DCCJ 1098/2018

[2018] HKDC 324

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 1098 OF 2018

BETWEEN

TERESA LYNN RUCKELSHAUSEN	Plaintiff
and	
HK TOPMATCH CHEMICAL CO LIMITED	1st Defendant
F FOREST TRADING LIMITED	2nd Defendant

Before: His Honour Judge MK Liu in Chambers (Open to public)

Date of Hearing: 23 March 2018

Date of Decision: 23 March 2018

DECISION

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1. On 19 March 2018, the plaintiff issued the writ of summons herein ("the writ") and took out an inter partes summons ("summons") for a Mareva injunction against the 1st and the 2nd defendants. Having read the affidavit of service produced by the plaintiff, I am satisfied that the writ, the summons and the 1st affidavit of the plaintiff ("the

supporting affidavit") in support of the summons were duly served on the 1st and the 2nd defendants on 20 March 2018.

The facts

2. I would first set out the facts deposed in the supporting affidavit.

3. The plaintiff is an American national residing in the USA. On or about 15 August 2017, the plaintiff came to know a man by the name of Roberto Bryant ("RB") and began to have constant communication with him via different electronic means. RB managed to persuade the plaintiff to transfer money to some bank accounts, including the following:-

(a) a sum of USD 40,000 transferred to the 1st defendant's account in the China Construction Bank (Asia) Corporation Limited Bank ("D1's Account") on or about 17 October 2017; and

(b) a sum of USD 80,000 transferred to the 2nd defendant's account in the Industrial and Commercial Bank of China (Asia) Ltd Bank ("D2's Account") on or about 6 November 2017.

4. Subsequently, the plaintiff discovered that she might well be a victim of a fraudulent scheme orchestrated by RB. In or about early December 2017, she made a report to the Hong Kong Police ("HKP").

5. On or about 7 January 2018, the plaintiff was informed by HKP that the USD 80,000 transferred by the plaintiff to D2's Account "*remains in the suspicious account and police has frozen the remaining balance*". On or about 16 January 2018, the plaintiff was informed by HKP that D2's Account was frozen.

6. On or about 1 February 2018, the plaintiff was informed by HKP that D1's Account was frozen. HKP did not reveal to the plaintiff the exact amount remaining in D1's Account. However, HKP said to the plaintiff that she should try to recover the USD 40,000 transferred to this account.

7. Although the 2 accounts have been frozen by HKP, HKP has not provided any guarantee to the plaintiff that the accounts would continuously be frozen. Further, HKP has not promised the plaintiff that prior notice would be given to her if HKP is prepared to cease to freeze the 2 accounts.

8. The plaintiff is now seeking a domestic Mareva injunction to freeze the USD 40,000 in the D1's Account and the USD 80,000 in the D2's Account, and a disclosure order to require each defendant to disclose all its assets of individual value of HKD 10,000 or more in Hong Kong ("the Disclosure Order").

The principles

9. The principles concerning Mareva injunction are well established. In order to obtain a Mareva injunction in an inter partes hearing, a plaintiff has to show[1]:-

(a) that he has a good arguable case on a substantive claim over which the court has jurisdiction;

(b) there are assets within the jurisdiction;

(c) the balance of convenience is in favour of grant; and

(d) there is a real risk of dissipation of assets, or removal of assets from the jurisdiction, which would render the plaintiff's judgment of no effect.

Good arguable case

10. On the basis of the evidence now before the court, the plaintiff may argue that the 1st defendant has to return the USD 40,000, and the 2nd defendant has to return the USD 80,000 to her, at least on the ground of unjust enrichment.

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[1] *Hong Kong Civil Procedure 2018*, Volume 1, § 29/1/65

11. In a claim based upon unjust enrichment, the questions to be determined are as follows[2]:-

(a) Was the defendant enriched?

(b) Was the enrichment at the plaintiff's expense?

(c) Was the enrichment unjust?

(d) Are any of the defences applicable?

