

HONG KONG / JUDGMENT

NEWMAX GARMENTS LTD v. SO SAN PING

COURT

District Court

DECIDED

6 September 2007

CASE / FILE NUMBER

DCCJ67/2007

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bjbj es^) Defendant

Coram : Her Honour Judge Mimmie Chan Date of hearing : 17 August 2007 Date of handing down
Reasons : 6 September 2007 REASONS FOR DECISION This is the Plaintiff s application for
summary judgment for the sum of HK\$900,000, and interest. At the end of the hearing, I gave
judgment in terms of the Plaintiff s summons issued 20 May 2007, and indicated that the reasons
for my decision would be handed down. These are my reasons.

Facts

The Plaintiff is a limited company, and the Defendant at all material times was one of two shareholders of the Plaintiff and a director of the Plaintiff until 1 May 2004. The Plaintiff claims that in about late April to early May 2004, the Defendant was asked to endorse the financial statements of the Plaintiff for the year ended 30 September 2003 (2003 Financial Statements) in his capacity as one of two directors of the Plaintiff. The Defendant demanded that a sum of HK \$900,000 be paid by the Plaintiff to him to hold as security before he would endorse the financial statements, to cover his potential liability for the tax payable by the Plaintiff in the event that the 2003 Financial Statements were found to be incorrect. The sum of HK \$900,000 was paid by the Plaintiff to the Defendant by cheque dated 4 May 2004. The Plaintiff seeks to recover the payment of HK \$900,000 from the Defendant on the basis that: (1) the Defendant had provided no consideration for the payment; (2) the payment was made by the Plaintiff under the mistake of fact that the Defendant would be personally liable for the Plaintiff s tax, when in fact such tax would only be payable by the Plaintiff; and alternatively (3) when payment was made, the Defendant had promised to return the sum of HK \$900,000 to the Plaintiff if the 2003 Financial Statements were correct and upon the issue of a notice of assessment for the year 2003/2004 by the Inland Revenue Department to the Plaintiff, which notice of assessment was in fact issued in June 2004. The Defendant claims that when he was asked by Lam Sau Wing ("Lam"), who was the other shareholder and director of the Plaintiff, in late April 2004 to endorse the 2003 Financial Statements, he noticed that they contained errors and refused to endorse them. According to the

Defendant, the 2003 Financial Statements were erroneous because they did not include a sum of US \$1,200,000 which had been invested by the Plaintiff in about March 2003 in a company in Mainland China, and the total assets of the Plaintiff as at September 2003 as shown in the 2003 Financial Statements were incorrect. Further, the Defendant claims that there were payments which had been made by the Plaintiff's customers and which were deposited into Lam's personal bank account, which payments amounted to HK \$25,694,206.16 ("Deposits"). The Defendant claims that he informed Lam that he would not endorse the 2003 Financial Statements unless they were rectified to include the investment of US \$1,200,000. However, the Defendant was informed by Lam that the submission of the 2003 Financial Statements could not be further delayed and that they would be rectified in the next financial year. The Defendant in his affirmation also referred to Lam's breach of an agreement made between the Defendant and Lam for (inter alia) the Defendant's sale of his shares in the Plaintiff to Lam for a sum of HK \$8,000,000, and Lam's default in payment of the purchase price of the shares ("Default"). The Defendant claims that in view of first, the Default; secondly, the Deposits; and thirdly, his duty as a director of the Plaintiff and "the potential legal consequences", and in order to ensure that Lam would procure the 2003 Financial Statements to be rectified in the next financial year, the Defendant demanded a cash guarantee of HK \$900,000. Hence, it is pleaded in the Defence that in consideration of the Defendant agreeing to endorse the 2003 Financial Statements, it was agreed between the Plaintiff through Lam and the Defendant that the Plaintiff would procure the 2003 Financial Statements to be rectified in the next financial year, and that HK \$900,000 would be given by the Plaintiff to the Defendant as a guarantee, which sum would be returned by the Defendant to the Plaintiff if the errors in the 2003 Financial Statements were rectified in the financial statements of the Plaintiff in the following financial year. In answer to a request for further and better particulars as to the basis upon which the figure of HK \$900,000 alleged by the Defendant to be held as guarantee was determined, the Defendant claims that he had asked for HK \$1,000,000 to reflect his share of the Plaintiff's potential tax liability, but Lam had counter-offered to reduce the amount to HK \$900,000, which was accepted by the Defendant. A written statement or acknowledgment ("Acknowledgment ") was in fact signed by the Defendant, in the presence of two witnesses, confirming that the sum of HK \$900,000 was received by him as security/guarantee pending confirmation that the 2003 Financial Statements were correct. The Acknowledgment was also signed by Lam on behalf of the Plaintiff. It provides that if the 2003 Financial Statements are correct, the security/guarantee would be repaid to the Plaintiff, and if the 2003 Financial Statements contained errors, the security/guarantee would belong to the Defendant. Legal principles for Order 14 The principles applicable to applications for summary judgment are clear. The onus is on a defendant to show that there are triable issues, or that he has a real or bona fide defence. The test at the summary stage is whether the defendant's assertions are believable. Whether there are triable issues Counsel for the Plaintiff seeks to establish at the application for summary judgment that the Defendant has no arguable or credible defence. It is claimed that the Defendant has not given any valuable consideration as a matter of law for the sum of HK \$900,000. The Defendant, as a director of the Company at the material time, had a legal duty to ensure that the Plaintiff maintains proper books and accounts which give a true and fair view of the state of its affairs, to endorse and approve the balance

