

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 20 OF 2004/10 OF 2005

BETWEEN:

**DAVID HAGUE
PRICE WATERHOUSECOOPERS**

Appellants/Applicants

and

NAM TAI ELECTRONICS, INC.

Respondent

CIVIL APPEAL NO. 25 OF 2004

DAVID HAGUE

Appellant

and

NAM TAI ELECTRONICS

Respondent

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

The Hon. Mr. Hugh Rawlins

Justice of Appeal

Appearances:

Mr. Richard Hacker Q.C. with Mr. Michael Fay and Ms. Claire-Louise Wiley for the Applicants/Appellants

Mr. David Chivers Q.C. with Mr. John Carrington and Mr. Terrence Neale for the Respondent.

2005: September 20, 21;
2006: January 16.

JUDGMENT

- [1] **GORDON, J.A.**: Civil Appeal No. 10 of 2005 is an appeal by the appellants against a decision of the trial Judge dated 29th October 2004 refusing to set aside leave to serve proceedings out of the jurisdiction on the appellants and further refusing to stay the proceedings on the ground of forum non conveniens. This appeal will be referred to as 'the service out appeal'.
- [2] Civil Appeal No. 25 of 2004 is a separate appeal against a decision of the trial Judge dated 14th December 2004 dismissing the application by the first appellant (hereafter referred to as 'Mr. Hague') to strike out a claim by the respondent (hereafter referred to as 'Nam Tai') to enforce a cross undertaking in damages given by Mr. Hague. This latter appeal will be referred to as 'the damages appeal'. The two appeals were heard separately as discrete appeals, even though one immediately followed the other in argument. This judgment will address both appeals.

The History

- [3] Nam Tai is a company incorporated in the British Virgin Islands (hereafter "BVI") under the International Business Companies Act, Cap 291 of the laws of the BVI whose shares were traded firstly on NASDAQ and subsequently on the New York Stock Exchange.
- [4] Tele Art Inc (hereafter Tele Art) is a company, also incorporated under the International Business Companies Act of the BVI. Tele Art was ordered to be wound up by an Order of the High Court of the BVI dated 17th July 1998 on the petition of Nam Tai presented on the 27th June 1997. Mr. Hague was appointed the liquidator. The proposal for the appointment of Mr. Hague as liquidator was made by Nam Tai. At the time of the presentation of the petition for the winding up of Tele Art Mr. Hague was employed by PricewaterhouseCoopers (hereafter PWC) in Hong Kong. It is the contention of the appellants that this appointment reflected the reality that all of the functions that the liquidator would have to perform in relation to Tele Art would have to be performed in Hong Kong.

- [5] Tele Art was found to be insolvent. Claims by creditors of Tele Art (including claims by Nam Tai and Bank of China) amounted to many millions of dollars and the only substantial asset in its liquidation was its holding of a significant number of shares in Nam Tai. Nam Tai sought to redeem the Nam Tai shares held by Tele Art which redemption was resisted by Tele Art; indeed, the liquidator sought and received an order from this court enjoining Nam Tai from proceeding to redeem and cancel the Nam Tai shares held by Tele Art. The liquidator, Mr. Hague, as is usual, gave an undertaking in damages as a condition to receiving the injunction against Nam Tai. The damages appeal arises from the attempt of Nam Tai to determine what damages should be awarded against Mr. Hague resulting from the granting of the injunction pursuant to his undertaking.¹
- [6] Independently of the claimed damages alleged to flow from the granting of the injunction, Nam Tai, in September 2002, commenced a separate suit against Mr. Hague and PWC. In that suit Nam Tai claimed against Mr. Hague as liquidator and PWC as his agent in relation to matters relevant to the liquidation up to 31st July 2002 for breach of statutory duties and or negligence in the carrying out of his duties as the liquidator of Tele Art.
- [7] On 4th October 2002 pursuant to a ‘without notice’ application, Nam Tai was granted leave to serve the Claim Form, the Statement of Claim and all other documents required to be served by personal service on Mr. Hague and PWC in Hong Kong. By application filed on December 24, 2002, the appellants applied to set aside the order for service out and the subsequent service made pursuant thereto on the grounds that the order for service out was given in breach of the CPR, Part 7, and also applied for all subsequent proceedings in the action to be stayed as against the appellants on the grounds of forum non conveniens.
- [8] On 29th October 2004 the High Court dismissed the application to set aside the order to serve out dated 4th October 2002 and refused the stay on forum grounds.

