

# Civil Justice Reform: Freezing Injunctions in aid of Foreign Proceedings

## Introduction

As part of Hong Kong's Civil Justice Reform that commenced on 2 April 2009, parties in foreign proceedings became able for the first time to obtain interim freezing or "Mareva" injunctions in Hong Kong in aid of intended or actual foreign proceedings, without otherwise having a substantive, underlying claim in Hong Kong.<sup>1</sup> An applicant can now freeze a party's Hong Kong assets in circumstances where there is a real risk of dissipation of those assets such that a judgment in favour of the applicant in the foreign Court would go unsatisfied. This article examines how the Hong Kong Courts have approached this reform and what implications it might have for you.

## Overview

Previously, the Court of First Instance (**CFI**) (or **the Court**) could not grant interim relief in support of substantive proceedings commenced outside of Hong Kong, absent a good cause of action justiciable in Hong Kong (for example, a breach of contract or negligence claim which could be brought in Hong Kong).<sup>2</sup>

Now, the Court can grant interim relief – including Mareva injunctions restraining a party from removing from Hong Kong, or otherwise dealing with, its assets located within Hong Kong – in respect of proceedings which:

1. have been or are to be commenced in a place outside of Hong Kong; and
2. are capable of giving rise to a judgment which may be enforced in Hong Kong under any ordinance or at common law.<sup>3</sup> (Judgments of certain countries can be enforced in Hong Kong pursuant to a statutory regime.<sup>4</sup> Otherwise foreign judgments may only be enforceable in Hong Kong at common law. In both cases, the judgment must be, amongst other things, final and for a monetary sum.)

## Key Issues

### The Court's approach to the reform

### Implications

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<sup>1</sup> Sections 21M and 21 N of the *High Court Ordinance (Cap 4)* and Order 11 Rule 1(1)(oc) and Order 29 Rules 1 and 8A of the *Rules of the High Court (Cap 4A)*. Note also that Hong Kong courts now have the power to grant interim relief in foreign arbitration proceedings in circumstances where those proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong: Section 45 Arbitration Ordinance (Cap 609).

<sup>2</sup> *Mercedes-Benz AG v Leiduck* [1996] 1 AC 284 (Privy Council (PC), affirming a decision of Hong Kong's Court of Appeal in *Mercedes-Benz AG v Leiduck* [1995] 1 HKC 338, such appeals as were then available from HK to the PC).

<sup>3</sup> Sections 21M(1)(a) and (b), 21M(7), 21L(3) of the High Court Ordinance; *Prema Birkdale Horticulture (Macau) Ltd v Venetian Orient Ltd* [2009] 5 HKC 485 at paragraphs [4] and [5].

<sup>4</sup> *Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)*; *Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A)*.

### The Court's approach to the reform

The issue of whether the foreign proceedings are capable of giving rise to a judgment which may be enforced in Hong Kong was examined by the CFI in *HM Revenue & Customs v Shahdadpuri*,<sup>5</sup> and more recently by the Court of Appeal (CA) on the appeal of that decision.<sup>6</sup> At first instance and on appeal, the respondent unsuccessfully sought to discharge a *Mareva* injunction which had been granted over his assets up to the value of £40 million in Hong Kong, in aid of proceedings commenced in England.

The English proceedings had been brought by Her Majesty's Revenue & Customs (HMRC) against, amongst others, the respondent, in respect of an alleged conspiracy to defraud HMRC of approximately £40 million. The fraud operated by way of creating fictitious sale and purchase transactions in order to cause HMRC to pay-out sums of money representing Value Added Tax rebates to the alleged fraudsters.

The respondent sought to strike out the Hong Kong action on the basis that any judgment arising from the English proceedings could not be enforced in Hong Kong because the Hong Kong Courts lacked jurisdiction to entertain an action for the enforcement of foreign revenue laws.

Both the CFI and the CA rejected this argument, finding that the English proceedings were not proceedings to recover a genuine tax liability but rather to recover funds defrauded from HMRC and thus the enforcement of any English judgment in Hong Kong would not constitute the enforcement of a foreign revenue law.

