

HISTORY OF INJUNCTIONS

1.4 In England, the jurisdiction to restrain by injunction the doing of wrongful acts was before the Judicature Act 1873 a jurisdiction which with a few exceptions,⁴ could only be exercised by the Court of Chancery. Its purpose was to remedy the deficiencies of the common law administered by the King's Justices that grew from the Norman Conquest (1066) to the reign of Henry III (1261–1272).

1.5 That remained so until, and by the Judicature Act, the jurisdiction of the Court of Chancery was transferred to the High Court of Justice.

1.6 Further, the Judicature Act⁵ extended the power of the court to grant *interlocutory* orders in all cases in which it appeared to the Court to be just and convenient that such order should be made, and that any such order may be made either unconditionally or upon such terms and conditions as the Court considered fit.

1.7 The limit in the exercise of the jurisdiction was whether such an order were 'just and convenient'. The jurisdiction was also expanded to restrain the publication of libel or the making of slanderous statements calculated to injure another man in his business. However, the words 'just and convenient' were not intended to give the right to an injunction to parties who had no legal right whatever, but simply to give to the Court, when dealing with legal rights which were under its jurisdiction independently, if it should think it just or convenient to add to what would have previously been the remedy by way of injunction. In this regard, the extension of power but not the legal right should be clearly observed.

MODERN LAW OF INJUNCTIONS

Evolution of the law

1.8 The evolution of the law of injunctions to its modern form, particularly in the exercise of discretion to grant an injunction may be marked by two developments. In this regard Hong Kong has followed closely the developments in England.

1.9 The first one was the development of the law in interlocutory injunction in the case of *American Cyanamid v Ethicon*.⁶ The following propositions were made:

- (1) It was no part of the court's function at the interlocutory stage to try to resolve conflicts of evidence. Those were matters to be dealt with at trial.
- (2) Unless the material available at the interlocutory stage failed to disclose that the plaintiff had any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to

⁴ The Common Law Procedure Act 1854 provides a few exceptions.

⁵ Section 25(8).

⁶ [1975] AC 396 (HL).

- consider whether the balance of convenience lay in favour of granting or refusing the interlocutory relief that was sought.
- (3) The governing principle was that the court should consider whether the plaintiff would be adequately compensated by an award of damages for the loss it would have sustained if the defendant had continued with the conduct sought to be restrained. If damages were adequate, and the defendant would be in a position to pay them, no interlocutory injunction should normally be granted.
 - (4) If damages would not be adequate, the court should then consider whether the defendant would be adequately compensated under the plaintiff's cross-undertaking in damages for any loss sustained. If damages would be an adequate remedy and the plaintiff was in a position to pay them, there would be no reason to refuse an interlocutory injunction.
 - (5) If there was any doubt as to the adequacy of the respective remedies in damages, the question of the balance of convenience would arise. Where other factors appeared to be evenly balanced it would normally be prudent to preserve the status quo.
 - (6) If the extent of the uncompensatable disadvantage to each party would not differ widely, it might not be improper to take into account the relative strength of each party's case as revealed by the affidavit evidence. This should only be done when the strength of one party's case was disproportionate to that of the other party.
 - (7) Special factors would be taken into account in the particular circumstances of individual cases.

1.10 Before *American Cyanamid*, interlocutory injunction orders were granted in cases where they are usually related to disputes in intellectual property and fraud. In fact *American Cyanamid* is itself a patent dispute involving sterile absorbable surgical sutures.

1.11 The second major development was also seen in the 1970s. During that period, pirated copies of video and tape recordings were becoming accessible. The value attributed to global design and trademarks was embryonic. Computer use was still not wide spread.

1.12 In 1976, the English Court of Appeal decided the celebrated case of *Anton Piller KG v Manufacturing Processes Ltd.*⁷ The then counsel, Hugh Laddie, later a judge of the English High Court, through historical research of early chancery practice, was able to formulate an order that would later become known as a form of a civil search warrant, the *Anton Piller* order.

1.13 Of course today we are in a different age. *Anton Piller* orders are sought to enforce, for example, restraint of trade clauses, and breaches of confidentiality upon termination of employment where there is concern that employees would take away confidential client information to compete with their employers.

⁷ [1976] Ch 55, [1976] 1 All ER 779.

Locus

1.22 An injunction to restrain publication is occasionally granted *contra mundum*, that is to say, against the whole world.¹⁹

Unknown defendants

1.23 While plaintiffs can usually identify the names of the defendants on whom an injunction may be granted, this has become more difficult nowadays. Modern plaintiffs increasingly anticipate instances where their persons may be harassed, their property damaged, or their confidential information exposed by persons who are difficult or impossible to identify. The Occupy Central incident (for which unknown persons are named as the 1st Defendants) in 2015 is a good example. The Occupy Central incident (for which unknown persons are named as the 1st Defendants) in 2015 is a good example.

1.24 In the UK, a recent example is *Harlan Laboratories UK Ltd v Stop Huntingdon Animal Cruelty and Ors*²⁰ where the plaintiff, Harlan Laboratories UK Ltd, breeds animals for medical and clinical research and has therefore been the target of anti-vivisectionist campaigns. It contends that directors and employees of companies within the Harlan Group may need the protection of an injunction against harassment when visiting the First Claimant.

1.25 The Second Claimant, a Chief Security Officer, of the First Claimant, represents the First Claimant's officers and employees, as well as the 'suppliers and service providers'.

1.26 The First and Second Defendants have been sued as unincorporated associations, by a named representative in each case. As an unincorporated association is not a legal entity, it cannot be sued solely in its own name.

19 *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430, the plaintiffs, murderers of a two year old boy, were granted permanent injunctions preventing disclosure of their identities. There was a real risk that their lives might be in danger if their identities are revealed.

20 The case is fully transcribed as *Harlan Laboratories UK Ltd (for and on behalf of its officers and employees and the officers and employees of Harlan Laboratories Inc and its subsidiaries worldwide), Theodore Robert Wasky (for and on behalf of the officers and employees of Harlan Laboratories UK Ltd, and the officers and employees of third party suppliers and service providers to Harlan Laboratories UK Ltd) v Stop Huntingdon Animal Cruelty ('SHAC') (an unincorporated association by its representative Greg Avery acting for and on behalf of the members of SHAC who are conducting activities against the Claimants), National Anti-Vivisection Alliance ('NAVA') (an unincorporated association by its representative Luke Steele acting for and on behalf of the members of NAVA who are conducting activities against the Claimants), Persons Unknown who are conducting protesting and/or unlawful activities against the Claimants* [2012] EWHC 3408 (QB).

Requirement of both just and convenient

1.27 The phrase 'just and convenient' under section 21L of the High Court Ordinance (Cap 4) should be taken as 'just, as well as convenient'.²¹ It is normally just and convenient where the court reasonably supposes that there is a continuing threat requiring the coercive power of a court order to mitigate it.²²

Damages an adequate remedy

1.28 As early as 1894, in *Shelfer v City of London Electric Lighting Company*²³ the court had laid down four tests as to when an injunction will not be granted, notwithstanding an infringement of rights of the plaintiff, but will instead award damages:

- (1) If the injury to the plaintiff's legal rights is small;
 - (2) And is one which is capable of being estimated in money;
 - (3) And is one which can be adequately compensated by a small money payment;
 - (4) And the case is one in which it would be oppressive to the defendant to grant an injunction;
- then damages in substitution for an injunction may be given.

1.29 The UK Court of Appeal also said that there may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, for instance, in:

hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disintitiled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. ... Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception.²⁴

1.30 *Shelfer* was recently reviewed by the UK Supreme Court in *Coventry (t/a RDC Promotions) v Lawrence*,²⁵ which is a case on nuisance. The UK Supreme Court considered that the approach should not be such as to fetter the exercise of the court's discretion. However, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. But the fact that those tests were not all satisfied

21 *Day v Brownrigg* (1878) 10 Ch D 294. This was a case in which the plaintiff sought an injunction to have his neighbour change the name of his house. The injunction was refused because no right had been infringed.

22 *UPS Ltd v Stop Huntingdon Animal Cruelty* [2011] EWHC 3199 (17 February 2011).

23 [1895] 1 Ch 287 (CA(Eng)) per Kekewich J.

24 [1895] 1 Ch 287 at 322-323.

25 [2014] AC 822 (SC).

2.56 An undertaking in damages extends to all defendants in the case, including defendants who have no injunction against them. It also extends to defendants joined after it is granted.⁶¹

2.57 Another example is *Money Link Travel Co Ltd v Yip Wing Ching*.⁶² In that case the plaintiffs applied for an interlocutory injunction to compel the defendant to deliver up seven Vehicle Registration Documents ('the VRDs'). The matter was first granted by DHCJ B Chu (as she then was) which prohibited the defendant, until further order, from using the VRDs for any purpose whatsoever without prior written consent of the plaintiffs ('the Interim Injunction').

2.58 The Interim Injunction was varied by two subsequent orders. The combined effect of the two variations was that:

- (1) The defendant was to deliver four of the seven VRDs to the plaintiffs to enable the plaintiffs to renew the VRDs with the Transport Department. After renewal, the plaintiffs were obliged to deposit those VRDs with the defendant's solicitors, who would hold the same as stakeholder and be responsible for their safe custody;
- (2) The defendant was to deliver the other three VRDs with his solicitors who would similarly hold the same as stakeholder.

