

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 2008/0330

BETWEEN:

eCHINA CASH INC.

Claimant

and

eCHINA CASH (BVI) LTD

First Defendant

LIGHT YEAR PARTNERS LLC

Second Defendant

ELLIOT FRIEDMAN

Third Defendant

Appearances:

Mr. Malcolm Arthurs of O'Neal Webster & Co. for the Claimant

Mr. Gerard Farara QC and Mrs. Tana'ania Small-Davis of Farara Kerins for the Second Defendant

2009: January 15th
April 20th

JUDGMENT

(Company Law – Interim injunctions – whether injunction should be discharged on continued on procedural lapse – principles to be applied – whether there is a serious issue to be tried – whether damages would be adequate – balance of convenience – fortification)

- [1] **FOSTER, J (Ag):** This application arises out of a dispute concerning the ownership of eChinaCash (BVI) Ltd (“eCC BVI”) a company incorporated here in the BVI.
- [2] The Claimant, eChinaCash Inc (“eCC Inc”) applied for and obtained an exparte injunction against the Second Defendant, Light Year Partners LLC (“Light Year”) on 7th November 2008. The order granting the injunction was later served on Light Year on 17th November 2008. eCC Inc at the time of applying for the exparte injunction did not seek any injunctive

relief against the First Defendant, eCC BVI nor the Third Defendant, Elliot Friedman (“Mr. Friedman”).

[3] The court now has before it two applications.

[4] First, Light Year is applying to discharge the exparte injunction on the following grounds:-

- a. The order is irregular in that having been made on an application without notice it has been made for a period of more than 28 days and no date for further consideration of the application has been set as required by CPR 17.4(4) and (5).
- b. eCC Inc’s undertaking in damages is not adequate and ought to be fortified, especially in light of it being an external company.
- c. The injunction does not preserve the status quo or the balance of convenience.
- d. There is no serious issue to be tried.

Light Year relied on the First, Second and Third Affidavits of Mr. Friedman along with the accompanying exhibits.

[5] Secondly, eCC Inc applied on 18th November 2008 for similar injunctive relief against eCC BVI and Mr. Friedman, supported by the First, Second and Third Affidavits of Clarisse von Wunschheim. They also seek to have the injunctive relief against Light Year continued.

The Parties

[6] The Claimant, eCC Inc is a United States company incorporated under the laws of Delaware. The First Defendant, eCC BVI is a BVI business company which owns a Chinese subsidiary called Beijing eChina Cash Network Technology Limited (“eCC China”) which at all times have been under the control of the Claimant. The Second Defendant, Light Year is a United States company also incorporated under the laws of Delaware and appears on eCC BVI share register as the sole holder of all the First Defendant’s outstanding shares. The third Defendant, Mr. Friedman is the owner and controller of 86% of Light Year’s shares and owns a minority shareholding in eCC Inc.

Background

[7] Sometime in April 2001 eCC Inc, which does business primarily in China incorporated eCC BVI which in turn set up 100% owned subsidiaries in China. These Chinese subsidiaries were intended to be the primary means by which eCC Inc conducted its various business interests in China. eCC Inc claims that at the time of incorporation of eCC BVI the shares in eCC BVI were erroneously issued to Light Year instead of eCC Inc.

