

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 34 OF 2016

BETWEEN:

WONG TAM YEE

Claimant

-and-

- (1) HUGE LEADER HOLDINGS LTD
- (2) HUNG KA LEUNG
- (3) EXCEL COURAGE HOLDINGS LIMITED
- (4) LAU CHI YUEN JOSEPH

Defendants

Appearance:

Mr Nicholas Brookes for the Claimant/Applicant

.....
2016: October 13;
October 17.
.....

JUDGMENT

Introduction

- [1] **Davis-White QC J (Ag):** I have before me an application by the claimant Wong Tam Lee for permission for an order for service out of the jurisdiction of the claim form and statement of claim on the second and fourth defendants, respectively

Hung Ka Leung ("Mr Hung") and Lau Chi Yuen Joseph ("Mr Lau") in Hong Kong, pursuant to CPR rule 7.5. Mr Lau is a citizen and resident of Hong Kong. So far as Mr Wong is aware, Mr Hung is a citizen of the United States of America and a resident in Hong Kong. Mr Wong is a citizen and resident of Hong Kong and an accountant.

- [2] The claim form in this matter was originally issued on or about 10 March 2016 and the statement of claim bore the same date. Both the documents have since been amended on 11 August 2016. An earlier application for permission to serve out of the jurisdiction and for injunctive relief was, I am told, made by Mr Wong in March of this year but that application was withdrawn with permission of the judge. In the affidavit in support of that application Mr Wong asserted that he was at all material times the beneficial owner of the only issued share in Excel (the "Excel Share"). He now asserts (as he did in legal proceedings in the Hong Kong SAR referred to below) that at all material times he was the legal owner only of the Excel Share. However, his case as originally mounted before this court mirrors his case in support of a stop notice, the relevant affirmation being in the exhibit before me, which he obtained in November 2015 and which I am informed is still in force, as regards the share in Excel. That matter is not before me but in the light of his current evidence, that he has never been the beneficial owner of the Excel Share, his current lawyers will no doubt be considering with him whether steps need to be taken in that respect.
- [3] The amended claim form and amended statement of claim in the current proceedings was served on 17 August 2016 on each of the first defendant, a BVI corporation, Huge Leader Holdings Limited ("Huge Leader") and the third defendant, another BVI corporation, Excel Courage Holdings Ltd ("Excel"). In each

case the acknowledgement of service filed reserves the right to dispute jurisdiction of the court and/or that the BVI is the convenient forum.

- [4] In simple terms the claim concerns the sole issued share in Excel. Between February 2011 and September 2015 Mr Wong had been the registered holder of that share (the "Excel Share"). He says that he held it on trust and that his belief was that the beneficiary was Mr Lau. He executed various documents in blank which enabled the Excel Share to be transferred and for the beneficiary of the trust to be identified. In September 2015 the Excel Share was transferred, initially to Mr Hung and later to Huge Leader. Mr Wong says that this was done wrongly and that he is entitled to have the share registered in his name again, with retrospective effect. So far as Huge Leader is concerned, he says that that company was closely connected with the original wrongdoing and was not a bona fide purchaser for value of the Excel Share. As such he seeks, and the following is a broad summary only, declaratory relief regarding the legal and beneficial ownership of the Excel Share, declarations regarding the identity of directors of the company, damages for conversion against Mr Lau and Mr Hung, an order that Huge Leader transfer the Share to him and an order for rectification of the register of members of Excel pursuant to section 43 of the BVI Business Companies Act 2004.

The alleged facts and earlier proceedings in Hong Kong SAR

- [5] What on first sight seems a fairly straight forward claim is complicated by the manner in which matters have developed. So far as concerns Mr Wong's position as registered shareholder, he explains in his second affidavit before me that in early 2011, Mr Lau, a businessman known to him, told him that he, Mr Lau, wanted to use a private company to acquire a travel agency business, that he

would then “repackage” the business and sell it to a listed company at a substantial profit. He asked if Mr Wong would be willing to act as the front man to negotiate with potential purchasers of the repackaged business on his behalf in return for a share of proceeds of sale if a sale was achieved. Mr Wong says that he agreed. Pursuant to this agreement Mr Lau arranged for Mr Wong to be registered on 21 April 2011 as the sole shareholder, and be appointed as director, of Excel. At that time Mr Wong was given three documents to sign and return to Mr Lau. He says that he did so. The documents in question were an un-dated declaration of trust, the beneficiary’s name being blank, an undated share transfer form with the name of the transferee being blank and an undated letter of resignation as a director of Excel (the “Blank Documents”). Excel did in due course acquire a travel agency, through the medium of acquiring a company called Achiever World Limited, but the proposed sale came to nothing and Mr Lau decided to operate the travel agency business himself.