2.59 At the hearing, the defendant did not contest an order to deliver up the VRDs to the plaintiffs. In relation to the undertakings, the defendant sought the following:

- (1) the usual undertaking to compensate the defendant for loss in the event of the court finding that the order for injunction was wrongly made; and
- (2) an undertaking from the plaintiffs that the VRDs should not be used for any purpose (save and except for their renewal) without the prior consent of the defendant or order of the court.

2.60 The plaintiffs resisted both undertakings and the primary contention was that the defendant had no arguable defence to the plaintiffs' claim. It was argued that the defendant never had authority to take possession of the VRDs, and any authority he might have to keep the documents must cease after his removal as director of the respective plaintiffs. The defendant had in any event failed to file a defence despite the time prescribed for doing so had passed, and for the purpose of the present application, had failed to file any evidence in response. It was argued that the merits of the plaintiffs' claim for the unlawful detention of the VRDs were so overwhelming that there would be no need for further consideration of any undertaking because the defendant could take matters no further at the trial. The court did not accept such submissions after considering the overall picture of the disputes between the parties.

2.61 On the second undertaking regarding dealings with the returned VRDs, the court noted that the purpose of the first undertaking was to protect the defendant

61 *Berkeley Administration Inc v McClelland* [1996] ILPR 772. See also *Hong Kong Civil Procedure 2016* Vol 1 (Sweet and Maxwell), 29/1/21.

62 [2014] HKCU 2597 (HCA 1389/2014, 11 November 2014, unreported).

against any loss he may suffer. This was already adequate protection in case the injunction was wrongly granted. The court held that there was no factual basis to justify an additional undertaking. The proposed second undertaking, if anything, was likely in practice to engender further conflict between the parties. The court did not accede to the defendant's request for the second undertaking.

Fortification

2.62 In a proper case the court may impose a condition that the plaintiff's undertaking be fortified by giving security.

2.63 A defendant should apply for the security at the time when the injunction is granted and the undertaking is given. Any subsequent application for fortification requires change of circumstances.⁶³

2.64 The court will take a broad view on the amount of fortification.⁶⁴

2.65 A defendant seeking fortification of an undertaking must show a likelihood of a significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient (ie the plaintiff would be unable to make good the loss). Although the loss itself, and its quantification, will lie in the future, the court is nonetheless required to make an intelligent estimate of the likely amount of the loss that would be caused by grant of the injunction.⁶⁵

2.66 As to causation, it is sufficient for the court to be satisfied that the making of the injunction was a cause without which the relevant loss would not have been suffered: *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*.⁶⁶

2.67 The burden of showing the need for fortification and the appropriate quantum falls on the defendant seeking fortification and there is no obligation on a plaintiff to give full and frank disclosure of financial circumstances to oppose an order for fortification (or to argue for a lesser amount): *Hui Chi Ming v Koon Wing Yee & Ors*.⁶⁷

2.68 Usually, merits of the parties' case are not a necessary consideration. However, if the plaintiff has a strong case, it may not appear just and proper to make the protection available to the defendant: *Felix Tschudi v Million Miles Global Ltd*.⁶⁸

2.69 In *Hengshi International Investments Ltd v Bayspring International Ltd*,⁶⁹ the court faced three applications:

63 *Elegant Jump Ltd v Tribune Bridge Ltd* [2000] 3 HKC 133, 137; *Hui Chi Ming v Koon Wing Yee* [2011] 1 HKLRD 260.

64 *Chow Chor Leung v Rafaella Sportswear Inc* [1990] 1 HKLR 449; *Taihan Global Holdings Ltd v Lau Siu Ming* [2011] HKCU 2281 (HCA 1687/2011, 25 November 2011).

65 *Hong Kong Civil Procedure 2015*, Vol 1 (Sweet and Maxwell), §29/1/24.

66 [2015] 1 WLR 2309 (CA (Eng)), §54.

67 [2011] 2 HKC 185, §§44-45.

68 [2014] HKCU 352 (HCA 318/2013, 12 February 2014, unreported), at §26 per To J.

69 [2015] HKCU 3163 (HCMP 1916/2015, 18 December 2015, unreported).

(3) Personal service of the order to be made on D1 and D2 be substituted.

2.185 On the peculiar facts of the case, the court found that there was irreparable damage:

Neither Good Brothers nor Marcellotino were moneylenders. There did not seem to be any proper board minutes for the creation of those mortgages ... the timing of those mortgages was at about the same time as the Injunction Summons or its hearing. G Lam J had said that there were clearly serious issues to be tried. [Counsel for the Plaintiff] submitted that any further depreciation in the price of the Property would result in irreparable damage to P and that the balance of convenience must lie in favour of granting the Injunctive Reliefs. I agree.

Undertakings may mitigate irreparable damage

2.186 In *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd*,¹⁵⁶ P1 & 2, a large and well-known local coffee and tea manufacturer, supplier, distributor and retailer, were part of the 'Tsit Wing Group' (TWG). P2 was the registered proprietor of the 'TW' and 'TWG' trade marks (Ps' Marks) used by, inter alia, over 90% of fast food chains, over 80% of tea houses, over 50% of hotels and over 40% of the cafés and Western restaurants run by a subsidiary of P1. Ps also supplied products directly to corporate end-users such as banks, accounting firms and law firms; and sold its products in supermarkets and convenience stores. D1 & 2 were part of the 'The Wellness Group' (TWG). D1 & 2s' registered trade mark of '1837 TWG Tea' co-existed with Ps' Marks in mainland China, Singapore and Taiwan. D1 was a Singaporean luxury tea manufacturer and retailer with international tea boutiques/counters and salons, including a tea salon in the IFC Mall in Hong Kong (the Tea Salon).

2.187 In proceedings against D1 & 2 alleging passing off and trade mark infringement, Ps obtained an interlocutory injunction restraining Ds from using their trade marks pending trial. The Judge found that Ds knew of Ps' Marks, having earlier signed a co-existence agreement with P for South Korea; Ds had failed to negotiate Ps' consent to use Ds' trade marks in Hong Kong; and despite a 'cease and desist letter', Ds launched the Tea Salon on 8 December 2011 (the Other Factors). Ds appealed, seeking to discharge the injunction.

2.188 The Court of Appeal allowed the appeal on a number of grounds but on irreparable damage, the Court of Appeal stated that given Ds' undertaking to confine their business operations to the Tea Salon, this was clearly a case where the extent of the uncompensatable disadvantage suffered by Ds would be greater than that faced by Ps. If the interlocutory injunction were to be discharged, the risk of irreparable damage to Ps pending trial would be small, even if a final injunction were to be granted.

Examples

2.189 The following paragraphs are devoted to examples of different types of irreparable damage cases.

¹⁵⁶ [2013] 2 HKLRD 505(CA).

Company & commercial disputes

(a) *To stop listed company making open offer of shares to existing shareholders*

2.190 In *Able Success Asia Ltd v China Packaging Group Co Ltd*¹⁵⁷ the plaintiff applied for an interlocutory injunction restraining a listed company from proceeding with an open offer of shares to its existing shareholders.

(b) *Stopping running of a business*

2.191 In *Kung Cheong Kai v Kung Cheong Ki*¹⁵⁸ the plaintiff sought an interlocutory injunction to restrain the defendants from selling certain bean products in competition with the plaintiff. Given the hearing of the application would be in three weeks, the court considered that keeping of sales records of the defendant would be sufficient:

The court has also taken note of the fact that the granting of the injunction at this stage would have a drastic effect on the defendants. Although the plaintiff is only asking the defendants not to sell 7 of the 11 products in the shop, the effect of the injunction would be that the defendants would not be able to operate a proper business at the new shop, and as a result the injunction would cause crashing and irreparable damage on the defendants' reputation if the court were to grant the injunction today. In short, there is a grave risk that the defendants may have to close down the shop altogether and it would not be able for the defendants to start a new business again. In such case, taking into account the drastic effect of the injunction on the defendants, I do not see fit to grant an injunction today.

On the other hand, the damages to the plaintiff are contained. Obviously, the defendants would have to keep records for the sale of their products. In the event that the plaintiff succeeds in the action, the defendants would have no difficulty in providing an account to the plaintiff for the business that has been operated by them.

There may perhaps be some dilution of goodwill on the part of the plaintiff. But balancing it with the drastic effect of the injunction on the defendants, I take the view that a proper opportunity should be given to the defendants to file evidence to oppose the application.

2.192 In *Kung Cheong Kai v Kung Cheong Ki*¹⁵⁹ the plaintiff and the 1st defendant are brothers and partners in the family business of Shu Kee 樹記 ('Partnership') which has a long history of selling bean curd and other bean products since the 1950s. The 2nd defendant is the 1st defendant's wife. The 3rd defendant is a company carrying on business since March 2013 under the name of 百年壹府 (Centenary Tofu) ('Centenary').

2.193 The plaintiff applied for an interlocutory injunction, to restrain the defendants from selling the same bean products which the Partnership sells or offers to sell, and in so doing, conducting a business which competes with the Partnership business. It is claimed that since late January 2013, the 1st and 2nd

¹⁵⁷ [2014] HKCU 1316 (HCMP 1091/2014, 15 May 2014, unreported) at para [68].

¹⁵⁸ [2013] HKCU 1075 (HCA 704/2013, 3 May 2013, unreported, unreported).

¹⁵⁹ [2013] HKCU 1262 (HCA 704/2013, 31 May 2013, unreported, unreported).

plaintiff's enjoyment of the building walls and open grounds which he claimed had been acquired by adverse possession. As stated at paragraph 17 of the judgment, 'It is possible to adversely possess part of a stretch of wall: *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 17 EG 131.'