- [8] In September 2001, 5 months after the incorporation of eCC BVI, it is claimed that the parties recognized the "error" and it was decided that steps would be taken to rectify the said error and vest eCC BVI shares in eCC Inc. eCC Inc alleges that on 19th September 2008 Mr. Friedman executed a document entitled "Action by Written Consent of the Manager of Lightyear Partners LLC" ("Action by Written Consent") which acknowledged that eCC BVI shares were mistakenly issued to Light Year and resolved to transfer the shares to eCC Inc. The said Action by Written Consent was accompanied by an undated cover letter addressed to eCC Inc and allegedly signed by Mr. Friedman.
- [9] In an email dated October 29, 2002 to Casper Partovi, Mr. Friedman acknowledged his intention to transfer the eCC BVI shares to eCC Inc and that he misplaced his amendment changing eCC BVI ownership from Light Year to "*eChinaCado*" [sic]. On October 31, 2002 Mr. Partovi responded to Mr. Friedman's email by attaching an extra copy of the Action by Written Consent and the undated cover letter. He also explained that the Action by Written Consent corrects the mistaken issuance of BVI stock to Light Year instead of eCC Inc and that the said documents were initially sent on 31st January 2002 with instructions that they be signed and placed in corporate binders for Light Year and eCC Inc.
- [10] Apparently, the Action by Written Consent and the relevant documentation to transfer the shares in eCC BVI to eCC Inc were never delivered to the registered agent of eCC BVI. Therefore the shares in eCC BVI were never formally transferred to eCC Inc. It is alleged that despite the error, eCC Inc and Mr. Friedman at all material times acted as if ownership of the shares in eCC BVI were transferred to eCC Inc.
- [11] Sometime in 2004 Mr. Friedman ceased his affiliation with eCC Inc and his departure from eCC Inc gave rise to litigation between the parties in 2005. eCC Inc contends that prior to and throughout the litigation Mr. Friedman and eCC Inc continued to behave as if eCC Inc was the duly registered or true owner of the disputed shares. This is so as is borne out in a sworn deposition by Mr. Friedman made in relation to the said litigation. He stated that to the best of his knowledge, the 100% owner of the shares in the eCC BVI was eCC Inc. The litigation was eventually compromised and Mr. Friedman executed a general settlement agreement between himself and Light Year on the one part and eCC Inc, eCC BVI and its Chinese subsidiaries on the other part. In essence the settlement agreement shows that eCC Inc was treated as owner of eCC BVI. Light Year and Mr. Friedman were

treated as having no interest in the ownership of eCC BVI. No provisions were made in relation to the disputed shares because the parties treated them as if they were eCC Inc's asset.

- [12] Sometime in July 2008 eCC Inc's management realized that Light Year was listed on the Share register of the eCC BVI as owner of the disputed shares, and that the intended transfer of the disputed shares had not been effected. In an attempt to rectify this error Ms. Von Wunschheim, eCC Inc's Beijing attorneys wrote to Mr. O'Brien, the attorney for Light Year and Mr. Friedman on July 17, 2008 advising them of the situation and requested copies of transfers effecting transfers of the disputed shares. The said correspondence also indicated that if by error no transfers were executed as yet, eCC Inc's attorneys would draft the transfers and forward them for execution. On July 21, 2008 Ms. von Wunschheim also sent copies of the Action by Written Consent and the undated letter from Mr. Friedman to eCC Inc acknowledging that the shares were erroneously vested in Light Year. Mr. O'Brien responded on July 24 and August 19, 2008 and indicated that the Action by Written Consent and the covering letter were not authentic and refused to properly effect the transfer of the disputed shares to eCC Inc. He also instructed eCC BVI's registered agent that they were not authorized to transfer any of eCC BVI's shares to any other party without express written permission from Light Year.
- [13] eCC Inc says that Light Year's and Mr. Friedman's action has interfered with their effective management of eCC BVI as they have taken advantage of the mistaken retention of the disputed shares to remove one of the Directors of eCC BVI. Mr. O'Brien in an email dated 8th October 2008 has indicated that Light Year has retained ownership of eCC BVI and its Beijing subsidiaries and that Light Year will move expeditiously to take operative control and to liquidate the Chinese subsidiaries.
- [14] eCC Inc contends that this action will cause irreparable damage to their interest in eCC BVI and its wholly owned subsidiaries and that Light Year and Mr. Friedman are using the current state of affairs not to assert a genuinely held belief in the ownership of the disputed shares but to force eCC Inc to purchase their minority shareholding on terms favourable to them.

- [15] Mr. Friedman in his defence states that the documents are forgeries and that the shares are not owned by eCC Inc and that they have no documents (share transfer documents or resolutions) to evidence that eCC Inc in fact owns the shares.
- [16] I will now consider whether or not the injunction should be discharged.

