

HONG KONG / JUDGMENT

MAX FORTUNE INDUSTRIAL LTD v. YU WAI CHING

COURT

Court of First Instance

DECIDED

14 December 2007

CASE / FILE NUMBER

HCA937/2006

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bjbj HCA 937/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 937 OF 2006

BETWEEN MAX FORTUNE INDUSTRIAL LIMITED Plaintiff and YU WAI CHING Defendant (By
Original Action)

AND BETWEEN YU WAI CHING Plaintiff and MAX FORTUNE INDUSTRIAL LIMITED Defendant
(By Counterclaim)

Before: Mr Recorder B Yu, SC in Court Date of Hearing : 3rd 7th December 2007 Date of
Judgment: 14th December 2007

J U D G M E N T

Introduction

Mr Yu Wai Ching (the defendant) was an employee of Max Fortune Industrial Limited (the plaintiff) from December 2001 until 4 March 2006. On 3 March 2006, a day before he ceased working, he had allowed persons who were not members of the plaintiff s staff to tour the plaintiff s factory in Fuzhou. The plaintiff claims that in doing so, he was in breach of company policy and his contractual duties. It also claims that during this tour, the defendant falsely represented that a competitor had an interest in the factory. Apart from breach of duties, this is said to give rise to liability for malicious falsehood. The Facts The plaintiff was established in

1993. It carries on the business of printing paper products. Its main products include paper bags; roll wraps, wrapping tissue paper and paper cups and dishes. The plaintiff has interests in 3 factories in the Mainland, one of which is in Fuzhou. The Fuzhou factory is a joint venture between the plaintiff and a Mrs Yu, a resident of Fuzhou. The Fuzhou factory mainly produces paper roll wraps. The defendant's position in the plaintiff was that of a senior production planner and controller. He was responsible mainly for production schedules and quality control. At the material time, he was posted to work in the Fuzhou factory and was the plaintiff's sole representative there. The defendant signed a Letter of Appointment dated 20 December 2001 which required him to adhere to the company rules, policies and terms. An appendix to the Letter of Appointment spelt out certain terms pertaining to confidentiality. There is also a non-solicitation clause. In February 2006, the defendant gave notice to the plaintiff that he was going to resign with effect from 6 March 2006. He ceased work on 4 March 2006. There is no dispute that on 3 March 2006, two persons made a visit to the Fuzhou factory at about noon. They are a Mr Chiu, an employee of Yuan Ming Industrial Company Limited (Yuan Ming) and a Mr Gordon Bailey (Mr Bailey), an employee of Watermark Publishing Limited. There is also no dispute that it was the defendant who led them on a tour around the production facility in the factory. The plaintiff came to know about the visit only later from Mr Bailey. Upon knowing of the visit, Mr Chan Che Sum, a director of the plaintiff (Mr C S Chan) telephoned the defendant on 14 March 2006 to question him about this. During this conversation, the defendant admitted his involvement in the tour. It is, however, in dispute as to whether he had admitted that he thereby breached company policy. Yuan Ming operates a factory in Shenzhen. Its owner is Mr Li Yuan Chu (Mr Li). It also produces paper carrier bags and roll wraps. The size and scale of Yuan Ming's factory was much smaller than that of the plaintiff's factory in Fuzhou. The plaintiff had at one time used Yuan Ming as a sub-contractor but the plaintiff has ceased to engage Yuan Ming for some years either because of quality problems or because the plaintiff entered into a joint venture with an entity called Hing Fai run by Mrs Yu to set up the factory in Fuzhou. The Claim By its Statement of Claim, the plaintiff claimed against the defendant for injunction and damages based, in part, on the solicitation clause. At the commencement of the trial, all claims have been dropped save the one arising out of the tour. There is also a counterclaim by the defendant for a declaration that the non-solicitation clause is unenforceable. This also fell away. The only remaining claim is that pleaded in paragraphs 8 and 9 of the Statement of Claim. There are essentially two causes of action, one for breach of agreement and the other for malicious falsehood. At the trial, counsel for the plaintiff sought an injunction to restrain the defendant from making representations to the effect that the Fuzhou factory is owned or operated by Yuan Ming or that Yuan Ming was in partnership or joint venture with the plaintiff. The plaintiff has not adduced any evidence that it has suffered any loss or damage arising from the alleged breach of agreement or malicious falsehood. Mr Chan for the plaintiff asked me to award nominal damages to the plaintiff. Paragraph 8 of the Statement of Claim alleges that the defendant acted in breach of his contractual duty in that (a) he conducted the tour for Mr Bailey and Mr Chiu without the knowledge and consent of the plaintiff when he knew or ought to have known that Yuan Ming and the plaintiff were rivals or competitors in the same industry, (b) during the tour, the defendant wrongfully represented to Mr Bailey that the Fuzhou factory was a factory of Yuan