sheets and audited accounts of the Plaintiff and to attach a director's report, and not to knowingly or recklessly make a statement which is misleading, false or deceptive to the Plaintiff's auditors or in its financial statements. Counsel referred to sections 121 - 124 ; 129, 129B, 129D and 129F of the Companies Ordinance. Non-compliance with these sections constitute offences under the Companies Ordinance. The Defendant's performance of an existing legal duty does not constitute valuable consideration. Counsel for the Plaintiff argued that even if the 2003 Financial Statements were inaccurate, any additional liability for tax (as a result of any alleged omission of the investment of US \$1.2 million) would be recoverable from the Plaintiff, and not from the Defendant personally. The sum of HK \$900,000 was paid to the Defendant under a mistake that the Plaintiff might be personally liable for additional tax as a result of any errors made in the Plaintiff's 2003 Financial Statements, and is recoverable as money had and received. Counsel for the Plaintiff pointed out that in view of the Defendant's duty owed to the Plaintiff to ensure that its accounts are accurate and contain a true and fair view of its financial matters, if the Defendant had truly considered that the 2003 Financial Statements were inaccurate, it was his duty to arrange for the 2003 Financial Statements to be rectified before endorsing the same, and the Defendant cannot rely on his own breach of duties as a director of the Plaintiff, or on his own act of contravention of the provisions of the Companies Ordinance, as valuable consideration for the receipt of the sum of HK \$900,000. Counsel for the Plaintiff argued that if the Defendant's account of events is believed, the agreement between the Plaintiff and the Defendant should not be enforced as being contrary to public policy and/or illegal. The allegations made by the Defendant in his affirmation filed in opposition to the application for summary judgment, with regard to the agreement made between the Defendant and Lam for the transfer of shares and Lam's alleged breach of agreement, are irrelevant to the issues in this action. Any alleged breach of the agreement made between Lam and the Defendant, and any other cause of action which the Defendant may have against Lam, are matters between the Defendant and Lam personally, and do not concern the Plaintiff. Obviously, these allegations do not afford a defence to the Plaintiff's claims against the Defendant in this action. In any event, the Defendant's assertion that the Plaintiff's investment of US \$1.2 million was omitted from the 2003 Financial Statements is not credible. The Plaintiff has produced a note prepared by the Defendant himself in April 2004, containing his calculation of the estimated value of the total assets of the Plaintiff, when Lam and the Defendant were negotiating the price of the shares in the Plaintiff to be sold by the Defendant to Lam. The Defendant's estimate did not take into account the value of the alleged investment of US \$1.2 million in Mainland China. This clearly contradicts the Defendant's assertions made in relation to the inaccuracies of the 2003 Financial Statements. I accept the submissions made by counsel for the Plaintiff on the lack of consideration for the Plaintiff's payment of the sum of HK \$900,000 to the Defendant, and that the sum of HK \$900,000 is recoverable from the Defendant as money had and received. Whether there is some other reason for trial Counsel for the Defendant very reasonably conceded that the Defendant has not raised triable issues in his Defence or in his affirmation filed in opposition to the application for summary judgment. The Defendant only sought to argue at the hearing that there is "some other reason" for the case to proceed to trial despite the fact that there might not be an arguable defence. The Defendant seeks to rely on the principles relating to "other reason for trial", as formulated by Megarry J in *Miles v. Bull* [1969] 1