Law on Injunctions

- [17] An interim injunction is another form of interlocutory injunction and the court's authority to grant such interim relief stems from **s. 24 of the West Indies Associated States Supreme Court (Virgin Islands Order) Cap. 80**. This section gives the court the discretion to grant such relief when it is just and convenient to do so and on such terms as it sees fit. The procedure for obtaining such injunctions is set out in CPR 2000 Part 17. In exercising this power our courts have adopted the test laid down by the House of Lords in **American Cyanamid v. Ethicon**¹. In essence, eCC Inc must satisfy the court that it has a serious issue to be tried, that is, one that is not frivolous or vexatious and that the balance of convenience favours the grant of an injunction.

Procedural Lapse

- [18] Mrs. Small-Davis, Counsel on behalf of the Second Defendant argued that the injunction obtained *ex parte* should be discharged as eCC Inc did not seek leave to serve the claim form and supporting documents on Light Year which is a non-resident company; that the claimant did not serve any of the material that was relied upon at the *ex parte* hearing; that the order is irregular as it did not indicate a return date in breach of CPR Rule 17.4 (4) and (5) and that there was insufficient urgency in moving the court on the *ex parte* application and that the defendants should at least have been given notice of the application.
- [19] Mr. Arthurs, on behalf of eCC Inc responded by saying that whilst it is acknowledged that the order of Mr. Justice Ross did not specify a return date it did speak to the injunction remaining in place until the return date or further order of the court and for that reason the order should not be set aside.

¹ (1975) A.C. 396.

[20] First, is the issue of leave to serve the claim out of the jurisdiction. CPR 7 sets out the circumstances and procedure in which a claim form may be served outside the jurisdiction. It states that an application for service outside the jurisdiction may be made *ex parte* and must be supported by evidence on affidavit which must state the grounds on which the application was made and the deponent's belief that the Claimant "has a claim with a realistic prospect of success", in what place and within what country the defendant may probably be found and if the application is made under Rule 7.3 (2) the grounds for the deponent's belief that the conditions of that rule are satisfied. From my perusal of the Court's file, at the hearing on 7th November 2008, there was no application before the court to serve the claim on Light Year and as such there was no explanation for this lapse. In the normal course of events an applicant would seek an order to serve the documents outside the jurisdiction. However, on 11th November 2008 eCC Inc attempted to serve Light Year's attorneys with the order but this was refused. The documents were later served on Light Year's registered office on 17th November 2008. It was not until 18th November 2008 that eCC Inc applied to serve the claim form out of the jurisdiction as per CPR 7. This order was granted on 26th November 2008.

[21] Second is the issue of eCC Inc's failure to provide the defendants with a note of the hearing or submissions relied on and the effect of this omission. The question to be asked is whether or not a failure to provide a defendant with material relied upon at an *ex parte* hearing can invalidate an order? I think not. The authorities² seem to suggest that the practice of providing the court with written submissions is recommended as such documents assist the court in determining whether or not to grant the order and to also reveal to Counsel on the other side what was urged upon the court to grant the order when applying to set aside the order. This practice assists the court in its consideration of an

² See Gee at para. 9.002 – "It is usual for skeleton argument to be used on an application of any complexity. If a skeleton argument is used, it will be one of the primary documents used by the judge in hearing the application and it is very important that it is an entirely fair document. It must not, by failing to mention matters divert the judge's attention away from material which he should have in mind if he is to have a fair view of the case."

See also Charles J at para. 100 in BVIHCV 2006/0307 – Michael Wilson & Partners Limited v Temujin International Limited et al