[6] For the next part of the story it is necessary to look to proceedings in the High Court of the Hong Kong Special Administrative Region (“Hong Kong SAR”) commenced by Excel and Mr Hung as plaintiffs against Mr Wong, as the first defendant, and four other individuals. Those proceedings resulted in a judgement of Deputy High Court Judge Ismail SC dated 26 February 2016.

[7] From about May 2012, Excel acquired shares in two Cayman companies, whose shares were listed on the Hong Kong Stock Exchange, Luxey International (Holdings) Limited (“Luxey”) and China Railsmedia Corporation Limited (“China Railsmedia”). On 24 September 2013 Mr Wong caused Excel, in effect, to transfer Excel’s shareholdings in Luxey and China Railsmedia (the “Cayman Shares”) in various blocks to the four other individuals who were defendants in the Hong Kong SAR proceedings. The following day Mr Wong was removed as director and

shareholder of Excel. This was through use of the Blank Documents that he had signed in April 2011, referred to above. The said documents were completed, apparently by Mr Hung but with Mr Lau's consent or connivance. The proceedings in the High Court of the Hong Kong SAR followed almost immediately. Interim freezing relief as regards the Cayman Shares was sought and obtained.

[8] The case brought by the plaintiffs in the Hong Kong SAR was one seeking proprietary remedies and/or damages in respect of the disposal of the Cayman Shares. Mr Wong's case was that the Cayman Shares were held by Excel for himself and Mr Lau as beneficial owners and that he had disposed of them properly in everyone's best interests. That case was rejected by the learned Judge who found that the Cayman Shares were owned by Excel. As found by the learned judge, Mr Wong had caused Excel to dispose of the Cayman Shares in breach of his fiduciary duties owed to Excel and some, but not all, of the other defendants had dishonestly assisted this breach of trust. Accordingly, he ordered that the Cayman Shares and all their proceeds (so far as then secured) be transferred to Excel forthwith and that Mr Wong be jointly and severally liable with others of the defendants to pay Excel equitable compensation of approximately HK\$283 million.

[9] Mr Wong relies on the Hong Kong judgment as regards three matters. I deal with the relevance of those matters to the application before me in more detail below but for now they can be summarised as being as follows:

(1) the fact that the Hong Kong SAR court declined to determine the beneficial owner of the Excel Share under the arrangements entered into by Mr Lau and Mr Wong, other than determining that it was not Mr Hung;

- (2) the judge's findings and statements of the evidence regarding Huge Leader;
- (3) the judge's statements of the position regarding apparent witness intimidation during, or in connection with, the proceedings.

[10] The reason that the beneficial ownership of the Excel Share appears to have become an issue in the Hong Kong SAR proceedings was because the plaintiffs had pleaded their case primarily on the basis that Mr Hung was the beneficial owner of the Excel Share, that duties were owed by Mr Wong to Mr Hung and that such duties were breached by him in connection with the sale of the Cayman Shares to the other defendants. However, because the only issue was whether Mr Wong owed duties to Mr Hung in this connection, the learned Judge decided that he only needed to determine whether or not Mr Hung was the beneficial owner of the Share in Excel, without needing to determine the identity of the beneficial owner if it was not Mr Hung.