QB 258 : - "Under rules 3 and 4 of the present Order 14, the defendant can obtain leave to defend if the defendant satisfies the court "that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial." These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff." The Defendant also relies on Caesar's Empire Karaoke v. Lam Chuen Ip & Others (unrep. HCA 4594 of 2003, 20 March 2004), where Miles v. Bull was applied. In Caesar's Empire Karaoke, Deputy High Court Judge Muttrie found that the transactions in question between the parties before him were suspicious, and allowed the defendants leave to proceed to trial. The learned judge's observation was: - " The suspicion that a transaction is tainted with illegality, as with the suspicion that it is a sham, gives rise to the need to examine the transaction closely. The need for trial therefore arises even if the defendants have no defence or at best a sketchy defence." Counsel for the Defendant argued that the circumstances surrounding the transaction made between the Plaintiff and the Defendant for payment of the sum of HK \$900,000 warrants close investigation by way of discovery and a full trial. Counsel claims that the reason stated for payment of the sum in question to the Defendant was itself very odd, and that the alleged mistake by the Plaintiff as to tax liability was not credible. He argued that as it is not known whether the 2003 Financial Statements were actually correct, "there could be some illegality involved" in the submission of the 2003 Financial Statements and the correctness of the Statements can only be examined and the suspicions can only be answered after the Plaintiff has made full discovery of its accounting documents. It is claimed by the Defendant that the HK \$900,000 must have some connection with the illegality claimed, as the Acknowledgment provides that the Defendant would get to keep the money if the 2003 Financial Statements were incorrect. The Defendant says that these suspicious circumstances as described make the present case fall within the category of cases contemplated in Miles v. Bull and Caesar's Empire Karaoke, such that there should be a trial despite the lack of a defence. The two cases cited and relied upon by the Defendant are clearly distinguishable from the facts of the present case. As counsel for the Plaintiff pointed out, if there are factors worthy of further investigation at trial, these factors should affect the issues between the parties. The matters which the Defendant claims should be investigated in this case are irrelevant to the court's determination of the Plaintiff's claim. The Plaintiff does not seek payment under the Acknowledgment. The Plaintiff claims that the sum of HK \$900,000 should be repaid because there was no consideration for the payment. The court is not required, at trial, to look into the accuracy or otherwise of the 2003 Financial Statements, because whether they are accurate or not, the Defendant must repay the sum of HK \$900,000 to the Plaintiff as the payment was not supported by any consideration moving from the Defendant. Counsel for the Plaintiff emphasized that the Plaintiff does not seek to enforce the agreement evidenced by the

Acknowledgment, and any illegality alleged to be tainting the said agreement does not affect the Plaintiff's claim at all. Contrasted with the facts of this case, the sale in *Miles v. Bull* which was suspected to be a sham was directly relevant to the questions in issue between the parties in the case. In *Caesar's Empire Karaoke*, the plaintiff's claim was made pursuant to the contract which was claimed to be unenforceable, the question of illegality therefore going to the very basis of the plaintiff's claim. More importantly, the defendants in *Caesar's Empire Karaoke* were able to identify and there was evidence before the court to support the claim of illegality. In the present case, the Defendant has not been able to give any credible basis for his claim of inaccuracies in the 2003 Financial Statements. This was the main reason given by the Defendant for his refusal to sign the 2003 Financial Statements, and I repeat my observations made in paragraph 16 above. The other reason stated in his affirmation for requiring the guarantee of HK \$900,000 was the alleged omission of the Deposits. Although the Defendant claimed in his affirmation that he "discovered" that the Deposits had been made, no further particulars were given as to what he allegedly discovered about the Deposits, and how they were relevant. It is clear that in resisting an application for summary judgment, a defendant must condescend to particulars and cannot make bare assertions and hope that something relevant might be unearthed should further investigations be made. These principles are clearly enunciated in the judgment of the Vice-Chancellor in *The Lady Anne Tennant v. Associated Newspapers Group Ltd.* [1979] FSR 298 : - "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism. " A further distinguishing feature of *Miles v. Bull*, as highlighted in the judgment of Megarry, J is that most or all of the relevant facts were under the control of the plaintiff in that case, and the defendant had to elicit information by discovery, interrogatories and cross-examination to assist her case. Here, the Defendant was a director and shareholder of the Plaintiff at the material time when the 2003 Financial Statements were prepared and being finalized. He had sufficient information about the Plaintiff to enable him to substantiate his allegations of alleged inaccuracies in the accounts, the alleged omission of the Deposits and how they are relevant, and the alleged suspicious nature of his agreement with the Plaintiff. However, the Defendant has failed to give any or any reliable particulars. This throws doubt on the credibility of his assertions. I am not satisfied, on the face of the Defendant's bare assertions, that there are suspicious circumstances that ought to be investigated at trial. I would highlight the fact that although the Defendant claimed in his affirmation that he had reported the alleged inaccuracies in the 2003 Financial Statements to the Inland Revenue Department, the documents which he produced to support such allegation are on their face totally irrelevant and fail utterly to substantiate his statement of having made the alleged report of inaccuracies. In all, the Defendant's assertions are incredible and totally unsubstantiated, whether to raise any triable issue or arguable defence, or to support any allegation of illegality or the suspicious nature of the transactions, as to constitute any reason for trial. I am satisfied that the Plaintiff is entitled to judgment. The award Accordingly, I ordered on 17 August 2007 that judgment be entered in favor of the Plaintiff for the sum of HK \$900,000, with interest from 4 May 2004 to the date of payment at judgment rate, and for the costs of the action including the costs of the Order 14 application,

with certificate for counsel. (Mimmie Chan) District Judge Ms. Sara Tong, instructed by T.H. Koo & Associates, solicitors for the Plaintiff Mr. Martin Wong, instructed by Paul W. Tse, solicitors for the Defendant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V (#p# (#p# (#p# &`#\$ N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[N(WdkHh-N Phyb_ 1\ g OoR,gX[:i#z *\mT zo/< xC&1 ({m8 B*-T 9JNV P0} W~7gb W~7g xC&1 ({m8 & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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