

## CHAPTER 2

### INTERIM INJUNCTIONS

#### 1. EX PARTE APPLICATIONS

[2-1] Ex parte injunctions are those for which the defendant has no notice of the application. It can only be justified on grounds of need for secrecy or urgency.<sup>1</sup> A middle ground often is ex parte on notice. Examples of ex parte application on the grounds of secrecy are often those of *Mareva* injunctions and *Anton Piller* orders.

[2-2] Examples of ex parte on notice applications are those where a case is too urgent to wait for it to be heard by inter partes summons, but where secrecy cannot be justified. An example of an urgent application is one that is made late at night on 22 September 2015 with the ex parte order granted at around 1.10 am on 23 September 2015.<sup>2</sup>

[2-3] Rogers J (as he then was) said in *Seapower Resources International Ltd & Ors v Lau Pak Shing & Ors*:<sup>3</sup>

For an ex parte application for an injunction to be urgent on the grounds of urgency it must be so urgent but you cannot give even five minutes warning to the other side. Here, solicitors were instructed for the Defendants, at least the 1st Defendant. The Plaintiffs' solicitors well knew it.

[2-4] In *Orieme Asia Pacific Ltd v Miron Industrial Co Ltd*<sup>4</sup> the plaintiff applied for an ex parte injunction on the afternoon of 6 July 2011 for the return of a set of moulds in the possession of the defendant. The Court applied the test in *Slik Hong*

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1 In the United Kingdom, the Civil Procedure Rules requires exceptional urgency and permission of the court is needed. In Hong Kong, Order 29 rule 1(2) of the Rules of the High Court (Cap 4A) expressly provides that where the case is one of urgency an application for injunction may be made ex parte. In fact urgency allows application for injunction before a writ is issued: O 29 r 1(3).

2 *Emperor International Holdings Ltd v Atnext Ltd* [2015] HKCU 2830 (unreported, HCA 2227/2015, 14 October 2015). This was a defamation case in which an ex parte injunction was sought to restrain publication of articles published on a website on the morning of 22 September 2015, unreported. The ex parte injunction was, however, discharged.

3 [1993] HKCU 513 (unreported, HCA A10715/1993, 15 December 1993) at p 9 of his judgment, applied in *Tyce Ltd v Max Concept Technology Ltd* [2003] 3 HKC 116.

4 [2011] HKCU 1337 (unreported, DCCJ 2534/2011, 13 July 2011).

*Kong Company Limited v Gerald Merlyn Rhoslyn Evans & Ors*,<sup>5</sup> namely, whether there are any exceptional circumstances to justify the applicant to go against the rules of natural justice to apply to court on an ex parte basis.

[2-5] In *Ho Tak Eng v Fame Brilliant Ltd*,<sup>6</sup> Rogers VP<sup>7</sup> said that:

8. ... the application before the Deputy District Court Judge, as well as the application in this Court, was made ex parte without any notice to the defendant. There was no justification for the application to be made without so much as giving even the shortest notice that the plaintiff's lawyers would be appearing in front of the judge. Ex parte applications without notice should only be made where either the delay would cause injustice to the applicant or the defendant would take action which would nullify the effect of the injunction. Apart from anything else, such a procedure is against the principles of natural justice.

[2-6] In *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd*,<sup>8</sup> the court stated the principle as follows, adding a reference to the additional dimension of the fundamental right of equality before the law:

... One of the facets of equality before the law (a fundamental right guaranteed under Article 25 of the Basic Law) is that no order ought to be made by a court against anyone without his first being given a reasonable opportunity of being heard. An exception to this fundamental rule is where *ex parte* orders are made by the court. At the risk of repeating the obvious, *ex parte* orders are *only* made 'where the situation is of such extreme urgency that there is literally no time to warn the defendant of what is proposed, or where the purpose of the injunction will or may be frustrated if the defendant is informed of what is proposed or where the defendant simply cannot be found': see *TRP Limited v Thorley*, unreported, 13 July 1993, English Court of Appeal per Bingham LJ.

[2-7] More recently, in *Emperor International Holdings Ltd v Atnext Ltd*<sup>9</sup> the Court held that ex parte injunction applications are exceptional courses:

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5 [2005] HKCU 997 (unreported, HCA 1424/2005, 25 July 2005); cf *Re First Express Ltd* [1991] BCC 782 where Hoffmann J (as he then was) said: "It is a basic principle of justice that an order should not be made against a party without giving him the opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made. There is, I think, a tendency among applicants to think that a calculation of the balance of advantage and disadvantage in accordance with the second condition is sufficient to justify an ex parte order. In my view this attitude should be discouraged."