[11] As the Judge pointed out, the question of ownership of the Excel Share was not simple because prior to the Hong Kong SAR proceedings both Mr Lau and Mr Wong had asserted (by way of public disclosure relating to the Luxey Shares) that Excel was 100% owned by Mr Wong. In that respect each had opened himself up to criminal proceedings in light of their avowed position that Mr Wong held the share on trust (according to him, for Mr Lau and according to Mr Lau, for Mr Hung). In determining the issue as to whether Mr Hung owned the Excel Share, the learned judge referred to the fact that there was an inadequacy of evidence. This was in part caused by the fact that Mr Hung had declined to attend to give evidence with the result that his written evidence was not before the court. Mr Wong's position was that he did not intend anyone other than Mr Lau to be the beneficiary under the trust of the share in Excel. Mr Hung's case was that through

the agency of Mr Law, Mr Wong agreed to be nominee shareholder and director of Excel on behalf of Mr Hung. Although Mr Hung did not give evidence other individuals gave evidence in support of his case, notably Mr Lau. The Judges conclusions regarding this issue can be briefly set out:

"[134] I agree with D1 [Mr Wong] that I do not need to decide the present purposes who, if not Mr Hung, was the beneficial owner of Excel at the material times; and my view is that it would be most unsatisfactory to try to do so in light of the clear gaps in information before the court-in particular the ownership of Huge Leader the connection of Huge Leader with Excel.

[135] I find that the plaintiffs have failed to establish that Mr Hung was beneficial owner of the Excel share at any material time up until and including 25 September 2013.

...

[149] I do not accept that the only possible beneficial owner of the excel share is Mr Wong (D1), Mr Hung or Mr Lau. It is clear that if Mr Wong is not ultimately a beneficial owner of the Luxey shares (through Excel) then there has been misleading disclosure of the ownership of Luxey shares. The true owner, if someone other than Mr Wong, may well not come forward because of the risk of investigation or prosecution".

[12] As regards Huge Leader the learned Judge referred to the fact that no-one on behalf of Huge Leader had given evidence, or any reliable evidence, (among other things) to say who owned Huge Leader (paragraph [122] of the Judgment). He referred to evidence from a Mr Sin who was appointed director of Excel on 23 March 2015. Mr Sin described Cherry Chan as being the "boss" of Huge Leader.

Miss Chan also appears to be a Hong Kong resident. Mr Lau was described by the judge as knowing "Miss Cherry Chan of Huge Leader". He was also described by the judge as being "clearly the common thread between all the characters in this action". The Judge said that there was evidence (being the fact that Miss Chan was a co-signatory with Mr Wong of a bank account held by Excel (see paragraph [147(a)] of the Judgment) that might indicate that Huge Leader and Excel did not deal on arms' length basis and that there was a connection between the real owners and/or controllers of Excel and Huge Leader (other than Mr Wong). There was further evidence from Mr Wong which the Judge refused to give any weight to on the basis that it emerged so late in the trial and had not even been put to earlier witnesses for the plaintiffs.

- [13] As regards the question of witness intimidation, in his judgement, between paragraphs [55] and [68] the learned judge referred to a report made to him by Mr Wong's counsel to the effect that there had been episodes of intimidation the previous day. The allegations in brief was a man believed to be a bodyguard of Mr Lau approaching a staff member of Mr Wong and asking him to tell Mr Wong that Mr Wong should be careful travelling about and should be careful what he said in evidence. The second alleged incident was that a man, also believed to be associated with Mr Lau, was taking photographs of Mr Wong's junior counsel while she was speaking to Mr Wong in the conference room outside court. Mr Lau effectively denied these matters and that he had any connection with the men in question. The judge found Mr Lau's evidence to be implausible and said that he did not believe him. Mr Lau counter-asserted that Mr Wong had committed acts of intimidation by way of text message. The judge found Mr Lau's evidence in this respect to be implausible and/or misleading but did not need to take the matter further.

CPR Part 7

- [14] The essential principles governing permission to serve out of the jurisdiction are conveniently summarised by Lord Collins in the case of **Nilon Ltd v Royal Westminster investments S.A.**¹ That Privy Council decision was on appeals from a judgement of the Court of Appeal, Eastern Caribbean Supreme Court (Territory of the Virgin Islands):

"First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

Serious issue

- [15] On the evidence before me I am satisfied that there is a serious issue to be tried on the merits as regards the two foreign defendants. As against Mr Hung the relief sought is both declaratory relief regarding his status as director and shareholder as well as damages for conversion of the documents executed by Mr Wong in blank. As regards Mr Lau the claim is one for declaratory relief regarding ownership of the Excel Share and again damages for conversion. On the conversion claim I raised with Counsel the question of whether a conversion claim

¹ [2015] UKPC 2.

would have difficulties given that Mr Wong as legal owner appears to have entrusted the documents to Mr Lau and, implicitly, permitted him to fill in the blanks and give effect to the same but am satisfied that there is at least a serious issue to be tried on that matter.