¹ See further at paragraph 20

The service out appeal

[9] The appellants are dissatisfied with both aspects of the order of 29th October 2004 and have appealed from that order. The actual service out aspect will be considered first and then the forum issue will be considered.

Service out Aspect

[10] The appellants' principal argument centered on the lack of jurisdiction of the court to make the service out order. Reliance was placed on the language of CPR Part 7.3, the relevant parts of which are herewith reproduced for ease of reference

"Service of claim form out of jurisdiction in specified proceedings

7.3 (1) The court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this rule.

Features which may arise in any type of claim

(2) A claim form may be served out of the jurisdiction if a claim is made –
(a) against someone on whom the claim form has been or will be served, and –
(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim;
(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or
(c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction.
....

Claims in tort

(4) A claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction.
....

Claims about trusts, etc.

(7) A claim form may be served out of the jurisdiction if –
(a) a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction;...

Miscellaneous statutory proceedings

(9) A claim form may be served out of the jurisdiction if the claim is brought under the –
(i) Carriage by Air Act, 1961 (U.K.);
(ii) Schedule to the Carriage by Air (Supplementary Provisions) Act, 1962 (UK);

- (iii) Schedule to the Carriage of Goods by Road Act, 1965 (UK);
- (iv) Nuclear Installations Act, 1965 (UK); or
- any amendment or substitution for these Acts in so far as they form part of the law of any Member State or Territory.

Proceedings which include other types of claim

7.4 If the claimant makes a claim which falls within –
(a) rule 7.3(3) (claims about contracts);
(b) rule 7.3(4) (claims in tort); or
(c) rule 7.3(7) (a) (claims against the defendant as a constructive trustee);
the court may grant any claim for a remedy which –
(i) does not fall within rule 7.3; but
(ii) arises out of the same facts or substantially the same facts as the claim in respect of which the order is made."

- [11] From the tenor of the arguments it would appear that both sides concede that if there is jurisdiction to serve out then it can only be based on CPR Part 7.3 (4). In brief the argument of the appellants is that, notwithstanding that the claim of Nam Tai for breach of a common law duty of care appears, *prima facie*, to fall within Part 7.3 (4) (claims in tort), any examination of the surrounding circumstances would reveal that, in fact, there is no jurisdiction in the court to order service out because the breach of the duty, if there was a duty and if there was a breach, was not committed within the jurisdiction of the BVI, nor was any damage suffered by Nam Tai within the jurisdiction. The appellants, however, do not in any way concede that there was a breach of a common law duty of care.
- [12] The appellants argue that if there was a breach of a common law duty of care, then not only is Mr. Hague not physically present in the BVI (at the time of the filing of the suit he was resident in Hong Kong) but PWC is also based in Hong Kong and has no presence in BVI; Nam Tai also has, at best, a minimal presence in BVI and carry out all their business in Hong Kong. It follows, therefore according to the appellants, that if any act or omission in breach of the appellants' common law duties to Nam Tai were committed, such acts or omissions would have been committed in Hong Kong. Similarly, if any damage flowed from any such breach of the common law duties owed to the respondent, then such damage would have been suffered in Hong Kong.