Trespass to land

2.355 In an ordinary case, a landowner whose title was not disputed was *prima facie* entitled to an injunction to restrain trespass on his land.²⁰⁹

2.356 In *Turbo Top Ltd v Lee Cheuk Yan*,²¹⁰ however, it was held that an injunction should not as a matter of course be issued even at an interlocutory stage.

2.357 In that case D1-5 were trade union officers, dockers or dock workers' union officers, while D6 was a group of unidentified persons 'forming a group of demonstrators'. From 17 April 2013, striking dock workers employed by HIT and their supporters had erected tents, canopies, tarpaulin shelters, banners and placards and held protests outside the Cheung Kong (CK) Centre (the Building), as HWL, a subsidiary of CK, had an indirect 27.6% interest in HIT; and the office of HWL's Chairman was in the Building. By Particulars and Conditions of Exchange, P, an indirect subsidiary of HWL, was the grantee of land housing the Building and certain open space around it (the Lot). Special Condition (13) designated the 'Public Open Space' within the Lot for the use of the public 'for all lawful purposes', not P's exclusive enjoyment.

2.358 Special Condition (16) provided that such obligation under Special Condition 13 arose only as a matter of contract between P and the Government and that neither party intended to dedicate or consent to any dedication of the Open Space (and other specified areas) to the public a right of passage. Since assigning certain undivided shares in the Lot to the Financial Secretary Incorporated (FIC), P and the FIC had been co-owners of the Lot. Under the deed of mutual covenant between P and the FIC (DMC), P enjoyed exclusive possession of the Open Space, but subject to the 'easements, rights and privileges' granted to the public 'for all lawful purposes freely'. On 24 April 2013, a group of 21 protesting students entered the Building and protested in the reception area on the seventh floor which was occupied by CK.

2.359 On 26 April 2013, P obtained an ex parte injunction restraining Ds from entering and demonstrating inside the Building. P subsequently sought an urgent interlocutory injunction to restrain Ds from protesting and keeping any tentage, canopies and other temporary structures on the Lot and a mandatory injunction requiring Ds to remove all such objects. P claimed that Ds' activities

209 *Turbo Top Ltd v Lee Cheuk Yan* [2013] 3 HKLRD 41 at para [16], following *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853, *Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v Park* [2001] HKCU 1100 (HCA 1167/2001, 8 November 2001, unreported), *Incorporated Owners of Fu Fai Court, Tin Hau Temple Road v Henble Ltd* [2003] HKCU 1164 (HCA 2844/2003, 8 August 2003, unreported).

210 [2013] 3 HKLRD 41.

in the Open Space were unlawful and amounted to trespass. Ds submitted the ex parte injunction should be discharged.

2.360 The court held²¹¹ that it was arguable that under the DMC, P and FIC as co-owners had granted the public a licence to use the Open Space and further agreed that as between themselves, P was to have possession of the Open Space subject to the public's rights under the licence. If so, the licence to occupy the co-owned property on a non-exclusive basis could not be unilaterally revoked by either tenant in common. Special Condition (16) was intended to prevent a public right of way from arising by dedication and acceptance, which would potentially be a permanent property right binding on both the Government and P. It did not mean the public had no licence at all to use the Open Space.

2.361 In *Incorporated Owners of Fu Fai Court, Tin Hau Temple Road v Henble Ltd*,²¹² the plaintiff applied for continuation of an interlocutory injunction obtained at an ex parte hearing against the defendant. The plaintiff is the Incorporated Owners of Fu Fai Court at 33 Tin Hau Temple Road. The defendant is the owner of a property behind the plaintiff's property known as 31 Tin Hau Temple Road. The defendant's property has no frontage at Tin Hau Temple Road and the only access to and from the defendant's property is via a right of way in a passage of 10.5 feet wide over the plaintiff's property.

2.362 In July 2002, after the defendant commenced construction works, the plaintiff offered the defendant a licence to use the right of way for a sum of \$3,500,000. The offer was rejected by the defendant. The construction work caused obstruction at the entrance to the plaintiff's property and the right of way. In December 2002, the plaintiff instituted HCA 4616 of 2002 against the defendant. The action was discontinued upon the defendant paying the plaintiff \$210,000 and half of the plaintiff's costs. The plaintiff agreed to allow the defendant to continue using the right of way with full vehicular access and excessive user of the right of way for the purpose of the redevelopment of the defendant's property and permitted the defendant to use the airspace over the plaintiff's property for removing materials to and away from the defendant's property. On 27 December 2002, the court made an order by consent (the 'Consent Order') which included the following terms in paragraphs 5 and 6:

The Plaintiff undertake not to institute any further proceedings in respect of the Defendant or its contractors or workmen in respect of the Defendant or its contractors or workmen continuing to use the right of way with full vehicular access (including trucks and lorries) and any excessive user of the right of way for the purpose of the present redevelopment at No. 31 Tin Hau Temple Road;

The Defendant be permitted to use the airspace of Fu Fai Court as swing space for the purpose of the crane to be used by the Defendant's contractors or workmen in removing materials to and away from the site at No. 31 Tin Hau Temple Road before the completion of the said redevelopment. For the avoidance of any doubt,

211 Ibid at paras [26]-[29], [31], applying *Chin Lan Hong v Cheung Poh Choo* [2005] 3 HKLRD 811, *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853 distinguished.

212 [2003] HKCU 1164 (HCA 2844/2003, 8 August 2003, unreported).

a trade name consists wholly or in part of word descriptive of the articles to be sold or the services to be rendered.”

41. As the plaintiff has decided to use a rather descriptive name for the plaintiff's Computer Festivals, it has to accept the risk of confusion resulting from the use of similar names by other traders. Based on the facts of the present case, there is no good reason to allow the plaintiff to monopolise the words... ‘computer festival’.
[emphasis added]

2.451 In *Bannershop Holdings Ltd v Foo Pei Pan*,²⁵⁸ the above approach was applied and the court held that it saw no good reason to allow the plaintiffs to monopolise the words ‘banner’ or ‘Bannershop’.

Copyright

2.452 It is important to plead a proper case for copyright right ownership and indeed any case generally.

2.453 In *Mak Shiu Tong v Yue Kwok Ying & Anor*,²⁵⁹ the Court of Final Appeal said at 242D in the context of a strike out application in a defamation action:

... Where a party invites the court to exercise a discretion on the basis of a case which differs from his pleaded case, the practice of the court has virtually invariably been to require the proposed amendment to be formulated so that everyone can properly see what the proposed new case is. It is difficult to envisage an exception. The simpler the proposed changes, the less excuse there is for not formulating them. The more complex they are, the more important it is that they are clearly set out.

2.454 In *MGX Asia Ltd v China Way Global Co Ltd*,²⁶⁰ the plaintiffs applied for an interlocutory injunction against the 1st, 2nd, 3rd and 5th defendants (‘Ds’) to restrain them from infringing P2's registered trade marks in Hong Kong and P1's copyright in relation to product drawings in Hong Kong, Thailand and the Mainland.

2.455 The intellectual property rights in question related to security devices for motorcycles (‘Devices’) which are manufactured and sold by P1 in Hong Kong and many countries around the world. There are 8 models of locks²⁶¹ covered by 10 copyright drawings.

2.456 The most important dispute concerned the ownership of the copyright works in question. Ps' case was that ‘the main issue for trial ... is the simple one: who was the author of the lock design drawings and owner of the copyright in them?’. Ds' case was that those drawings were made by the employees of three Mainland factories owned or jointly owned by D2, and therefore the copyright in them does not belong to P1.

258 [2015] HKCU 19 (HCA 1277/2014, 31 December 2014, unreported at para [36].

259 (2004) 7 HKCFAR 228, [2005] 1 HKLRD 33.

260 [2014] HKCU 354 (HCA 2001/2013, 12 February 2014, unreported).

261 Those locks are sold under the trade mark/brand name ‘Xena’. There are almost identical products which are sold under the trade mark/brand name ‘Kovix’.

2.457 Ps' case changed from that which was originally pleaded. Ps' pleaded case was that the drawings were created by Mr Ivan Foti (‘Foti’) with his independent and substantial skill, labour and judgment in the course of his employment with P1. Further, it was averred that ‘the original computer files comprising the Copyright Works are kept in his computer’. Pursuant to Ds' request for particulars, dates of creation of the Copyright Works were pleaded by Ps. An affirmation from Foti was filed in support of these allegations. However, shortly before the hearing, on 24 January 2014, Ps took out a summons for leave to file, inter alia, the 2nd and 3rd affirmations of Foti out of time (‘Summons’). In his 3rd affirmation, Foti said that he was not in fact the sole author of the Copyright Works. Instead, they were jointly created with others. Three persons had been named as the joint authors.

2.458 The court accepted that due to the short time available, no amended pleading could be presented. However, the court noted that Ps' case was no longer one based on the 10 drawings pleaded in the Statement of Claim. The new case was that those 10 drawings were relied upon as part of various series of drawings and those series of drawings in their entirety are said to constitute the Copyright Works belonging to P1. In addition, Ds had not had a proper opportunity to answer Ps' case. The court accordingly dismissed the application.

The court will not interfere with internal management of a company

2.459 It is well-established that the court would not interfere with the internal management by directors of a company.²⁶²

Restrain holding of board meeting

2.460 In *Zhi Charles v Kim Young Jun*,²⁶³ the court refused to grant an injunction to ‘refrain from holding the scheduled Board Meeting on 27 November 2015 to approve the announcement of interim results of 30 September 2015’. The plaintiff's case was that the approval of any interim reports of the 6th defendant on the basis that the Loan Facility is legal and proper, and without taking whatever account or notice of certain issues, at least without any accompanying announcements alerting the shareholders and the public to the issues, would render any such report misleading.