The CPR gateways and good arguable case

[16] As regards the question of the classes of case in which permission to serve out maybe give, which I shall refer to convenience as the relevant gateways, Mr Wong relies upon the following gateways:

(1) CPR 7.3(2), the “necessary or proper party” gateway;

(2) CPR 7.3(4), a claim in tort, where the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction;

(3) CPR 7.3(6) where the whole subject matter of the claim relates to property within the jurisdiction;

(4) CPR 7.3(7), claims about companies.

[17] As regards the “necessary or proper party” gateway I have reminded myself of what Lord Collins says in the **Nilon** case at paragraph [15]. I am satisfied that the case against Mr Hung and Mr Lau, at least so far as it relates to the declaratory relief, can be characterised as one where they are necessary or proper parties to the claim primarily mounted against Huge Leader. I am satisfied that there is a serious issue to be tried in the case of each cause of action. I am also satisfied that Mr Wong has a good arguable case that this gateway applies. I deal with the question of the rectification claim further below, but essentially for the reasons set out there am not satisfied that there is a serious issue to be tried under the rectification jurisdiction.

- [18] As regards the claim in tort I am similarly satisfied that the conversion claims are ones as to which Mr Wong has a good arguable case that the gateway applies. Reliance was placed upon the place where damage occurs and I am satisfied that that can be said (at least to some extent) to be this jurisdiction, being where the share was transferred (on Mr Wong's case wrongly) as a result of conversion of the relevant documents.
- [19] As regards the "property within the jurisdiction" gateway I am also satisfied that Mr Wong passes the good arguable case threshold: put simply all of the claims (and I need not address the question whether permission in relation to a particular claim can be given on this ground even if others within the claim form are not so covered) relate to property within the jurisdiction, namely the Share in Excel.
- [20] I am also satisfied that the good arguable case threshold is met as regards the head concerning claims relating to ownership or control of a company.

Appropriate forum

- [21] The final question is whether or not this jurisdiction is, in all the circumstances, "clearly or distinctly the appropriate forum for the trial of the dispute and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."
- [22] The first issue which I need to address in that respect is the question of the claim for rectification of the register of members of Excel under s43 of the **BVI Business Companies Act 2004**. So far I have not needed to address that issue because the claim against Huge Leader raises the same substantive issues of law and fact as to whether Huge Leader should be registered as the owner of the Excel Share.

As such I was able to consider the claim against Huge Leader in the context of the submission that the “necessary or proper party” gateway applied in this case, without having to deal with the rectification claim. In my assessment this case is not an appropriate one to be brought under the summary procedure provided for by s43 of the 2004 Act. That is because there will inevitably be substantial issues of fact to be gone into.² Whether or not in this case a stay or adjournment of the rectification proceedings is appropriate, rather than a striking out, on the grounds that the proceedings are not simply there to bring in Mr Hung and Mr Lau (contrast **Nilon**), it does not seem to me that the bringing of such proceedings can provide a basis for saying that the rectification claim in these proceedings is a good reason of itself why the other claims against Mr Hung and Mr Lau should be brought within this jurisdiction. In short the rectification claim should proceed separately from the other claims whether those claims are brought in this jurisdiction or another. In this context I have considered the submission that this is a case where, given the stance taken by Mr Lau in the Hong Kong SAR proceedings that he was not the beneficial owner of shares and given the finding against Mr Hung, the case will proceed on judgment by admission and no evidence beyond the Hong Kong judgment will be needed. In my assessment this is over optimistic. Mr Lau is not, in my view, bound by the admissions he made in the Hong Kong SAR proceedings (in the sense that he is prevented from asserting the contrary), further there is the real possibility that he asserts that he was properly acting on behalf of the true owner in permitting the Blank Documents to be completed and acted upon. On any view, as is clear from the history to date, this is a case where both Mr Lau and Mr Wong have given inconsistent evidence at various times and produced late evidence which the Hong Court SAR court declined to take into account. Further, the case against Huge Leader raises further factual issues

² See **Nilon** at paragraphs [37] and [53].

which were not gone into in the Hong Kong SAR proceedings and which will necessarily involve a detailed examination of the evidence. Accordingly, the rectification proceedings are not, in my assessment, a powerful factor pointing to the entirety of the proceedings continuing in this jurisdiction.

