

HONG KONG / JUDGMENT

PAUL Y. MANAGEMENT LTD v. ETERNAL UNITY DEVELOPMENT LTD AND OTHERS

COURT

Court of First Instance

DECIDED

27 December 2007

CASE / FILE NUMBER

HCA571/2007

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bjbj *nYH HCA 571/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 571 OF 2007

BETWEEN PAUL Y. MANAGEMENT LIMITED Plaintiff and ETERNAL UNITY DEVELOPMENT
LIMITED 1st Defendant CHAN YUK YAN 2nd Defendant ETERNAL UNITY PROPERTIES LIMITED
3rd Defendant and PAUL Y. ENGINEERING GROUP LIMITED 1st Third Party PYI CORPORATION
LIMITED 2nd Third Party

Before: Deputy High Court Judge L. Chan in Chambers Date of Hearing: 17 December 2007 Date
of Judgment: 27 December 2007

J U D G M E N T

This is an application by the plaintiff for summary judgment against the defendants. The cause of action is a loan for HK\$10 million advanced by the plaintiff to the 1st defendant on 25 October 2005 together with interest and expenses. The loan was advanced pursuant to a loan deed of the same date. Relationship of the defendants and ownership of the Project The 2nd defendant holds 90% of the shares of the 1st defendant. The 1st defendant holds 99.99% shares of the 3rd defendant. Both the 2nd and 3rd defendants are named in the loan deed as guarantors of the loan. The 1st and 3rd defendants in turn own 13% and 62% of a Mainland Company Eternal Real Estate Development Company Limited (ER Estate). ER Estate owns a real property development project in Beijing (the Project). The loan deed and supplements The loan deed required repayment within two months. The repayment date was extended to 25 January 2006 by a supplement to the loan deed made on 24 December 2005. The repayment date was further

postponed to 25 February 2006 by a 2nd supplement to the loan deed dated 24 January 2006. There was no repayment by 25 February 2006. The plaintiff then started this action against the defendants for repayment of the loan with interest and expenses. The alleged Master Agreement, the Three Agreements and the Management Agreement The defendants deny that the loan is repayable. They say that this loan is part of an oral master agreement (Master Agreement) made on 22 June 2005 between one Paul Y. Engineering Group Limited () as represented by one Tom Lau and the 2nd defendant. They further allege the terms of the Master Agreement as follows:

- (1) PYE should within 14 months advance or cause its related companies to advance loans up to RMB420, 000,000.00 (the Facility) to ER Estate for the purpose of financing and hence completing the Project.
- (2) Part of the Facility, i.e. RMB130, 000,000.00 would be used ER Esta would be advanced at such times and in such amounts according to the actual need to ensure the Project would be completed and units therein ready for hand over to individual purchasers in 14 months.
- (4) The Facility would be secured by various properties of the Project.
- (5) This security would be provided by ER Estate entering into presale contracts of various units of Blocks A, B and C and leasing contract for the carpark and club house of the Project, with cancellation provisions entitling ER Estate to cancel the presale or leasing arrangement upon repayment of sums advanced under the Facility.
- (6) Interest at the rate of the People s Bank of China s basic lending rate + 8% per annum would be paid to PYE for advances made under the Facility.
- (7) PYE would be entrusted with the project management of the Project and complete the remaining works timeously and would receive payment of 5% of the construction costs incurred as project management fee.
- (8) The sums advanced under the Facility would be repaid after UMO s^s| O(u k O(u k s^s|x s^s| *QHQ g k notes refer to certain pre-sale and leasing contracts for some properties. The first pre-sale agreement is for purchasing some units at RMB250 million. The second is a leasing agreement for RMB50 million. The last is a pre-sale agreement for some units at RMB50 million. The total sum under the three agreements is RMB420 million. The RMB420 million is supposed to be used as follows: RMB150 million in cash, RMB150 million for construction costs and RMB120 million for the rest of the building costs. There is another presentation on the use of the RMB420 million; namely RMB130 million for Shun Tat, RMB270 million for construction costs and RMB20 million for others. The defendants further allege that the following four written agreements were entered into in part performance of the Master Agreement. They are:
 - (1) Framework Presale Agreement for Block C of the Project dated 22nd .UFh gTSp y(u kTSp .UFh gTSp d by PY Construction (China) Limited (PY China). The Block C Agreement provided that ER Estate would pre-sell to Galaxy Land RMB250 million worth of units in Block C. The parties would enter into formal contracts for the per-sales. Of this RMB250

