HCA 2236/2019
[2020] HKCFI 630

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 2236 OF 2019

BETWEEN

UNIVERSAL ENTERTAINMENT CORPORATION	1st Plaintiff
TIGER RESORT ASIA LIMITED	2nd Plaintiff

and

KAZUO OKADA	Defendant

Before: Hon Coleman J in Chambers (Open to Public)
Date of Hearing: 17 April 2020
Date of Judgment: 22 April 2020

J U D G M E N T

Introduction

1. These proceedings were commenced by writ of summons dated 3 December 2019, subsequently amended on 11 March 2020. But leave to serve the writ out of the jurisdiction on the defendant in Japan was only granted by order of 22 March 2020, albeit there was then some delay in notification of the grant of the order reaching the plaintiff. Formal service of process has yet to take place.

2. In the meantime, on 22 January 2020, the plaintiffs issued a summons ("Summons") returnable on 31 January 2020, seeking a *Mareva* injunction against the defendant to restrain him from disposing of or diminishing the value of his assets in Hong Kong, including his shares in Okada Holdings Ltd ("OHL") and Okada Fine Art Ltd ("OFA"), both being Hong Kong private companies. The application was made *inter partes* because (a) there was no longer any confidentiality, the writ having been issued; and (b) the then value of the defendant's shares in OHL alone exceeded the amount of US$620 million sought to be restrained.

3. The return date of 31 January 2020 fell within the General Adjournment Period ("GAP") and so was adjourned. By directions on 6 March 2020, Keith Yeung J adjourned the summons to 17 April 2020. But the GAP was then extended to cover that date. On 14 April 2020, the plaintiffs expressed the intention to make an *ex parte* application on notice, to seek an interim *Mareva* injunction – that is, to obtain interim-interim relief – in similar terms to, and pending the determination of, the Summons. As Duty Judge, on 15 April 2020, I fixed the hearing for 12 noon on 17 April 2020.

4. I fixed the hearing on the basis of the Certificate of Urgency provided on behalf of the plaintiffs, which identified a change in circumstances said to justify the fact that the Mareva injunction had "become urgent". The particular change of circumstances identified was that there had been a massive (about 50%) decrease in the value of the OHL shares since 22 January 2020.

5. Mr Steven Kwan and Ms Charlotte Chan appeared as Counsel for the plaintiffs. Despite the short notice, Mr William Wong SC appeared as Counsel for the defendants. Both sides filed skeleton arguments. Although the hearing began at 12 noon, because of certain developments on the evidence and the need to take further instructions, the hearing was adjourned until the late afternoon. At the end of the hearing, I reserved my decision. This is my Judgment.

The Background and the Claim

6. The 1st plaintiff is a public company incorporated under the laws of Japan, and carries on the business of manufacturing Pachinko machines and operating casino resorts. The 2nd plaintiff is a Hong Kong incorporated wholly-owned subsidiary of the 1st plaintiff.

7. The defendant is the founder of the 1st plaintiff. He was a director of both plaintiffs for the period when the matters giving rise to the claims occurred. Essentially the claims arise out of the plaintiffs' developing, since 2008, an integrated casino and resort complex in the Philippines ("the Project"), over which it is said the defendant had absolute control and supervision. The Project had an approved budget ("Budget") in the sum of US$2.43 billion. However, the plaintiffs say that due to the defendant's mismanagement of the Project during his directorships, the plaintiffs continuously overspent on the Project.

8. The plaintiffs say that, despite all reasonable steps taken by the plaintiffs' current directors after January 2018 to reduce the forecasted costs overrun, the costs incurred and paid for the Project had accumulated to a sum of about US$3.05 billion by September 2019. That gives rise to the underlying claim in the sum of US$620 million in excess of the

Budget, which is also the 'ceiling figure' sought to be frozen by the Summons and on this interim-interim application.

9. The claim against the defendant is as to alleged breaches of duties of care under both Japanese law and Hong Kong law, in causing the significant overspending on the Project.

