

HONG KONG / JUDGMENT

STACK ELECTRONICS ASIA LTD v. LU DA LIN AND OTHERS

COURT

Court of First Instance

DECIDED

16 November 2007

CASE / FILE NUMBER

HCA1850/2007

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bjbj HCA 1850/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 1850 OF 2007

BETWEEN STACK ELECTRONICS ASIA LIMITED Plaintiff and LU DA LIN (alias LU DALIN,
SYLVESTER LU DA LIN, SYLVESTER LUK DA LIN 1st Defendant and SYLVESTER LUI DA LIN)
UNITED VANTAGE ASIA LIMITED N2m gP P[gP |vU\ gP P gP T CO. LTD.) 5th Defendant

Before: Hon Reyes J in Chambers Date of Hearing: 16 November 2007 Date of Decision: 16
November 2007

D E C I S I O N

I. INTRODUCTION The Plaintiff (Stack Asia) alleges that its business has wrongly been diverted by the 1st to 5th Defendants (respectively, Lu, United Vantage, New Elite, New Elite SZ and NEC). Stack Asia has obtained interlocutory injunctions prohibiting the Defendants from competing with it and freezing up to \$21 million worth of the Defendants assets. Stack Asia also obtained an Anton Piller Order enabling it to search premises occupied by Lu, United Vantage and New Elite and to seize documents found there. Lu, United Vantage, New Elite and NEC (the 4 Defendants) now apply to set aside and discharge the injunctions obtained by Stack Asia. The 4 Defendants say that the injunctions were only obtained through non-disclosure of material facts by Stack Asia. That non-disclosure is said to have been deliberate. It is also suggested that Stack Asia has misused materials obtained under the Anton Piller Order. Stack Asia, on the other hand, submits that I should continue the injunctions until trial. II. ALLEGED NON-DISCLOSURE AND MISUSE OF MATERIAL A. Alleged Non-disclosure 1: Existence of a Counterclaim United Vantage

counterclaims against Stack Asia for unpaid commission of \$2.58 million. The figure is simply pleaded as a Counterclaim in US\$ and HK\$ figures with no supporting particulars. Stack Asia's Defence to Counterclaim consists of a bare denial coupled with a plea setting off damages due to Stack Asia as a result of any diversion of business by United Vantage against any commission payable. Nothing was said about unpaid commission when the interlocutory injunctions were obtained at an ex parte hearing. The 4 Defendants allege that Stack Asia by the Affidavit of a Senior Manager (Steve Parham) has admitted that unpaid commission is due. Mr. Parham said this:-

57. Specifically in relation to Lu's expenses and commissions claims, these were very inaccurate for a variety of reasons notably that he submitted claims for sales he was not responsible for (since other Stack offices handled the transaction), mathematical errors, transaction detail errors, incorrect accounting for taxes and freight, submission of cancelled transactions, past due or bad debt issues.
58. I would respectfully point out that Stack NY [Stack Asia's New York parent] did make partial payments to Lu while the discrepancies were being ironed out, in a show of good faith. The 4 Defendants contend that the non-disclosure was material in 3 ways. First, the ex parte judge (Deputy High Court Judge Chan) was concerned about the amount which Stack Asia sought to freeze. At that time, Stack Asia was proposing to freeze \$12 million. The judge, however, was not persuaded that this was an appropriate measure of any likely damages for diversion of Stack Asia's business. The judge only ordered \$2 million to be frozen instead. At a later ex parte hearing before Recorder Shieh SC, this was increased to \$21 million. The 4 Defendants say that, had the ex parte judge known of the Counterclaim, that could have had an impact on the \$2 million frozen. Second, the 4 Defendants say that Stack Asia is routinely and notoriously late in making payment, whether in respect of commissions or the purchase price of goods supplied. As far as late payment of commissions is concerned, this practice caused staff to leave the employ of the Stack group of companies for New Elite. Had the ex parte judge been told of Stack Asia's alleged practice of late payment, he might (it is suggested) have doubted that New Elite was poaching Stack Asia's staff. Instead, he might have formed the view that staff were leaving Stack Asia for New Elite due to dissatisfaction over pay. Third, the ex parte judge was told that Stack Asia became suspicious of possible diversions by Lu, when Stack Asia's profits remained steady or even declined despite a thriving economic climate. Had the judge known of Stack Asia's practice of late payments of suppliers, he might have formed the view that Stack Asia's business was bad because no one wished to deal with it. I am unable to treat Mr. Parham's remarks, read with or without the Defence to Counterclaim, as an admission. Nor am I persuaded that the late payment of commission was a material non-disclosure. Consider the context. United Vantage entered into an Agency Agreement with Stack Asia. By that contract United Vantage agreed to:- operate for the sole and exclusive benefit of [Stack Asia] as a sales and purchase agent within the Asian marketplace or other geographic area as mutually agreed. United Vantage also undertook:- in all matters [to] act loyally and faithfully to [Stack Asia] and ... where it is not possible to obtain such orders or instructions in relation to any particular matter [to] act in

