Defendant for the repayment of three loans in the aggregate sum of HK\$10 million that it alleges were made by the Defendant to the Plaintiff in January, February and March 2006 respectively, together with interest. The Plaintiff claims the three loans were repayable at the end of June, July and September 2006 respectively and interest on them was payable monthly at the rate of 9% per annum. The method by which the monies were said to have been advanced by the Plaintiff to the Defendant was the same in each case. First, the Plaintiff issued a cheque for the amount of the loan to a Ms Ng Mei Fa (Ms Ng), who was the General Manager of the Defendant. Then, Ms Ng issued a cheque to the Defendant for the amount of the loan (or, in the case of the first loan, two cheques in the aggregate amount of that loan). As evidence that the loans were made by the Plaintiff to the Defendant, the Plaintiff points to the fact that, at the same time each of the three loans was respectively made, a promissory note was executed by the Defendant in respect of each loan in favour of the Plaintiff as payee, to evidence the Defendant s indebtedness to the Plaintiff

in the sum of the loan in question. The Plaintiff also points to the fact that, after the monies were advanced, the Defendant paid various monthly interest payments on each of the loans. These interest payments were made by cheques drawn by the Defendant in favour of the Plaintiff. The Defendant continued to make these interest payments on a monthly basis until 1 September 2006 when cheques in respect of the interest payable to approximately mid-September were paid to the Plaintiff. The Plaintiff also relies on the existence of interest calculations signed by the Defendant in respect of some of the payments of interest. At first blush, the Plaintiff's claim seems to be a very simple debt claim. However, there are certain features that make this matter less than straight forward:-

- (1) There are no formal loan agreements in writing and no corporate resolutions of the Defendant in respect of the loans. Instead, as noted above, the Plaintiff issued cheques direct to Ms Ng and Ms Ng then issued cheques to the Defendant. In addition, there may be some further relationship between the Plaintiff and Ms Ng because one of the directors and shareholders of the Plaintiff is Ms Ng's younger brother, Mr Ng Wing Kwong.
- (2) Ms Ng is married to Mr Ho Kai Cheung (Mr Ho), who is the registered holder of 20% of the shares of the Defendant and one of its two directors.
- (3) The Defendant has commenced proceedings against Mr Ho and Ms Ng, namely HCA No. 2145 of 2006 in which the Defendant sues Mr Ho and Ms Ng for fiduciary embezzlement of the Defendant. This action is what Mr Barlow, counsel for the Defendant, referred to in his skeleton argument as the Original Action. In that action, the registered owner of 80% of the Defendant's shares and its other director, Mr Koichiro Takahashi, also sues to recover a total sum of HK\$16.9 million allegedly lent by him to the Defendant on behalf of Mr Ho. The Defendant says that Mr Ho and Ms Ng have been guilty of systematic embezzlement of its funds from 1998 until September 2006 when they were both dismissed for cause and also that they defrauded the Defendant of HK\$14 million in June 2004 through the use of forged documents in Guangzhou.
- (4) In the action by the Defendant and Mr Takahashi against Mr Ho and Ms Ng, interlocutory proprietary tracing injunctions have been obtained to restrain Mr Ho and Ms Ng from dealing with any funds belonging to the Defendant or any property representing those funds. Mareva injunctive relief has also been ordered against Mr Ho and Ms Ng.
- (5) The proceedings against Mr Ho and Ms Ng were commenced by the Defendant and Mr Takahashi on 27 September 2006, slightly over a month before the present proceedings were commenced by the Plaintiff against the Defendant on 2 November 2006.
- (6) The Defendant has joined Mr Ho and Ms Ng as 1st and 2nd Third Party respectively in this action in which third party proceedings it alleges that Mr Ho and Ms Ng are the beneficial owners and controlling minds of the Plaintiff, that they duped Mr Takahashi into counter-signing the Promissory Notes relied upon by the Plaintiff, and that, if the Defendant is indebted to the Plaintiff, it is because of their fraudulent breaches of fiduciary duty owed to the Defendant. In the light of these features of the claim, Mr Takahashi asserts that the