Ming, and he further told Mr Bailey that he was leaving the plaintiff to join Yuan Ming, and (c) by his conduct, he approved or confirmed a representation by Mr Chiu of Yuan Ming that Yuan Ming was in partnership or joint venture with the plaintiff, when he knew or ought to have known that this was not true. Paragraph 9 of the Statement of Claim alleges that the statements and representations made or confirmed by the defendant as pleaded in paragraph 8 were false and were published maliciously. The plaintiff's case is that it was the plaintiff's company policy that employees should not allow third parties to view the production facilities in the plaintiff's factory without the consent of the plaintiff's directors. The Issues The defendant admits he conducted the tour at the Fuzhou factory for Mr Chiu of Yuan Ming and Mr Bailey of Watermark. He denies that this was against company policy. He denies that he has represented to Mr Bailey that the Fuzhou factory was a factory of Yuan Ming and denies that he either approved or confirmed a representation by Mr Chiu to the effect that the plaintiff was in joint venture or partnership with Yuan Ming. His case is that he was led by Mr Li to believe that Yuan Ming was considering setting up a factory in Fuzhou and was seeking to discuss with Mr C K Chan with the view to doing processing work for the plaintiff. The issues I have to consider are:

- (a) was the defendant in breach of his employment contract with the plaintiff in permitting Mr Chiu and Mr Bailey to conduct the tour of the Fuzhou factory on 3 March 2006;
 - (b) in particular, was there a company policy to the effect as contended by the plaintiff, and if so, has the plaintiff done all that was reasonably sufficient to give notice of the policy to the defendant;
 - (c) whether the defendant acted in breach of his obligation to the plaintiff in allowing Mr Chiu and Mr Bailey to tour the factory;
 - (d) whether the defendant made the representations he is alleged to have made to Mr Bailey; and
 - (e) whether the plaintiff has established the elements of the tort of malicious falsehood.
- Company policy I start with the issue on company policy. The Letter of Appointment expressly provided that the defendant was required to adhere to company policy and rules. It did not however set out what these are. The plaintiff has not been able to produce any record to show that the defendant has been apprised of the policy, or indeed, what are the terms of the policy. Mr Chan said the policy was that no person may enter the production unit without the permission of the company, and that only the plaintiff's directors could give that permission. Mr Chan gave 3 reasons why the company had that policy. The first is that certain clients required the plaintiff to maintain confidentiality of their patterns or styles. The second was a concern over security after the September 11 incident. The plaintiff's customers from the United States of America imposed certain conditions on manufacturers of goods for export into that country to ensure that products exported to the States do not pose a security risk. The third was that certain production techniques are said to be confidential to the plaintiff. The defendant disputes all these. He claims that suppliers, sub-contractors and customers have frequently been allowed into the factory and that he was

