

CAMP 46/2019
[2019] HKCA 916

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

MISCELLANEOUS PROCEEDINGS NO 46 OF 2019
(ON AN INTENDED APPEAL FROM HCMP NO 1987 OF 2018)

IN THE MATTER of FONFAIR
COMPANY LIMITED

and

IN THE MATTER of sections 724
and 725 of the Companies Ordinance
(Cap 622)

BETWEEN

HARBOUR FRONT LIMITED

Petitioner

and

MONEY FACTS LIMITED

1st Respondent

LEUNG YUET WAH, LEUNG YUET KEUNG
and LEUNG YUET HOI

2nd Respondent

LEUNG YUET KEUNG

3rd Respondent

MARCON INVESTMENT LIMITED

4th Respondent

FONFAIR COMPANY LIMITED

5th Respondent

Before: Hon Kwan VP and Cheung JA

Dates of Written Submissions: 26 March 2019 and 9 April 2019

Date of Judgment: 23 August 2019

J U D G M E N T

Hon Kwan VP (giving the Judgment of the Court):

1. This is the renewed application of the 3rd respondent, Leung Yuet Keung (“YK”), for leave to appeal to the Court of Appeal against the decision of Deputy High Court Judge Kenneth Wong given on 26 November 2018 (“the Decision”) to grant an interlocutory injunction to restrain the sale or disposal of a valuable piece of land at Yau Tong Marine Lot Nos 2, 3 and 4 (“the Yau Tong Property”) unless with the prior approval or consent of Harbour Front Ltd (“Harbour Front”), pending the determination of a petition brought by Harbour Front on 12 November 2018, alleging unfairly prejudicial conduct in the affairs of Fonfair Co Ltd (“Fonfair”).

2. On 12 March 2019, the judge handed down his decision refusing the application of YK for leave to appeal against the Decision (“the Leave Decision”).

3. YK issued a summons on 26 March renewing his leave application before the Court of Appeal.

4. Having considered the papers and the submissions filed on behalf of YK and Harbour Front, we exercise our discretion under Order 59 rule 2A(5)(a) to determine this application without a hearing on the basis of written submissions only.

5. For leave to appeal to be granted under section 14AA of the High Court Ordinance, Cap 4, the court must be satisfied that the intended

appeal has a reasonable prospect of success or that there is some other reason in the interests of justice the appeal should be heard. Reasonable prospect involves the notion that the prospect must be more than fanciful without having to be probable.

6. This is an appeal against the exercise of discretion of the judge. As noted in the Leave Decision, the principles for granting leave to appeal in this kind of situation are well established. The appeal court is not to exercise an independent discretion of its own. Its initial function is one of review only. It may set aside the judge's exercise of discretion if it can be shown that the judge did so under a mistake of law or in disregard of principle, or under a misunderstanding of the evidence, or had taken into account irrelevant matters, or failed to take into account relevant ones, or that the conclusion reached in the exercise of discretion is outside the generous ambit within which reasonable disagreement is possible. It is only if the appeal court has reached the conclusion that the judge's exercise of discretion must be set aside for one or more of these reasons that it becomes entitled to exercise a discretion of its own.

7. The six grounds of appeal in the draft notice of appeal are the same as those considered by the judge in the Leave Decision. The judge gave short reasons for refusing leave as he had "detailed the reasons for the exercising of his discretion in granting the said injunction in the [Decision]", noting that "in essence, [YK] is rehashing the arguments deployed at the last hearing before this Court when the order was made"¹.

¹ Leave Decision, §§2 and 4

8. YK's counsel, Ms Frances Lok, took issue with the judge's statement that her submission for the leave application was merely rehashing the arguments she had deployed before. She contended that the grounds of appeal pointed out relevant matters that the judge failed to consider or is plainly wrong and that some of her arguments arose from the Decision itself.

9. The mere fact that certain matters relied on by counsel were not mentioned in the judgment does not mean that the judge had not taken them into consideration. Nor is the judge required to address all the points made by counsel, whether legal or factual. There is no suggestion in the draft grounds of appeal or Ms Lok's submission that the matters the judge allegedly failed to have any or any sufficient regard to were not raised before him first time round. Repeating the arguments that had been made before without demonstrating how and why the judge went wrong is of little assistance and does not begin to make out a case that the judge's conclusion is plainly wrong.