10. As will be evident from the above factual summary, the plaintiffs are now controlled by different directors. The defendant was ousted as a director in June 2017, he says as a result of a "coup" orchestrated by his wife and her paramour, siding with the defendant's son and deceiving his daughter. The wife and paramour are alleged to have had an affair since October 2016. But the paramour, Mr Jun Fujimoto, had been a director of the 1st plaintiff since 2001.

11. It is fair to say that these and other surrounding events have given rise to various litigation proceedings in Hong Kong, Japan and the US.

12. As to the shares in OHL, the defendant owns 46.7% of the issued shares. However, under its Memorandum and Articles of Association, the directors of OHL may in their absolute discretion decline to register any transfer of shares. Given the ongoing proceedings among the former and current directors of OHL, it is unlikely that the current directors of OHL would register a transfer of shares in OHL by the defendant. This practical bar to dissipation was one of the reasons why the plaintiffs originally considered that the Summons was the appropriate means to apply for *Mareva* relief, as there was no imminent or immediate requirement for such relief.

13. OHL's only asset is its shareholding in the 1st plaintiff, being 69.66% as at 30 March 2020. The value of OHL therefore depends on the share price and market capitalisation of the 1st plaintiff. As at 10 December 2019, the value of the defendant's shares in OHL was said to be about US$915 million. However, the revised estimate as at 6 April 2020, following a significant drop in the share price of the 1st plaintiff, was approximately US$330 million.

14. That sum would not be sufficient to cover the claim of, or to freeze assets up to the 'ceiling figure' of, US$620 million. Hence, the plaintiffs say that the only other known assets held by the defendant in Hong Kong, being the OFA shares and OFA's assets are at risk.

15. However, also in Hong Kong, the defendant's wife petitioned for a divorce and various ancillary orders in FCMC 12767/2018. As part of his draft evidence – prepared in some haste for the hearing, and which was exhibited in approved form to his solicitor's affirmation dated 16 April 2020 – the defendant exhibited a copy of an Order made by HHJ Melloy in the Family Court dated 18 April 2019 ("the FC Order"). The FC Order records on its face that it was made after hearing from Counsel for both the wife (as petitioner) and the defendant (as respondent), though the accuracy of that record was subject to some question at the hearing before me.

16. In any event, the FC Order gave various directions as to the ancillary matters, but did so on the basis of certain undertakings. In particular, the defendant (as respondent to the matrimonial proceedings) undertook to the petitioner and to the Family Court "not to sell, transfer or pledge any assets including any art pieces and any company shares,

including those held under [OFA], to any third parties without the Petitioner's consent or without an order of the Court" ("the FC Undertaking").

17. The defendant also explained in his draft evidence that he had applied to discharge the FC Undertaking on the grounds, amongst others, that there is no risk of dissipation on his part. During the hearing, I was informed by Mr Wong (after he took instructions on my enquiries) that the application for discharge of, or release from, the FC Undertaking was originally due to be heard on 20 April 2020. But, as that date was to fall within the GAP, HHJ Melloy has directed that the application will be determined on paper by reference to the evidence already filed and to submissions and replies to be filed by the defendant and his wife on 7 and 14 May 2020.

18. It was against that timetable, and the fact that the FC Undertaking will therefore stay in place until at least 14 May 2020, that I was able to reserve my decision on the plaintiffs' interim-interim application until this Judgment.

19. It was also on the basis of the FC Undertaking that Mr Kwan changed his approach to the interim-interim application between the morning and afternoon hearings. To be fair, Mr Kwan had also heard the expression of my preliminary views, namely that in light of the practical hurdles for any transfer of shares in OHL I would unlikely grant any interim-interim relief as regards those shares, and that the FC Undertaking seemed to provide protection as regards OFA and OFA's assets.