6 [2006] 1 HKLRD 34, [2005] HKCU 1811 (CA).

7 He also quoted *Re First Express Ltd* [1991] BCC 782.

8 [2002] HKCU 559 (unreported, HCA 5191/1998, 8 May 2002), at para 24 per Ma J (as the Chief Justice then was).

9 [2015] HKCU 2830 (unreported, HCA 2227/2015, 14 October 2015).

... It is well-established, and should have been well-known to all legal practitioners, that hearing an application and making orders on an *ex parte* basis are exceptional courses that require to be justified.

**[2-8]** The need for natural justice has led to comments by the Court that:

...there is much to be said for the view that a proper note of any *ex parte* application should be kept by the solicitors for the applicant present at the hearing, and a copy of the note ought to be provided to the other party, at any rate upon request being made. This is simply a matter of natural justice.<sup>10</sup>

**[2-9]** *Shanghai Liyou Investment Management Ltd v Ningxia Zhongyincashmere International Group Ltd & Ors*<sup>11</sup> was a case where the plaintiff had more than 48 hours to give notice of its application to the defendants but did not do so. Within a short span of three days from the issuance of the demand letter, the plaintiff obtained an *ex parte* injunction in aid of arbitration. On the facts and circumstances of that case, including the failure to give notice, the court discharged the injunction and refused to grant.

## 1.1 Ex parte on notice

**[2-10]** The practice of giving notice to the opponent where *ex parte* applications are made has developed over time.

**[2-11]** Proper notice should be given. One minute's notice was considered to be misleading when it was suggested that notice had been given.<sup>12</sup>

**[2-12]** Given that such applications are an *ex parte* application on notice, and that, inevitably, therefore, the court is deciding it without the benefit of evidence from the defendant, it is best that the court should say as little as possible about the merits of the dispute, because the merits of the dispute will inevitably have to be decided based upon the full evidence which will be before the court on the next occasion.<sup>13</sup>

**[2-13]** In *Step Perfect Limited v Gregory Goldstein*<sup>14</sup> the court refused to grant interim reliefs pending hearing of the *ex parte* on notice application for injunction.

**[2-14]** In that case, the first defendant was the sales representative of the plaintiffs for the US market under an alleged oral agreement. There are serious issues to be tried as to the true nature of the first defendant's role as representative, what fiduciary duties that carried, and whether those duties had been breached. In dispute are also the date of termination of the agreement, whether the first defendant had diverted business from the plaintiffs during subsistence of the agreement and after,

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10 *Grande Cache Coal LP v Marubeni Corp* [2015] HKCU 2225 (unreported, HCA 2136/2015, 23 September 2015) at para [35] per Anderson Chow J.

11 [2016] HKCU 1209 (unreported, HCMP 3423/2015, 20 May 2016). See also Chapter 6 on injunctions related to companies.

12 *Grande Cache Coal LP v Marubeni Corp* [2015] HKCU 2225 (unreported, HCA 2136/2015, 23 September 2015) at para [34(3)] per Anderson Chow J.

13 *New Team International Ltd v Yau Yim* [2015] HKCU 1282 (unreported, HCA 1161/2015, 29 May 2015) at para [8]. This was a case seeking various interlocutory injunctions in relation to allegations of breach of confidentiality and breach of copyright.

14 [2017] HKCU 1482 (unreported, HCA 846/2017, 5 May 2017).

whether the alleged confidential information was really confidential, and whether he had used confidential information belonging to the plaintiffs.

[2-15] At the same time, the defendants also have raised serious defences which should be tried. This includes the defence that the agreement did not contain a restraint of trade clause, and that the information was not confidential. Moreover, even on the plaintiffs' own case, the first defendant was an independent contractor, and there are issues as to whether or not he owed fiduciary duties to the plaintiffs.

[2-16] The court was concerned about the delay in the application. The court adopted the scenario most in favour of the plaintiffs for the purpose of the hearing. In February, there was an incident akin to the first defendant admitting diversion of the plaintiffs' business, and he voluntarily surrendered all diversion of the plaintiffs' business, and he voluntarily surrendered orders from a customer to the plaintiffs. The plaintiffs already had information that the defendants were starting their own business, and yet the writ was only filed on 7 April, and the summons for injunction was filed on 24 April, two months after the February incident. There was no explanation from the plaintiff about the delay. The defendants were only given about six working days after service of the summons to prepare for this hearing. As far as the first defendant is concerned, this was *ex parte* on notice. In that shortness of time, the defendants have come up with two affidavits with grounds in opposition, and in support of an application for stay for *forum non conveniens*.