10. We have no reason to differ from the judge that to a large extent, the submissions on behalf of YK in the leave application are in substance rehashing the arguments deployed at the injunction hearing. In our view, the complaint that the Leave Decision provided "no meaningful consideration" of the grounds is not a valid complaint.

Background

11. We do not propose to go into the background matters in detail, they have been set out comprehensively in the Decision at §§6 to 26. A brief account would suffice, for a proper understanding of this judgment.

12. YK and his brother Leung Yat Tung (“YT”) have been engaged in litigation for more than two decades. The Yau Tong Property is the last piece of land inherited from the estate of their father (the founder of Universal Dockyard Ltd) and has a special value to the Leung family. Fonfair was the registered owner of this property since 1980. To keep this property in the hands of the Leung family, Fonfair, which used to be a wholly owned subsidiary of Universal Dockyard Ltd, was spun off at the time of the flotation of UDL Holdings Ltd on the Stock Exchange in 1991.

13. The Yau Tong Property is the only material asset of Fonfair, and Fonfair carries on no other business apart from letting out this property. Its value was estimated to be \$1.2 billion to \$1.5 billion in November 2018.

14. Money Facts Ltd (“Money Facts”), which holds 65.79% of the shares in Fonfair, was set up by YK and YT in 1990 pursuant to a shareholders’ agreement. Each owned 50% of Money Facts. With YK’s consent, YT’s 50% shareholding was later transferred to Harbour Front, a company of the family trust of YT.

15. Harbour Front owns shares directly in Fonfair and indirectly through Money Facts. It is the majority shareholder in Fonfair, holding 65.86%.

16. YK also owns shares directly in Fonfair and indirectly through his company Marcon Investment Ltd, the 4th respondent, and through Money Facts. His total shareholding in Fonfair is 33.53%.

17. In previous petitions brought by Harbour Front to wind up Money Facts and Fonfair on just and equitable grounds, it was held that

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the two companies were intended to be quasi-partnerships between the two brothers, which gave rise to equitable considerations, such that each would have equal right of participation in the companies². In dismissing the petitions, the courts found that due to YT's misconduct, he and Harbour Front were excluded from the management and control of the companies for good reasons and unfair prejudice was not made out. Until Harbour Front has remedied the misconduct found by the courts and made reparation of the losses suffered by Fonfair as a result of the misconduct, it cannot re-assert the right of equal participation in the management of the companies³. Since 2001, YK has been in sole control and management.

18. In the latest unfair prejudice petition brought by Harbour Front in November 2018, it is contended that ever since the hearing before Harris J in HCCW 111/2015 and HCCW 116/2015 in June 2017, Harbour Front has continuously taken active, serious and diligent steps to remedy the misconduct and hence should be allowed to return to a management role in Fonfair. Those steps were summarised in §29 of the Decision.

19. On 2 October 2018, Fonfair put up newspaper advertisements inviting a public tender for the sale of the Yau Tong Property. After making protests to YK to no avail, Harbour Front issued the unfair prejudice petition on 12 November seeking recognition of its right to participate in the management of Fonfair, an injunction to restrain YK from proceeding with the land public tender, and an order of disclosure of

² Judgment of Kwan J in HCCW 880/2001 and HCCW 246/2002 dated 2 February 2004 ("Kwan J's 2004 Judgment"); Reasons for Judgment of Harris J in HCCW 111/2015 and HCCW 116/2015 dated 15 February 2018, [2018] HKCFI 358 ("Harris J's 2018 Judgment")

³ Reasons for Judgment of Court of Appeal in CACV 260/2008 dated 18 September 2008 ("CA 2008 Judgment"), §10; Harris J's 2018 Judgment, §§20 to 23, 41 to 42

information to Harbour Front concerning the proposed sale of the Yau Tong Property by public tender. On the same day, Harbour Front issued an *inter partes* summons⁴ for an interlocutory injunction to restrain the sale of the property without its prior approval or consent, and for disclosure of information relating to the sale.