2.461 The plaintiff argued, citing *Burland v Earle*²⁶⁴ that the court would interfere when the directors are not acting within their powers in dealing with the internal affairs of the company. However, the court held that it failed to see how

262 See *Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd* [2009] 2 HKLRD 11 at paras [19]–[21] per Rogers VP; *Zhi Charles v Lim Hosok* [2015] HKCU 654 (HCA 160/2015, 19 March 2015, unreported) at para 10 per G Lam J; *Zhi Charles v Kim Young Jun* [2015] HKCU 2904 (HCA 2494/2015, 27 November 2015, unreported) at para [14].

263 [2015] HKCU 2904 (HCA 2494/2015, 27 November 2015, unreported).

264 [1902] AC 83, referred to in *Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd*, *ibid*.

the plaintiff from using the Disputed Way otherwise than for pedestrian access was granted. The Court of Appeal also issued a declaration that the plaintiff, his licensee or servants are entitled to use the Disputed Way for pedestrian access and that the plaintiff was entitled to an easement over the Disputed Way in the form of 1–2 feet-wide soil, mud path only. They confirmed the learned Recorder's reasoning that the plaintiff was never entitled to a concrete pathway over the Disputed Way.

(b) Release of cargo by carrier

3.123 In *Yue Kit Group Ltd v Syms Containers Line Agencies (HK) Ltd*,¹¹⁰ a shipper under a bill of lading, claimed against a carrier for damages in respect of the carriage of a number of reefer containers from Hong Kong to Haiphong, Vietnam. The plaintiff complained that the carrier refused to release the cargo upon arrival in Haiphong and one of the containers which was not shipped on the vessel in Hong Kong, but instead did so only against the payment of or security for certain charges and extra fees, which the plaintiff claims should not have been raised.

3.124 The plaintiff commenced proceedings on 25 August 2008. By an *inter partes* summons dated 27 August 2008, the plaintiff applied for a mandatory injunction requiring the defendant to release the cargo held in Haiphong. On about 3 September 2008, upon the agreement of the plaintiff's consignee to pay an additional sum of US\$34,050, the six reefer containers situated at Haiphong were released. On about 4 September 2008, upon the plaintiff's agreement to treat HK\$63,749, being part of a total sum of HK\$579,715.29 paid into court by the plaintiff, as security for fees and expenses incurred in respect of the handling of the damaged container, that damaged container was released to the plaintiff in Hong Kong.

Relationship of interlocutory mandatory injunction with issue estoppel

3.125 An interlocutory mandatory injunction is not to be granted unless a very high merits threshold has been demonstrated by the plaintiff. However, such an interlocutory decision does not create any sort of issue estoppel. In any event, if anything, even if it were to amount to any finding or issue estoppel, it only amounts to an issue estoppel that the judge on that occasion found that there were very strong merits. It does not go to show that it is a case whereby the defence is susceptible to be struck out.¹¹¹

110 [2010] HKCU 468 (HCA 1579/2008, 9 February 2010, unreported).

111 *Anmol Kumar Sawlani v Yeshma Gobindram Sawlani* [2013] HKCU 1996 (HCA 2231/2011, 9 May 2013, unreported) at para [26].

Delay in applying for interlocutory mandatory injunction

3.126 When an interlocutory injunction is sought, the applicant must show he has acted promptly and without delay as delay can be taken to mean that there is no irreparable damage. The Court of Appeal had made certain observations on the length of delay which are useful to practitioners on the question of delay¹¹².

Rule of thumb on length of delay

3.127 As a rule of thumb (which should not be mechanically applied), an unexplained delay for 6 weeks and an explained delay for 3 months may be accepted, but any period longer than that is not acceptable. In *King Fung Vacuum & Ors v Toto Toys Ltd & Ors*,¹¹³ the 1st defendant delayed for almost a year after becoming aware of the factor of which they then complained before applying for interlocutory injunction without any explanation for such delay, Rogers VP at pp 792–793 said:

20. There has traditionally been a strong requirement when interlocutory injunctions have been sought, that the plaintiff must show that it has acted promptly and without delay. Promptly in the circumstances of interlocutory injunctions has been commonly understood to be a period of six weeks or so of unexplained delay and three months with an explanation given for the delay in making application for an injunction. Since the *American Cyanamid* decision the importance of irreparable damage in an application for an interlocutory injunction is paramount. If there is no irreparable damage demonstrated then the need for an interlocutory injunction has not been shown. This is important because of the approach of the courts take to interlocutory injunctions. They are not the trial of the action and the court is concerned with whether irreparable damage will occur before a trial can take place. It stands to reason that if a party is prepared to allow matters to proceed and takes no action with respect to matters which have been extant for lengthy periods, it lies ill in their mouth to say that there is likely to be irreparable damage and that is the case here.

3.128 *Dorshare Ltd v Shun Pong Ltd*¹¹⁴ concerns an application for an interlocutory injunction that was delayed for more than a year and in the absence of irreparable damage, Anthony Chan J said that the unexplained delay can be fatal to an application for an interlocutory injunction because it can reflect the lack of irreparable damage, cause prejudice to the person who will be affected by the injunction, render it unreasonable or unjust to grant an interlocutory injunction, and 'in a bad case of unexplained inordinate delay ... constitute an abuse of process'.

3.129 Although the aforesaid rule of thumb is not to be applied with any rigidity, and much turns of the circumstances of each case.

112 [2006] 2 HKLRD 785 (CA).

113 [2006] 2 HKLRD 785 (CA).

114 [2013] HKCU 36 (HCA 1823/2012, 4 January 2013, unreported) at para [16].

duty to act in the best interest of the company should sign them. If he refused to do so thus breaching his fiduciary duty, the court held that the correct course was for the 1st Respondent to apply for a mandatory injunction that he sign the cheques.

3.163 The court also held that a validation order was not directed to the petitioner; it was a decision by the court that in the event that the company is wound up, expenses up to the specified amounts approved by both directors of the company will not be void.

Franchising

3.164 The meaning of franchising is as follows:¹⁶⁶

Franchising is used in English commercial practice to describe a relationship in which numerous legally independent businesses trade under a common style and to common standards as if they were branches of one larger enterprise. The franchisor invariably specifies the manner in which each franchised business is to trade, often in great detail, although the day-to-day running is left to the franchisee. This element of operational control typically distinguishes franchising from simple licensing arrangements. The success of any franchising operation depends on the public relying on the individual outlets of the franchise to provide goods or services of a uniform degree of quality. The public may frequently be unable to distinguish franchised businesses from those run as branches of a single business, and in some cases there may be a mixture of franchised outlets and branches owned and operated by the franchisor. [emphasis added]

3.165 In *TGI Friday's Inc v Perfect Wave Ltd*,¹⁶⁷ the plaintiff applied for both interlocutory mandatory and prohibitory injunctions restrain the defendant franchisee from operating a business under the franchisor's trade name or passing off their business as being connected with the franchisor when their franchise term had yet to expire, with such injunctions likely to have a finality effect. The mandatory injunctions required de-identification of the restaurant as a TGIF restaurant. The court adopted the general approach:

- (1) For an application for an interlocutory injunction that has a finality effect, the court is to have some consideration or some assessment as to whether the plaintiff will likely succeed at trial; it is for the court to control the extent of such consideration or assessment.
- (2) But the combination of the mandatory and finality points in the present context does call for a higher threshold on the merits, ie the plaintiff should show they have good prospects of success on the merits.
- (3) But it does not follow that if this threshold is not satisfied the court will necessarily withhold the granting of the injunctions sought.
- (4) Rather, this brings into focus the balance of convenience, and the plaintiff will need to show that the balance tilts so much in their

¹⁶⁶ Wadlow, *The Law of Passing-Off: Unfair Competition by Misrepresentation* (4th Edn, Sweet and Maxwell 2011) at para 7–108 at pp 513–514.

¹⁶⁷ [2013] HKCU 769 (HCA 2376/2012, 9 April 2013, unreported) at para [16].

favour that justice requires the granting of the injunctions sought, even taking into account the mandatory and finality points.

3.166 The Court in *TGI* commented that in *The Body Shop International Plc v Rawle & Ors*,¹⁶⁸ the franchisor sought to restrain the franchisee from operating a business under their brand name or from passing off such business as being in any way connected with them when 'there are only three weeks to run until the contract runs out anyhow', and the court held that 'a rather higher burden of proof rests upon the plaintiff'.¹⁶⁹

Appeals from interlocutory mandatory injunction

3.167 If a mandatory injunction refused at first instance is to be granted pending appeal, a strong *prima facie* case must be shown that the appeal will succeed.¹⁷⁰

3.168 See *T v Shiu Wai Tuen*¹⁷¹ citing the textbook '*Injunctions*' by Bean and Parry.¹⁷²

A judge who refuses an interim injunction may nevertheless grant an injunction pending appeal (*Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261). Likewise, a judge who has decided in favour of the defendants at a trial may grant an injunction restraining them from acting on their success (e.g. by disposing of property whose ownership was in question in the action) pending appeal (*Orion Property Trust Ltd v Du Cane Court Ltd* [1962] 1 WLR 1085). There is no inconsistency in either of these propositions. On an application for an interim prohibitory injunction, the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial; at trial, the question is whether the claimant has sufficiently proved this case. However, on application for an injunction pending appeal, the question is whether the judgment that has been given is one upon which the successful party ought to be free to act despite the injunction should be granted where any appeal would be frivolous or where to grant the injunction would inflict greater hardship than it would avoid (per Megarry J in the *Erinford* case, above). If a mandatory injunction refused at first instance is to be granted pending appeal, a strong *prima facie* case must be shown that the appeal will succeed (*R v Westminster City Council Ex parte Augustin* [1993] 1 WLR 730).

