

HONG KONG
The Big Freeze
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GALL

Ancillary Relief in Hong Kong in Aid of Foreign Proceedings

Section 21M of the High Court Ordinance and Pre-Action Discovery

“It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in respect to assets located or persons resident within the territory of the former.”¹

Plaintiffs or potential plaintiffs in jurisdictions outside Hong Kong (“**Foreign Plaintiff or Foreign Plaintiffs**”) frequently enquire about whether it is possible to locate and freeze assets within Hong Kong pending the resolution of foreign proceedings. This is done with a view to being able to take enforcement action against the Hong Kong assets in the event that a judgment is obtained in the foreign proceedings. As a major world financial centre, Hong Kong is – perhaps more than any other – a jurisdiction through which both legitimate and illegitimate funds flow on a daily basis.²

Understanding the mechanism by which those funds can be (a) located through careful use of pre-action discovery; and (b) frozen before they depart the jurisdiction, can give foreign attorneys an appreciable litigation edge when it comes to satisfying a judgment with the defendant’s assets in Hong Kong. There are, however, a number of pitfalls which require attention to avoid.

Pre-Action Discovery – *Norwich Pharmacal*³ Orders

In Hong Kong, proposed plaintiffs (both local and foreign) are able to take advantage of a pre-action process known as *Norwich Pharmacal* applications. Such an application allows the proposed plaintiff to seek an order from the Court that innocent third parties who may have been caught up in a wrongdoing perpetrated against the proposed plaintiff, whether willingly or unwillingly, provide discovery in relation to such wrongdoing.

Norwich Pharmacal orders are often employed by the proposed plaintiff to identify wrongdoers⁴, obtain evidence in support of proposed proceedings against wrongdoers and/or identify assets belonging to wrongdoers. *Norwich Pharmacal* orders can be a useful tool for Foreign Plaintiffs who suspect that there are potential defendants or assets in Hong Kong against which it may be profitable to seek enforcement actions.

¹ *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818

² The World Economic Forum Financial Development Report 2012 ranked Hong Kong first in its Financial Development Index. This is somewhat attributable to declines in other financial markets (notably New York and London) but underscores the ability of defendants to “park” funds in Hong Kong’s relatively deep markets of both equities and real estate.

³ *Norwich Pharmacal Co. & Others V Customs and Excise Commissioners* [1974] AC 133

⁴ It is settled law in Hong Kong that a *Norwich Pharmacal* order may, in an appropriate case, be made in aid of foreign proceedings or potential foreign proceedings. See *Manufacturer’s Life Insurance Company of Canada V Harvest Hero International Ltd* [2002] 1 HKLRD 828

Having identified assets, whether through *Norwich Pharmacal* orders or through ordinary asset-tracing and forensic accounting, the question becomes how those assets can be restrained from dissipation out of the jurisdiction.

Common Law Enforcement

Prior to the introduction of the Civil Justice Reform (“**CJR**”) in Hong Kong on 2 April 2009, Foreign Plaintiffs could only rely upon the common law in order to seek recognition, protection and realisation of assets belonging to a company or commence ancillary winding-up proceedings to achieve the same result – a step which is not always practically, legally or commercially viable.

In practice, this ordinarily means that once a monetary judgment has been obtained in a foreign jurisdiction, it must be sued upon in Hong Kong. The putative defendant therefore gains a second bite of the cherry in terms of defending the action in Hong Kong, *albeit* at a disadvantage as he must convince the Hong Kong Court why the foreign judgment should be set aside or not enforced in Hong Kong.

Whilst enforcement of the judgment at common law remains an option, the ability of Foreign Plaintiffs to enforce foreign judgments, or seek to restrain assets on an interim basis (for example, pending the result of foreign proceedings), has been significantly enhanced by the 2009 passage of the CJR, and in particular section 21M of the *High Court Ordinance* (“**HCO**”).

Section 21M HCO – Interim Relief in the Absence of Substantive Proceedings

Ordinarily, where Hong Kong proceedings were contemplated (or already initiated), a defendant’s assets would be frozen by use of an interim *Mareva* injunction (also known as a freezing order).⁵ In order for a plaintiff (or prospective plaintiff) to obtain interim relief in this way, it is necessary to demonstrate:

- (a) That there is a serious question to be tried between the parties;
- (b) That the plaintiff has a good arguable case on its substantive claims against the defendant;
- (c) Damages would be inadequate to compensate the plaintiff;
- (d) The balance of convenience is in favour of granting the injunctive relief; and
- (e) There is a real risk of dissipation of assets which would render any judgment the plaintiff obtains of no benefit.