such manner as it reasonably considers to be most beneficial to [Stack Asia s] interests . There was evidence that Lu had formed New Elite to compete with Stack Asia. There was evidence that, although nominally only an employee of United Vantage, Lu was in fact the moving force or alter ego behind United Vantage. Thus, arguably, insofar as United Vantage had by the Agency Agreement agreed to be Stack Asia s fiduciary, so in equity did Lu. Indeed, there was evidence before the judge that, from time to time, for business purposes Lu (with the knowledge and approval of Stack Asia) identified himself as a de facto managing director of Stack Asia. There was consequently ample material for the judge to form a preliminary view that Lu and through him United Vantage were wrongfully competing with Stack Asia, in breach of the Agency Agreement and their fiduciary duties in equity or duty of fidelity at law. I note in passing that, even now at the inter partes hearing, the 4 Defendants seem to have no real answer to the allegation of wrongful competition. In particular, in their affirmation evidence, Lu, United Vantage and New Elite seem to be under the impression that so long as they do not deal with Stack Asia s actual customers, they may engage in precisely the same business as Stack Asia. But that would put them into a position of conflict of interest. By the Agency Agreement, United Vantage and arguably Lu as United Vantage s alter ego undertook to promote the interests of Stack Asia and not to solicit customers within the same line of business. From the Statement of Claim (which he read), the ex parte judge would have known that the Agency Agreement stipulated the payment of commission to United Vantage. It is true that he might not have known whether or not there was unpaid commission and (if so) how much. But I do not believe that, in the ex parte judge s mind, such consideration could have been material in the face of apparent breaches by the 4 Defendants (whether acting on their own or as nominees of Lu) of fiduciary obligations to Stack Asia. As for the allegation that Stack Asia is a late payer, I do not see how that can have any material bearing on the prima facie case of diversion by the 4 Defendants.

B. Alleged Non-disclosure 2: Falsification of Orders Before the ex parte judge Stack Asia alleged that Lu caused monies to be sent to New Elite SZ by unauthorised telegraphic transfers. Stack Asia says that New Elite SZ is a nominee company of Lu. Stack Asia denies having known anything about New Elite SZ at any relevant time. The transfers were said by Stack Asia to have been made in connection with 2 transactions, one a purchase from Shuangfeng, the other a purchase from Recycle Land Korea. In both cases, monies transferred to New Elite SZ (Stack Asia claims) were later transferred back. The 4 Defendants say that the 2 purchase transactions were bona fide. The 4 Defendants suggest that Stack Asia must have known about the Shuangfeng deal because it was the biggest deal ever done by [Stack Asia] . According to Lu s affirmation, monies for the Shuangfeng purchase were transferred by Stack NY to Stack Asia in 2 tranches. Cheques in relation to each tranche were then issued to So Yin Huen (at the time an office assistant at Stack Asia, now a shipping clerk at New Elite). So Yin Huen caused the monies represented by the cheques to be transferred to New Elite SZ through Hua Xin Bank Shenzhen. The Shuangfeng purchase, however, fell through. This (Lu says) was because Stack NY delayed in sending the 2nd tranche of payment. When the deal collapsed, the monies sent to New Elite SZ were remitted back to So Yin Huen who returned the sum to Stack Asia s account. In relation to Recycle Land Korea, according to Lu, a similar

process was followed. Monies were transferred by Stack NY to Stack Asia. This was to enable Stack s Shenzhen office (Stack SZ) to purchase goods from Recycle Land. So again drew cheques representing the monies transferred and then remitted the same to New Elite SZ. The latter then paid Recycle Land s Mainland agent. The goods purchased from Recycle Land were delivered to Stack Asia s customer (Zhenhua). Zhenhua paid for the goods by a transfer of monies. Zhenhua later sued Stack SZ for defective delivery. But Zhenhua s claim was dismissed by a Mainland court. In my judgment, there has been no substantial non-disclosure. Before the ex parte judge, Stack Asia relied on an Affirmation of Nicky Yau (an accounts clerk). That dealt with the Shuangfeng and Recycle Land purchase orders as follows:-