20. In granting the interlocutory injunction, which is merely to restrain the actual sale or disposal of the property, but not the continual proceeding with and marketing of the public tender, or the offering and continual offering of the property for sale⁵, the judge emphasised that his primary objective was to preserve the *status quo*, namely, to keep the Yau Tong Property within the ownership of Fonfair, so that if Harbour Front should succeed at the trial, it will have a meaningful participation in the management of Fonfair and the reliefs it obtains will not become nugatory⁶. The judge declined to order the disclosure of information of any potential sale of the property as part of the interim relief.

21. We turn to consider the six grounds of appeal in the draft notice of appeal.

Ground 1: delay

22. The judge disagreed with Ms Lok there was any delay in applying for the interlocutory injunction. He found that the delay, if any, was not substantial – Harbour Front first learnt of the closing date of the public tender (30 November 2018) from newspaper advertisements on

⁴ The summons was first heard on 16 November and adjourned to 23 November for full arguments.

⁵ Sought in §§1(a) and (c) of the summons

⁶ Decision, §§5, 38, 39, 51

2 October 2018 and took out the application about six weeks later on 12 November⁷.

23. Ms Lok submitted that the judge's finding is "perverse". More than three pages in the grounds of appeal were devoted to this. With respect, her arguments are wholly without merit.

24. She contended that the delay was not six weeks but should be in the region of four months, pointing to the fact that Harbour Front was aware of the proposed sale by public tender in July 2018 and the extraordinary general meeting held on 16 August 2018 attended by YT and his daughter Gillian. It was submitted that they were informed of the details in relation to the public tender at that meeting, including the various stages of the public tender and the timetable. She prayed in aid the previous instance when Harbour Front applied for an interim injunction in 2008 and was reprimanded in the CA 2008 Judgment for waiting two weeks before bringing proceedings and then making urgent applications on very short notice. She invoked the principles of *res judicata* and issue estoppel.

25. It is apparent from the records of the EGM produced in evidence that the timetable of the various stages of the public tender given by YK at the meeting was tentative. Only a target date was mentioned for the appointment of agents to deal with the proposed public tender. The time frame for the tender would then be proposed by the agents and finalised. It is important not to lose sight of the fact that from July to 9 November 2018, Harbour Front was actively engaged in taking various

⁷ Decision, §48

steps with the view of remedying the misconduct found by the court for it to re-assert its right to take part in Fonfair's management. It is understandable that Harbour Front might not wish to apply for an interim injunction without firmer dates of the timetable of the public tender and without first taking the steps it might be advised to remedy the past misconduct. The factual situation in 2018 was very different from the circumstances in 2008. It is misconceived to rely on the CA 2008 Judgment to found some kind of estoppel.

26. The judge is right to find that the delay here was six weeks, from the newspapers advertisements on 2 October 2018. A delay of six weeks, even if unexplained (which we do not think is the case here), in the circumstances of interlocutory injunctions has been commonly regarded as acceptable (*King Fung Vacuum Ltd & Ors v Toto Toys Ltd & Ors* [2006] 2 HKLRD 785 at §20). Besides, delay is not an absolute bar to the grant of an injunction. The ultimate question is still, after taking into account all the circumstances, including the nature and length of the delay, whether it is just to grant the injunction (*Kwoon Chung Motors Co Ltd v Kwok Cheuk Kin & Ors*, HCA 2222 & 2223/2014, 1 December 2014, §58).

27. As for the allegation that Harbour Front had concealed from the court its ambition to acquire the Yau Tong Property at the first hearing of the summons on 16 November 2018, this is of little moment to the issue of delay. YK did depose to Harbour Front's intention to buy the land from Fonfair in his affirmation filed on 20 November, so this information was placed before the court at the substantive hearing on 23 November. We will return to this in considering one of the other grounds of appeal.

Ground 2: the merits threshold

28. This may be dealt with shortly. The contention was that the judge should have found that the interim orders sought would effectively dispose of part of the substantive claim in the petition, so the merits threshold should be “likely to succeed at trial” instead of the serious issue to be tried or the good arguable case test applied by the judge.

29. The test of “likely to succeed at trial” would be applied where the grant or refusal of an interlocutory injunction would in effect dispose of the action finally (*BMC Global Limited & Anr v Tor Asia Credit Master Fund LP & Ors*, HCA 2392/2016, 14 October 2016, §35). Ms Lok has cited no authority in support of her proposition that this is the threshold test where the interim injunction would only dispose of part of the substantive claim effectively.