not aware of the existence of the policy. It is unnecessary for me to find whether such a policy exists. This is because I am not satisfied that the plaintiff has proved that it has done all that is reasonably sufficient to give notice of the policy to the defendant. In the event it does not matter for the plaintiff. For the reasons I shall explain, I find that irrespective of whether the policy exists, and whether defendant knew or ought reasonably known of such policy, his conduct on 3 March 2006 was in the circumstances a breach of his duty. The plaintiff's evidence that the defendant knew of the policy consists firstly of an assertion by Mr Chan that his elder brother (Chan) would have made telephone calls to the factory managers and the plaintiff's staff to remind them of the policy. This is said to arise as a result of an incident in October 2005 where the factory manager of another one of the plaintiff's factories was said to have breached the company's rule in letting some one to enter the factory without permission. The episode was followed by a letter issued by the plaintiff's administration department reminding staff to observe rules as to confidentiality. The problem is that the plaintiff did not call Mr C K Chan to give evidence, and there is no evidence as to what he has or has not said to the defendant. Although the defendant did receive a copy of the letter from the administration department, that letter did not mention anything about company policy with regard to factory visits. The second piece of evidence that is relevant here is the letter dated 14 March 2006 sent by Mr C S Chan to the defendant immediately following their telephone conversation on that day. In that letter, Mr Chan recorded that the defendant admitted he had breached company's policy. The defendant denies that he has done so. Mr Chan did give evidence but he could not remember much about the conversation other than that the defendant admitted he took some one into the factory. Even if the defendant did admit during the telephone conversation with Mr Chan on 14 March 2006 that what he did was against company policy, I would not draw the inference that he was aware of the existence of the policy before 6 March 2006. It is relevant to note that the plaintiff has issued a number of staff manuals from time to time, but none of those mention a policy with regard to factory visits. In the circumstances, I am not satisfied that the plaintiff has discharged the burden on it of proving that it has done all that is reasonably sufficient to bring the terms of the policy to the notice of the defendant. Whether the defendant acted in breach of his duties Mr Bailey made a witness statement which I admitted in evidence. In that statement, he described the visit he made to the Fuzhou factory. He explained earlier in his statement that he was led by Yuan Ming to believe that they had one factory in Shenzhen and one factory in Fuzhou, and the one that he was taken to in Fuzhou was Yuan Ming's factory. The following is what he said concerning the visit:

7. I was greeted by a Chinese gentleman who seemed to be the representative of the Fuzhou Factory. Mr Chui [there is no dispute that this is a reference to Mr Chiu] introduced him to me as Mr Yu , the production manager of the Fuzhou Factory. Mr Yu did not give me his business card. [There is no dispute that this is the defendant.] Yu then guided as to tour around and view the Fuzhou Factory. I viewed the facilities and the production process. During the tour, I found that there was a lot of Max Fortune signage being displayed throughout the Fuzhou Factory. But I did not notice any signage of Yuan Ming there.

8. As I observed the signage of Max Fortune at the entrance and throughout the Fuzhou Factory, I asked Mr Yu why it was so. Mr Yu did not answer me directly. Mr Chiu in the presence of Mr Yu said to me that Yuan Ming was in partnership or joint venture with Max Fortune and for this reason the Max Fortune signage was being displayed (see attached email from Lake Li mentioning the joint venture between the two companies). Mr Yu said he was leaving Max Fortune to join Yuan Ming shortly. I should interpose here to mention that in the course of the parties submissions on whether the Court should admit the hearsay statement of Mr Bailey under section 47 of the Evidence Ordinance, I have drawn the parties attention to the procedure adopted in *High Fashion Garments Co Ltd v Ng Siu Tong & Ors* [2003] 2 HKC 562 and *Cheung Wai Man Vivien and Anor v Centaline Property Agency Ltd and Ors* [2004] 1 HKC 692 and inquired of the defendant through his counsel whether he would wish to have the opportunity of cross-examining Mr Bailey via video-link. Mr Li declined to take the opportunity, maintaining that this was a burden. In considering the weight to be attached to Mr Bailey's witness statement, I take into account the fact that his evidence has not been tested by cross-examination. I bear in mind however that he has no motive to lie or to exaggerate the defendant's conduct. What he said about raising query concerning the logo displayed in the factory is inherently probable. Mr Bailey has produced an e-mail from Mr Li dated 22 February 2006. In that e-mail, Mr Li asserted that Yuan Ming had a joint venture factory in Fuzhou. He said that Yuan Ming was moving their gift wrapping roll facilities from Fuzhou to Shenzhen. In response, Mr Bailey told Mr Li that he would like to visit the Fuzhou factory on 3 March. Naturally, at the time of his visit, Mr Bailey was under the impression that he was visiting a factory in which Yuan Ming had an interest, and his query about the logo of the plaintiff was only natural. After the visit, Mr Bailey sent an e-mail to the plaintiff in which he said he believed he visited the plaintiff's Fuzhou factory, saying I understand you have a joint venture with Shenzhen Yuanming. In my view, these contemporaneous communications strongly corroborate Mr Bailey's account. As the defendant was ostensibly the person who was in charge of the Fuzhou factory, it was natural for Mr Bailey to seek confirmation from him when he became genuinely puzzled by the inconsistency between what he was told and what he saw. I am satisfied that the defendant was aware of the representation being made by Mr Chiu to the effect that Yuan Ming had an interest in the factory by way of joint venture or partnership, and that he stood by allowing Mr Bailey to labour under the misapprehension. At the same time, I have no hesitation in rejecting the inconsistent account presented by the defendant in his evidence. Apart from giving inconsistent versions as to the purpose of the visit and what actually happened during this visit, the defendant's account is inherently improbable. He would have the Court believe that the main purpose of the visit by Mr Chiu and Mr Bailey was to talk to Mr C K Chan and yet when every one knew that Mr C K Chan had just gone out for lunch and was expected to be back any minute, no one thought of making a call on Mr K Chan's mobile telephone to find out where he was and how long they had to wait. Instead, the party just left without having spoken to Mr K Chan. I do not accept the defendant's explanation as to why he did not wish to telephone Mr C K Chan himself that afternoon. But even if he did not want to do so, there was simply no credible reason why he did not suggest that Mr Chiu should make