million purchase price, RMB130 million would be paid by Galaxy Land to the then mortgagee of the Project T?b kl\I paid plus interest at 8% above the basic lending rate of the People s Bank of China for the period between the date of receipt of the money and the date of repayment. Hence, the defendants say that RMB250 million would be advanced under the Block C Agreement for use in completing the Project. Regarding the Blocks A & B Agreement, Galaxy Land has the option to purchase certain units in Blocks A & B at the price of RMB12,000 per m2. Galaxy Land may enter into actual pre-sale contracts in respect of the purchase. The total purchase price for the units in these two blocks could be up to RMB240 million. The payment of purchase price would be in line with the need of costs for completing the Project. The parties would, at the time of ER Estate s request for payment, negotiate and agree on the units to be pre-sold to Galaxy Land and sign the relevant pre-sale contracts. Upon signing the pre-sale contracts, Galaxy Land would pay 50% of the purchase price (i.e. Up to RMB120 million) to ER Estate. The remaining 50% would be paid upon obtaining the title certificate. There is also a provision for cancellation of the pre-sale contracts and repayment of purchase price with interest. It is similar to that of the Block C Agreement. The defendants therefore say that RMB120 million would be advanced under this agreement for use in completing the Project. For the Clubhouse and Carpark Agreement, the term of lease was for 30 years at the total rental of RMB50 million. Payment of the rental was also in line with the need for costs of the Project. There is also a provision for cancellation and repayment of rental with interest which is similar to that of the Block C Agreement. The defendants say that RMB50 million would be advanced under this agreement for completing the Project. They further say that the total sum to be advanced under the Three Agreements would be RMB420 million which was the Facility provided in the Master Agreement for completing the Project. Pursuant to the Block C Agreement, the parties also signed some actual pre-sale contracts in respect of 124 units in Block C. On 20 October 2005, the parties further entered into a memorandum of understanding (). The management fee payable under the Management Contract and the money paid to ER Estate for developing the Project were deemed by the MOU to be debts due from ER Estate to PY China. These debts had to be repaid with interests. The MOU also confirmed that some units in Blocks A, B and C had been pre-sold to PY China and its related company for them to hold as security for the payment of the management fee and the repayment of the project costs. It also provided that if such money should be outstanding, the parties through negotiation and agreement could treat the outstanding money as payment for the outstanding purchase price of the units or the outstanding rental under the Three Agreements. Finally, it confirmed that the Three Agreements were all for securing prompt payment by ER Estate of the management fees and repayment of the project costs. Upon full payment of the fees and repayment of the costs and purchase price, ER Estate could cancel the pre-sale contracts and the Clubhouse and Carpark Agreement. The MOU thus confirmed that the Three Agreements were for providing security to PY China for the payments to be made by ER Estate. However, it also allowed PY China to take up some interest in the Development in the event of ER Estate s default in making full payment/repayment promptly. On 6 January 2006, PYE also made a public announcement in accordance with the Listing rules of the HKSE on

the money that Galaxy Land/PY China had paid ER Estate under the Three Agreements. The announcement stated among other things: The trading balances arose from payment of certain development and construction costs by the Group on behalf of the employer, Eternal Real Estate Development Co., Limited in respect of a residential development in Beijing (the Project). The trading balances, which bear interest at 8% over the lending rate as announced by The People s Bank of China and are repayable on demand, are secured by certain property units of the Project with an independent valuation of approximately HK\$183,255.000 as at 15th October, 2005. The alleged Further Agreement The defendants then say that in mid-October 2005, the 2nd defendant requested to draw down RMB10 million under the RMB420 million Facility to pay the contractors and creditors. PYE then represented through Tom Lau that it suffered from shortage of RMB. It instead proposed to lend the 2nd defendant HK\$10 million on the following terms:

- (1) A sum of HK\$10 Million would be advanced in Hong Kong through the Plaintiff as PYE s agent, which would be repaid in HKD upon Eternal Real Estate having received a corresponding advance under the Facility in RMB, which PYE represented would be available within 2 months time; and
- (2) On Eternal Real Estate receiving a corresponding advance under the Facility in RMB in Beijing, the 2nd Defendant would convert the same into HKD and repay the same to PYE in Hong Kong. These terms were characterized as the Further Agreement. The defendants say that the loan deed dated 25 October 2005 was made pursuant to the Further Agreement. They further allege that the plaintiff entered into the loan deed as agent of PYE. The defendants then allege that PYE had failed to advance the RMB20 million to the 2nd defendant within two months. They also allege that PYE had failed to make adequate advance to the 2nd defendant and ER Estate for completing the Project within 14 months from June 2005 as provided in the Master Agreement. They therefore say that the HK\$10 million under the loan deed is not due yet. The plaintiff s arguments The plaintiff denies that there was any Master Agreement or Further Agreement. It says that each of the Three Agreements and the Management Agreement was an independent agreement and there was no Master Agreement. It further says that if there were any Master Agreement, it would have been made in writing and referred to in the Three Agreements and the Management Agreement. Furthermore, the notes written by Tom Lau on 22 June 2005 merely showed that there were the Three Agreements, the Management Agreement and the total amount of money to be paid to ER Estate thereunder. The notes did not refer to any Master Agreement. These notes were compatible with the fact that there were merely the Three Agreements and the Management Agreement each being a stand-alone agreement. The plaintiff further says that the Three Agreements and the loan deed were all prepared by lawyers. The Three Agreements made no mention about the Master Agreement. The loan deed also made no reference to the Three Agreements or the alleged Master Agreement. The loan deed provided a definite date for repayment. Such provision was in conflict with the terms of the Three Agreements and the alleged Master Agreement. The security provided in the loan deed was also different. The 2nd and 3rd defendants stood as guarantors in the deed.

However, the security in the Three Agreements for the repayment of the purchase price and rental were the units in Blocks A, B and C and the use of the clubhouse and the carpark. The plaintiff further refers to six agreements made between PY China and ER Estate under which a total of RMB145,085,568 had been advanced to ER Estate for payment of project costs. These agreements were listed in schedule 4 of the defence. Some of the advances were made before the loan deed and some after. These six agreements all contained provisions that their advances would in due course be set-off against the purchase price to be paid under the Block C Agreement, but the loan deed did not have such provision. This shows that if PY China should have agreed to advance money to ER Estate pursuant to the Three Agreements with the units in the blocks as security, it would have done so in writing. The loan deed was without such provision and was therefore an arrangement independent of the Three Agreements. Even if there were the Master Agreement, which would have encompassed the terms of the Three Agreements, there was no reason why the loan deed should have any connection with it. Furthermore, if there were indeed the Further Agreement, there was no reason why its terms would not appear in the loan deed and the loan deed would instead contain a definite repayment date which contradicted the terms of the alleged Further Agreement. The plaintiff further submits that parole evidence is not admissible to contradict the terms of a written agreement (see *Hennabun Capital Ltd v Wong Chun Hung Vincent*, HCA 340/2001 at paragraph 15 and *Societe Provencale de Constructions Metalliques Navales et Ferroviaires v Tao-Yih Woo t/a T. Y. Woo & Co.* [1961] HKLR 394 at 401). The defendant's arguments

The defendants further refer to some notes written by Tom Lau on 30 June 2007 and some other notes referring to some contracts to be drafted. The Three Agreements, the loan deed and another loan of HK\$30 million advanced by one Jenvin Ltd. (a company related to PYI Corporation Ltd. ()) were referred to together in these notes. They say that these agreements were all under the Master Agreement. The plaintiff however replies that these notes were created at a time when the parties wanted to sort out and settle all the dealings between them. All these transactions were mentioned in the notes for this purpose. Furthermore, ER Estate wrote on 15 November 2006 a demand letter to PYI, PY China and Galaxy Land in relation to the Three Agreements and the payment of project costs.