Prior to the introduction of section **21M HCO**, the ability of a Foreign Plaintiff to bring interim relief applications in Hong Kong in aid of foreign proceedings was limited by reason of the decision of the Privy Council in *Mercedes Benz AG v Leiduck* (“**Leiduck**”).⁶ The Hong Kong Courts undoubtedly have the jurisdiction to grant relief to plaintiffs in Hong Kong proceedings (such as granting *Mareva* injunctions or the appointment of receivers). However, in *Leiduck* the Privy Council held that unless there was jurisdiction to obtain substantive relief in Hong Kong, Foreign Plaintiffs had no standing to obtain interim relief to restrain any of the defendant’s assets that may be located in Hong Kong. This was because the Court’s jurisdiction to grant such interim relief was dependent upon, and incidental to, there being a pre-existing cause of action in Hong Kong.

⁵ Named for the well-known case *Mareva Compania Naviera SA v International Bulkcarriers SA* *1975+ 2 Lloyd’s Rep 509 in which such an order was granted.

⁶ [1996] AC 284

Whilst it is difficult to argue with the legal reasoning behind *Leiduck*, the decision obviously created an unsatisfactory position in Hong Kong in terms of restraining assets obtained through fraud, or which a defendant had attempted to conceal from a Foreign Plaintiff with the intent of rendering the Foreign Plaintiff's judgment hollow. This was the position highlighted by the dissenting Lord Nicholls in *Leiduck*:

*"The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable".*⁷

Section 21M now overrides the principles set out in *Leiduck*, in that, it is no longer necessary for the Foreign Plaintiff to prove to the Hong Kong Court that he has a claim to substantive relief in Hong Kong. Provided the foreign proceedings are capable of giving rise to a judgment which may be enforced in Hong Kong (as a general rule, it must be a final and conclusive monetary judgment), the Foreign Plaintiff may apply for interim relief. This applies to both judgments which may be enforced in Hong Kong at common law, or through the *Foreign Judgments (Reciprocal Enforcement) Ordinance*.⁸

The foreign proceedings would ordinarily be on foot prior to commencing the Hong Kong application for interim relief. If, however, there is a need to proceed on an urgent basis, the foreign proceedings may even be in a formative stage. Provided a good cause of action can be shown, the Hong Kong Courts theoretically have jurisdiction to make an order for interim relief under section 21M. Where foreign proceedings have been commenced, and a foreign court seized of the primary proceedings has granted interim injunctive relief, there will typically be limited reason for the Hong Kong court to refuse relief under section 21M.⁹

Summary

In circumstances where a foreign plaintiff has suspicions that the defendant has assets in Hong Kong which need to be protected, then there are a number of steps that the Foreign Plaintiff may be able to take to identify and protect such assets.

One of the most common situations in which a Foreign Plaintiff is likely to avail itself of section 21M is where the plaintiff has identified (either through *Norwich Pharmacal* relief or otherwise) assets belonging to the defendant in Hong Kong and wishes to take steps to protect such assets. It is not uncommon for Foreign Plaintiffs to identify, through their investigations, offshore assets which might be of interest to them for one or more of the following reasons:

- (a) Assets belonging to the company involved in litigation have been dissipated by its directors and/or shareholders once they became aware of the prospect of litigation;
- (b) The Foreign Plaintiffs have commenced proceedings in their home jurisdiction but have identified offshore assets against which they will wish to enforce any judgment they obtain;

⁷ *Supra* at 305

⁸ Unfortunately, U.S. litigators will be all too aware of the lack of reciprocal arrangements for the registration and enforcement of U.S. judgments outside of their own jurisdiction. U.S. plaintiffs will, therefore, need to ultimately rely on the common law to enforce any judgment in Hong Kong, but will at least be able to take comfort that the assets frozen pursuant to section 21M HCO will not be dissipated in the meantime.

⁹ *Deiulemar Shipping SpA v Transfield ER Futures LTD* [2011] 1 HKLRD 75 (*albeit* in that instance relief was not granted as an injunction had not been obtained in the foreign proceedings).

(c) The defendants hold the assets through corporate vehicles and/or nominees and there is a Hong Kong based company or individual which can be usefully restrained from disposing of those assets to maintain the *status quo* and prevent dissipation of assets once proceedings are commenced.

Provided the Foreign Plaintiff has commenced (or is entitled to commence) proceedings against a party in a jurisdiction outside of Hong Kong, the Foreign Plaintiff may have grounds to seek interim relief under section 21M, such as appointing a receiver, or obtaining a *Mareva*-style injunction over the defendant's assets. The Foreign Plaintiff can then continue to focus upon the foreign proceedings, without the need to run concurrent proceedings in Hong Kong, knowing that assets have been secured in Hong Kong.

Should the Foreign Plaintiff subsequently obtain a judgment in the foreign proceedings then the judgment can be registered in Hong Kong and enforcement proceedings commenced against the frozen assets.

In the past 12 months, GALL has successfully frozen substantive assets in Hong Kong in support of legal proceedings commenced in jurisdictions such as the United States and England.