that call. If the defendant believed at the time that the visit was an innocent one, it is also incredible that he did not inform Mr C K Chan of the visit upon his return to the factory. I am satisfied that I can rely on Mr Bailey's statement as to what really happened, and am further satisfied in all the circumstances that what the defendant did was in breach of his duty of fidelity to the plaintiff. Having rejected his account, I am not satisfied that there was any bona fide reason for him to allow outsiders to tour the factory. More importantly, his conduct during the tour shows that he was doing what he did to advance not the plaintiff's interest but that of Yuan Ming, and he knew that. He knew that Yuan Ming was in the same line of business as the plaintiff and would have known that it was a potential competitor. On the evidence before me, I am satisfied that the defendant did know that a misrepresentation was being made to Mr Bailey to the effect that the plaintiff was in joint venture or partnership with Yuan Ming. He of course knew that this was untrue. That does not necessarily mean that the defendant was guilty of having made the misrepresentation himself. Mr Chan for the plaintiff referred me to Chitty on Contracts, 29th ed., paragraphs 6-014 and 6-015 and contended that the defendant has made a misrepresentation by conduct. As the misrepresentation did not give rise to any contractual act or damages, it has no real legal consequence. Having already found that the defendant acted in breach of his implied duty of fidelity, it is unnecessary for me to make a finding as to whether he has impliedly misrepresented the position to Mr Bailey. Suffice it to say that his conduct was a breach of his duty. The plaintiff has not, however, adduced any evidence of loss or damage occasioned to it as a result of the breach. I can only award nominal damages to the plaintiff for the breach of the implied term of the employment agreement. Nor can the plaintiff succeed in malicious falsehood as at least one of the essential conditions for such a cause of action, viz. proof of actual loss, is absent, see Clerk & Lindsell on Torts, 19th ed., paragraph 24-09, Hong Kong Wing On Travel Service Ltd v Hong Thai Citizens Travel Services Ltd [2001] 2 HKLRD 481. Since the defendant has already left the plaintiff's employ, I do not think that there is any real risk that the defendant would repeat his conduct. I do not think this is a case which calls for the grant of an injunction. I decline to do so. In the circumstances, I would give judgment to the plaintiff in the sum of \$100 as nominal damages for breach of the employment contract. The counterclaim is dismissed. As the plaintiff has only succeeded in obtaining nominal damages, I make an order nisi that there be no order as to the costs in the action, save that the defendant shall have the costs of the adjournment on the 1st day of the trial which was occasioned entirely by the plaintiff's application for an adjournment of the trial which I refused. This is also an order nisi. I further make an order nisi that the defendant should have his costs of the counterclaim, since the abandonment of the counterclaim was only the result of the abandonment by the plaintiff in relying on the non-solicitation clause. Both parties are at liberty to apply to the Court to vary or set aside the costs order nisi within 14 days of the judgment. (Benjamin Yu, SC) Recorder of the Court of First Instance High Court Mr P K Chan, instructed by Messrs Howell & Co, for the Plaintiff Mr Albert Li, instructed by Messrs Yip & Partners, for the Defendant

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