

8.3.05



1 IN CHAMBERS  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
3 CAUSE NO: 68 OF 2004

4 BETWEEN:

5 **KTH INVESTMENTS LIMITED**

Plaintiff

6  
7 AND:

- 8 (1) CHINA ONE FINANCIAL LIMITED
- 9 (2) KTH CAPITAL MANAGEMENT LIMITED

Defendants

10  
11  
12 BEFORE: THE HON. MADAM JUSTICE LEVERS

13  
14 APPEARANCES:

15 Counsel for the Plaintiff: N. Sanders of Walkers  
 16 Counsel for the 1<sup>st</sup> Defendant: M. Imrie of Maples &  
 17 Calder  
 18 Counsel for the 2<sup>nd</sup> Defendant: J. Tarboton of  
 19 Appleby Spurling Hunter

20  
21 Heard: March 3, 2005

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RULING

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23  
24 **Livers J,**

25  
26 There are two applications before this Court. One,  
27 the Plaintiff's application for a stay of these

1 proceedings in the Cayman Islands until the final  
2 determination of the proceedings commenced in Hong  
3 Kong with action number HCA 76 of 2005 called the  
4 ("Hong Kong Action") and the other, the Second  
5 Defendant's application for the proceedings to be  
6 struck out on the basis that they disclose no  
7 reasonable cause of action.

8

9 The Second Defendant's action can be conveniently  
10 dealt with first. The Second Defendant argues that  
11 the Plaintiff's claim is hopeless and has no  
12 prospects for success and should be struck out and  
13 discontinued with costs, on the basis that no  
14 reasonable cause of action is disclosed.

15

16 The Plaintiff's claim is set out in its Originating  
17 Summons for rectification of the share register of  
18 China One. The claim is brought by KTH Investments  
19 Limited ("KTHI") to substitute the name of KTHI for

1 that of KTH Capital Management ("KTHCM") on the  
2 share register of China One, Financial Ltd.

3  
4 Rectification is an equitable remedy argues the  
5 Second Defendant and that is usually granted where  
6 it is clear that there is a mistake between the  
7 parties that has led to the incorrect recording of  
8 a document.

9

10 **Background**

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12 This is a claim brought under section 46 of the  
13 Companies Law (2004 Revision). The background to  
14 these proceedings is set out in the various  
15 affidavits of the parties. The affidavits filed to  
16 date record a complex transaction involving a  
17 number of parties. These proceedings are limited  
18 in that KTHI seeks the rectification of the  
19 register of members of China One. China One is a  
20 vehicle whereby a consortium of financial

1 institutions invested in non-performing loans in  
2 China which were auctioned by a Chinese entity  
3 called Huarong.

4

5 Proceedings were commenced for the rectification in  
6 the Cayman Islands and subsequently proceedings by  
7 this and other Plaintiffs were commenced in Hong  
8 Kong. The Hong Kong claim is based on  
9 misrepresentation as to funding. The Plaintiff  
10 claims that it is only its money that was put into  
11 the fund through which China One shares were  
12 purchased. The Defendants claim that other  
13 investors were involved. A Writ of Summons and a  
14 Statement of Claim is to be issued. The Writ of  
15 Summons has already been filed.

16

17 In its application for striking out these  
18 proceedings, for disclosing no reasonable cause of  
19 action, the Second Defendant relies to some extent  
20 on evidence in the affidavits that is has filed.

1 The Plaintiff submits that to strike out on the  
2 basis that it discloses no reasonable cause of  
3 action, the Court must not look at the evidence and  
4 that the Court is required to assume that each and  
5 every one of the facts pleaded is true and will be  
6 capable of proof at trial. Pleadings will only be  
7 struck out if a cause of action is not one known to  
8 the law or if the facts pleaded do not constitute  
9 the cause of action alleged or if the relief  
10 pleaded is not such as could be ordered by this  
11 Court. In this case the action was started by  
12 Originating Summons and does not require a  
13 pleading. It is supported by the affidavit  
14 evidence of a Mr. Luo and I agree with learned  
15 counsel for the Plaintiff that a cause of action  
16 arises under the Companies Law, as does a question  
17 that warrants determination by the judge. My  
18 function is to decide whether this case is so  
19 plainly unarguable that there is no point in having  
20 a trial. I agree with Counsel for the Plaintiff

1 that this is not a plain and obvious case where the  
2 Court should exercise its jurisdiction to strike  
3 out.

