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Different Types of Injunctions

Historically, an injunction is an order of an equitable nature restraining a person to whom it is directed from performing a specified act (i.e., prohibitory), or in certain exceptional cases requiring a person to perform a specified act (i.e., mandatory). In Hong Kong, the Court of First Instance is empowered to grant an injunction principally by section 21L of the High Court Ordinance (Cap. 4), and the common law relief by way of *Mareva* injunction[1] finds expression in section 21L(3).

Injunctions may be classified as interlocutory (or interim), where the order itself is expressed to have effect only until a further hearing takes place or until a named day or else contains some similar limitation, or perpetual injunctions, where the order is not so limited. They may further be classified as *ex parte*[2] injunctions or injunctions made on *inter parte* applications. The bases upon which a court may grant an injunction include proprietary claims or freezing assets from being dissipated (commonly known as *Mareva* injunction). The principles applicable to their grant are different, and they were usefully outlined in *Lau Lai Shan Lisa v Zhang Qi & Others* [2019] HKCFI 1750 ("***Lau v Zhang***") and the cases referred to therein.

I. Background

1. In *Lau v Zhang*, the Plaintiff ("**P**") alleged that she was induced to sign some

[1] The jurisdiction of the court to grant a *Mareva* injunction may be traced to the decision of the English Court of Appeal in 1975 in *Mareva Compania Naviera SA v. International Bulk Carriers SA "The Mareva"* [1980] 1 All E.R. 213; [1975] 2 Lloyd's Rep. 509, CA.

[2] An *ex parte* application is made in the absence of other party, and it gives rise to the obligation to give full and frank disclosure to the court. For further information, see our publication "Duty of Full and Frank Disclosure".

documents by fraudulent misrepresentations of the 1st Defendant (P's sister-in-law, "**D1**") resulting in some transactions being entered into against her will. P's claims include deceit, conversion, negligence, breach of fiduciary duty, knowing receipt of trust property, dishonest assistance in a breach of trust, unjust enrichment, proprietary/tracing claims, and conspiracy to injure by unlawful means. The 2nd and 3rd Defendants ("**D2**" and "**D3**") allegedly assisted D1 in procuring the transactions.

2. D1's pleaded defence include that the transactions in dispute were effected with the knowledge and consent of P, her brother and parents, and P knew the nature of the documents she signed. D2 and D3 claimed to be innocent parties embroiled in the family dispute. Furthermore, the defences of *bona fide* purchaser / recipient for value / change of position were raised.

3. In June 2018, P obtained an *ex parte* proprietary injunction restraining D1 from dealing with the sale proceeds of a transaction, and a *Mareva* injunction against D1 up to the sum of HK$110,000,000. Furthermore, a disclosure order was made against D1 in respect of the whereabouts of the sale proceeds and their proceeds. A few days later, the court made orders on an *inter partes* basis to continue the injunctions with an additional disclosure order against D1 and the relevant bank.

4. P sought a proprietary injunction against D2 and D3, and a disclosure order against D2's bank regarding its bank account, under section 21 of the Evidence Ordinance (Cap. 8).

II. Key Points

1. The threshold tests concerning merits and other factors between the two types of injunctions are different, in brief:

<u>For proprietary injunctions:</u>

(1) a lower threshold test is required, that is the plaintiff is only required to show that there exists a serious issue to be tried and the claim is not liable to be struck out. On the contrary, if the opposing party seeks to show that there is no serious issue to be tried, the threshold is high, as

it would be necessary to demonstrate that the claim should be struck out;

(2) the court will readily find that the balance of convenience favours the preservation of the fund pending trial;

(3) it is not necessary to demonstrate a real risk of unjustified dissipation of assets, as in the case of *Mareva* relief.

<u>For *Mareva* injunctions:</u>

(4) a plaintiff must show a real risk of unjustifiable dissipation of those assets, such that any judgment would then go unsatisfied. Such a risk must be supported by some credible material and should not be too readily inferred;

(5) a higher merits threshold test is required, a plaintiff needs to show a good arguable case "*in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success*"[3];

(6) once a real risk of dissipation has been shown, the balance of convenience will normally weigh in favour of granting the injunction.

2. In relation to the disclosure order, *Lau v Zhang* applied the principles set out in *Pacific King Shipping Holdings Pte Ltd v Huang Ziqiang* [2015] 1 HKLRD 830 at §29. Generally speaking, a court would not use its powers easily to order disclosure of information touching the confidential relationship of banker and customer. However, such an order maybe justified, even at the early interlocutory stages of an action, where the plaintiff sought to trace funds which, in equity, belonged to it and of which there is strong evidence that it had been fraudulently deprived and delay might result in the dissipation of the funds before trial.

[3] "*The Niedersachsen*" [1983] 1 WLR 1412.

III. Findings

On the basis of the evidence presented by the parties, the judge found that there was a serious issue to be tried as to P's right to trace into the funds. The judge was not convinced by D2/D3's evidence, which the judge thought was riddled with holes and inadequacies. In light of the large sum of money involved, the judge formed the view that the nature and justification for the payment in issue cry out for explanation and supporting evidence. In considering the adequacy of damages, the judge was not satisfied with a bare assertion to suggest that D2/D3 have sufficient financial means to compensate P in damages for any wrongdoing which might be established. The judge formed a view that if P's claim ultimately succeeds, there is an obvious risk of prejudice to P in the absence of injunctive relief. The balance of convenience further favoured granting the injunctive relief sought because some of the funds were already frozen by the Joint Finance Intelligence Unit[4]. The court granted the proprietary injunction and disclosure order sought by P.

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[4] A unit jointly run by the Hong Kong's Police Force and Customs & Excise Department to combat money laundering, terrorist financing, use of crime proceeds, etc.