Otherwise, the Court must still abide by the general principles governing the grant of interim injunctions.<sup>7</sup> Specifically, the applicant must show that:

1. it has a good arguable case against the respondent in respect of the substantive foreign claim;
2. the respondent has assets within Hong Kong;
3. the refusal of *Mareva* relief would involve a real risk of dissipation of the respondent's assets in such a way that a judgment in favour of the applicant in the foreign Court would go unsatisfied; and
4. it is "just and convenient" to grant the injunctive relief; this requirement is otherwise subsumed within the general rubric of the "balance of convenience".

The Court re-affirmed the application of these general principles in *Honor Resources (International) Co Ltd v Savvy Resources Ltd*,<sup>8</sup> which involved a damages claim for breach of a contract for the sale and purchase of iron products. The Court found that it had jurisdiction, pursuant to the reforms, to make a *Mareva* injunction whilst Hong Kong proceedings were stayed in favour of foreign proceedings. In granting the *Mareva* injunction, the Court held that a factor in deciding whether there is a risk of dissipation includes the existence of good arguable grounds to say that the respondent has acted dishonestly or with an unacceptably low standard of commercial morality.

The CA emphasized in *Deiulemar Shipping SpA v Transfield ER Futures Ltd* (in which it refused relief)<sup>9</sup> that the remedy - which puts the other party at a very real disadvantage - should not be taken for granted. The Courts will carefully and critically scrutinize the material placed before it in arriving at any decision to grant such significant relief.

### Implications

The Hong Kong Courts appear willing to exercise their new found jurisdiction to grant *Mareva* injunctions in aid of foreign proceedings, in the appropriate circumstances.

In deciding whether to commence proceedings outside of Hong Kong against a defendant with Hong Kong assets, and where there is a risk that those Hong Kong assets will be dissipated, consider seeking a *Mareva* injunction. This will

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<sup>5</sup> [2010] 5 HKLRD 690.

<sup>6</sup> [2011] 5 HKC 53.

<sup>7</sup> *Prema Birkdale* (*supra*) at paragraph [8].

<sup>8</sup> [2010] HKEC 445.

<sup>9</sup> [2011] 1 HKLRD 75.

ensure that any judgment you might obtain in the foreign jurisdiction will not be a "hollow victory" and there will be assets available internationally against which to enforce the judgment.

A *Mareva* injunction will usually also require the respondent to disclose on affidavit, a list of its other assets in Hong Kong; which is a useful mechanism for "flushing out" any otherwise unknown local assets of the respondent. \

A note of caution that only the judgments of a relatively few countries can be enforced in Hong Kong pursuant to the statutory reciprocal enforcement regime and otherwise foreign judgments (including those of the UK and USA) can only be enforced through the more complicated and time consuming common law route. This should be factored into any decision to seek a *Mareva* injunction and any subsequent enforcement proceedings.

For banks, often the Court order granting the *Mareva* injunction will be served by the applicant on third party financial institutions which may hold the respondent's assets. The orders are usually framed very widely: prohibiting the respondent from removing from Hong Kong, or otherwise disposing or dealing with, any of its Hong Kong assets up to a certain value, generally specifying certain numbered bank accounts, and prohibiting third parties notified of the order from assisting or permitting the respondent to breach the order.

On being served with a *Mareva* injunction, you should consider the terms of the order closely and take steps to freeze any identifiable assets of the respondent.

Although, contractually, a bank would not require a provision in its account terms and conditions allowing it to freeze a customer's account pursuant to a Court order (and can act on the Court order alone), the bank might wish to consider including such a provision as a practical matter, in order to give it something else to rely upon when a customer queries when its funds are frozen.

## Conclusion

The reforms to the Court's power to grant interim injunctions over assets in Hong Kong in aid of foreign proceedings, appear to have been taken up by litigants and implemented by the Courts. Such injunctions offer parties a very useful means of obtaining interim relief by freezing local assets to meet any foreign judgment, where there is otherwise no underlying claim in Hong Kong.

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