20. Mr Kwan's revised application sought an order that in the event of the withdrawal (with or without leave), discharge or modification of the FC Undertaking, (1) the defendant should inform the plaintiffs in this case in writing within 24 hours, and (2) the defendant should be restrained from dealing with, disposing of diminishing the value of his shares in OFA or any assets held in the name of OFA until 7 days thereafter. Obviously, the idea of that revised approach would be to keep in place some form of undertaking or order restricting the defendant's dealing with OFA or its assets for sufficient time either to allow the determination of the Summons, or if necessary a renewed interim-interim application.

21. The change of approach arose because at least Mr Kwan and Ms Chan, and it seems those instructing them, had not been aware of the FC Undertaking prior to its being exhibited by the defendant to his draft affirmation filed to oppose the interim-interim application.

Applicable Principles

22. The principles applicable to the grant of *Mareva* injunctive relief are well-established. The applicant has to show that: (1) there is a serious issue to be tried on the merits; (2) there are assets within the jurisdiction; (3) there is a risk of dissipation of those assets so as to render any judgment which the plaintiff may obtain nugatory; and (4) the balance of convenience is in favour of granting an injunction.

23. But it is also trite that the purpose of granting a freezing order is to restrain a defendant from evading justice by disposing of assets otherwise than in the normal course of his affairs, with the result that the defendant becomes judgment-proof. It is not to provide security for the

plaintiff. It is also important that the burden of proof is on the applicant to show the real risk of dissipation, and to do so by solid or cogent evidence relevant to that risk and not simply to the underlying claim. The applicant is required to show that, at least objectively, the effect of the defendant's conduct would be to frustrate the enforcement of any judgment.

24. Similarly, because equity does not act in vain, a court does not usually order injunctions where time has elapsed and an injunction would in effect be locking the stable door after the horse has bolted. The mere fact of delay in bringing an application for a Mareva injunction does not, without more, negate a risk of dissipation. But delay, and the lack of any proper explanation for it, is always a relevant consideration when assessing whether there is a real risk of dissipation.

25. As to the test for granting interim-interim relief, that is essentially a balance of fairness. Interim-interim arrangements are meant to be a very short-term kind of arrangement. This sort of arrangement would only be made as a temporary stop-gap measure, and in circumstances where the court feels that there are other issues which have to be explored, but where the time given to the court to deal with the matter and in preparation of the matter is not sufficient for that purpose. Yet, in the meantime, there has to be some kind of arrangement to regulate the affairs between the parties. Hence, the court has to do practical justice on the balance of fairness, even though it may not have sufficient time to consider the matter fully.

26. An interim-interim arrangement is not meant to be an interim arrangement as such. Therefore, the parties are at liberty to come back

to the court to debate what should be the interim arrangement, and without impediment arising from the very provisional nature of the interim-interim order.

27. Any *ex parte* application should be regarded as exceptional, and courts should not entertain them unless there are cogent justifications, usually in terms of either extreme urgency or secrecy. When faced with an *ex parte* application, the court should ask whether the applicant can show those exceptional circumstances justifying proceeding on an *ex parte* basis. If he cannot, the court should not be concerned about the substantive merits of his application.

The Interim-Interim Application

28. The current interim-interim application comes about in the unusual circumstances of the GAP. In order to fit the analysis into the right context, it may be helpful to identify what would likely have happened had there been no GAP. Leaving aside questions of 'service out' and any attendant delay, it is likely that the substantive *inter partes* application made by the Summons would have been determined. That determination would have either granted or refused the *Mareva* injunction.

29. If granted, the injunction would almost certainly have been in the standard terms identified by the Practice Direction 11. Those terms provide first for the general restriction against removal from Hong Kong of any of the defendant's assets up to the value of the 'ceiling figure' (here, the plaintiffs suggest US$620 million). The terms also provide that the defendant ought not to dispose of or deal with or diminish the value of any of his assets in Hong Kong up to the 'ceiling

figure', the prohibition including in particular any specific assets then named (here, the plaintiffs point to the shares in OHL and OFA). But the terms also provide that if the total unencumbered value of the defendant's assets in Hong Kong exceeds the 'ceiling figure', the defendant is free to remove or deal with them as long as the total unencumbered value still in Hong Kong remains above that figure.