[23] I should add that there is a further reason why I do not consider the rectification claim to be one that is appropriately brought under the summary procedure. That is because, as explained in **Nilon**, the jurisdiction is primarily about legal title. A company is not concerned about beneficial title. Rectification is not a vehicle for deciding questions of beneficial title. Although pleaded in conversion, rather than breach of trust, on the pleaded facts of Mr Wong's case, there must also have been a breach of trust by Mr Lau in permitting the blank share transfer form to be filled in with Mr Hung's name as transferee. That seems to me to bring the case within the principle set out in the case of **Elliot v Mackie & Sons Ltd, Eliot v Whyte**,³ dealt with by Lord Collins in paragraph [43] of the **Nilon** decision and the overall principle set out in **Nilon** regarding the scope of rectification proceedings.

[24] In this case, as in **Nilon**, it is my assessment that the claims have little to do with Mr Wong's right, as trustee, to be registered as the shareholder of the Excel Share. The issue is whether the completion of the blank share transfer (and other Blank Documents) was wrongful or not and whether Huge Leader is a bona fide purchaser for value without notice. That turns upon the determination of facts and the legal nature of transactions which took place in the Hong Kong SAR between (on the face of things) Hong Kong SAR residents. Excel itself had no role in any of those matters. So far as concerns Huge Leader, there is no evidence that the position is different. Mr Wong himself relies on connections and actions in Hong

³ 1935 SC 81.

Kong as revealed by evidence in the Hong Kong SAR proceedings as providing the basis for saying that Huge Leader was not a bona fide purchaser for value without notice of the Excel Share. Excel's business is and was as holding company of Cayman shares listed on the Hong Kong stock exchange and of Achiever World Limited. The evidence in the Hong Kong SAR proceedings seems to have been that Huge Leader was a BVI company with no substantial business, no office and no employees.⁴ In short, as in **Nilon**, there is no suggestion that any witnesses or documents are in the BVI or that there is any connection with the BVI other than as a place of Excel's incorporation and Huge Leader's incorporation. Reliance was placed on the fact that there is a specific gateway for service out in relation to BVI companies but as Lord Collins observed in **Nilon** the existence of that gateway (and I would add, its application on the facts) does not obviate the need for a claimant seeking permission to serve out to demonstrate that the BVI is clearly the appropriate forum. The same point applies as regards the other applicable gateways in this case.

[25] A number of submissions were made as to why the BVI might be a more appropriate forum than Hong Kong SAR. First, it was said that there is no other clearly available forum and the only other plausible forum has declined to deal with the matter in that the court in the Hong Kong SAR has declined to deal with the issue of ownership of the Excel Share. However, that was because the Hong Kong SAR court decided that it did not need to in order to dispose of the case before it. That was something that Mr Wong agreed to. There is no suggestion that the Hong Kong court is prevented from dealing with the issue or that it will decline to do so, if it is required to by the matter being put fairly and squarely before it in legal proceedings. Interestingly the Hong Kong SAR court did determine ownership of

⁴ See paragraph [125] of the judgment.

Cayman shares in the relevant proceedings, in circumstances where one of the candidate owners was a BVI company. As is clear from those proceedings the sort of issues raised in this case have already been ventilated as side issues in that case. In short, it seems to me that Hong Kong SAR is a clearly available forum.

[24] It was also submitted that BVI was more appropriate as a forum, given the issue of witness intimidation that was raised in the Hong Kong SAR proceedings. However, I am unable to find that witness intimidation (if it were likely to happen) would be less likely to happen were the proceedings to be conducted in BVI rather than Hong Kong. If it did arise I have every confidence that the Hong Kong SAR courts would be able to deal with it as effectively as the BVI courts.

[25] In short, in my assessment, there are available gateways for service out on Mr Hung and Mr Law pursuant to CPR part 7.3 but I do not give permission to serve out on those gentleman because I am not satisfied that the BVI is clearly or distinctly the appropriate forum for trial of the dispute and that in all the circumstances I ought to exercise my discretion to permit service out. The application is accordingly dismissed.

Malcolm Davis-White QC J (Ag)
Commercial Court Judge
17 October 2016