- [13] The response of Nam Tai to the above argument is that Mr. Hague was appointed liquidator of Tele Art by the High Court of the BVI. As such Mr. Hague had a duty to the creditors to get in and distribute the assets of Tele Art to them and any other creditors. Nam Tai further asserted that as the official liquidator of Tele Art Mr. Hague is deemed to be an officer of the BVI High Court as well as being an agent of Tele Art. As liquidator, Mr. Hague is, according to Nam Tai, accountable to the High Court of the BVI for the proper fulfillment of his obligations. Nam Tai's argument runs further that had Mr. Hague collected the assets of Tele Art in accordance with his responsibility, then he would have had the obligation to distribute a dividend to the creditors of Tele Art of whom Nam Tai was one such; the collection of assets and distribution of dividends is a matter strictly under the supervision of the BVI courts. It follows logically, therefore, so goes the argument of Nam Tai, that any damage suffered by Nam Tai is damage arising solely out of the liquidation of Tele Art, which liquidation is taking place in the BVI.
- [14] Both sides accept that the onus was on Nam Tai to show a serious issue to be tried – **Seaconsar Far East Ltd v Bank Markazi**². The appellants complain that the whole of the case of Nam Tai rests upon the advice of solicitors acting for the respondent and as such the Court is not in a position itself to analyse Nam Tai's case to determine whether there is an arguable case³.
- [15] It is true that the affidavit of Stephen Seung, which was filed in support of the application to serve out, does contain the following at paragraph 13:

"I am advised by the Applicant's Solicitors and verily believe that the above actions of the Respondents may make them liable for claims in negligence and breach of trust and that such claims would be actionable under the laws of the Virgin Islands."

Prior to that paragraph, however, Mr. Seung sets out a number of allegations, which if proved, would raise a *prima facie* case of breach of a common law duty of care

² [1994] 1 AC 438

³ See **Raychem Corp v Thermon (UK) Ltd** [1989] RPC 423 at p.428

(negligence) against the appellants. In other words, the opinion of the "Applicant's Solicitors" is actually surplusage and does not detract from the allegations of fact in the affidavit. It is those allegations that a court will analyse to determine whether there is a "real issue which it is reasonable for the court to try."⁴

- [16] Assuming (only for the purpose of determining jurisdiction) that there has been a breach of the common law duty of care then the issue is where did the breach occur. Mr. Hague as the official liquidator, appointed by the BVI court is an officer of the BVI court⁵. The liquidation of Tele Art is in fact governed by the Companies Act, Cap 285 of the laws of the BVI. A perusal of that Act, and in particular, Sections 126 et seq reveal, as one would expect, a whole regimen under which an official liquidator operates and to which he is subject. Such a regimen could only be enforced, as of right, by the BVI courts. Other courts might, as a matter of comity enforce the provisions in the BVI Companies Act but such enforcement might be refused.
- [17] It seems patent that once Mr. Hague accepted the appointment of official liquidator, he submitted to the jurisdiction of the BVI Court and I so hold. Service out on Mr. Hague is therefore found to have been properly ordered. Based on CPR rule 7.3 (2) service on PWC was also properly ordered.

Forum non conveniens

- [18] The appellant also argued as a ground of appeal that in any event the action should be stayed on the grounds of forum non conveniens. Learned Queens Counsel urged on this court a number of circumstances as demonstrating that BVI was not the forum conveniens. He argued it was clear that Hong Kong would be clearly more appropriate. Among the reasons he put forward were the following
- none of the parties have any actual physical or business presence in BVI;
 - the events of which complaint is made took place in Hong Kong;

⁴ CPR Rule 7.3 (2)(a)(i)

⁵ Palmer's Company Law R. Dec. 2001 Vol 3 para 15.323

- it would be considerably more expensive to litigate the issues in this case in BVI as all the witnesses are in Hong Kong; further the parties all have Hong Kong lawyers familiar with these proceedings;
- because witnesses are in Hong Kong they would be compellable in proceedings commenced in Hong Kong but not in proceedings in the BVI;
- it is not disputed that Hong Kong could deal with the issues raised by the proceedings.

In the light of the above considerations, it was argued, Nam Tai had failed to discharge the burden which it bore to show that BVI was the more appropriate jurisdiction in the context of seeking leave to serve out.

- [19] Learned Queens Counsel for Nam Tai responded by pointing out that when the court considers staying on the grounds of *forum non conveniens*, it must bear in mind the two-stage test laid down in **Spiliada Maritime Corp v Cansulex Ltd**⁶. The first stage, which is the sine qua non for the exercise of the court's discretion, requires that the alternative jurisdiction is available. Only if the alternative jurisdiction is available does the court proceed to consider the second stage, namely, is it more appropriate for the trial of the action.