30. It is important to note that the 'ceiling figure' is set by reference to the amount of the claim, assuming that there is a sufficiently meritorious claim to that particular figure. The 'ceiling figure' is not set by reference to the value of any of the defendant's assets. Indeed, it is not unusual that the value of a defendant's assets which are frozen is less than the value of the claim against the defendant in those proceedings. That only emphasises that the application is not intended to provide security for the claim.

31. If, after the grant of the injunction, there is a significant drop in value of one of the assets particularly referred to as restrained in the hands of the defendant, that does not trigger any new application – except, perhaps, for a worldwide Mareva injunction if there are other assets out of Hong Kong. Of course, the drop in value may have a practical effect on the defendant's ability to deal with his assets in Hong Kong so as to maintain a total unencumbered value above the 'ceiling figure'.

32. So had there been no GAP, and had the injunction been granted, the drop in the value of the OHL shares would not have triggered any new application for a Hong Kong *Mareva* injunction, let alone one with any degree of urgency. (Of course, had the injunction been refused,

the drop in the value of the OHL shares would not likely have triggered a renewed application.)

33. These matters raise at least significant questions as to whether the drop in the value of the OHL shares could properly have triggered this interim-interim application on an urgent basis. The fluctuation in value of an asset, such as public listed shares which are bound to fluctuate in value, is essentially irrelevant to the considerations as to the grant or refusal of *Mareva* relief. I agree with Mr Wong's submission that the decrease in value – apparently due to the impact of the COVID-19 pandemic – is not and cannot be a valid ground to say that there is suddenly some urgency in this case. This, says Mr Wong, is particularly so against the fact that the plaintiffs say they "discovered" the overspending on which they base their claim more than two years ago. I also accept the force in Mr Wong's submission that the plaintiffs' concern appears to be that it no longer has a good security (in practical terms) for its claim, if it can be established.

34. But in any event, Mr Wong says not only is there no urgency, there is no risk of dissipation pending the *inter partes* hearing of the Summons. First, there has simply been no change in the position regarding the transferability of the OHL shares, which the defendant cannot for most practical purposes deal with.

35. Secondly, as to the OFA shares, Mr Wong also says that there has been significant material non-disclosure. He points first to the FC Order containing the defendant's FC Undertaking. The submission is that the existence of the FC Undertaking was within the full knowledge of

the plaintiffs, and they knew that an application had been made to set aside the FC Undertaking, but that they failed to disclose these matters.

36. So, says Mr Wong, whether there should be some interim measure over the defendant's personal assets is already a matter before, and to be determined by, the Family Court. On that point, I disagree. It seems to me that the basis upon which the defendant (as the respondent to the matrimonial proceedings between himself and his wife) might give an undertaking or face an order in similar terms arises in the particular context of the matrimonial proceedings. Whilst there may be some overlapping considerations with those in this Court (such as, perhaps, risks of dissipation), the basis upon which the defendant might face an order in proceedings in this Court is not entirely the same. It is important, at least, that the "claims" in the two sets of proceedings are rather fundamentally different, and that they involve different parties.

37. As an aside, and though it may turn on the two procedural chronologies, the existence of the "claim" in one set of proceedings may be or become relevant in the other set of proceedings, and vice versa. But this is not a matter which need detain anyone for present purposes.