Costs

Costs on discontinuation

3.169 In *Incorporated Owners of Estoril Court v Cheer Rich Enterprises Ltd*,¹⁷³ the parties reached an amicable settlement upon the respondent giving an

¹⁶⁸ (1992) 27 IPR 255.

¹⁶⁹ *TGI Friday's Inc v Perfect Wave Ltd* [2013] HKCU 769 (HCA 2376/2012, 9 April 2013, unreported), at [19] the court quoted Sir Peter Pain at p 261 followed *Lansing Linde v Kerr* [1991] 1 WLR 251.

¹⁷⁰ *R v Westminster City Council ex parte Augustin* [1993] 1 WLR 730.

¹⁷¹ [2011] HKCU 86 (HCA 2229/2007, 10 January 2011, unreported) at para [14].

¹⁷² Bean, Parry, *Injunctions* (9th Edn, Sweet and Maxwell) at para 6.31.

¹⁷³ [2012] HKCU 1037 (LDBM 41/2010, 17 May 2012, unreported).

sole proprietorship in label-printing registered in the name of the 1st defendant. D3 was incorporated to take over that business. D4–D8 were formed to meet business demands and investment holding. The plaintiff and the 1st defendant had been the sole shareholders and directors of those companies. To tie in with the emigration plans of the plaintiff and the 1st defendant, these companies had undergone a series of restructuring involving assets held on trust by D9 and D10.

6.32 In August 2009, the 1st defendant purportedly caused shares in D9 to be transferred to her at nil consideration pursuant to a board resolution signed by the plaintiff and herself. Purportedly as the sole shareholder of D9, the 1st defendant resolved to nominate D2 as director and remove the plaintiff as director. The plaintiff dispute the validity of the transactions in respect of D9 and D10.

6.33 The 1st defendant sought to restrain the plaintiff and/or his servant including the CEO from directly or indirectly interfering with the 1st defendant's right as director of D3–D8. She relied on the principle that a director who is improperly and without cause excluded by other directors from the board is entitled to an injunction from such exclusion:

Besides that, he is in the position of a shareholder, of a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his services. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and those decisions which say that, where a wrong is done to the company by the exclusion of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual. There may be cases where, by preventing a director from exercising his functions in addition to its being a wrong done to the individual, a wrong is also done to the company, and there the company have a right to complain.²⁰

6.34 The court held that the 1st defendant had made out a case of being interfered with in her management of the companies as a director and that there was risk of dissipation of assets. Damages would not be an adequate remedy. The balance of convenience was in favour of the grant of an injunction.

6.35 In *Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd*²¹ P obtained interim injunctions: (1) against the directors of C from voting to terminate his appointment as chairman of C's board of directors and as its chief executive and/or to re-designate him as a non-executive director of C; and (2) against C itself from implementing any such resolution.

6.36 P claimed that based on an alleged contract between himself and C or other directors arising from the board of directors' (Board) acceptance of his proposal to take a three-month leave of absence, he would thereafter necessarily remain in these positions. On appeal, the Madam Justice Kwan found that P did not have an arguable case and that in her view, the balance of convenience, in any event, dictated that there should be no injunction and that no irreparable damage had been shown to have been suffered by P. She set aside the injunctions and

²⁰ *Pulbrook v Richmond Consolidated Mining Company* (1878) 9 Ch D 610, 613.

²¹ [2009] 2 HKLRD 11 (CA).

dismissed a renewed application for an injunction. P then sought a temporary injunction pending his appeal to the Court of Appeal.

6.37 The Court of Appeal considered the two injunctions being sought. The Court of Appeal dismissed the application:

19. I consider that the relief sought here is simply something which this Court cannot give. The reason for that is that this whole matter is a matter of internal management by the Board. What the Board apparently is considering is who should be their chairman, and who should be their chairman is, first and foremost, a matter for the Board itself. This Court cannot dictate to a board who should be its chairman. This Court cannot dictate to a company who should be its executive directors. Two hundred years ago, Lord Eldon said in the case of *Carlen v Drury* (1812) 1 Ves & B 154:

"... the court could not undertake the management of every brewhouse and playhouse in the kingdom."

20. That is a fundamental principle of company law. Lord Davey, 100 years ago, referred in the case of *Burland v Earle* [1902] AC 83 at p 93, a case referred to by the Judge below:

"It is an elementary principle of law relating joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."

HOLDING OF ANNUAL GENERAL MEETING

6.38 In *Chi Dong Eun v Kim Young Jun*²² the court was dealing with a 3rd application by the 2nd plaintiff ('Zhi') for an interlocutory injunction against the 18th defendant ('SMG') to stop it from holding an AGM on 4 September 2015.²³ The 1st plaintiff ('Chi') is the son of Zhi. The court held that the 3rd application was blatantly an abuse of process of the court. That aside, there were too many reasons to dismiss it without the need for SMG to answer it with evidence. That included the lack of any proper ground to suggest that Zhi or Chi would suffer any irreparable harm which cannot be adequately compensated with damages if the injunction sought is not granted.

NOTICE TO HOLD BOARD MEETING

6.39 Is a defective notice of a directors' meeting a ground for an injunction to prohibit the carrying out of its resolutions?

6.40 Sometimes, the validity of board meetings have been challenged on the basis of lack of notice being given to a director in question.

²² [2015] HKCU 2223 (HCA 1880/2015, 28 August 2015, unreported).

²³ The other two applications were the decisions of L Chan J dated 7 August 2015 and Au-Yeung J dated 17 August 2015.

8.4 That the being the case, the jurisdiction to grant an anti-suit injunction must be exercised with caution and only when the ends of justice require it: see *Airbus Industries GIE v Patel* per Lord Goff:⁵

The broad principle underlying the jurisdiction is that it may be exercised when the ends of justice require it. Generally speaking, this may occur when the foreign proceedings are vexatious or oppressive ... But, as was stressed in the *Aerospatiale* case,⁶ in exercising the jurisdiction regard must be had to comity, and so the jurisdiction is one which must be exercised with caution...

8.5 The Hong Kong Court of Appeal in *Liaoyang Shunfeng Iron and Steel Co Ltd v Yeung Tsz Wang*⁷ has adopted the words of Lord Scarman in *British Airways Board v Laker Airways Ltd*.⁸ Lord Scarman spoke of the power of the courts to grant protection to an applicant from a foreign suit that is unconscionable and thereby unjust, spoke of “wide and flexible” principles of equity being employed to afford that protection. Put another way, the courts are not to employ a narrow, technical approach, one that more often denies a just solution rather than ensures it, our courts are instead adopt a broader approach to better identify the true justice of the matter. Lord Scarman said:

The approach [to the granting of an anti-suit injunction] has to be cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court. Caution is needed even in a ‘forum conveniens’ case, i.e., a case in which a remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognised and enforceable by the foreign court.

8.6 Nevertheless, even in the latter case, the power of the English court to grant the injunction exists, *if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a “wide and flexible” equity it can be seen to be an infringement of an equitable right of the applicant.* The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained.”

Jurisdictional Clause

8.7 A distinction is to be drawn between cases where the application for an anti-suit injunction is founded upon a contractual right and other cases, that is, cases (such as the present case) in which it is asserted that the foreign proceedings

5 [1999] 1 AC 119 (HL) at 133. See also *Liaoyang Shunfeng Iron and Steel Co Ltd v Yeung Tsz Wang* [2012] HKCU 1267 (CACV 234/2011, 14 June 2012, unreported), [85].

6 *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871.

7 [2012] HKCU 1267 (CACV 234/2011, 14 June 2012, unreported).

8 [1985] AC 58 at 95.

have been commenced in bad faith for the purpose of frustrating proceedings in Hong Kong. In this regard, see *Turner v Grovit* (supra) per Lord Hobhouse at paragraphs 27 and 28:

The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstances, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract. But where he is relying upon conduct of the other person which is unconscionable for some non-contractual reason, English law requires that the legitimate interest must be the existence of proceedings in this country which need to be protected by the grant of a restraining order...

It is recognised that to make an order against a person who is a party to proceedings before a foreign court may be treated as an interference (albeit indirect) in the foreign proceedings. Thus English law requires the applicant to show a clear need to protect existing English proceedings. The protection of English proceedings is, understandably, regarded as a legitimate subject matter for an English court. It is not the concern of any other court. The order made operates in personam and relies for its enforcement solely upon the English court. In the present case, the Court of Appeal [2000] QB 345, 364, were at pains to stress that their orders were directed to the defendants and not the Spanish court.”

Clean hands

8.8 An anti-suit injunction is an equitable remedy and therefore subject to general equitable defences, including that of unclean hands. This was distinct from there being a “strong reason” not to grant an injunction.