13. I found two purchase orders issued in November 2005 in the name of the Plaintiff. The purchase orders were to the value of over HK\$5 million dollars for one and over \$286,000 for the other. These two purchase orders were between the Plaintiff and two unrelated companies (i.e. unrelated to the Plaintiff or to [New Elite] as far as I could tell from the documents). However, the documents indicated that in settling the purchase orders, the beneficiary of the funds was a company called [New Elite SZ]... There is seemingly no reason why [New Elite SZ] was named as the beneficiary of the funds. There is now produced to me and marked for identification purposes, Exhibit NYTT-3 , which are copies of the purchase orders and the telegraphic transfer forms showing the name of [New Elite SZ] as the beneficiary of the said telegraphic transfers (the handwritten translation annotations in English on the Hang Seng Bank Remittance forms in respect of Hua Xin Bank and [New Elite SZ] were prepared by [Stack Asia s] Solicitors).
14. These two purchase orders did not go through , i.e. the transactions did not happen, and eventually, the monies were returned to [Stack Asia]. Stack Asia also relied on an Affirmation of Christine Chiu (an office manager). That stated:-
21. Nicky [Yau] later searched the old records to see if [New Elite] had ever been involved in [Stack Asia s] business. What she found she gave to me to inspect. I saw in particular, two purchase orders which were suspicious.
22. A purchase order was issued in November 2005 to an unrelated company. However, in making payments in respect of that purchase order, the company called [New Elite SZ] ... was named as the beneficiary in the telegraphic transfer forms, though the purchase order was in the name of that unrelated company. The value of the purchase order was US\$693,588.00. Two separate payments were made in order to settle this purchase order, in the sums of HK\$4,680,000.00 and HK\$729,000.00 respectively.... I understand from the Plaintiff s Accounts Department that this purchase order was subsequently cancelled. I do not know what happened to the monies which were transferred to [New Elite], but I do understand that the monies were later returned to [Stack Asia] -- by whom or when, I do not know.

23. The other purchase order was also issued in November 2005. Again, this purchase order named the same [New Elite SZ] ... as the beneficiary of the telegraphic transfer of monies, though the purchase order was in the name of another unrelated company.
24. I do not understand why that [New Elite SZ] would be named as the beneficiary of the monies making up the value of the particular purchase orders, which were made between [Stack Asia] and the buyers, when [New Elite SZ] seemingly had no involvement in the transactions at all. In relation to New Elite SZ, Stack Asia's President Steve Patsis deposed as follows in the ex parte application:- [New Elite SZ] is closely related to [United Vantage] and [New Elite] in that Lu Feng Xin [Lu's father] took important positions in each of these companies. Further [New Elite SZ] and [NEC] share the same registered office.... It appears that [Lu] has been causing [Stack Asia] (unknowingly) to fund the acquisition of goods on a short term basis for [Lu] to take advantage of and profit from the transactions in the place of [Stack Asia]. Essentially therefore, [Lu] has been using [Stack Asia] as his own personal interest free, unsecured, illegal, margin finance facility. In relation to the same 2 purchase orders, the Skeleton of Mr. Barrie Barlow SC stated to the ex parte judge:- ... [Lu] misappropriated [Stack Asia's] money by falsifying purchase orders and causing monies to be transferred to one of his Shadow Company (i.e. [New Elite SZ]). This allegation has been dealt with in Nicky Yau's Affirmation (paragraphs 13 and 14) and Christine Chiu's Affirmation (paragraphs 21-24). The relevant documentary evidence has been exhibited to Nicky Yau's Affirmation as Exhibit NYTT-3 (also exhibited to Christine Chiu's Affirmation as Exhibit CCYP-4). It will be apparent that, at the ex parte hearing, the target of Stack Asia's complaint was not so much the genuineness of the Shuangfeng or Recycle Land purchases, as the interposition of New Elite SZ. Why (Stack Asia queried) had money been transferred to New Elite SZ when it had no role to play in the purchases? The answer suggested by Mr. Patsis was that Lu was making use of New Elite SZ to obtain short-term finance by temporarily parking there monies from Stack Asia ultimately destined for other purposes. Consequently, I doubt that further disclosure on what precisely happened between Stack Asia on the one hand and Shuangfeng or Recycle Land on the other would have helped the ex parte judge. The real focus was the role played by New Elite SZ. On that, Stack Asia claims to have been in the dark. It is true that the Statement of Claim suggests that the Shuangfeng and Recycle Land deals were wholly fictitious. This is despite Mr. Patsis apparently having appointed a Mainland lawyer for the litigation initiated by Zhenhua. But on balance, given the emphasis in the affidavit evidence before the ex parte judge, I do not think that the pleading in the Statement of Claim can be treated as having misled the judge in a material way.
- C. Alleged Non-disclosure 3: Role of New Elite SZ
- The 4 Defendants say that Stack Asia was all along aware of New Elite SZ's role. According to Lu, the latter company acted as a banker. Lu says that companies which want to receive or remit foreign currency in the Mainland need permission to do so. Stack SZ did not have such permission, but New Elite SZ did. Thus, New Elite SZ's account with Hua Xin Bank Shenzhen was used (Lu alleges) to receive foreign currency for eventual payment of Stack SZ's Mainland suppliers. Mr. Charles Sussex SC (appearing for the 4 Defendants) submits that it is most disingenuous for Stack