38. As to the plaintiffs' knowledge of the FC Undertaking, the plaintiffs clearly do know about the existence of the matrimonial proceedings. Indeed, the affirmation material which supports the Summons specifically refers to the matrimonial proceedings. But such proceedings are ordinarily dealt with in Chambers, not open to the public. Further, under the relevant procedural rules of the Family Court in such proceedings, there is a general prohibition preventing persons other than the parties to the proceedings, or their solicitors, from having access to

and the ability to copy documents filed or lodged in the proceedings. As it happens, I note that the FC Order also has another express undertaking recorded as being given by the defendant (as respondent in those proceedings) not to disclose anything in relation to the proceedings to any third parties including the press. That undertaking, though made express, is entirely consistent with the usual confidential nature of such proceedings that applies to both parties.

39. As to what might be read into the giving of the FC Undertaking, I accept that some caution is necessary. I simply do not know on the materials I have how the FC Undertaking came about. But, it seems to me to be a fair inference that either the wife or HHJ Melloy, or both, considered there to be a proper basis of concern that the defendant (as respondent and those proceedings) might deal with his assets in a way which would be prejudicial to the Family Court's ability properly to exercise its dispositive powers in the matrimonial proceedings. The fair inference is that the wife sought such an undertaking, though I accept that some undertakings are given even when the person giving the undertaking does not accept the basis upon which it is demanded. Nevertheless, I also note that an extremely experienced Family Court Judge thought it appropriate to accept and record the FC Undertaking.

40. But, on the materials I have, I am not prepared to proceed for present purposes on the basis that the plaintiffs in fact knew of the FC Undertaking, simply because one member of the plaintiffs' Board of Directors (that is, the wife) must have known, when that person ought to have kept that as private. I do not rule out the possibility that the directors did know, from the wife and/or from Mr Fujimoto with whom she now has a relationship; but, as I say, I am not prepared to proceed on

that as though it is a fact. Also, for the moment, I do not think I need to address the perhaps more 'knotty' question as to whether the wife ought to have made the plaintiffs' Board of Directors aware of the FC Undertaking, and to have taken any such steps as might have enabled her properly to do so.

41. So I do not accept for present purposes that the plaintiffs' failure to reveal the existence and terms of the FC Undertaking was a material non-disclosure.

42. Of course, the plaintiffs certainly now know about it, and have understandably varied their interim-interim approach in the light of that knowledge.

43. Further on the topic of material non-disclosure, Mr Wong referred during submissions to the fact that the artwork which comprises the assets of OFA is already under the physical possession and control of the 1st plaintiff, by virtue of a bailment agreement. He handed up a copy of the agreement, and a rough translation from Japanese to English. He also handed up copy of a public announcement made by the 1st plaintiff to the Japanese investing public in 2018, apparently in response to public enquiries about the continuation of the operation of the Okada Museum of Art, at which OFA's artworks are on display. The announcement informed the public, including its shareholders, that the 1st plaintiff had executed a bailment contract for all artworks, which did not expire until 2 October 2023, meaning that the 1st plaintiff has no obligation to surrender any of the artworks exhibited and kept at the Okada Museum of Art until at least that date, even if OFA (of which the defendant is sole director) requests otherwise.

44. I accept that the bailment contract (or "deposit contract", being the phrase preferred by Mr Kwan) obviously does not transfer ownership of any the artwork from OFA to the 1st plaintiff. Nor does it prevent transfer of ownership of either the artwork or the shares in OFA to anyone else, though any new owner would presumably take ownership subject to the existing contractual promises in the bailment contract. So Mr Kwan is correct when he says that the terms of the bailment contract would not prevent the defendant from dissipating the assets comprised in the OFA shares or the artwork.

45. Nevertheless, in the context of a consideration of whether there exists a real risk of dissipation, it seems to me that it is material that the assets of OFA are subject to the bailment contract and are under the physical possession and control of the 1st plaintiff, likely at least until October 2023. Those facts are material because they are relevant to and may impact on the finding of real risk of dissipation. This is particularly so against the plaintiffs' submission that the artworks are "rather liquid" and can be disposed of by the defendant through OFA "easily". The possibility that even with such disclosure there may still be found such a real risk does not remove the materiality.