30. This ground is clearly without merit.

Ground 3: preserving the status quo

31. It was contended that contrary to the judge’s stated intention of preserving the *status quo*, the interim injunction he granted does not have that effect. It was asserted that the injunction would give Harbour Front “substantive right to participate in Fonfair’s management” in that any disposal of the Yau Tong Property would require Harbour Front’s prior consent.

32. The judge had considered this contention and rejected it⁸. He was careful to limit the scope of the interim injunction to no more than is warranted so as to hold the balance and maintain the status quo⁹. There is simply no basis for appellate intervention.

Ground 4: the assessment of the merits

33. After reviewing the evidence, and applying the test of serious issue to be tried, the judge found that for the purpose of the application for interim injunction, Harbour Front has shown a good arguable case that its exclusion from participation in the management of Fonfair and Money Facts notwithstanding its satisfactory remedy of past breaches of the shareholders' agreement (particularly regarding the steps taken after the hearing of the petitions before Harris J in June 2017) is unfairly prejudicial¹⁰.

34. Ms Lok sought to challenge this provisional finding. This is a fruitless exercise.

35. Similar submissions were made to the judge¹¹ and were rejected¹². The judge is entitled to reach those tentative views. It cannot be said that his preliminary assessment of sufficient merits is plainly wrong. Reliance was even placed on the manner in which the present application for interim injunction was made as a "fresh abuse" to justify excluding Harbour Front from management. This has only to be stated to be

⁸ Decision, §51

⁹ Decision, §§37, 40 and 50

¹⁰ Decision, §32

¹¹ Decision, §30

¹² Decision, §§31 and 52

rejected. There is no justification at all to ask the Court of Appeal to consider the evidence afresh and make a new evaluation.

Ground 5: if damages are an adequate remedy

36. This seeks to attack the holding that financial compensation after the sale of the Yau Tong Property will not be adequate remedy for the wrongful exclusion of Harbour Front from participating in the companies' management, if so found by the court after trial¹³. Ms Lok submitted that this is clearly wrong. The point was made in YK's affirmation that he and Harbour Front both agreed to sell the Yau Tong Property. Assuming that Harbour Front were to succeed in the present petition, its best case would only be that the board of directors of Fonfair failed to achieve a reasonable price for the sale of the property and damages would be sufficient remedy for Harbour Front. Ms Lok placed heavy reliance (as she did before the judge) on this statement of Rogers VP in the last paragraph of the 2008 CA Judgment:

“Finally, I would for completeness just make the point that the application for interim injunctions (whether pending appeal or as sought in the appeal proper) was objectionable on the basis that, clearly (and as [counsel for Harbour Front], I think, accepted) damages were an adequate remedy.”

37. In 2008, Fonfair had received an offer for the purchase of the Yau Tong Property. This triggered an action by Harbour Front against the directors of Money Facts claiming a declaration that YK was in breach of the shareholders' agreement and an application for an urgent interim injunction to restrain the directors from voting on a resolution to consider and act on the offer. What Rogers VP said in the last paragraph of the

¹³ Decision, §43

2008 CA Judgment was a finding of fact in the context of that particular application, and is not binding on the judge (as Ms Lok has accepted before the judge¹⁴ but now wished to retract). In any event, we agree with the judge that the statement of the Vice President is *obiter* and was made “for completeness”, as the paramount fact underlying the decision in that judgment was the persistent failure of Harbour Front to remedy the past misconduct.

38. The judge took the view that damages are not adequate to protect the right of Harbour Front to equal participation in the management of Fonfair and Money Facts as this is not a right that is quantifiable in monetary terms¹⁵. We are inclined to agree and would add these observations.

39. The standard question in this context “are damages an adequate remedy” is just a convenient shorthand. The real question is whether it is just in all the circumstances that a plaintiff should be confined to his remedy in damages (*Araci v Fallon* [2011] EWCA Civ 668 at §42; *Chitty on Contracts*, vol 1 (33rd ed) at §27-015). The fact that some assessment could in principle be made does not mean that it is just that the plaintiff should be limited to an unsatisfactory remedy (*Araci v Fallon* at §72).