Paragraph 6 of the loan deed was made because PY China had not fully performed the Block C Agreement and did not pay ER Estate the RMB20 million. It instead paid HK\$10 million of this sum in Hong Kong and asked the defendant to enter into the loan deed.) The plaintiff denies that the RMB20 million under the Block C Agreement had not been paid. It refers to the seven agreements listed in schedule 4 of the defence which show the advancement of a total of RMB18,285,000 to ER Estate and of which RMB15,085,568 were expressed to be related to the Block C Agreement. The more important point however is the failure of the demand letter to mention the terms of the alleged Further Agreement at all. If the HK\$10 million were not repayable because of PYE's breach of the Further Agreement, the demand letter would have said so. The plaintiff therefore says that all these show that the loan deed was an independent transaction and the Further Agreement was a fabrication. Otherwise, the terms of the loan deed would not have been in contradiction with the terms of the alleged Further Agreement. Finding on the loan deed I

agree with the plaintiff's reasoning. I also agree that the parole evidence rule does not allow the admission of oral evidence on the alleged Further Agreement as such evidence contradicts the express terms of the loan deed. I therefore find that the HK\$10 million loans advanced under the loan deed was a stand-alone transaction and the defendants' allegations that it was part of the Master Agreement or the Three Agreements or that it was made pursuant to the Further Agreement are unbelievable. Defence of set-off Apart from the above argument of the alleged Master Agreement and Further Agreement, the defendants have another ground of defence. They allege that the HK\$10 million together with another HK\$30 million advanced by Jenvin Limited under an agreement dated 7 December 2005 had been set-off in May 2006 against RMB40 million consultant's fees allegedly due from PYI to the 2nd defendant. This set-off agreement was said to have been made orally between the 2nd defendant and one Charles Chan, the person allegedly in control of PYE and PYI. However, both the HK\$10 million under the loan deed and the HK\$30 million advanced by Jenvin were still referred to in the demand letter of ER Estate dated 15 November 2006. The letter, however, made no mention of the alleged set-off. Furthermore, there were the notes referred to in paragraph 23 above which were made after May 2006 for negotiating a global settlement of all disputes between the parties. This HK\$10 million loan and the HK\$30 million loan were still mentioned in these notes. This shows that they had not been set-off. If there were indeed a set-off in May 2006, these loans would have ceased to exist and would not have been mentioned in these notes or the demand letter. If they should still be mentioned despite having been set-off, then the set-off against the alleged consultant's fee would also have been mentioned. But no set-off was mentioned. For these reasons, I do not think the allegation of set-off is believable at all. Defence of set-off against damages The next ground of defence is the setting off of this HK\$10 million loan against the damages payable by PYE/PY China for breach of the Master Agreement or the Three Agreements. There is no evidence on why the Three Agreements have not been fully performed or who have breached them. There is no credible evidence in support of the defendants' claim for damages. The defendants cannot rely on this as a defence. Illegal Money Lending Finally, the defendants argued that the HK\$10 million loan was an illegal loan contrary to the provisions of the Money Lenders Ordinance. The defendants argue that this loan was not exempted by Schedule 1 of the Ordinance because it was a loan advanced to the 2nd defendant personally through his agent the 1st defendant. This is a re-run of the Master Agreement argument. Furthermore, if the 2nd defendant were personally borrowing the HK\$10 million, his role would be a primary borrower and not a guarantor. A guarantor has only secondary liability to repay. The assumption by the 2nd defendant of the guarantor's role is inconsistent with his allegation that he was the primary borrower.

Judgment

For the above reasons, I hold that the defendants have no defence to this claim. I therefore give summary judgment to the plaintiff for the amount claimed in the Statement of Claim with interest at the daily rate of HK\$6,506.85 from 22 March 2007 to today. I also make an order nisi

that the defendants do pay the plaintiff the costs of this action. (L. Chan) Deputy High Court Judge Mr Jat Sew Tong, SC and Mr Victor Dawes, instructed by Messrs Pinsent Masons, for the Plaintiff Ms Teresa Cheng, SC and Mr David Tsang, instructed by Messrs Siao, Wen and Leung, for the 1st, 2nd and 3rd Defendants PAGE - 1udk 1udk i\$&`G Carlson-HCA.dot setup Microsoft Word 9.0 "POYH "POYH Judiciary Hong Kong Title 9nYH 9nYH 9nYH Microsoft Word Document MSWordDoc Word.Document.8

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