[2-17] Given the delay of the plaintiffs, the Court was not prepared to grant interim injunction without full arguments, and made the following orders:

- (a) The defendants are to file and serve a further affidavit in opposition to the injunction and to support the stay application if so advised, within 14 days from today;
- (b) The plaintiffs may file and serve an affirmation in reply and in opposition within 21 days thereafter;
- (c) The defendants may file and serve an affirmation in reply to the stay summons only within 14 days thereafter;
- (d) Both summonses are to be set down for a speedy hearing by the same judge with one day reserved in consultation with the diaries of [names of counsel].

#### 1.1.1 Examples of *ex parte* injunctions granted

[2-18] *Ex parte* injunctions have been granted on the following occasions.

[2-19] In aid of arbitration:

- (1) In aid of arbitration proceedings in the Bahamas: *Hengshi International Investments Ltd v Bayspring International Ltd*,<sup>15</sup>

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<sup>15</sup> [2015] HKCU 3163 (unreported, HCMP 1916/2015, 18 December 2015).

- (2) In aid of arbitration proceedings to commence in Singapore under section 21M of the High Court Ordinance (Cap 4): *Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd*;<sup>16</sup>
- (3) In aid of arbitration proceedings to be commenced in London: *VE Global UK Limited v Charles Allard JR & Anor*;<sup>17</sup>
- (4) In aid of arbitration proceedings: *La Dolce Vita Fine Dining Group Holdings Ltd v Zhang Lan*.<sup>18</sup>

**[2-20]** *Mareva* injunctions:

- (1) *Mareva* injunctions in aid of English proceedings under section 21M of the High Court Ordinance (Cap 4): *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd*;<sup>19</sup>
- (2) World-wide *Mareva* injunction, in aid of Australian proceedings, under section 21M of the High Court Ordinance (Cap 4): *Harvey River Estate Pty Ltd v Anne Patricia Larter (General Partner in the Sports trading Club Partnership)*.<sup>20</sup>

**[2-21]** Infringement of intellectual property to prevent infringement of intellectual property rights: *Pandora A/S v Glamulet International Ltd*.<sup>21</sup>

**[2-22]** Cyber fraud, in this case alleged cyber fraud by hacking into the plaintiff's access to the SWIFT payment process by a remote system: *Banco Del Austro SA v Regal Prosper Trading Ltd*.<sup>22</sup>

**[2-23]** Email fraud:

- (1) Sending of unauthorised emails: *Pacific Rainbow International Inc v Shenzhen Wolverine Tech Ltd & Ors*.<sup>23</sup>
- (2) Phishing scam: *Golden Brothers Inc v Medicare Asia Ltd*.<sup>24</sup>

16 [2015] HKCU 2793 (HCMP 1622/2015, 18 November 2015).

17 [2017] HKCU 2542 (unreported, HCMP 1678/2017, 10 October 2017).

18 [2015] HKCU 579 (unreported, HCMP 473 & 474/2015, 18 March 2015).

19 [2015] HKCU 2772 (unreported, DCCJ 3986/2014, 17 November 2015).

20 [2015] HKCU 3175 (unreported, HCCL 14/2015, 18 December 2015).

21 [2015] HKCU 3207 (unreported, HCA 2941/2015, 18 December 2015).

22 [2015] HKCU 3039 (unreported, HCA 477/2015, 9 December 2015).

23 [2017] HKCU 1076 (unreported, HCA 3023/2016, 2 May 2017). The plaintiff placed orders for materials and received an email directing it to pay into certain bank accounts in Hong Kong, which emails were not authorised. The plaintiff applied for both a proprietary injunction of monies in bank accounts and also a *Mareva* injunction.

24 [2016] HKCU 2467 (unreported, HCA 2590/2016, 14 October 2016). The plaintiff fell victim to an email scam where through fraudulent means funds were transferred by it to a bank account of the defendant in Hong Kong. The court noted that cases of this type are becoming increasingly commonplace and notwithstanding the criminal element involved civil proceedings are instituted by aggrieved parties in an effort to trace and recover the lost proceeds. See also *Mesirow Financial Administrative Corporation v Best Link Industrial Co Ltd* [2016] HKCU 171 (unreported, HCMP 1846/2015, 25 January 2016) and *Guaranty Bank and Trust Co v ZZZIK Inc Ltd* [2016] HKCU 1679 (unreported, HCA 1139/2016, 18 July 2016).