IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 482/85

CIVIL APPEAL No. 8/85

BETWEEN:	CONNIE L. STEWART	-	PLAINTIFF/RESPONDENT
AND:	ASK SECURITIES LTD.	-	1ST DEFENDANT
AND:	FIELD NOMINEES LTD.	-	2ND DEFENDANT
AND:	KEITH B. STEWART	-	3RD DEFENDANT

CIVIL APPEAL NO. 3/86

BETWEEN:	ASK SECURITIES LTD.	-	1ST DEFENDANT/APPELLANT
	FIELD NOMINEES LTD.	-	2ND DEFENDANT/APPELLANT
	KEITH B. STEWART	-	3RD DEFENDANT/APPELLANT
AND:	CONNIE L. STEWART	-	PLAINTIFF/RESPONDENT

APPEARANCES: Mr. Andrew Jones of M&C for Appellants
Mr. Pierre Lamontagne Q.C. with Mr. Charles Quin of BC&Co. for the Respondent

DATE: July, 28,29 & August,11,1986 & December 1,1986

ZACCA, P.

In have had the benefit of reading the reasons for Judgment of Henry, J.A. I am in agreement with his reasoning and his conclusions. There is nothing I can usefully add.

KERR, J.A.

I concur with the Judgment of Henry, J.A. for the reasons stated therein.

"(a) a declaration that she is the undivided owner of one half of 1,094,510 shares in the common stock of Gradco Systems, Inc. purportedly transferred by the Third Defendant under an 'annuity agreement' dated 26th February, 1985.

(b) the delivery up to her, in transferable form, of share certificates in the common stock of Gradco Systems, Inc. to the extent of one half of 1,094,510 shares.

(c) an accounting by all Defendants of whatever dividends might have been paid to them or either of them on the said shares.

(d) payment of one half of the said dividends

(e) an order restraining each of the three Defendants from disposing of, or in any way charging the said shares to the extent of one half thereof, until complete satisfaction of the judgment to be rendered herein

(f) interest on the value of one half of the said 1.094,510 shares of the common stock of Gradco Systems, Inc. pursuant to the statute

(g) costs of this action"

On November 22, 1985 she obtained an ex parte order, upon the usual undertaking as to damages, for injunctions restraining the Defendants from disposing of the 1,094,510 shares and ordering Ask to instruct Field not to dispose of the shares. These injunctions were ordered to expire on November 29, 1985.

On November 27, 1985 she filed a summons asking for orders that the injunctions be extended to December 10, 1985, and for discovery in relation to the whereabouts of the shares.

On November 29, 1985 Ask filed a summons to stay the action, discharge the ex parte order of November 22, 1985 and dismiss the wife's summons of November 27, 1985. The injunctions which had been granted on November 22 were continued until December 2, 1985 when the hearing of the wife's summons commenced. That hearing continued until December 5 when Ask's summons (which had in the meanwhile been ammended) was argued. At the conclusion of the hearing the learned trial judge by orders made on December 12, 1985

refused the application made in Ask's summons, continued the ex parte injunctions until January 10, 1986, upon the usual undertaking as to damages and ordered the discovery sought in the wife's summons. Ask and Field appealed against those orders and by consent the injunctions were continued until after the determination of the appeal.

On January 10, 1986 Ask and Field filed a summons asking that the order made on December 12, 1985 be discharged unless the wife pay U.S.$5 million into court to secure her undertaking in damages. That summons was dismissed and there is an appeal also against the order dismissing it. It may be convenient to deal first with this latter appeal.

Where an undertaking in damages has to be given by a party outside the jurisdiction the normal practice is for the undertaking to be given by the party's solicitor or by some other person within the jurisdiction. Such an undertaking is the personal undertaking of the solicitor or other person and not merely an undertaking on behalf of the party as is given when the party is within the jurisdiction, by his solicitor. In the instant case the undertaking given was not the personal undertaking of the wife's solicitor but an undertaking on her behalf. It is for this reason that the summons by Ask and Field was filed. Ask was however represented at the time when the undertaking was given and it must be presumed that the undertaking was accepted at the time and in the form that it was given. It does not seem to me therefore that Ask can subsequently require security for the undertaking unless it can show that there has been a change in the wife's circumstances to justify such a requirement. In any event the summons is in the form not merely of a summons for security to be given but of a summons for the discharge the order embodying the undertaking. Counsel for Ask has quite properly conceded that if the summons is regarded as an application to discharge the order Ask's appeal cannot succeed because the application would have been

made on the basis of facts and submissions which could have been advanced at the time when the original order was made. Field was not represented at the hearing when the original order was made and there is nothing in the record to indicate that it was served with the summons on which the order was made. It is not therefore in the same position as Ask. If, however, as its counsel maintains, Field is a holding company and the mere nominee of Ask it would suffer no damages as a result of the injunctions. It would not, therefore, be appropriate to require the wife to give security for her undertaking in so far as Field is concerned. For these reasons it seems to me that the summons by Ask and Field was correctly dismissed and the appeal against that decision must be dismissed. I turn now to the appeal against the orders made on December 12, 1985.

It should first be observed that although the summons to stay the proceedings was brought by Ask only and Field did not appear at the hearing, both Ask and Field have purported to appeal against the order dismissing it. There is no record of leave having been given to Field to appeal and for that reason it would appear that Field's appeal must in any event be dismissed. Counsel for the Appellants submits that the issue between the wife and husband in the Cayman Islands proceedings is the same as that between them in the California proceedings, that it is fundamental to the Cayman Islands proceedings and that it ought properly to be determined by the California court so that the Cayman Islands proceedings ought to be stayed. These submissions are, up to a point, irrefutable. There can be no doubt that the issue of the wife's right to rescind the marital settlement agreement and consequently of her claim to one-half of the Gradco shares is common to both the California and the Cayman Islands actions. It is equally clear that the California court is the proper forum to determine that isses. The parties are domiciled in California, the agreement was executed in California and is subject to the law of California and the law relating to

community property is that of California. The issue is fundamental to the Cayman Islands proceedings in as much as the wife's action against Ask and Field can only succeed if the issue with her husband is determined in her favour. But Ask and Field are not parties to the California proceedings and a determination of those proceedings will not necessarily determine the action against them here. For that reason it cannot be appropriate to stay the proceedings permanently. The learned trial judge was therefore correct, in my view, in refusing a stay.

Finally I turn to the appeal against the order extending the interim injunctions until January 10, 1986 and ordering discovery. Counsel for the Appellants submits that on the pleadings Ask and Field are purchasers for value without notice, that for this reason the action against them is bound to fail and that therefore the order extending the injunction and granting discovery ought not to have been made. Counsel for the Respondent on the other hand submits that Ask and Field are not purchasers for value without notice because in the one case title to the shares never vested and in the other no value was given. In my view this issue is one which refer properly to be decided at the trial after consideration of the relevant evidence, and injunctions and discovery ought not to be refused on that ground only. It should in any event be observed that what was applied for in the summons and what the learned trial judge granted was not interlocutary injunctions but an extension of the interim injunctions. It is not clear from the record whether Field was served with the summons, but in the case of the third Defendant Stewart who was not served an interim exparte injunction was clearly the correct order to make. The action is in the nature of a tracing action and discovery was granted in aid of the injunctions with liberty to apply. In my view the learned trial judge was not in error in making the orders that he did.

For these reasons I agreed to the order made dismissing the appeals, extending the interim injunctions to September 7, 1986 and ordering discovery by August 25, 1986.