CACV 161/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 161 OF 2002

(ON APPEAL FROM HCA 906 OF 2001
& HCA 5137 OF 2001 (CONSOLIDATED))

BETWEEN

HCA 906/2001

WORLDCOM, INC	1st Plaintiff
MCI WORLDCOM ASIA PACIFIC LIMITED	2nd Plaintiff

and

CLINTON ADKINS ROWE	Defendant

AND BETWEEN

HCA 5137/2001

ROWE, CLINTON ADKINS	Plaintiff

and

MCI WORLDCOM ASIA PACIFIC LIMITED	Defendant

Before: Hon Mayo VP and Sakhrani J in Court

Date of Hearing: 30 July 2002

Date of Decision: 2 August 2002

J U D G M E N T

Hon. Mayo VP (giving the judgment of the Court):

1. This is an appeal from a judgment of Deputy High Court Judge A. Cheung. He was hearing an Order 14 application for summary judgment. He granted leave to defend to the defendant conditional upon his paying into court $2.5 million as the Judge considered the defence being advanced to be shadowy. The defendant appeals against the imposition of this condition.

2. The plaintiffs in turn have lodged a cross appeal. It is their contention that the Judge should have entered judgment in their favour.

3. The litigation in question involves a dispute over the defendant's employment with the 2nd plaintiff.

4. The 2nd plaintiff seeks the return of HK$3,507,840 being moneys they paid to him conditional upon his remaining in their employment until 1 July 2002. The defendant was dismissed from his employment effective from 8 December 2000. His dismissal was on the grounds of his gross misconduct.

5. It was alleged that he had with others established a business known as Blue Telecom which was in direct competition with the 2nd plaintiff.

6. The defendant's counterclaim is for damages for wrongful dismissal, breach of contract and defamation of character.

7. It will be appreciated that the main issue in this litigation is whether the plaintiffs are able to establish that the defendant has been guilty of misconduct of such a nature as to justify his dismissal. The Judge identified two main issues:

(1) the nature and extent of the defendant's involvement in Blue Telecom; and

(2) whether Blue Telecom was in competition with the plaintiffs' business.

8. These issues need to be somewhat refined. The defendant accepted that he had been involved with Blue Telecom. It was his contention however that it was common ground that Blue Telecom was a customer of the 2nd plaintiff. He claimed that what he had been doing had been assisting them in a similar manner to the services normally rendered to customers and that other senior members of the 2nd plaintiff were aware of what he had been doing.

9. Mr Bell for the defendant submitted that his client had given detailed explanations in respect of all of the allegations made by the plaintiffs in their pleadings and affidavits and that there were clearly triable issues.

10. According to him what the Judge had done was to conduct a mini trial on the affidavit evidence. This had been particularly unfair to the defendant as the Judge had permitted counsel representing the plaintiffs to refer to details contained in over 350 pages of documentation exhibited to various affidavits and then observe that the defendant had not satisfactorily dealt with the matters referred to.

11. The approach adopted by Mr Reyes SC for the plaintiffs was to refer to a number of e-mails which had either been received or sent by the defendant and then argue that it was manifest from the subject matter of the e-mails that the defendant had actively been involved in the promotion of Blue Telecom and that this company had indeed been in direct competition with the 2nd plaintiff.

12. We were taken through a number of these e-mails. It has to be said immediately that on the face of the material disclosed a very strong case indeed could be made out that the defendant had been guilty of the misconduct alleged against him.

13. This however rather misses the point of what this appeal is all about.

14. While it is undoubtedly the case that the plaintiff was heavily involved with Blue Telecom it remains a fact that the defendant has not been afforded a proper opportunity of satisfactorily dealing with the allegations which have been made against him.

15. We do not think that the Judge was plainly in error in coming to the conclusion that there were triable issues and that the defendant should have his day in court.

16. What then has to be considered is whether the Judge was in error in imposing a condition that the defendant had to pay into court HK$2.5 million.

17. The issue as to whether the defence being run is shadowy revolves around the credibility of the evidence being advanced by the defendant.

18. In the light of the e-mails which have been referred to the case being run by the defendant is barely credible. Having regard to the fact that there will almost certainly be a trial on this very issue it is not desirable that we should comment in any detail upon this evidence as a whole.

19. Suffice it to say that in our view it cannot be demonstrated that the Judge was in error in concluding that the defence being run was of a shadowy nature.

20. This then leads to the next question which is whether the amount ordered by the Judge was excessive.

21. It is clear from the judgments in *Wu Cho Mei v Wong Sian Yu* [1994] 1 HKC 188 and *Hwang Yiou Kwa Victor and Anor v Morgan Guaranty Trust Co. of New York* [1985] 1 HKC 294 that the Judge should have given the defendant an opportunity of making representations to him concerning his financial situation and more particularly his ability to comply with any order which might be imposed as a condition to his being granted leave to defend the case.

22. It is apparent that no such opportunity had been afforded to the defendant by the Judge.

23. The defendant has now sworn various affidavits in relation to his financial affairs. We are satisfied on considering this evidence that the condition imposed by the Judge is in all probability one which the defendant will be unable to fulfil. On considering all the circumstances we are of the view that if the defendant is ordered to pay the sum of HK$400,000 into court within 28 days of the handing down of this judgment this is an order which he might reasonably be expected to comply with. We so order.

24. The next question which has to be addressed is whether a stay of execution should be ordered in the event that the defendant is unable to comply with the amended condition that we have ordered pending the outcome of the defendant's counterclaim.

25. We are satisfied that the reality of this litigation is such that if the plaintiffs succeed with their claim it is virtually inevitable that all of the counterclaim will fail. This being the case we are not prepared to grant a stay pending the outcome of the counterclaim.

26. Prior to the commencement of the appeal we entertained two short applications. One from the defendant for a stay of the cross appeal pending security being made available and the other from the plaintiffs to adduce additional evidence.

27. We dismissed both applications. Having regard to the amount of time taken on the two applications we have come to the conclusion that the fairest order to make in relation to costs is to make no order on both applications.

28. So far as the substantive appeal is concerned we make an order *nisi* that if the condition for defending the case is complied with, costs are to be in the cause of the action and, if the condition is not complied with, costs will be to the plaintiffs.

(Simon Mayo)
Vice-President

(Arjan H Sakhrani)
Judge of the Court of First Instance

Mr A.T. Reyes, SC, instructed by Messrs Lovells, for the Plaintiffs in HCA 906/2001 and Defendant in HCA 5137/2001.

Mr Adrian Bell, instructed by Messrs Haldanes, for the Defendant in HCA 906/2001 and Plaintiff in HCA 5137/2001.