Defendant has a good defence to the Plaintiff's claim. As a first line of defence, the Defendant denies that it received any of the alleged loans in the aggregate sum of HK\$10 million from the Plaintiff. Instead, sums were received from Ms Ng. These were understood by Mr Takahashi to be sums which Mr Ho owed to the Defendant by way of shareholder's contributions. Mr Takahashi understood that Mr Ho and Ms Ng had arranged to borrow these monies from the Plaintiff in order to enable Mr Ho to fund his contributions to the Defendant. Alternatively, the Defendant contends that the Plaintiff is a front for Mr Ho and Ms Ng. Mr Ho was permitted to take sole responsibility for the Defendant's management. Mr Ho caused the Defendant to employ his wife, Ms Ng. Mr Takahashi does not read Chinese and was duped into signing the Promissory Notes and the cheques in respect of interest. It is said that the Promissory Notes were devised in order to defraud the Defendant and the interest payments to the Plaintiff were unauthorized. The relevant principles applicable to an application for summary judgment are well-known and have not been in dispute between the parties in this case. The case being clearly one within the scope of Order 14 and the Plaintiff having satisfied the preliminary requirements of the procedure, it is accepted by both parties that the burden is on the Defendant to satisfy the Court why judgment should not be given against it. To do so, the Defendant must show that there are triable issues or that there ought for some other reason to be a trial of the claim. In determining whether the Defendant has demonstrated that there are triable issues, it is not appropriate to embark on a mini-trial of the action on affidavit evidence. The Court simply asks itself whether what the Defendant says is credible. As Godfrey JA put it in *Ng Shou Chun v. Hung Chun San* [1994] 1 HKC 155 at 158: The issue is not whether the defendant's assertions are to be believed; it is whether those assertions are believable. As to the Defendant's first line of defence, it seems to me that the Defendant has raised a triable issue as to whether the Plaintiff did in fact enter into a loan agreement with the Defendant or whether the loans were by way of shareholder's contributions from Mr Ho. It is common ground that the payments made by the Plaintiff were made to Ms Ng and not to the Defendant. The Promissory Notes cannot, it seems to me, be said to be entirely free from ambiguity as they appear to identify the counterparty to the loan as Ng Mei Fa (Hypermax Ltd.). The other supporting documents relied upon by the Plaintiff, namely the interest calculations and cheques, are documents which Mr Takahashi says he did not understand and which he says were misrepresented to him when he signed them. It seems to me that these are matters that should go to trial to be tested by cross-examination. I cannot say that the Defendant's evidence in this regard is not believable. Furthermore, the allegations of the Defendant concerning the fraud on the Defendant, if believed, will clearly provide a defence to the Plaintiff's claim. I do not understand the Plaintiff to contend to the contrary. Instead, the Plaintiff says that the Defendant's case that Mr Ho and Ms Ng were acting in concert with the Plaintiff to defraud the Defendant is a bare allegation with no particulars, so that the Defendant's evidence on this summary judgment application is devoid of credibility and should be disregarded. Mr Ronny Wong SC, who leads Mr Tim Wong, for the Plaintiff, submits that the Defendant's allegation of fraud is a mere vague general allegation. He submits that although the Defence filed by the Defendant pleads the allegation that Mr Ng and Ms Ho were acting in concert

with the Plaintiff to defraud the Defendant, none of the particulars pleaded amount to fraud on the part of the Plaintiff. Reliance is placed on the text in Note 14/4/4 of Hong Kong Civil Procedure 2007 (Vol.1) at p.175 which states: If the defence relied upon is fraud, the affidavit should state the particulars of the fraud (see O.18 r.8(1); Wallingford v. Mutual Society (1880) 5 App. Cas. 685). A mere vague general allegation of fraud is useless. So, it is submitted, the Defendant's affidavit evidence does not state the particulars of the fraud relied upon. I do not agree that the Defendant's affidavit evidence is insufficiently particularized for the purposes of establishing, on this summary judgment application, that there are triable issues and hence that leave to defend should be granted. In my judgment, although the Defendant's pleading may be susceptible to requests for particulars and its case as to the connection between the Plaintiff and Mr Ho and Ms Ng is tenuous, I think the Defendant has put forward sufficient material in its affidavit evidence to demonstrate that there are matters which should be investigated at trial in this regard. Given the pending dispute in the action against Mr Ho and Ms Ng and the relationships between the various parties involved, I do not think it can be said at this stage that the Defendant's evidence is not believable. It is not, of course, for me to express any view as to whether the Defendant's evidence should, or will, be believed as that is a matter for the trial. Accordingly, I propose to say no more as regards the merits of either of the defences advanced by the Defendant. Mr Barlow submitted in his skeleton argument that the Plaintiff was well aware of the Defendant's defence before it issued its summons under O.14. He points in particular to the fact that what he has described as the Original Action was commenced before the Plaintiff brought this action. Hence, he submits that the appropriate order should be that the summons be dismissed and not merely that the Defendant be granted leave to defend. On the footing that the correct order is that the summons be dismissed, he submitted that costs should be to the Defendant in any event. I have reflected on this submission but have come to the conclusion that the appropriate order is that there be unconditional leave to the Defendant to defend the action. Although a Defence was filed shortly before the Plaintiff issued its O.14 summons, it is only through a series of five affirmations, four of which were served last week, that the Defendant has fully set out its case. More importantly, it seems to me that it would be wrong for me to assume that the commencement of the so-called Original Action resulted in the Plaintiff having knowledge of the details of the Defendant's case against Mr Ho and Ms Ng. Making that assumption would be to accept one of the underlying premises of the Defendant's case, namely that the Plaintiff is a vehicle through which Mr Ho and Ms Ng have perpetrated part of their alleged fraud on the Defendant. Whether that premise is sound must be left to the trial. I therefore grant the Defendant unconditional leave to defend this action. As to costs, the usual order in the circumstances is that the costs of the O.14 application be costs in the cause and I so order. (Joseph Fok, SC) Recorder of the Court of First Instance of the High Court Mr Ronny F H Wong SC leading Mr Tim Wong, instructed by Messrs Wong & Poon, for the Plaintiff Mr Barrie Barlow, instructed by Messrs Jesse H Y Kwok & Co, for the Defendant

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