- application to set aside an order obtained *ex parte* and is but one of the criteria in the exercise of its discretion. There is no statutory requirement or rule for such a practice. The absence of written submissions or failure to provide the defendant with a note of the hearing would not in of itself be enough to invalidate an order. The court has a discretion to hear matters without the benefit of court reporters or written submissions and it seems that my brother judge exercised his discretion by hearing this matter without the benefit of both court reporter and written submissions.
- [22] Thirdly, the Order did not specify a return date. CPR 17 mandates that an injunction should remain in place for a period of no more that 28 days. In other words the court must fix a date for further consideration of the application and fix a date on which the injunction will terminate unless a further order is made on the further consideration of the application. However, perusal of the court's file revealed that the order was renewed on application by eCC Inc. The application was filed before the expiry of the 28 days and heard on 4th December 2008 (the day before the injunction expired).
- [23] In *ex parte* applications, it is Counsel's duty to the court to specifically point out the material aspects of the case that may have an influence on the court exercising its discretion whether to grant the injunction or not and Counsel is under a further duty to ensure that the draft order before the court is in its usual form and must draw the court's attention to any irregularities or matters that would be material to its consideration of the application. See Gee at para. 17.023 where it was stated that: – "the applicant and his representatives must present all aspects of the application with scrupulous fairness. This includes disclosure of all material facts, and fair presentation of the draft order itself and all circumstances material to whether it should be made."
- [24] In the case of **Memory Corporation Plc. And Another v Sidhu and Another (No. 2) [2000] 1 W.L.R. 1443**) the applicant obtained both a search order and worldwide freezing order. The defendant sought to discharge the orders on the ground that counsel misled the judge by telling him that the draft freezing order was in the form of the standard form provided for under the 1996 Practice Direction. In fact the problem with the disclosure order was that once the defendant had been compelled to give information there was no guarantee that the material would not reach the hands of a prosecutor and so the order itself purported to override the privilege against self-incrimination to which the defendant

might be entitled. The Court of Appeal had already criticized this form of order as inadequate to safeguard the privilege. The misrepresentation was a serious breach of the duty to present the application fairly, but in the circumstances did not lead to a discharge of the order. It follows that the absence of a return date stated on the order is not in itself a good reason to automatically discharge the order. In this case, and before the “return date” as calculated in CPR Part 17.4 (4) had not expired, eCC Inc had applied to renew the injunction, it having not been served at the time.

- [25] And finally, Mrs. Small-Davis submits that the application should not have been made *ex parte* as there was no real need for urgency or for eCC Inc to move the court *ex parte*. CPR 17.3 allows the court to grant an interim remedy on a Without Notice application if there are good reasons for not giving notice. Having regard to the evidence before the court, (the written threat of liquidation and or takeover of eCC BVI, the sale of shares, correspondence to eCC BVI's registered agent not to take instructions from eCC Inc) which has not really been challenged by Light Year except to say that the liquidation process could not take place in a seven day period, I find that eCC Inc had persuasive reasons for moving the court “without notice”.
- [26] I have had regard to the authorities³ and it follows that the procedural lapses advanced by Counsel are not so significant to call for an immediate discharge of the order. Accordingly, I will not discharge the order on this ground.

Is there a serious issue to be tried?

- [27] Mrs. Small-Davis submitted that there is no serious issue to be tried as to whether Light Year is the true owner of the disputed shares. She stated that eCC Inc's claim is based on two copies of similar undated letters purportedly from Light Year under the hand of Mr.

³ Thane Investments Ltd and others v Brian Tomlinson and others [2003]EWCA Civ 1272
Memory Corporation Plc. and Another v. Sidhu and Another (No. 2) [2000] 1 W.L.R. 1443
Zhu Jiang Finance Ltd v American Dream In Guangzhou Ltd and others, BVIHCV 2003/0121
Fursey Management Limited v Gefio General Finance Corporation Inc and another, BVIHCV 2003/0087
Anne L Manfre and Others v Edward St Clair Smith, ANUHCV 2001/0135
Georgetown (town clerk) v Hughes and Others (1997) 56 WIR 313
McDonald's Corporation v McDonald's Corporation Ltd and Another (1997) 55 WIR 226
East Coast Drilling and Workover Services Ltd v Petroleum Co of Trinidad and Tobago (2000) 58 WIR 351
Locke v Bellington Ltd and Others (2002) 61 WIR 68
Sinclair Investment Holdings SA v Carlton Ellington Cushnie [2004] EWHC 218
Harley Street Capital Limited v Tchigirinski and Others [2005] EWHC 2471

Friedman which acknowledges that eCC BVI has mistakenly issued the disputed shares to Light Year instead of eCC Inc and answers given by Mr. Friedman in a deposition in the course of earlier litigation.

