

HONG KONG / JUDGMENT

KENSINGTON INTERNATIAL LTD v. ICS SECRETARIES LTD

COURT

Court of First Instance

DECIDED

8 August 2007

CASE / FILE NUMBER

HCMP2261/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

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 the High Court Ordinance and IN THE MATTER of an application for a
Norwich Pharmacal order

BETWEEN KENSINGTON INTERNATIAL LIMITED Applicant and ICS SECRETARIES LIMITED
Respondent and LONG BEACH LIMITED 1st Intervener DENIS CHRISTEL SASSOU-NGUESSO 2nd
Intervener E. INVESTMENTS LIMITED 3rd Intervener BLAISE ELENGA 4th Intervener

HCMP 2696/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 2696 OF 2006

IN THE MATTER of the High Court Ordinance and IN THE MATTER of an application for a
Norwich Pharmacal order

BETWEEN KENSINGTON INTERNATIONAL LIMITED Applicant and ICS SECRETARIES LIMITED
Respondent and LONG BEACH LIMITED 1st Intervener COTRADE ASIA LIMITED 2nd Intervener
HEMISPHERE VENTURES LIMITED 3rd Intervener E. INVESTMENTS LIMITED 4th Intervener
(formerly known as ELENGA INVESTMENTS LIMITED) PAN AFRICA CONSULTANCY LIMITED
5th Intervener JEAN-YVES OLLIVIER 6th Intervener DENIS CHRISTEL SASSOU-NGUESSO 7th
Intervener BLAISE ELENGA 8th Intervener

(Heard Together) Before: Deputy High Court Judge Carlson in Chambers (Not open to public)
Date of Hearing: 27 July 2007 Date of Judgment (Handed Down): 8th August 2007

J U D G M E N T

Introduction

In a judgment dated 30 June this year, I found the Applicant to be in breach of my order dated 2 November 2006 (as varied on 16 November) (the NP Order) giving it Norwich Pharmacal orders against the Respondent, by passing on to Globalwitness a commercial website much of the disclosure made to it by the Respondent under the NP Order. This material includes bank and credit card statements of the son of the President of the Congo, Mr Denis Sassou-Nguesso and other highly confidential information pertaining to the other interveners in these proceedings. As a result of this material coming into the possession of Globalwitness which has published a lot of it on the internet, other media organisations have also obtained this information and published and commented on it in articles appearing in print and on the internet. The nature of some of this confidential material is sensitive and embarrassing for the interveners. The Respondent is also highly aggrieved because it says that its reputation as a company providing company secretarial services to its clients has been adversely affected. It may be thought, quite erroneously, that it has somehow been a party to the leaking of information and that its ability to keep confidential information private is in doubt or, that it is somehow party to its clients alleged assistance to the Congo government's efforts to avoid payment of the various judgments against it which are the subject of the NP Order. My judgment of 30 June relates the basis of my finding that the Applicant has breached the terms of the NP Order. The affidavits in support of the summonses to restrain further leaks and publication set out precisely what has been passed on by it to Globalwitness. Mr Hunsworth, who has appeared for the Applicant in all of the substantive hearings leading to the making of the NP Order has very frankly admitted that the information and material that has been passed on to Globalwitness has been quite deliberate for the purpose of putting pressure, by publication of this embarrassing information, on the Congo and its allies in this matter in order to satisfy the London judgments that have been obtained against it. The nature of the breach of the NP Order has therefore been a deliberate one but it must be emphasised that it has also been a considered one. Mr Hunsworth has already made his submissions prior to my judgment of 30 June as to why the Applicant was entitled to put the disclosed material into the public arena by passing it on to Globalwitness. He has told me that the Applicant had received carefully thought out legal advice, presumably from his firm, that they were entitled in law to pass the information onto Globalwitness. In this regard this advice was supported by a judgment of Langley J, a judge of the Commercial Court in London, in the related litigation going on in London that the material disclosed in Norwich Pharmacal proceedings in London could be made use of in other related proceedings in the United States. The basis of