"There are three aspects of availability to consider. First, it has been held that the foreign court is not "available" to a claimant unless at the time of the application for a stay, it was open to him to institute proceedings against the defendant as of right before that court. If, by contrast, the jurisdiction of that court would be open to him only if the defendant undertook to submit, and did later submit, to its jurisdiction, or if in due course the court granted leave to the claimant to commence the proceedings, the court is not available in the material sense. It follows that an undertaking by the defendant to submit to the jurisdiction of a foreign court cannot make the foreign court available if it would not have been so without his undertaking."⁷

As a statement of the law, the passage above reflects decisions of this Court. Learned Counsel for Nam Tai then pointed out that Hong Kong was not an available jurisdiction in the Spiliada sense because Mr. Hague no longer lives in Hong Kong, rather he now lives

⁶ [1987] AC 460

⁷ Dicey & Morris, *The Conflict of Laws* 13th Ed. At para 12-023

in England. This argument is wholly persuasive. On that basis Hong Kong is not an available forum.

- [20] In the circumstances the service out appeal is dismissed and the order of the learned trial Judge is confirmed. In the court below the learned trial Judge awarded the respondents costs in the sum of \$2,500.00. There was no appeal against this order which is hereby confirmed. Costs are awarded to the respondent on this appeal in the sum of \$1,667.00 being two thirds of \$2,500.00

The damages appeal

- [21] As the learned trial Judge remarked in her judgment dated December 14, 2004 from which this appeal derives, "this claim is yet another tentacle in the continuing saga between Nam Tai and Mr. Hague." The injunction sought by Mr. Hague preventing Nam Tai from redeeming its shares in the ownership of Tele Art was granted by the Court on 22nd January 1999 and was discharged on 5th July 2002 as a result of an application by Nam Tai. The judgment giving rise to this appeal derives from an application by Mr. Hague ('the Strike Out Application') supported by an affidavit by James E. Cooper, a solicitor of Hong Kong:
- (a) to strike out the Amended Points of Claim (and Points of Claim) served by Nam Tai under CPR Part 26.3(1)(a) and/or (b) and/or (c) ; and/or
 - (b) for summary judgment under CPR Part 15.2 on the ground that Nam Tai has no real prospect of succeeding on the claim; and/or
 - (c) for an Order under CPR Part 34.2, that the further information sought by letter dated 10th April 2003 should be provided.

- [22] At the same time as the court below heard the Strike Out Application it also heard an application by Nam Tai for judgment in default of defence on the grounds that Mr. Hague had failed to file a defence to the Points of Claim. In that latter regard, at the hearing of the Strike Out Application and the application for judgment in default, Counsel for Mr. Hague made an oral application for an extension of time within which to file a defence which

additional time was granted by the court. With respect to the Strike Out Application the learned trial Judge concluded as follows:

"Having reviewed the pleadings and evidence filed by the Applicant Nam Tai and the Respondent, Mr. Hague, in the matter, and in particular the Defence filed on the 12th May 2004, I am definitely of the view that there are triable issues in the matter which should be aired at trial.

"I have taken cognizance of the fact that the issues in this matter require expert witness on stock market conditions and therefore it is imperative that such evidence be given by these experts so that they could be cross examined on their expertise.

"The application is dismissed."

It is against that conclusion that Mr. Hague has appealed.

- [23] It seemed to be accepted by both Counsel that cases where undertakings in damages are enforced are not very common. There are, however, a number of cases deriving from England which are of great assistance. The first such case to which reference is made is **Cheltenham and Gloucester Building Society v Ricketts et al**⁸ the head note of which reads in part:

"The court had an unlimited discretion, which was exercisable in accordance with ordinary equitable principles, whether or not to enforce an undertaking as to damages given as the price for a grant of an interlocutory injunction, although where it was determined that the injunction should not have been granted the undertaking was likely to be enforced unless there were special circumstances for not enforcing it."