8.9 The impropriety or misconduct relied upon “must have an immediate and necessary relation to the equity sued for”.⁹ In other words, the doctrine applies where “the plaintiff seeks to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief”.¹⁰

8.10 An example of the defence being successfully deployed in that context can be found in *Royal Bank of Scotland plc v Highland Financial Partners LP*.¹¹

8.11 In that case, Highland, a capital management group based in the United States, planned to launch a collateralised debt obligation. Loan notes with an aggregate size of €500 million would be issued, secured by a portfolio of loans. RBS was engaged to finance the acquisition of the loans and to market the notes, and held security over the acquired loans via a debenture. After the collapse of Lehman Brothers in September 2008, RBS terminated the mandate and sought to

9 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq 318 at 319; *Moody v Cox* [1917] 2 Ch 71; *Poon Ka Man Jason v Cheng Wai Tao* [2015] 2 HKC 143 at [6.7.2].

10 Spry, *Equitable Remedies* (9th Edn, 2013, London: Sweet & Maxwell), p 254. See also *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246, [46].

11 [2013] 1 CLC 596.

alleged representations. The reason is that it would be 'grossly unjust' to deny a party to the privileged information in order that the party may investigate and test the claim.

Rather, English law maintains the right of a party to maintain legal privilege. Whilst a person's state of mind and also that person's actions may well have been influenced by legal advice, there is no general implied waiver of privileged material merely because a state of mind or certain actions are in issue. This means that, in the absence of the disclosure of the privileged legal advice, the other party is precluded from being able to put that legal advice to a person to show that the advice influenced the state of mind or actions of that person. In many cases it could be said that privileged legal advice might be relevant to establishing an issue and that, in this way, the privileged material can be said to be put in issue. That is not the approach taken in English law. Rather, the underlying policy considerations for creating privilege to protect communications between a client and solicitor are treated as paramount even if some potential unfairness might occur.

The test in English law is therefore based neither on general principles of fairness nor on relevance. Implied waiver arising from particular proceedings or pleading allegations in those proceedings is limited to proceedings between solicitor and client as set out in *Lillicrap v Nalder*⁴¹ and *Paragon Finance*.

10.72 In the case of *Digicel (St Lucia) Ltd v Cable & Wireless*⁴² Morgan J followed the approach of Ramsey J in the *Farm Assist* case. He rejected the argument that Ramsey J had gone too far in his statement of principle set out in paragraphs [53]–[54] of his judgment:

The fact that legal advice is relevant to an issue does not result in waiver of privilege. Relevance is a necessary precondition for disclosure but it is not a sufficient condition for a finding of waiver. The position is the same even where the legal advice is 'highly relevant,' rather than relevant to a lesser extent, and even where an investigation of the issue may be hampered by the absence of privileged material. The position is the same again even when the issue is to a person's state of mind. Equally, in my judgment, it makes no difference that the alleged state of mind relates to a matter of law rather than to a matter of fact.

There will of course be waiver of privilege if a party deploys the contents of the legal advice in the litigation. In the absence of such deployment, there is no rule of law which allows the court to override the claim to privilege just because the court thinks it would be fair to do so. The court will simply have to do the best that it can to what it hopes will be right conclusion on all the evidence presented, even where evidence that would be relevant has been withheld by a party, who is entitled in law to withhold that evidence.

10.73 The court in *Chinachem Financial Services Ltd v Century Venture Holdings Ltd*⁴³ has followed the approach adopted and the principles enunciated in the English cases as the correct approach on the basis that it avoids any inroads into the right of legal professional privilege in Hong Kong. The court went on to say that this is a right recognised by the Court of Appeal as a fundamental right

41 [1993] 1 All ER 724, [1993] 1 WLR 94.

42 [2009] EWHC 1437 (Ch).

43 [2014] 2 HKLRD 557.

and given paramount importance by Hong Kong's constitutional document under Article 35 of the Basic Law.⁴⁴

10.74 In *Koay Ai See v St Teresa's Hospital*⁴⁵ the plaintiff brought a personal injury action against the defendants, both medical practitioners, for negligently failing to diagnose her with Ménière's disease. Copies of three privileged expert liability reports obtained from Dr W by the plaintiff were mistakenly provided to the defendants during discovery without intending to waive legal professional privilege (LPP). The plaintiff sought an injunction to restrain the defendants from relying on the reports and for delivery up of all copies. The defendants opposed the application, arguing that any LPP had been waived and they had no reason to believe that the reports were inadvertently disclosed.

10.75 The court held that the defendant's solicitors should have realised that the plaintiff had mistakenly disclosed the reports. A hypothetical reasonable solicitor standing in their shoes having the conduct of the litigation would have queried why Dr W's reports were being relied upon when the plaintiff had nominated a different expert. Under the current case management regime, expert evidence could only be adduced with leave of court in respect of identified experts, and usually only one expert from a particular speciality and even the scope of his or her evidence might be limited. Once this query was raised, the mistake would soon have been discovered, and made obvious, so that the hypothetical reasonable solicitor would realise that he had been permitted to see Dr W's reports because of an obvious mistake by the plaintiff's solicitors.⁴⁶

10.76 The court also said obiter that in the current regime of cooperative communication, a solicitor, who was unsure whether privilege had been deliberately waived by the disclosure of a privileged document, should confirm the position with the disclosing solicitor.⁴⁷

10.77 In *Chinachem Financial Services Ltd v Century Venture Holdings Ltd*,⁴⁸ in 2009, P and D entered into a claims recovery service agreement (the Agreement) whereby D undertook to procure a favourable outcome for P in a legal action in mainland China. At a meeting between P and D in November 2011, an issue arose as to the legality of the Agreement. P then engaged its solicitors who prepared a draft Memorandum of Advice (the Advice) on a number of matters, including the legality of the Agreement and whether P should retain D's services. Although there was negotiation to extend the Agreement, no supplemental agreement was signed. In early 2013, D commenced proceedings against P on the Mainland for payment under the Agreement.

10.78 In March 2013, P commenced proceedings in Hong Kong, claiming against D for declarations that the Agreement had come to an end and that D was

44 See also *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701 at 715.

45 [2015] 3 HKLRD 338.

46 [2015] 3 HKLRD 338, [21], applying *Guinness Peat Properties Ltd v Fitzroy Robinson* [1987] 1 WLR 1027; *Al-Fayed v Commissioner of Police of the Metropolis (No 1)* [2002] EWCA Civ 780.

47 [2015] 3 HKLRD 338, [22].

48 [2014] 2 HKLRD 557.

to the identification of the Applicant or the other person and (4) any photographs evidencing or relating to the fact or details of these matters.

10.148 The application for a super-injunction was denied, with Tugendhat J relying on the principle of open justice, adding:

[I]t is not just open justice that is in issue: it is the right of a person affected by a court order, in particular a respondent, to be heard before the order is made. Apart from [Human Rights Act 1998] section 12, that requirement is set out twice in the [Civil Procedure Rules], once in CPR 25.3(1), (3), cited above, and again in CPR PD 25 para 4.3(3):

“[E]xcept in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.”

Secrecy may be essential in the case of a respondent who, if tipped off, is likely to defeat the purposes of an application by publishing the material before he can be shown to have had notice of the injunction, or before it can be granted. It is less easy to show the need for such secrecy where the person targeted by the application is a national newspaper. There may be a need to work out ways to address the problems which arise in such cases, but giving privacy claimants comprehensive derogations from [the obligation to give notice to the proposed target of the injunction] cannot be the answer.

Report of the Committee on Super-Injunctions

10.149 The *Terry* case gave rise to concerns which centred round the perceived growth in the use and application of super-injunctions and the increasing frequency with which proceedings were being anonymised. The Committee on Super-Injunctions was then set up in April 2010 to examine the procedural issues. On 20 May 2011, the Committee chaired by Lord Neuberger issued its report.

10.150 The report recognized that as they incorporate derogations from the principle of open justice, super-injunctions and anonymised injunctions⁸⁸ can only be granted when they are strictly necessary. They cannot be granted so as to become permanent in practice.

10.151 The following guidance was recommended:

- (1) Practice Guidance should be issued, setting out the procedure to be followed when applying for interim injunctions, with the aim of protecting information said to be private or confidential pending trial. Such interim injunctions should in future be referred to as ‘interim non-disclosure orders’. Draft Guidance is set out in Annex A.
- (2) The Guidance should articulate the proper approach to the principle of open justice and to applications for derogations from that principle. It should stress the importance of properly complying with Human

88 An anonymised injunction is an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated. The proper approach to anonymisation has been clarified in the case *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 All ER 324.

Rights Act 1998 section 12⁸⁹ and state that it will be a very rare case where advance notice of such an application to media organisations, which are likely to be affected by any order, can be justifiably withheld.

- (3) The Guidance should also set out a standard form of irrevocable undertaking to be given to the court by third parties not to use information said to be private which is provided to them in advance of any hearing, other than for the purpose of the proceedings. Such an undertaking will continue to operate beyond the conclusion of the proceedings.
- (4) The Practice Guidance should be accompanied by a Model Order.

10.152 The Model Order in the report provides for the following injunction:

INJUNCTION

6. Until [] (the return date) / the trial of this claim or further Order of the Court, the Defendants must not:

- (a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the **Defendants’ legal advisers**) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the information referred to in Confidential Schedule 2 to this Order (the **Information**);
- (b) publish any information which is liable to or might identify the Claimant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material (including but not limited to the profession [or age or nationality of the Claimant]) which is liable to, or might lead to, the Claimant’s identification in any such respect.”

10.153 There was also a model order on super-injunction in restraining reporting:

[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A REPORTING RESTRICTION IS STRICTLY NECESSARY]

REPORTING RESTRICTION/SUPER-INJUNCTION

7. Until service of the Order/ the return date/ [] the Defendants must not use, publish or communicate or disclose to any other person the fact or existence of this Order or these proceedings and the Claimant’s interest in them, other than:

- (a) by way of disclosure to the Defendants’ legal advisers for the purpose of obtaining legal advice in relation to these proceedings; or
- (b) for the purpose of carrying this Order into effect.