Asia to claim that it knows nothing about the use of New Elite SZ as banker for Stack SZ. Lu's evidence is to the effect that Stack NY kept a tight control over monies flowing to and from Stack Asia and Stack NY. Given that control, it is inconceivable (Mr. Sussex infers) that the upper management of the Stack group would not have been aware of New Elite SZ's role. There is a conflict of evidence between the parties. Mr. Parham denies knowledge of New Elite SZ having been used as banker. His case is that neither Stack NY nor Stack Asia ever authorised such use. If he is right, I do not see how Stack Asia can be faulted for not disclosing that which its upper management was not (and would not) have been aware. I am not prepared to infer from Mr. Lu's allegations of a tight financial control by Stack NY and Stack Asia that Mr. Parham is being disingenuous. Any conclusion one way or another on the question must of necessity await trial. Consequently, I do not think that this contention of non-disclosure can be a ground for setting aside the interim injunctions obtained by Stack Asia.

D. Alleged Non-disclosure 4: Inflation of Payroll with Ghost Employees At the ex parte hearing Stack Asia alleged that Lu was inflating Stack SZ's payroll with the names of persons who were no longer working for Stack SZ. Lu denies this. Lu counters that Stack Asia knew or ought to have known that he was not responsible for preparing the payroll. Further, the ghost employees identified by Stack Asia were actually still working for Stack SZ. In any event, Lu says that, because of Stack NY's close scrutiny of staff salaries and payments, it is improbable that Lu could inflate the payroll without Stack Asia immediately noticing discrepancies. Mr. Parham denies Lu's allegations. Again this alleged non-disclosure stems from conflicts in the parties' evidence. If Mr. Parham is right, then Stack Asia cannot be criticised for not drawing the ex parte judge's attention to factual matters which Stack Asia does not accept are true. I do not think that I can draw the inferences which Mr. Lu suggests arise from his evidence about the control wielded by Stack NY or Stack Asia. I am unable to resolve the differences between the parties on this matter in advance of trial.

E. Alleged Non-disclosure 5: Solicitation of Employees The 4 Defendants say that the ex parte judge ought to have been told that Lu did not in fact poach employees. Many left the employment of Stack Asia or Stack SZ of their own accord due to late or non-payment of commissions. I do not think that this alleged non-disclosure is a basis for setting aside the injunctions obtained. Stack Asia does not accept that staff departures have been due to late or non-payment of commissions. There is a conflict of evidence between the parties. That conflict must await trial for resolution. In any event, whether or not staff were poached by Lu, there is no dispute that a significant number of Stack Asia or Stack SZ staff are now working for New Elite or its related companies. The ex parte judge would (it seems to me) consequently have been concerned at how Lu, United Vantage or New Elite could countenance employing former Stack group staff to work in competition with Stack Asia or Stack SZ. At the very least, there would be conflict of interest questions. This is especially the case since the operation of New Elite appears to have been kept secret from the upper management of the Stack group.