- [24] In **Balkanbank v Taher et al**⁹ the point is made that if the court determines that the undertaking is to be enforced, then the next logical question to be determined is what loss has the defendant suffered in terms of money, was it caused by the order which the plaintiff obtained and if so, is the damage too remote. In **F. Hoffman-La Roche & Co et al v Secretary of State for Trade and Industry**¹⁰ Lord Diplock said the following which might be found helpful:

⁸ [1993] 4 All ER 276

⁹ [1995] 2 All ER 904

¹⁰ [1975] AC 295

"The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is a contempt of court, not a breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which the principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would *not* prevent the defendant from doing that which he was restrained from doing by the terms of the injunction."

Learned Queen's Counsel for Nam Tai urged that in so far as the eminent Law Lord was speaking to the measure of damages, his statements were obiter dicta. Be that as it may, even obiter dicta from so eminent a source are deserving of the most serious consideration.

- [25] In **Uzor v Chinye et al**¹¹, a case from the High Court, Chancery Division, England, Mr. D. Donaldson Q.C. sitting as a Deputy Judge of the High Court had this to say on the issue of the remoteness of the damage that can be recovered under an undertaking:

"The other suggested basis was that that failure to obtain the paid chairmanship was caused in part by the publication of the order. Even if that had been established by credible evidence, it would not have fallen within the cross-undertaking. As is clear from Lord Diplock's formulation, the loss for which a defendant is to be compensated is that which results from his being unable to do that which is prohibited by the order, or, equivalently, in the case of a positive order, the loss flowing from the act which the defendant or a third party has been compelled to perform. The court is not concerned with the fact of the order but with its content and substantive effect. Loss covered by the cross-undertaking in the case of a freezing order is the loss resulting from the inability to use the frozen assets, and, in the case of a disclosure order, loss resulting from the disclosure. **But the cross-undertaking does not extend to the injury to reputation or any loss consequential thereon which is caused by the mere fact that a freezing or disclosure order has been made.** Such loss does not result from compliance

¹¹ [2004] EWHC 827 (Ch)

with the order. Accordingly, even if I were to accept that the making of the order and its publication were the cause of the decision by IMB not to appoint the first defendant, this would not be covered by the cross-undertaking. (emphasis added)

- [26] It was argued, on behalf of Nam Tai that the “notional contract” basis was not the only basis of assessment. We were referred to two cases from the English court of appeal which suggested, learned Queen’s Counsel for Nam Tai urged, that damages were awarded on account of loss caused by the fact of the injunction itself. In **Keller v Cowen et al**¹² a mareva injunction was granted against the injunctee as a result of which the injunctee’s credit line was withdrawn by its bankers. Upon the removal of the injunction an inquiry as to damages was ordered and subsequently awarded. The plaintiff appealed on a number of grounds, including causation. The Court of Appeal had this to say in that regard:

“As to causation, there is nothing whatever in this complaint. Mr. Hickey sought to argue that the real losses were due to the litigation rather than the continuation of the freezing orders. That is flatly contrary to an express finding of fact reached by the judge at page 11 of his judgment in these terms:

‘The variation of 12 November to allow the company to trade was plainly important to the bank but the fact that the freezing orders were still in place until 21 December was in my judgment on all the evidence the cause of the loss of the credit line which was of such importance to the company.’

As to which losses were within the reasonable contemplation of the parties, the judge in this regard too correctly directed himself as to the law. In my judgment it was entirely open to him reach the final conclusion that he did reach, namely that losses for which he compensated the company were indeed within the reasonable contemplation of the appellant....”

I do not find **Keller v Cowen** helpful to Nam Tai as the ratio is based on the specific facts found by the trial judge.

- [27] The second case to which we were referred is **Johnson Control Systems Ltd. V Techni-Track Europa Ltd (in administrative receivership)**¹³ I found this case of no help on the issue of causation. Indeed the Lord Justice Mantell commented in his judgment:

“So far as the enquiry as to damages is concerned, the judge took the view that a proper award should reflect the value of Europa immediately prior to the grant of the injunction. That was and is not controversial. He then proceeded to value the company at £225,000 which became the sum reflected in the award.”

¹² [2001] EWCA Civ 1704

¹³ [2003] EWCA Civ 1126

The appeal dealt principally with the issue of how the valuation of Europa was arrived at.

