

Case Bulletin: 2019/03

Injunctions In Aid of Foreign Proceedings

In our case law bulletin “Different Types of Injunctions”, we look at some of the legal principles governing the grant of proprietary and *Mareva* injunctions, particularly their differences. In this bulletin, we look at some useful restatements in *Gatecoin Limited v BD Multimedia HK Limited* [2019] HKCFI 2025 (“*Gatecoin v BD*”) concerning the grant of *Mareva* injunction in aid of foreign proceedings. Such an injunction application could be made pursuant to sections 21M and 21N of the High Court Ordinance (Cap. 4). These powers can be invoked to assist proceedings that have been or are to be commenced outside Hong Kong and foreign judgments, which are capable of giving rise to judgments enforceable in Hong Kong.

I. Background

1. In *Gatecoin v BD*, the Plaintiff (“**P**”) is a company incorporated in Hong Kong and now in liquidation. P operated a crypto-assets exchange platform, whereby its customers would deposit funds for the purpose of buying or selling crypto-assets, such as Bitcoin and Ethereum. Since 2017, due to the tightening of regulatory control over crypto-asset business, P resolved to transfer P’s monies to the personal account of Mr Menant, P’s substantial owner and director. Mr Menant engaged the Defendant (“**D**”) and its French parent company (collectively the “**D Group**”) to provide certain payment services. As a result, P and its customers deposited funds into D’s bank account in Hong Kong.
2. P commenced proceedings in Paris claiming return of funds allegedly stolen by D Group. P succeeded in obtaining an injunction to freeze D Group’s

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bank accounts in France, but it was discharged on technical grounds including the *locus standi* of P to sue in France (the “**Release Order**”).

3. Meanwhile, P was wound up in Hong Kong based on a petition presented by its parent company. The joint liquidators of P took over the French proceedings and sought a *Mareva* injunction in Hong Kong against D in aid of the French proceedings.
4. D alleged that it has suffered loss due to the chaotic situation created by P, and asserts a claim in France by way of damages arising from the alleged breach of contract on the part of P. D also filed a proof of debt in P’s liquidation in Hong Kong.

II. Key Points

1. As a pre-condition in granting an injunction in aid of foreign proceedings, the court must be satisfied that “*if the proceeding that have been ... commenced in the foreign court result in a judgment, that judgment is one that the Hong Kong court may enforce*”¹.
2. Then, the court will consider the same questions as it would if a *Mareva* injunction is sought in support of an action proceeding in the Hong Kong court, i.e., does the plaintiff have a good arguable case, and is there a real risk that the defendant will dissipate his assets if the *Mareva* is not granted?
3. In the circumstances, the underlying cause of action has little significance in considering the *Mareva* injunction application. Foreign judgments will be enforced in Hong Kong even though the claim is one that would not have succeeded under the law of Hong Kong. There is no reason in principle why the prospect of such a judgment should not receive the protection of a *Mareva* injunction.
4. The Hong Kong court has to form a view, based on the available material, including any findings of the foreign court itself, whether the plaintiff has a good arguable case before the foreign court.

¹ *Per* Lord Phillips NPJ in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (2016) 19 HKCFAR 586 at para 47.

5. As to the approach towards assessing risk of dissipation:
 - (1) The test is an objective one as to whether the refusal of a *Mareva* injunction would involve a risk that a judgment in favour of the plaintiff would remain unsatisfied because of a risk of an unjustified dealing with assets.
 - (2) It is not necessary for the plaintiff to show any subject or nefarious intent on the part of the defendant to dissipate or remove assets from the jurisdiction to defeat any judgment.
 - (3) The burden of showing real risk of dissipation of assets is very often discharged by means of “*inferential evidence*”.
 - (4) The court may take into account the “*unacceptably low standard of commercial morality*” exhibited by the defendant so that an inference can be drawn that “*there is a danger that if the defendant thought it was in its best interests to do it, it would not shrink from attempting to defeat the interests of the plaintiff under any judgment the plaintiff might obtain*”².
 - (5) However, the court should examine with care allegations that a defendant has acted dishonestly and should not too readily infer a real risk of dissipation from the conduct of commercial morality of a defendant.

III. Findings

At the end, it was accepted that any judgment that may be obtained by P in the French proceedings will be enforceable under common law, as an alternative argument to the “*final and conclusive*” nature of the judgment and applicability of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). The judge analysed and accepted P’s evidence, and found that D acknowledged a sum was due and owing to P. Despite the Release Order, which is under appeal, the

² See Godfrey J (as he then was) in *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLR 235 at 240H.

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judge found that P has established a good arguable case. The judge also found that there is a real risk of dissipation in that D is of unacceptably low commercial morality. It was considered that D's counter-claim lacks particulars and not properly quantified, and at best, it is a bare assertion of an unliquidated cross-claim. In balancing convenience, the judge considered that D has no entitlement to the sum in dispute, and any loss that may be occasioned by the *Mareva* injunction is minimal. D is not permitted to hang onto the money as security for its alleged counter-claim against P, otherwise it would be unjustifiably affording D with a priority over other creditors in the liquidation of P. A *Mareva* injunction was granted in favour of P.

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