F. Alleged Non-disclosure 6: Misuse of Confidential Information and Diversion of Business Opportunity Before the ex parte judge, Mr. Parham deposed as follows:-

46. In respect of the type of confidential information which I believe that [New Vantage] has misappropriated from [Stack Asia], using the corporate Defendants as vehicles through which to commit serious damage to the commercial interests of [Stack Asia] by abusing this confidential information. This would include details of customers, details of vendors, contact persons of customers and vendors, prices, quotas, customer preferences, where to source products required by customers, the price at which [Stack Asia] would buy these products for onward sale to its customers, which would all be examples of the type of confidential information which [Stack Asia] has painstakingly over the years accumulated and exploited for commercial gain. In response, the 4 Defendants say that Stack Asia should have disclosed the following:- listnum "WP List 1" \l 2 That the names of Stack Asia's suppliers and customers are publicly accessible. listnum "WP List 1" \l 2 That customers would not buy from an exclusive agent. listnum "WP List 1" \l 2 That Lu could not bid against Stack Asia for electronic components. listnum "WP List 1" \l 2 That Lu and other staff would not be able to access the computer systems of other offices within the Stack group. listnum "WP List 1" \l 2 That purchasing agents would not know the identity of customer buyers. listnum "WP List 1" \l 2 That certain supposed information relating to a China trip by an employee Loven was not confidential but simply disseminated as a joke to ridicule Loven. listnum "WP List 1" \l 2 That in fact Lu never cooperated with Chris Lau to divert the Macau Computer Screens contract. I do not believe that the foregoing matters addressed the gravamen of Stack Asia's charges before the ex parte judge. The matters seem peripheral or even trivial when juxtaposed against that gravamen. There is a serious question to be tried as to whether Lu, United Vantage and New Elite have been competing with Stack Asia contrary to fiduciary obligations. It must at the very least be arguable that the information used by them for the conduct of such competing business should instead be regarded as belonging to Stack Asia in equity, for use solely in the advancement of Stack Asia's interests. By the same token, the business opportunities being exploited by New Elite should (if Stack Asia is right) be treated as belonging to Stack Asia in equity. This is regardless of whether or not lists of potential customers or suppliers are widely available in databases accessible to the public. G. Alleged Non-disclosure 7: Accounting Documents of United Vantage At the ex parte hearing Stack Asia referred to Lu having taken away certain accounting documents. Lu says that he did so in order to find a more affordable accountant. He complains that he was never asked to return the documents. I do not believe that this constitutes any material non-disclosure. In any event, it is unclear to me why the desire to engage a cheaper accountant necessitated Lu's taking the documents. H. Alleged Non-disclosure 8: Financial Position of New Elite SZ Lu says that his father purchased New Elite SZ from its previous owners because the company had permission to deal with payments in foreign currency. But Lu claims that his father found that he had been defrauded by the previous owners and had bought a near worthless company. Lu's father is said to have been induced to buy New Elite SZ by an alleged false audit report which stated that shareholders' equity in the company was over RMB 100 million. Lu complained to the Mainland police about the fraud. Stack Asia obtained a copy of the alleged false audit report when they searched Lu's office following the grant of the ex parte injunction. But they would also have seen a copy of Lu's complaint to

the Mainland police. Stack Asia used the audit report to raise the amount frozen by the injunction from \$2 million to \$21 million. This was done (Lu complains) even though Stack Asia would have known from the complaint that the audit report was unreliable. Stack Asia does not accept that the audit report is wrong. I do not think that the status of the audit report on New Elite SZ is something that I can determine at this time. The mere fact that the audit report was obtained along with a copy of Lu's complaint of fraud would not by itself render the report unreliable.