- [28] Learned Queen's Counsel for Nam Tai argued that the genesis of the 'notional contract' basis of assessment was **Smith v Day**¹⁴ and in particular an obiter statement by Brett LJ to the following effect:

"If damages are grantedI think the Court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shewn in Hadley v Baxendale 9 Ex 341....In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of a contract or duty, and in such case the damages arising from such a breach unless, as in Hadley v Baxendale, notice had been given to the opposite party of there being some particular contract which would be affected by the breach."

Counsel went on to suggest that Brett LJ intended to employ the 'notional contract' or 'duty' merely as aids to determining issues of causation and remoteness on an inquiry as to damages rather than to limit the loss to which the injunctee would be liable by the imposition of an artificial obligation. I agree with learned Counsel. It therefore becomes necessary to examine the Points of Claim as advanced by the respondent and the circumstances in which the injunction was granted. (The Points of Claim referred to herein are the Amended Points of Claim unless otherwise stated).

- [29] On December 22, 1998 Nam Tai gave notice to Tele Art of its intention to redeem 138,500 common shares in the capital of Nam Tai registered in the name of Tele Art on January 22, 1999. On January 22, 1999 Mr. Hague, as the official liquidator of Tele Art applied for and obtained an injunction preventing Nam Tai from redeeming the 138,500 shares. Some play is made in the Points of Claim that notwithstanding that Nam Tai, to the knowledge of Mr. Hague, was represented by attorneys in the BVI the application for the injunction was made ex parte. I discount this absolutely on the basis that it was not until April 2002, more than two years later, that Nam Tai applied for the discharge of the injunction. At paragraph 12.1 of the Points of Claim the following statement is made:

"12.1 The 1999 Injunction was discharged on the basis of:

¹⁴ [1882] 21 CHD 421

12.1.1 material non-disclosure

12.1.2 suppression of facts;"

In other words, according to Nam Tai's own statement, the circumstances for discharging the injunction existed from the time of the grant. It can, therefore, only be inferred that Nam Tai deliberately chose to leave the injunction in place or was indifferent to its remaining in place. I shall revert to this point later.¹⁵

- [30] The basis of Nam Tai's claim for damages is that in November 1997 it made a Rights Offering of 3,000,000 units, each unit comprising 1 common share and 1 warrant to subscribe 1 common share in the capital of Nam Tai. It is the contention of Nam Tai, supported by the affidavit of R. Rappaporte filed on Nam Tai's behalf, that the result of the injunction, which had to be disclosed by Nam Tai in accordance with the rules of the NASDAQ exchange on which the shares of Nam Tai and the warrants were being traded, was to immediately depress the price of the Nam Tai shares causing Nam Tai to extend the expiry date; at the extended expiry date, of the 3,000,000 units offered, only 1,460,655 warrants were exercised resulting in a loss to Nam Tai of \$31,402,638. By a series of mathematical permutations utilizing the US Treasury Bill rate, financing and legal charges, ROE, Nam Tai quantifies its claim as being \$31,402,638; \$6,300,000; \$1,767,969 per annum; \$3,328,680.00 per annum and \$2,500,000.
- [31] Nam Tai offers as the causal link between the loss sustained and the grant of the injunction the fact that Nam Tai was obliged to and did disclose the fact of the injunction in various ways and hence investors in the market shied away from investment in Nam Tai.
- [32] Nam Tai's position is based on a complete non sequitur. The terms of the injunction were quite simply to prevent Nam Tai from redeeming its own shares held by Tele Art to satisfy a debt owed by Tele Art to Nam Tai. There is no potential unquantified liability to Nam Tai for acts which it may have committed or omitted on which investors in the market might fasten on as demonstrating risk potential. I therefore come to the conclusion that if the

¹⁵ See paragraph 39

warrants were not taken up or the share value of Nam Tai's common shares diminished, these happenings were unrelated to the injunction granted to Mr. Hague.

[33] If Nam Tai had suffered loss by virtue of the delay in redeeming its shares caused by the injunction, then such loss might not have been too remote for Nam Tele Art to recover damages. That, however, is not the claim of Nam Tai.