12. In my view, it is arguable that each of the defendants was enriched as a result of the sum transferred by the plaintiff to its bank account in Hong Kong, and the enrichment was at the plaintiff's expense. It is also arguable that the enrichment was unjust, for each of the defendants has not provided any consideration in support of the transfer. Further, HKP's investigation and intervention (ie freezing the accounts) is evidence showing that the transfers may well be procured by some unlawful activities, and the defendants may have taken part in these activities. These are also factors arguably in support of the unjust element.

13. I am satisfied that the plaintiff has shown a good arguable case against each defendant.

[2] *Shanghai Tongji Science and Technology Industrial Company Limited v Casil Clearing Limited* (2004) 7 HKCFAR 79, per Ribeiro PJ at [67]

Assets within the jurisdiction

14. In respect of the USD 80,000 transferred to the D2's Account, HKP has told the plaintiff that the money remains in the account.

15. In respect of the USD 40,000 transferred to the D1's Account, although HKP did not reveal the exact amount in D1's Account to the plaintiff, HKP has told the plaintiff to try to recover the USD 40,000 from the 1st defendant. From this, it can be inferred that the amount in the D1's Account is more than USD 40,000, or at least would not be substantially less than USD 40,000.

16. I am satisfied that there are assets within the jurisdiction which can be frozen by an injunction granted by this court.

Real risk of dissipation of assets

17. As said in the above, HKP's investigation and intervention is evidence showing that the transfers may well be procured by some unlawful activities, and the defendants may have taken part in these activities. In the circumstances, I am satisfied if no injunction is granted, there is indeed a real risk that the judgment obtained by the plaintiff would go unsatisfied by reason of the disposal by the defendants of their assets.

Balance of convenience

18. By reason of the real risk of dissipation of assets mentioned above, if no injunction is granted but the plaintiff succeeds in obtaining final judgment in these proceedings at the end, the judgment obtained by the plaintiff may well be an empty judgment. On the other hand, if the injunction sought by the plaintiff is granted but the defendants succeed at the trial, there is no evidence showing that the prejudice suffered by the defendants as a result of the injunction is something which cannot be compensated by damages. I am satisfied that the balance of convenience is in favour of granting the injunction.

Undertaking as to damages

19. There is one matter troubling me for a while in this application. The plaintiff has offered an undertaking as to damages in the supporting affidavit. However, (a) the plaintiff is a foreign plaintiff, and (b) apart from saying that "*I have sufficient assets to meet any order this Honourable Court may consider just for payment of damages or compensation (if any) to any person affected by the operation of the Mareva injunction*", she has not given any specific information concerning her financial ability in the supporting affidavit.

20. In my view, in the circumstances set out in the paragraph above, it would be necessary to require the plaintiff to pay a sum into court in support of the injunction. The total of the amounts to be frozen by the injunction is USD 40,000 + USD 80,000 = USD 120,000, which would be about HKD 940,000. The life of the injunction would be up

to the conclusion of the trial or a further order made by the court in these proceedings. The injunction would prevent the defendants from using these sums to invest during the life of the order. Taking all these into account, and bearing in mind that the best lending rate at present is 5% per annum, and this action is at the very primitive stage, I would require the plaintiff to pay HKD 60,000 into court in support of the injunction.

21. Mr Foster Yim, counsel for the plaintiff, offers an undertaking that the plaintiff will pay HKD 60,000 into court to fortify the undertaking as to damages within 14 days. I accept this undertaking.

Other matters

22. I am of the view that the Disclosure Order sought by the plaintiff is a proper and a necessary order in aid of the injunction. I would grant the Disclosure Order to the plaintiff.

23. The plaintiff also seeks costs of this application. In my view, this is an application for an interlocutory injunction and who is the ultimate winner is yet to be determined. In these circumstances, I am of the view that the appropriate costs order should be costs of this application be the plaintiff's costs in the cause, with a certificate for counsel, to be taxed if not agreed.

Deposition

24. For the reasons above, I make an order in terms of the summons with the amendments indicated in this decision.

25. I thank Mr. Yim for the assistance provided to this court.

(MK Liu)
District Judge

Mr Foster Yim, instructed by Payne Clermont Velasco, for the plaintiff

The 1st defendant was not represented and did not appear

The 2nd defendant was not represented and did not appear