I. Alleged Non-disclosure 9: Financial Position of Stack Asia

The 4 Defendants say that Stack Asia misrepresented its financial position to the ex parte judge. Stack Asia (the 4 Defendants assert) wrongly suggested that the Stack group had established a good reputation since 1997. In fact, a company in the group Stack Far East was wound up due to a failure to pay its debts. Further, Stack Asia failed to note that its financial statements only show a total shareholders equity of \$6.9 million. I do not think that the ex parte judge was misled as to Stack Asia's financial position. In fact, the judge himself observed that the company [Stack Asia] is not in good shape. He stated that currently, the accounts show that it's not in excellent financial order. He then concluded:- Now, I would not require any fortification now because I think, well, even if you want \$10, you'll have to go to the bank at times and I'm not seeking a fortification of \$10. I think there should be some fortification to be paid into this court within, say, five working days and the amount can be released at any time upon production of a bank guarantee to the satisfaction of the registrar. After a brief adjournment, the ex parte judge himself proposed a figure of \$200,000 as fortification. However, he described that amount as a really very small sum. Mr. Barlow accepted the proposed fortification as well as the judge's direction that either party be at liberty to apply to vary it. The 4 Defendants may take the view that the fortification of \$200,000 is too small, given the potential losses to the 4 Defendants as a result of the injunctions obtained. They have a liberty to apply to vary that fortification upwards. But that is a different question from whether the judge was misled about Stack Asia's financial position.

J. Alleged Misuse of Materials

The 4 Defendants assert that material obtained by Stack Asia through the Anton Piller Order granted by the ex parte judge has been used otherwise than for the purposes of these proceedings. This is said to be apparent from the receipt by New Elite's customers and suppliers of e-mails smearing [Lu] so as to drive [him] out of business. The sender of the e-mails claims to be an anonymous disgruntled ex-employee. Lu suggests that the sender must be Stack Asia because only Stack Asia could have access to New Elite's customer list. Further, the e-mail comes with material relating to previous criminal and civil proceedings involving Lu. Lu suggests that only Stack Asia would have such documents in its possession. Obviously, materials obtained under an Anton Piller Order must only be used for the purposes of the proceedings in which the Order was granted. Any breach of an express or implied undertaking to that effect is to be deplored. But I am unable to infer from the material adduced by the 4 Defendants that Stack Asia is the actual sender of the relevant e-mails. I therefore do not think that the e-mails constitute any basis for discharging the interim order.

K. Conclusion

The allegations raised by the 4 Defendants do not constitute a basis for discharging the injunctions obtained ex parte.

III. EXTENSION OF THE INJUNCTION PRIVATE

There remains the question whether and in

what way the interim injunctions obtained ought to be extended. By letter dated 15 November 2007 United Vantage and Lu gave 7 days notice to terminate the Agency Agreement (insofar as not already ended). The Agency Agreement will thus expire on 22 November 2007 at the latest. Mr. Sussex argues that by reason of the termination Lu, United Vantage, New Elite and NEC should be free to compete with Stack Asia from (say) 23 November at the latest. There would be no point then (Mr. Sussex submits) to extending that portion of the ex parte Order prohibiting the 4 Defendants from engaging in the same business as Stack Asia. Mr. Barlow, however, has referred to *GSL Engineering Ltd. v. Yau Hon-yin and others* [1990] 1 HKLR 199. There Godfrey J said (at 203G-204F):- Quite apart from any question of misuse by the defendants of confidential information, there is the question of the first defendant's breach of duty, when he was managing director of the plaintiff, in diverting or attempting to divert business from customers of the plaintiff away from the plaintiff and in his own direction. The first defendant is no longer in the service of the plaintiff. He accepts that he has acted in breach of duty in the manner I have just described. But his contention is that, while he may have been wrong to do this in the past, he is no longer the plaintiff's managing director. He is therefore now entitled to deal with the plaintiff's customers and the plaintiff is not entitled to any injunction restraining him from doing it. That was an argument considered by Sir Robert Megarry, Vice-Chancellor, in *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] 1 Ch 227. This was also a case of a managing director; in that case, one who had committed the breaches of duty complained of while there was still some years of his service contract yet to run, but who had purported to resign his office. He, too, had set up in business dishonestly in competition with his employer. The judge pointed out that the defendant had been guilty of gross and repeated breaches of his implied obligation to be faithful to the company whilst still in office as managing director of the company. He also, whilst still the managing director, and without the company's knowledge, sold goods for the benefit of himself and his companies to customers of the company. All that is very similar to what happened in the present case. The judge remarked that the employee's contention was that he was entitled to go on acting as he had and that the company was not entitled to any injunction restraining him from doing it. The judge nevertheless held that injunctions to restrain him from soliciting orders from the customers or suppliers of the company or otherwise dealing with them ought to be granted; and I agree with the approach of the Vice-Chancellor. I think it would be most unsatisfactory if an employee whose breaches of fiduciary obligation are proved or admitted, should be enabled pending the trial of an action at which all these matters are to be sorted out, to be allowed to go on with the course of conduct from which he has already derived an unjustified benefit. The claim made by the employer in the *Thomas Marshall* case was based in part on the duty of a director of a company to apply the company's property for the benefit of the company and not for himself. It is true that here the first defendant is no longer in the employ of the plaintiff, but it was argued in the *Thomas Marshall* case that it was by way of his acting as managing director of the company that the defendant had established his relationship with the suppliers and customers of the company, so that, even if he ceased to be managing director of the company, he could not claim instant freedom to use for himself the