[34] As stated above at paragraph 20 one of the prayers of the application of Mr. Hague was for summary judgment under CPR Part 15.2 on the ground that Nam Tai has no real prospect of succeeding on the claim. It will be recalled that the trial Judge stated in her judgment that "having reviewed the pleadings and evidence filed by the applicant Nam Tai and the respondent, Mr. Hague, in the matter, and in particular the Defence filed on the 12th May 2004, I am definitely of the view that there are triable issues in the matter which should be aired at trial."

[35] CPR Part 15.2 reads as follows:

"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the-

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue."

[36] In *Swain v Hillman*¹⁶ Lord Woolf MR said:

"Under r 24.2 [for our purposes in pari materia with CPR r 15.2] the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr. Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

Lord Woolf added:

"It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives

¹⁶ [2001] 1 All ER 91

contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally that it is in the interests of justice."

- [37] With the greatest of respect to the learned trial Judge, when she found in her judgment that there were triable issues she misled herself. The concept of triable issues derives from the old Rules of the Supreme Court Order 14 which spoke to issues which ought to be tried. As the learned authors of Civil Procedure, The White Book Service, 2004, state at page 526 the approach evidenced by the "no real prospect of success" of CPR is stricter than the old Order 14. In **Man Liquid Products Limited v Patel**¹⁷, an English Court of Appeal case, Potter LJ said the following:

"In the *Saudi Eagle*,¹⁸ when comparing the test to be met by a defendant under R.S.C. Order 14 ("an arguable case"), with the standard laid down in *Evans v Bartram* (H.L.) [1937] AC 473 in respect of a defendant seeking to set aside a regular judgment signed in default, the Court of Appeal (per Sir Roger Ormrod) said: "... *Evans v Bartram* ... clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. ... Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."

The above quotation encapsulates the difference in standards.

- [38] In the circumstances, the appeal of Mr. Hague is allowed. The order of the trial Judge is set aside in its entirety and it is ordered that summary judgment for the appellant Mr. Hague be entered pursuant to CPR Part 15.2.
- [39] Even if the Court had come to a different conclusion in regard to CPR Part 15.2, as remarked above, the court has unlimited discretion exercisable in accordance with ordinary

¹⁷ [2003] EWCA Civ 472

¹⁸ Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyds Rep. 221

equitable principles whether or not to enforce an undertaking as to damages¹⁹. As remarked in paragraph 28 above, on the face of the amended Points of Claim Nam Tai took two years to seek the removal of the injunction giving rise to this claim. The grounds on which the injunction was removed were material non-disclosure and suppression of facts. By use of ordinary logic, both grounds must have existed from the time of the grant of the injunction and have been available to Nam Tai. Indeed the affidavit of Stephen Seung in support of the application to remove the injunction adverts to no new information relied on that was not available at the time of the granting of the injunction. The maxim of Equity, *vigilantibus, non dormientibus, jura subveniunt* seems apposite. In **Smith v Clay**²⁰ Lord Camden LC said that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great time".

- [40] In **Lindsay Petroleum Co v Hurd**²¹ Lord Selborne LC said the following:

"Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

- [41] In the circumstances of this case, Nam Tai, as a large corporation trading on the stock exchange, seeking to raise money, which it says it needed, must have been conscious of the damage it says was being done by the existence of the injunction, if indeed damage was being done. Nam Tai chose to do nothing for two years. Had this Court not decided as it has done at paragraph 38 above, in the exercise of its discretion it would refuse to entertain the enquiry as to damages.
- [42] In the circumstances of the decision of this Court, it is unnecessary to embark on a consideration of the grounds of appeal relating to the provision of further information.

¹⁹ See paragraph 23 supra

²⁰ (1767) 3 Bro.C.C. 639

²¹ (1874) L.R. 5 P.C. 221

[43] Nam Tai shall pay Mr. Hague his costs on the basis of prescribed costs in CPR Part 65.

Michael Gordon Q.C
Justice of Appeal

I concur.

Denys Barrow, SC
Justice Appeal

I concur.

Hugh Rawlins
Justice of Appeal