89 Hong Kong Bill of Rights, Article 16. Cf Article 19 of the International Covenant on Civil and Political Rights.

those proceedings are capable of giving rise to a judgment enforceable in Hong Kong.⁵⁵

12.100 Order 30 rule 9 applies to an application for appointment of a receiver under section 21M(1) as it applies to an application for appointment of a receiver in an action or proceeding in the High Court subject to the following modifications:

- (a) the application must be made by originating summons in Form No 10 in Appendix A and accordingly rule 1(1) does not apply; and
- (b) rule 1(3) and (4) does not apply to the application.

12.101 Section 21M and Order 30 rule 9 were enacted as part of the civil justice reforms which took effect in 2009.⁵⁶ Order 30 rule 9 applies to most of the provisions of the Order to applications under section 21M of the Ordinance for appointment of a receiver in aid of proceedings outside Hong Kong.

12.102 An application for appointment of a receiver under section 21M should be commenced by originating summons in Form No 10 in Appendix A of the Rules of the High Court, which is the expedited form.

Enforcement

12.103 In common law, when the Court has appointed a receiver who is in possession, his possession is the possession of the court. This may not be disturbed without permission of the court. If anyone, whoever he may be, disturbs the possession of the receiver, the court will hold that person guilty of contempt of court and liable to imprisonment.⁵⁷

Exercising powers of receivership in Mainland China

12.104 Receivership orders having extraterritorial effects should be viewed with caution and avoided. This is of significant importance because the Mainland courts and authorities⁵⁸ do not seem to recognize Hong Kong receivership orders.

55 Order 30, rule 9, Rules of the High Court (Cap 4A).

56 For the background to these rules, see the commentary in *Hong Kong Civil Procedure 2016* (Hong Kong: Sweet & Maxwell), Vol 1 under Order 29 rule 8A.

57 *Kerr & Hunter on Receivers and Administrators* (19th Edn, 2009, London: Sweet & Maxwell), §6–32.

58 *Macau First Universal International Ltd v Ding Xiaohong* [2012] HKCU 1575 (CACV 193/2011, 31 July 2012, unreported), [29] where mainland authorities had not approved the replacement of a legal representative of a PRC company appointed by resolution of receivers. See also *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569, [46] where the expert evidence of the parties showed that the orders of appointment of interim receivers made by courts in the British Virgin Islands, Samoa and Hong Kong would not be recognised and cannot be enforced by a Chinese court. The court however made certain orders that were considered to be recognized under Chinese law.

In particular when there are conflicting decisions in foreign jurisdictions, Hong Kong courts will be careful in exercising jurisdiction.

12.105 In *McDonald v Golden Dynasty Enterprises Ltd*,⁵⁹ the court ordered the passing of resolutions in order to be enforced in China:

As explained in the affidavit of [solicitors] who has the conduct of this matter for the plaintiffs, in the absence of co-operation from the directors and officers of the Companies, the Receivers will find it problematic to act for and on behalf of the Companies in China. From his experience in the area of cross-border insolvency and restructuring between Hong Kong and China, he deposed that it is extremely difficult (although not impossible) to obtain recognition in China of the authority of liquidators, provisional liquidators and receivers to act for and on behalf of the companies to which they have been appointed, solely by reference to the orders or documents by which they were appointed, and this is particularly true for receivers, as there is not a concept in Chinese jurisprudence which is equivalent to the role of a receiver in common law jurisdictions. Also from his experience, the courts, government departments, third parties including banks and trade debtors will often not recognise the authority of such appointment holders based solely on the orders or documents which appointed them, even if they are properly sealed, notarised and translated into Chinese. This is particularly the case where the directors and officers refuse to recognise the authority of the appointment holders and continue to hold themselves out as being the sole persons of authority in relation to a company.

Speaking from his experience, [solicitor for the plaintiff] thinks that the courts, government departments and third parties in China would recognise the authority of the board of directors of a foreign country to act for and on behalf of the company to which they are appointed, as the authority of the board of directors is a concept of corporate governance broadly recognised and accepted in China and such authority is normally recorded in both board resolutions and powers of attorney, which are routinely recognised in China. Hence, the Receivers made this application to compel the directors of each of the Companies to pass the necessary board resolution and to execute a power of attorney, so as to appoint the Receivers as attorneys to exercise the Companies' rights as shareholders in the PRC Subsidiaries.

12.106 In *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd*,⁶⁰ P and D entered into a series of contracts for carriage by sea as the carrier and shipper respectively. D commenced proceedings against P in several courts in the People's Republic of China for wrongful release of cargoes without production of the bills of lading. P's reliance on what it regarded as an exclusive jurisdiction clause in the bills of lading in disputing the jurisdiction of the PRC courts was rejected. Nineteen judgments were given by the Ningbo Maritime Court in favour of D, against which P was in the process of appealing. P obtained anti-suit injunctions against D in the United Kingdom from pursuing the PRC proceedings based on the jurisdiction clause (the UK Anti-Suit) and an ex parte worldwide freezing order in the UK (the UK *Mareva*). Based on the UK *Mareva*, P obtained another ex parte *Mareva* injunction (the HK *Mareva*) and later an ex parte receivership order (the Receivership Order) in Hong Kong against D under

59 [2008] 5 HKLRD 569.

60 [2015] 2 HKLRD 458.

ensuring that orders of the Hong Kong courts will not be flouted and the evaluation of the individual circumstances of each case;²⁰

- (3) Subject to mitigating factors, if any, the starting and primary penalty for contempt of court in breaching an order in the nature of an injunction is imprisonment.²¹ The normal penalty for breaches of injunction orders is imprisonment measured in months.²²
- (4) In a case where there has been a failure to comply with an order of the court and where there is no evidence to suggest that compliance was in any way difficult or impossible, a sentence of imprisonment would not be inappropriate. This would be particularly so in a case where the sentence was designed to enforce compliance. A sentence of imprisonment for a wilful failure to observe a court order can often be appropriate.²³
- (5) The court is empowered with quite a few sentencing options under its inherent powers and the common law. As observed in *Morris v Crown Office*:²⁴

The powers at common law remain intact. It is a power to fine or imprison, to give an immediate sentence or to postpone it, to commit to prison pending his consideration of the sentence, to bind over to be of good behavior and keep the peace, and to bind over to come up for judgment if called upon ...”

- (6) It was also observed that imprisonment should be regarded as a sanction of last resort in civil contempt;²⁵
- (7) Where the conclusion is reached that the contempt was “not deliberate or not contemptuous”, it would be only be in very rare circumstances that a sentence of imprisonment would be appropriate;²⁶
- (8) In respect of a failure to comply with a mandatory order, the court has the power to commit a person indefinitely “in cases where the contemnor obstructs the administration of justice by refusing to do something which he is required to do, that is to say something which he must do to enable the administration of justice to proceed, but it is not known how long he will remain in his obstructive and defiant frame of mind, it may well be that an indeterminate sentence is preferable. It enables the contemnor to apply for his release if he

20 *Abu Dhabi National Tanker Co v Lam Ming Chi* [1998] 4 HKC 320 at 336E.

21 *GE Transportation (Shenyang) Co Ltd v Lu Jinxiang* HCMP 1792/2013, 22 January 2014, unreported at p 23 para 53.

22 *A O Smith Holdings (Barbados) SRL v Zhang Dacheng* HCMP 1132/2011, 1 June 2012, unreported at p 18 para 61.

23 *Excel Noble Development Ltd & Ors v Wah Nam Group Ltd & Ors* [2001] 4 HKC 148 at 162B–E per Rogers VP.

24 [1970] 2 QB 114 at 125.

25 *Arlidge, Eady & Smith on Contempt* (4th Edn, 2011, London: Sweet and Maxwell), para 14–5.

26 *Solar System International Co Ltd v Unison Watch Manufacturing Ltd* CACV 3523/2001, 7 February 2002, unreported at p 7, para 24.

has had a change of heart; and it enables the court to review its own decision at any time.”²⁷

EXAMPLES OF CIVIL CONTEMPT

13.32 In *Mandecly Ltd v Hao Wei*²⁸ the motion for contempt cited the first defendant for contempt on the basis of his “failure and/or refusal, in his personal capacity and/or in his capacity as director of the third defendant” to obey the order of 17 August 2006 and the further order of 20 December 2007. The grounds of the application for committal were set out as follows:

AND FURTHER TAKE NOTICE that the grounds of this application as set out in the Affirmation of Siu Yat Fung Anthony filed herein on 21 January 2008 together with the exhibits referred thereto and the Statement filed pursuant to Order 52, r. 2 of RHC dated 18 January 2008, all proving the said Contempt, which are duly served herewith.

13.33 The Court of Appeal held that the notice of motion, in itself, is an unsatisfactory form of a motion to commit for contempt. Such a notice of motion should specify very clearly what it is that the defendant has either done in breach of the order or has failed to do. It should not be left to be gleaned either from the statement in support of the application for leave to apply for an order for committal, still less should reference have to be made to a 10 page affidavit.

13.34 In *Willwin Development (Asia) Company Ltd v Wei Xing & Ors*,²⁹ the applicant A claimed in HCA 797/2012 (“the Main Action”) that, among other things, the first respondent, R1 and the third respondent, R3 as ex-directors had breached their fiduciary duties and duties of confidence in diverting business away from A to the second respondent, R2 (a limited company to which R3 was a shareholder and director).