relationship which he had established on behalf of the company. It seemed to the Vice-Chancellor that the employer had at least a good arguable case on that point. Again, I take the same view. I am far from convinced that the point will necessarily succeed at the trial of the action, but I am satisfied that it is a good arguable point. So while I am unable to accept the case of the plaintiff in so far as it relies on an alleged misuse of confidential information, I accept that the plaintiff has a good arguable case on the matter of the first defendant's continuing duty to make use of the plaintiff's trade connection for the benefit of the company and not for his own benefit. For these reasons, I come to the conclusion, on the whole matter, that it would not be right to release the defendants from the constraints of the injunction presently in force, and I therefore refuse this present application. I think Mr. Barlow is right and I should follow the approach in *GSL Engineering*. Here it appears that for about a year Lu has been competing with Stack Asia through New Elite. It is suggested by Stack Asia that Lu has been diverting funds from Stack Asia for much longer than that through New Elite SZ. Such longer period of diversion may or may not be the case, but even ignoring New Elite SZ, at least between December 2006 and today, Lu through New Elite has been surreptitiously engaged in the same business as Stack Asia. By any reckoning, Lu and New Elite are thus in an analogous position to the 1st defendant director in *GSL Engineering*. In such circumstance, the mere fact that the Agency Agreement has ended or will come to an end shortly, is not a sufficient ground for discharging the interim injunction against competition. The reason (as explained in *GSL Engineering*) is that otherwise New Elite would obtain an unfair headstart as a result of trading while United Vantage and Lu were arguably still bound by the Agency Agreement. New Elite was set up by Lu over a period X when Lu ought to have been devoting his efforts to Stack Asia's business. If the Court were now to allow New Elite to compete with Stack Asia upon termination of the Agency Agreement, New Elite would not have to undergo a similar setting-up period X. New Elite would in effect benefit from Lu having used Stack Asia business time to set up New Elite. Consequently, the injunction against competition should be extended until trial or further order. In respect of the freezing order, Mr. Sussex queried the current cap of \$21 million. That was calculated on the basis of an annual net profit of about \$7 million mentioned in the audit report of New Elite SZ for 2003. Multiplying \$7 million by 3 to cover the years from 2003 to the present gives \$21 million. Mr. Sussex has suggested that the audit report is suspect. But, pending trial, I think that I have to take the report at face value. It is true that Lu has complained that the audit report is misleading. However, the validity of his complaint cannot be determined at this interlocutory hearing. Potentially, therefore, companies on their face within the New Elite group have been earning about \$7 million annually over (say) the last 3 years. On this basis, it seems to me that the \$21 million figure in the freezing order should remain. Mr. Sussex asks that, in any event, the permitted withdrawals under the freezing order be varied. He asks that Lu be allowed to withdraw living expenses of \$150,000 per month and the 4 Defendants be entitled to withdraw a total of \$150,000 per month towards legal expenses. I am prepared to vary the Mareva part of the injunction accordingly. There remains the question of fortification. I should like to hear further from counsel on an appropriate amount for fortification. I shall also hear the parties

on costs and any consequential matters. (A. T. Reyes) Judge of the Court of First Instance High Court Mr Barrie Barlow, SC, instructed by Messrs Robertsons, for the Plaintiff Mr Charles Sussex, SC and Ms Frances Lok, instructed by Messrs Oldham, Li & Nie, for the 1st to 1udk 1udk phoenix i\$&`G 'k^0 'k^0 'k^0 hca.dot setup Microsoft Word 9.0 W@Y* Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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