

HONG KONG / JUDGMENT

A AND ANOTHER v. C

COURT

Court of First Instance

DECIDED

6 July 2007

CASE / FILE NUMBER

HCMP2261/2006

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bjbj HCMP 2261/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO 2261 OF 2006

IN THE MATTER of a NORWICH PHARMACAL ORDER and IN THE MATTER of section 21L of the
High Court Ordinance

BETWEEN A 1st and 2nd Interveners B (Applicants) and C Respondent

Before: Hon A Cheung J in Chambers (Not open to the public) Date of Hearing: 6 July 2007 Date of
Judgment: 6 July 2007

J U D G M E N T

[This is an edited version of the oral judgment given in Chambers, not open to the public, on 6 July 2007 leave to publish this edited version has been given] This is an ex parte application by two applicants, ie the 1st and 2nd interveners in these proceedings (the applicants identified as and in the title of this judgment) for relief following a judgment given by Deputy High Court Judge Carlson several days ago to the effect that the original applicant in these proceedings has acted in breach of a Norwich Pharmacal order that has been granted by the learned judge previously. The breach concerns the supplying of information and documents obtained from the original respondent in these proceedings pursuant to the order to a third party, namely, the respondent in the present application (the respondent identified as in the title of this judgment). The information and documents concern the applicants. The applicants present complaint is that the respondent, a company incorporated in the UK, has published the relevant information and documents on a website maintained by the company. I have no information as to where the

website is run or maintained. Having considered the materials that have been placed before the Court and considered the authorities that Ms Ismail, acting on behalf of the applicants, has referred the Court to, including, in particular, *Distillers v Times* [1975] 1 QB 613 and *Riddick v Thames Board Mills* [1977] 1 QB 881, I am satisfied that a prima facie case for the grant of relief against the respondent's use or continued use of the disclosed information and documents has been made out. That is not only for the purpose of protecting the applicants' interest whose information and documents have been disclosed pursuant to the Norwich Pharmacal order for the specific purposes set out in the order, but also to protect the integrity of the court's process. The only complication in the present case is the fact that the respondent is a UK company with no presence in Hong Kong and apparently the website is maintained out of the jurisdiction. That brings into focus the jurisdictional questions of whether an inter partes summons for relief can be served on that non-party resident out of the jurisdiction and whether any ex parte relief can be granted in the meantime pending the hearing of the inter partes summons. It is in those circumstances that Order 11, rule 9(4) and (5) of the Rules of the High Court (Cap 4A) come into play. As has been pointed out by authorities both in the UK and in Hong Kong, those sub-rules form a code of their own. They govern the service of a summons out of the jurisdiction in existing proceedings on, inter alios, a non-party domiciled and resident outside the jurisdiction. There is no need, additionally, to bring the application within a limb of rule 1(1) of Order 11, Order 11 rule 1 being, of course, the rule governing the service of originating process out of the jurisdiction. In our jurisprudence, service and jurisdiction are intricately linked. I have considered the English case, *The Ikarian Reefer* [2001] 1 All ER 37 and the case of *Reyes J*, ie *Hong Kong Housing Authority v Hsin Yieh Architects & Associates Limited* [2005] 1 HKLRD 801 (upheld on appeal: [2006] 1 HKLRD 316 on another ground, decision of the Court of Appeal under appeal: FACV 4/2006), which follows the English case. In particular, I have considered the discussions by the courts on the (hypothetical) case of giving leave to serve a summons out of the jurisdiction on a foreign entity who is involved in conduct amounting to a contempt of court: *The Ikarian Reefer* at pp 44g to 45j and *Hong Kong Housing Authority* at p 811 (para 40). In that sort of situation, there is no doubt that it would be proper for the court to grant leave to serve the summons out of the jurisdiction on that non-party guilty of contempt. In the present case, I should immediately say that Ms Ismail has not put her clients case on the footing of contempt but I think she is right in submitting that the example of contempt discussed in the cases is nothing more than an example. I see no real difference between that example and the type of situations that I am faced with in the present case. Indeed if the respondent does not desist from making use of the disclosed information and documents on its website, it may well be committing a contempt, after it has been put on notice by the applicants' legal representatives of the court's order and the very specific purposes for which discovery has been ordered in the first place. Having borne in mind the authorities in question, I am convinced that a proper case for the granting of leave to serve a summons for relief on the respondent has been made out. Having overcome that hurdle, I think there can be no real objection to the Court granting an ex parte injunction against the respondent pending the hearing of the inter partes summons. The Court's jurisdiction does not present any problem once it has concluded that this is a proper case for the service of the summons out of the jurisdiction on the respondent. In fact, the matter can be tested this way. Suppose after giving

leave to serve the summons on the respondent (which is duly effected), on the return date the respondent does not appear, can the Court grant the relief sought in the inter partes summons against the respondent in its absence? The answer would seem to me to be obvious. The Court must have the jurisdiction to grant the relief sought against the respondent even though the respondent does not appear. The simple reason is that the summons has been properly served on the respondent pursuant to the leave granted. That being the case, I see no reason why in order to do what is just or convenient as the Court is specifically empowered to do under section 21L of the High Court Ordinance (Cap 4), it cannot grant an ex parte injunction in the meantime pending the hearing of the inter partes summons. Turning to the order that is being sought, I am persuaded that the order sought is properly based on the materials that have been placed before the Court. The order contains a gagging order. I am satisfied on the very peculiar circumstances of the present case that such a gagging order is appropriate. See A v B [2002] 3 HKLRD 111. The order sought contains a mandatory part. I am, of course, aware of the stringent approach adopted by the court towards the grant of interlocutory mandatory injunction. This is particularly so when the interlocutory mandatory injunction is sought on an ex parte basis. But, again, on the very peculiar circumstances of the present case, having balanced all the relevant considerations, I am of the view that such an ex parte mandatory injunction should be granted. The applicants have, through counsel, offered the usual undertaking as to damages and I have been told that, in fact, they do have assets in Hong Kong available to satisfy any order as to damages in case the undertaking as to damages should be invoked. Although the assets are presently subject to a Mareva injunction, I have also been told that, thus far, there is no proprietary claim to the assets. So for all those reasons, I am prepared to make an order in terms of the draft order subject to some amendments. (Andrew Cheung) Judge of the Court of First Instance High Court Ms Roxanne Ismail instructed by Messrs Laracy Gall, for the applicants

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