4

5 **The Application for a Stay**

6

7 The Plaintiff seeks to urge this Court to exercise  
8 its discretion in granting a stay of these  
9 proceedings for the following reasons:

10

11 1. The affidavits filed in this proceeding to  
12 date indicate that there are alternative  
13 claims arising out of the same facts in favour  
14 of KTHI and a number of associated parties;

15

16 2. Those and other claims are being litigated in  
17 the Hong Kong action;

18

19 3. The conversion of these proceedings to an  
20 action for the purposes, inter alia, of

1 allowing additional relief to be sought was  
2 raised at the hearing of the Summons for  
3 Directions and objected to by KTHCM but not  
4 ruled on by the Court, as directions were  
5 ultimately agreed;

6  
7 4. Hong Kong is the most convenient forum for  
8 determination of the claims that arise for  
9 relief additional to that sought in these  
10 proceedings. There are a number of lawsuits  
11 in Hong Kong, the witnesses are in Hong Kong  
12 and the documents are based in Hong Kong and  
13 there will be a need for Chinese language  
14 evidence which is much better catered for in  
15 Hong Kong;

16  
17 5. The nature of the claims that arise in favour  
18 of the Plaintiff in this action against the  
19 Second Defendant and others are set out in the  
20 Statement of Claim in the Hong Kong Action.

1 They include, the Plaintiff alleges, claims  
2 concerning the beneficial ownership of the  
3 shares in China One that are the subject of  
4 these proceedings. The Plaintiff urges this  
5 Court to hold that they are not strictly  
6 parallel proceedings and that different relief  
7 is sought arising out of the same facts and  
8 different parties are involved. That the  
9 Cayman Islands proceedings determine only one  
10 element namely, the legal ownership of the  
11 shares in China One. That a stay will not  
12 cause any increase in costs and will not  
13 prejudice the Second Defendant. That Cayman  
14 is the only realistic jurisdiction in which  
15 the rectification application can be made.

16  
17 The Second Defendant's attorney Mr. Tarboton argues  
18 that there are two alternatives. If the Hong  
19 action is for substantially similar relief as that  
20 claimed in the Cayman proceedings, then this is a

1 form of abuse of process for the Plaintiff to bring  
2 duplicate proceedings and the Court should require  
3 the Plaintiff to elect in which forum it seeks to  
4 litigate and discontinue the other proceedings.  
5 However, if, as the Plaintiff's evidence shows, the  
6 Hong Kong action seeks different relief by and  
7 against different parties, then a stay of the  
8 Cayman proceedings is clearly inappropriate. He  
9 relies on Australian Commercial Research and  
10 Development Ltd. v ANZ McCaughan Merchant Bank Ltd.  
11 [1989] 3 All ER 65. In that case Brown-Wilkinson  
12 V-C held:

13

14 "In my judgment, where a plaintiff  
15 seeks to pursue the same defendant  
16 in two different jurisdictions in  
17 relation to the same subject  
18 matter, the proceedings verge of  
19 the vexatious."

20

21

22 The Court further held that:

23

24 "In those circumstances, in my  
25 judgment, the Plaintiff is  
26 required to elect which set of

1 proceedings it wishes to pursue.  
2 This is not simply a question of  
3 the stay of its action here: the  
4 action here must be dismissed if  
5 it wishes to pursue the matter in  
6 the Australian courts and not  
7 here. Accordingly, unless the  
8 action here is dismissed (with the  
9 consequent payment of costs  
10 incurred in the action here), in  
11 my judgment one does not get on to  
12 the kind of considerations of  
13 forum conveniens with which the  
14 *Spiliada* was concerned."  
15

16 Here the question is did the Plaintiff commence two  
17 sets of proceedings relating to the same subject  
18 matter and would the dispute being resolved in Hong  
19 Kong resolve all the necessary disputes. In this  
20 present proceeding, the Hong Kong action comprises  
21 of broader claims than the rectification claim.  
22 However, the Plaintiff alone has not commenced that  
23 Hong Kong action. The Plaintiff alone commenced  
24 the action in the Cayman Islands for the  
25 rectification of the share register. It is  
26 conceded by all parties that the Plaintiff can only  
27 ask for rectification in the Cayman Islands. In

1 the Hong Courts subsequently, the Plaintiff has  
2 been joined by other Plaintiffs and asks for wider  
3 relief inclusive of the rectification relief.

4

5 The foreign proceedings in Hong Kong do not involve  
6 the identical parties and does not seek  
7 substantially the same relief as the Cayman action.  
8 What it does do, however, is provide a more  
9 convenient forum for the facts to be adjudicated on  
10 and wider relief given excluding, the application  
11 for rectification. If the Cayman action was to  
12 proceed concurrently with the Hong Kong action, the  
13 court might find itself with conflicting judgments.  
14 If, however, this action is stayed and as a result  
15 of the stay, no prejudice is caused to the Second  
16 Defendant then if on the merits a rectification is  
17 ordered in Hong Kong it can simply be ordered under  
18 this cause of action when it is resurrected.

19

1 The Plaintiff in this case was forced to bring this  
2 action to prevent a distribution by China One in  
3 respect of the shareholdings, that is the subject  
4 of this dispute and therefore in all the  
5 circumstances I hold that a stay of these  
6 proceedings should be granted.

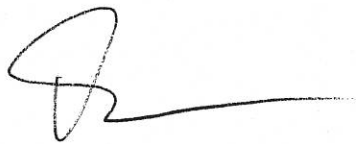
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8 Costs of the applications to the Plaintiff to be  
9 agreed or taxed.

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11 Dated this 8<sup>th</sup> day of March 2005.

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14 Judge of the Grand Court

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