- [28] Mr. Arthurs submitted that the correspondence and sworn admissions on oath along with the parties behaviour establish a prima facie case of ownership of eCC BVI's shares on eCC Inc's part and as such there is a serious issue to be tried.
- [29] eCC Inc instituted these proceedings to protect its alleged interests and to ascertain the true ownership of the issued shares of eCC BVI based on the actions of the Light Year and Mr. Friedman as outlined above.
- [30] The Claim Form and supporting documents filed by eCC Inc, Light Year and Mr. Friedman disclose that the substantive issue for trial would be whether or not Mr. Friedman's signature is forged and if so, whether eCC Inc entitled to be registered as the beneficial owner of the shares in eCC BVI.
- [31] In brief this is the substance of Mr. Friedman's case. He alleges that in 2001 he was the Chief Executive Officer of eCC Inc and since then eCC Inc began its strategy of claiming the eCC BVI shares owned by Light Year, a company in which he owns 86% of the shares. He further alleges that in 2008, a signed resolution from Light Year's Board and a signed share transfer agreement for Light Year's shares in eCC BVI surfaced and the signatures on these documents are clearly forged as the documents were never executed by him. He further said that answers given in a deposition where he repeated that eCC Inc owned the shares in eCC BVI was mistakenly given during the course of a stressful deposition and acrimonious litigation.
- [32] An allegation of forgery is always considered a serious issue to be tried and not lightly made. The law on forgery is set out at para 1324 of Halsbury's Vol. 11. The learned authors put it thus:-

"At common law the making of a written instrument which purports to be that which it is not and with the intent to use it as that which it is not in order to defraud is forgery. To constitute a forgery the instrument or some part of it must be false in a material respect. It is not essential that the forged instrument should be so made that if it were what it purports to be it would be valid; but it must sufficiently

resemble a valid instrument as to be calculated to deceive." They went on at para. 1327 to state the instances in which a document is false.

[33] And at para. 1332 – **Evidence as to handwriting in forged document** - they went on to say this: -

"Where it is necessary to prove that the forgery charged was in the defendant's handwriting, it may be shown by the admission of the defendant himself, or by the evidence of persons acquainted with his handwriting, either from having seen him write or from corresponding with him, or by the evidence of experts who are not acquainted with his handwriting but who by comparing the alleged forgery with other writing proved at the trial to be that of the defendant's can say that the alleged forgery is his work. Evidence must be given to show who was the person whose signature or writing is being forged, and to show either that there is no such person, or if there is such a person, that he did not write the alleged signature or writing."

[34] Having perused the claim and various exhibits, in particular the alleged forged signatures on the Action by Written Consent and accompanying correspondences and the signature of Mr. Friedman as contained in his various affidavits which were put before the court in January 2009, those signatures to my untrained eye appear to be similar. (See Action by Written Consent and Friedman's 1st, 2nd and 3rd affidavits) I hasten to add that it is noted that these alleged forgeries took place in 2001, eight years ago and that Mr. Friedman complained about this in 2008 and that Ms. Yan, the former General Manager of eCC Inc, after a two year break in communication, to inform Mr. Friedman and other board members in January 2009 that her signature is being forged by eCC management in Beijing. (See 3rd Affidavit of Mr. Friedman). These are matters which raise sufficient questions to be considered "serious issues to be tried".

[35] In an email dated 29th October 2002, Mr. Friedman acknowledged that eCC Inc owned the shares in eCC BVI and in a sworn deposition Mr. Friedman categorically stated on three occasions that eCC Inc owns all the shares in eCC BVI. These are compelling arguments for eCC Inc and when weighed against the arguments of the defendants there is a some

significant imbalance in this affidavit evidence. There are letters alleging forgery, a deposition, the Action by written Consent all of these being issues which speak to something.

- [36] It is noted that on an application such as this the court need not engage it self in a mini trial and all that is required is that the court be satisfied as to the existence of a dispute at this stage. See **American Cyanamid** at page 407, para H where it was stated that "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."
- [37] Clearly this is a matter which is best determined after a trial on all the issues. Accordingly, I am satisfied that eCC Inc has made out a serious issue to be tried having regard to the nature of the allegations before this court.