46. There can be no question but that the 1st plaintiff, as a party to the bailment contract, and hence as the party having physical possession and control of the artwork, must know those facts. I find that there was a material non-disclosure in failing to draw the Court's attention to those facts. It is also clearly no answer for Mr Kwan to say, as he did in submission, that Mr Wong's appearance at the hearing somehow rendered this application one properly to be regarded as taking

place *inter partes*, or that there could not be non-disclosure now that the defendant has disclosed it.

47. Mr Wong urges me, in the light of this material non-disclosure, to take a robust approach and refuse any interim-interim order because of it. Certainly, it is open to a Court which has found material non-disclosure to refuse the relief on that basis, irrespective of and sometimes without consideration of the merits. On a full *inter partes* hearing, I expect I would be minded towards such a robust approach. But, this is not such a hearing, as Mr Wong himself has stressed. The simple fact is that the Court does not yet have a sufficiency of materials, and the sufficient time properly to consider them, to put the various features of the case in their proper context.

48. So, applying the principles for interim-interim relief, it seems to me that I should approach matters by reference to providing a stop-gap measure on a practical basis which balances fairness, where the matter cannot be properly or fully considered. I can also at the same time – as part of that balance – give directions for a full hearing to be brought on reasonably quickly, to allow the proper and full consideration of the matters raised by the Summons.

49. As a practical matter, concerns about disposal of or dealing with the OHL shares does not arise in the short term. Nor, so long as the FC Undertaking remains in place, do concerns about disposal of or dealing with the OFA shares, or the OFA artwork. The only practical balancing required on a stop-gap basis arises if the Family Court allows the defendant's application to be released from the FC Undertaking, and

only if it does so before the Summons can be heard on an *inter partes* basis.

50. To cater for the circumstances, I am prepared to make an order broadly in the terms of the varied approach adopted by Mr Kwan, after he learned of the existence and the terms of the FC Undertaking. In my balancing of fairness, I specifically take into account that the FC Undertaking is in any event likely to remain in place for a good part of the period between now and the date on which the Summons can be heard. Even against the material non-disclosure which I have found, I think the balance requires some stop-gap arrangement to allow consideration in any change of circumstances caused by the discharge of, or release from, the FC Undertaking.

51. For these purposes, not least because it is difficult to give any deep consideration to the underlying merits of the claim, I do not think I need to, and I do not propose to, address those merits. But having read Mr Wong's skeleton argument on those merits, and whether there exists a serious issue to be tried in the action, I must say I see some force in at least some of the points. The merits, however, can be properly considered on the hearing of the Summons.

Result

52. I, therefore, order that in the event of the withdrawal (with or without leave), discharge, or modification of or release from the FC Undertaking, (1) the defendant should within 24 hours of that occurrence inform the plaintiffs in writing of it, and (2) the defendant shall be restrained from dealing with, disposing of or diminishing the value of his

shares in OFA or any assets held in the name of OFA until 7 working days thereafter, or further order of this Court. I also grant liberty to apply.

53. Further, in order to bring the Summons to a hearing, I also give directions, in accordance with the evidential timetable sought by the parties, which was to seek 28 days each, starting from the date of the hearing on 17 April 2020. Leave is granted to the defendant to file and serve his affirmation(s) in opposition to the Summons by 4:30pm on 15 May 2020, and to the plaintiffs to file their affirmation(s) in reply (if any) by 4:30pm on 12 June 2020. No further affidavit or affirmation may be filed or served without leave. The Summons dated 22 January 2020 will be fixed for substantive hearing with three hours reserved, at 10am on 26 June 2020, which I am told is convenient for both sides.

Costs

54. I reserve all questions of costs to the hearing of the Summons.

(Russell Coleman)
Judge of the Court of First Instance
High Court

Mr Steven Kwan and Ms Charlotte Chan, instructed by Payne Clermont Velasco, for the plaintiffs

Mr William Wong SC, instructed by Wong Wan & Partners, for the defendant