40. As emphasised in the affirmation of Gillian Leung, apart from being the only asset of Fonfair, the Yau Tong Property was a legacy of her grandfather and has a special and unique value to the Leung family. It has always been the intention of YT and Harbour Front to keep the property

¹⁴ Decision, §45

¹⁵ Decision, §41

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under the control of the family. She claimed that in the absence of equal participation, Harbour Front is unable to assess what should be the best approach to maximise the interests of the Leung family members, whether to develop (re-zoning applications had been made to the Town Planning Board by YK in 2006), sell or continue to lease out the property. And even if Harbour Front is prepared to consider a sale of the property, there would still be many questions to be considered by the management in what form the disposal should take, such as whether to sell to a strategic partner and retain an equity in the development¹⁶. Any loss that may be caused by depriving Harbour Front of such right in participation may not be easily quantifiable in money terms.

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41. It was contended that the judge had failed to take into account it has always been the clear intention of Harbour Front to purchase the Yau Tong Property from Fonfair¹⁷. We do not think this would assist YK at all. Harbour Front did not respond to the alleged intention in full¹⁸. Assuming that Harbour Front does have the ambition of acquiring the property for itself, it might be deprived of the opportunity of purchasing this unique property if the court should refuse to grant an interim injunction to protect its rights. As in any transaction for the sale and purchase of land, damages would not be an adequate remedy.

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42. In all the circumstances, we do not think it is just to confine Harbour Front to the unsatisfactory remedy of financial compensation.

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43. We would just mention one other matter. We do not rely on it because this point does not appear to have been canvassed before the

¹⁶ 3rd affirmation of Leung Chi Yin Gillian filed on 21 November 2018, §§38 to 47, 52

¹⁷ Affirmation of Leung Yuet Keung filed on 20 November 2018, §§81 to 85

¹⁸ 3rd affirmation of Leung Chi Yin Gillian, §§68 to 74

judge. Damages would only be an adequate remedy if the opposing party is in a position to pay. Harbour Front offered an undertaking in damages in seeking the interim injunction and deposed that it has sufficient financial resources to honour its undertaking with the value of its shareholding in Money Facts and Fonfair reflecting the Yau Tong Property, which is very substantial¹⁹. In contrast, YK made no mention in his affirmation if he might be good for any possible compensation to Harbour Front. Assuming that his substantial asset is also his shareholding in Fonfair, his shareholding is 33.53% as opposed to Harbour Front's 65.86%. It may need to be shown that his shareholding should be sufficient to satisfy any claim of Harbour Front for compensation.

Ground 6: the balance of convenience

44. The judge had weighed a number of factors²⁰ in considering the balance of convenience and came to the view that the balance lies in favour of granting a limited injunction to preserve the status quo.

45. Ms Lok repeated her argument, which was rejected by the judge, that the injunctive relief would cause Fonfair irreparable harm. We do not think she has made any point of substance and see no basis to interfere with the judge's assessment and exercise of discretion.

Conclusion and orders

46. There is no substance in any of the grounds of appeal in the proposed appeal. We dismiss the application for leave to appeal.

¹⁹ 1st affirmation of Leung Chi Yin Gillian filed on 12 November 2018, §117

²⁰ Decision, §§46 to 52

47. As this application is wholly without merit, we further order pursuant to Order 59 rule 2A(8) that no party may under rule 2A(7) request the determination to be considered at an oral hearing *inter partes*.

48. Costs of the application should follow the event. We order YK to pay the costs of Harbour Front in this application.

49. Having considered the statement of costs for summary assessment submitted by Harbour Front, and bearing in mind that the grounds of appeal are the same as those considered in the leave application before the judge, and that Harbour Front was represented by the same legal team, we reduce the reasonable fees claimed from \$152,956 to \$112,156.

50. The costs order *nisi* and gross sum assessment will be made absolute if no application for variation is made by any party within 14 days of the handing down of this judgment.

(Susan Kwan)
Vice President

(Peter Cheung)
Justice of Appeal

Written submissions by Ms Sabrina Ho, instructed by Yiu & Associates, for the Petitioner (Respondent)

Written submissions by Ms Frances Lok, instructed by Ho & Ip, for the 3rd Respondent (Applicant)