Adequacy of Damages

- [38] Mrs. Small-Davis is seeking to have the order discontinued by reason that eCC Inc has not proved that damages are not an adequate remedy and that eCC Inc has not identified any injury or given any evidence that such injury would result in a particular kind of damage that cannot be compensated for. Mr. Arthurs is of a different view and submitted that damages are not an adequate remedy in this case where the wrongs complained of might mean the disruption or the ultimate death of eCC Inc's business interests in China.
- [39] The evidence before this court and the wrongs complained of speaks to the disruption of the Chinese subsidiaries, the disposition of the disputed shares and the threat of liquidation of eCC BVI and these are matters which I find cannot be compensated for in damages.

Balance of Convenience

- [40] Does the balance of convenience favour the grant of the injunction? Mrs. Small-Davis submitted that the proposed undertaking whereby the Light Year and Mr. Friedman are prepared not to take any steps to amend the register of directors of the eCC BVI, deal with,

vote or dispose of any assets or the disputed shares or amend the share register of eCC BVI, liquidate the Chinese subsidiary of eCC BVI and change the general manager of the Chinese subsidiary would preserve the status quo.

[41] The basis of the claim according to eCC Inc is that Light Year is not the owner of the shares in eCC BVI and having regard to the nature of the claim (share dispute) especially the ease with shares can be transferred I am of the view that the interests of justice demands that the injunction be continued to preserve the shares.

[42] I am satisfied that eCC Inc is entitled to have this injunction continued. Accordingly, the defendants' application to discharge the injunction is dismissed.

Fortification

[43] Mrs. Small Davis raised the issue of fortification but did not address it in any depth in terms of an amount except to say that some sort of fortification should be provided by providing good and sufficient security for the potential damage to the defendants. Fortification is intended to provide a fund for compensation for damages to the defendants if it transpires that the grant of this injunction was wrong and that they have suffered loss as a result. It is the price eCC Inc is required to pay for the interim injunction. (See Lindley L.J. at page 253 in **Tucker v New Brunswick Trading Co. [1890] 44 Ch. D. 249** - "An undertaking is the price of an injunction and if a man gets an injunction he must pay the price.")

[44] The court has a discretion as to whether or not to order fortification and in considering the question must have regard to all the circumstances of the case.⁴ In particular, I remark that eCC Inc is a company incorporated in Delaware with no assets within the jurisdiction thus making it difficult for Light Year and Mr. Friedman if eventually successful to enforce judgment. The court is not in a position to order a monetary sum on fortification as no evidence was given as to the value of the claim or the likely quantum of loss likely to be suffered in the event the injunction was wrongly granted.

[45] However, I am minded to make such an order on fortification and will order that eCC Inc pay 10% of the value of eCC BVI's shares or \$100,000.00 whichever is the lesser, into court within 28 days of the date of this order failing which the order will stand discharged unless eCC Inc files an application within 14 days of the date of this judgment to show

⁴ See Gee on Commercial Injunctions, 5th Ed., Cap. 11

cause why it should not pay into court the said sum as fortification for the injunction granted. I make this order in this way as no real risk of loss or damage has been identified by either party in their dispute as to the true ownership of the shares in eCC BVI. The status quo is maintained as has been for the past eight years or thereabouts.

Conclusion

[41] For the foregoing reasons the court has determined as follows

- (a) The Application to set aside the injunction granted without notice is dismissed.
- (b) The Application for injunctive relief against eCC BVI and Mr. Friedman and to continue the injunction against Light Year is granted and this order continues until trial or further order.
- (c) The Claimant (eCC Inc) is ordered to pay into court the sum equal to 10% of the value of the First Defendants shares (eCC BVI) or \$100,000.00 which ever is the lesser sum as fortification of its undertaking in damages, to be paid within 28 days of the date of this judgment unless within 14 days hereof an application is filed by the Claimant to show cause why such sum should not be paid; and the Defendants are liberty to file an application within 14 days of the date hereof to show cause why such sum as ordered to be paid by the Claimant is insufficient in the circumstances of this case.
- (d) Costs are reserved.

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Peter I. Foster
High Court Judge (Ag.)
British Virgin Islands