13.35 The business diverted included business A alleged that it had been conducting with its customer Apple Inc. A had applied, ex parte, and obtained in the Main Action on 14 May 2012 an injunction order (“Injunction Order”) and an Anton Piller order (“Anton Piller Order”) (they will be collectively referred to as “Ex Parte Orders”). The Ex Parte Orders were continued by DHCJ Mimmie Chan, as she then was, on the return date of 18 May 2012. The attempts of the respondents to set aside the Ex Parte Orders were dismissed on 12 July 2012 by DHCJ Saunders who made modifications/variations to the Injunction Order.

13.36 The Anton Piller Order was also against R1 and R2, and, among other things, expressly required R1 and R2 to disclose various documents listed in Schedule 2 attached to the order (“Listed Items”), which included all company records, financial documents, price quotations, purchase orders, invoices, receipts and agreements incidental to R2’s business, and also business correspondence of

27 *Hong Kong Civil Procedure 2015*, Vol 1 at p 974 §52/1/6; see also *Re So Sau Chung* [1966] HKLR 523 at 545–546.

28 [2008] HKCU 993 (CACV 65/2008, 25 June 2008, unreported).

29 HCMP 2946/2014, 12 October 2015, unreported.

into account the underlying objectives set out in Order 1A, rule 1 and the conduct of the parties.³²

18.26 In the context of the wide discretion, in relation to costs in an interlocutory injunction, the court could take into account, among others, (a) the consideration that the inherent nature of an interlocutory injunction may make it fair to normally require the unsuccessful party only to bear the costs of the application if the successful party also succeeds in the substantive action; (b) any facts or factors, including the conduct of the parties and the reasonableness of resisting the application, which may render it just to require the unsuccessful party to bear the costs without being dependent upon the final outcome of the action, and even on a forthwith basis.³³ In so exercising its discretion, the court must as usual also take into account all the circumstances pertinent to that particular application, and the underlying objectives of the CJR as set out in Order 1A, rule 1.

18.27 In *Chiu Luen Public Light Bus Company Limited* (潮聯公共小型巴士有限公司),³⁴ it was held that when defendants should clearly be aware of the at the least arguable nature of the plaintiffs' case (and thus their title to sue), and under the well-established principles governing the grant of interlocutory injunctions, and the plaintiffs had a clear case for the injunction,³⁵ it would be unreasonable for the defendant to oppose the continuation of the interlocutory injunction. Costs will be awarded against the defendant.

18.28 In that case the defendant opposed the injunction on the basis that the plaintiff had no title to sue because it could not show special damage. The court considered that the legal arguments as to what constitutes special damage to found the title to sue are not straightforward questions, in particular as to what may meet the requirement for "direct" loss. Thus, it cannot be said that the defendants acted improperly in seeking to resist the injunction by arguing that as matter of legal analysis, the plaintiffs did not come within this requirement. The court ordered the plaintiff's costs in the cause.³⁶

32 Rules of the High Court (Cap 4A), Order 62, rule 5(1).

33 *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the Public Highway namely, the Westbound Carriageway of Argyle Street between the Junction of Tung Choi Street and Portland Street and/or other Persons Hindering Or Preventing The Passing or Repassing of Argyle Street* HCA 2086/2014, 13 August 2015, unreported, [9].

34 *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the Public Highway namely, the Westbound Carriageway of Argyle Street between the Junction of Tung Choi Street and Portland Street and/or other Persons Hindering Or Preventing The Passing or Repassing of Argyle Street* HCA 2086/2014, 13 August 2015, unreported.

35 *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the Public Highway namely, the Westbound Carriageway of Argyle Street between the Junction of Tung Choi Street and Portland Street and/or other Persons Hindering Or Preventing The Passing or Repassing of Argyle Street* HCA 2086/2014, 13 August 2015, unreported, [8]. The court said it was lucky that the defendant was not required to pay costs forthwith.

36 *Chiu Luen Public Light Bus Co Ltd v Persons unlawfully occupying or remaining on the Public Highway namely, the Westbound Carriageway of Argyle Street between the*

Immediate taxation

18.29 If the court considers it is appropriate in the present case to order the plaintiffs to pay the defendant's costs of the summons forthwith, there are three options:³⁷

18.30 First, the court can order immediate taxation of the defendant's costs of the summons. Second, the court can do a summary assessment and order payment of such costs as assessed in lieu of taxation under Order 62, rule 9A(1)(a). Third, the court can make an order under Order 62, rule 9A(1)(b) for provisional summary assessment.

18.31 If the second or third option is adopted, one need not be concerned about the proportionality of the costs of a separate taxation hearing as compared with the costs of the summons. Otherwise, this issue has to be addressed.

THIRD PARTIES

18.32 Costs awarded on an indemnity basis is the normal rule.

18.33 In *Project Development Co Ltd SA v KMK Securities Ltd*,³⁸ it was held that since innocent third parties were entitled to expenses against plaintiffs incurred as a result of complying with *Mareva* injunctions, it followed that the intervener should be indemnified for the expenses it had incurred in successfully applying to vary the order by permitting the intervener to recover all the costs it established as being reasonable. In that case, the Queen's Bench Division ordered that the intervener's costs were to be taxed in accordance with Order 62, rule 29 of the then English Rules of Supreme Court on a solicitors and own client basis but with a direction that, notwithstanding the terms of rule 29(1), it was for the intervener to establish that the costs had been reasonably incurred and were reasonable in amount.

APPLICATION FOR INTERLOCUTORY INJUNCTION DISPOSED OF BY CONSENT

18.34 The court will look at the conduct of the parties in determining the question of costs when an application for interlocutory injunction is disposed of by consent. It is also relevant that the Civil Justice Reform imposes a duty on the parties to take note of the underlying objective. The following case is set out in detail to illustrate this point.

Junction of Tung Choi Street and Portland Street and/or other Persons Hindering Or Preventing The Passing or Repassing of Argyle Street HCA 2086/2014, 13 August 2015, unreported, [10].

37 *Midland Business Management Ltd v Lo Man Kui (No 2)* [2011] 2 HKLRD 667, [17]–[18].

38 [1982] 1 WLR 1470.

- (a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the **Defendants' legal advisers**) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the information referred to in Schedule 3 to this Order (the **Information**);
- (b) publish any information which is liable to or might identify any member of the Plaintiff (including staff, students, advisors and members of the Council) as the subject of the Information or which otherwise contains material which is liable to, or might lead to, the identification of any member of the Plaintiff in any such respect, provided that nothing in this Order shall prevent the publication, disclosure or communication of any information which is contained in this Order or in the public judgments of the Court.

PROTECTION OF HEARING PAPERS

2. The Defendants must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied any Affirmation and any exhibits thereto and information contained therein that are made, or may subsequently be made, in support of the Application or the Plaintiffs solicitors' notes of the hearing of the Application (the Hearing Papers), provided that the Defendants shall be permitted to copy, disclose and deliver the Hearing Papers to the Defendants' legal advisers for the purpose of these proceedings.
3. The Hearing Papers must be preserved in a secure place by the Defendants' legal advisers on the Defendants' behalf.
4. The Defendants shall be permitted to use the Hearing Papers for the purpose of these proceedings provided that the Defendants' legal advisers shall first inform anyone, to whom the said documents are disclosed, of the terms of this Order and, so far as is practicable, obtain their written confirmation that they understand and accept that they are bound by the same.

PUBLIC DOMAIN

5. For the avoidance of doubt, nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or any part thereof, as was already in, or that thereafter comes into, the public domain in Hong Kong (other than as a result of breach of this Order or a breach of confidence or privacy).

COSTS

6. The costs of and occasioned by the Application are reserved.

VARIATION OR DISCHARGE OF THIS ORDER

7. The parties or anyone affected by any of the restrictions in this Order may apply to the Court at any time to vary or discharge this Order (or so

much of it as affects that person), but they must first give written notice to the Plaintiffs solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Plaintiffs solicitors in advance. The Defendants may agree with the Plaintiffs solicitors and any other person who is, or may be bound by this Order, that this Order should be varied or discharged, but any agreement must be in writing.

EFFECT OF THIS ORDER

8. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
9. A Defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents, or in any other way.

THIRD PARTIES

- (1) *Effect of this Order.* It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined, or have his assets seized.
- (2) *Effect of this Order outside Hong Kong.* The terms of this Order do not affect or concern anyone outside Hong Kong until it is declared enforceable or is enforced by a court in another jurisdiction and then they are to affect him only to the extent they have been declared enforceable or have been enforced UNLESS such person is:
- (a) a person to whom this Order is addressed or an officer or an agent appointed by power of attorney of such a person; or
- (b) a person who is subject to the jurisdiction of this court and (i) has been given written notice of this Order at his residence or place of business within the jurisdiction of this court and (ii) is able to prevent acts or omissions outside the jurisdiction of this court which are a breach or assist in a breach of this Order.

UNDERTAKINGS

The Plaintiff gives to the court the undertakings set out in Schedule 2 to this Order.

NAME AND ADDRESS OF PLAINTIFF'S SOLICITORS

The Plaintiff's solicitors are:

[], Hong Kong (Tel:)

INTERPRETATION OF THIS ORDER

- (1) In this Order "he", "him" or "his" include "she", "her", "hers" and "it" or "its".
- (2) When there are two or more Defendants then (unless otherwise stated):
- (a) references to "the Defendant" mean both or all of them;