Langley J's decision to permit its use in this way was that the information had all been read to or by the court in London or referred to at previous public hearings. The new English Civil Procedure Rules 31.22(1) and (2) provide that the general limitation on the use of information obtained from disclosed documents did not apply in those circumstances. It is right to say that Mr Hunsworth had relied on this judgment at the hearings before me at the end of June in support of his contention that there had been no breach of the NP Order by the disclosure of this information to Globalwitness. It is fair to say that he now considers himself further fortified, and indeed justified by a judgment dated 26 July of Burnton J, a judge of the Queen's Bench Division, who, whilst not commenting on the correctness of my judgment of 30 June, considered that the matters raised in my judgment would have been decided differently by the English court. Burnton J had before him in application to enjoin Globalwitness from further publication of the disclosed material and to remove it from its website. He declined to do so on grounds which include the reasons put forward by Mr Hunsworth as justification for the passing on of the information by the Applicant to Globalwitness under the NP Order. Mr Hunsworth immediately accepts, as he must, that subject to any appeal from my order, the Applicant has been found to be in breach of it and that his clients must now face the consequences of that breach. His submissions therefore can aptly be described as mitigation. What his response amounts to is this. The decision to release the information to Globalwitness was done following carefully considered legal advice which has turned out to be mistaken. The nature of the advice was based on a view of the law that reflected the law in England and the relevant provisions of its CPR which are, for all intents and purposes, identically worded to the equivalent Hong Kong rule being O.24 r.14A of the RHC. The advice, although he has no instructions to disclose it, would appear to have been supported by the judgment of Langley J to which I have already referred and amply confirmed by Burnton J's judgment of 26 July. Mr Hunsworth submits that solicitors will regularly advise their clients based on English law unless the law in Hong Kong differs either as a result of statutory differences or as a result of Hong Kong case law. Mr Hunsworth submits that this is what has happened here. The only difference is that by my judgment of 30 June, I have found Hong Kong law on this aspect to apparently differ from the position in England. This therefore has been an honest mistake following proper and considered legal advice. In such circumstances he submits that I should not adopt the draconian course that the Respondent and the Interveners are contending for which is to dismiss these Norwich Pharmacal proceedings and presumably to decline to entertain any fresh Norwich Pharmacal applications that may be instituted. Mr Hunsworth says that his clients apologize for their mistake they will not repeat it in future and all that I should do is to penalise them in costs. What are the Court's Powers? The effect of my judgment of 30 June is that what the Applicants have done is abusive of the process of the court. I have been referred to a most instructive article by I H Jacob on this area of the law which has stood the test of time it was written over 35 years ago but, in my judgment, remains a good analysis of the law. I am able to visit such abusive conduct under the court's inherent jurisdiction to regulate its own processes or under the rules of court. It must be clear that the course to be taken by the court in such circumstances will vary from the very draconian, which is to dismiss the proceedings, to making no order at all save perhaps as to costs, which is what Mr Hunsworth has urged. How Serious is This Breach? I must be loyal, right or wrong, to my own judgment.

Plainly, the two English judgments referred to by me, in the parallel proceedings in England, are to the opposite effect. Mr Hunsworth takes great comfort from them as part of his mitigation. Nevertheless, I am satisfied that it really was most unwise, if anything high-handed is the better way of expressing it, of the Applicant to have acted in the way that it did by deliberately passing on the disclosed documents without first applying to the court for leave to do so. Whilst it is easy enough to say that the matter was clear because the documents had already been referred to or read to or by the court, thereby putting them into the public domain under the relevant part of Order 24, the fact is that there is no reported case in Hong Kong where 3rd party disclosure of this kind has taken place in Norwich Pharmacal proceedings. It is the case that in the matter before Langley J, an application had been made to him to allow disclosed material to be used in other proceedings in the United States. It strikes me that this is a very bad breach of its type which will need to be dealt with accordingly. The fact is that the Applicant has for the past few years been using a number of means to obtain payment under these judgments. Most significantly it has, quite properly, resorted to the courts of a number of jurisdictions. In the United States it has also employed political lobbying in an attempt to involve agencies of the United States government. None of these methods have, as yet, been successful. It has now embarked on attempting to embarrass the Congo government and its alleged allies through these publications. In respect of the publications by Globalwitness that I have had drawn to my attention, publication itself was embargoed until the final day for compliance by the Respondent under the NP Order, in that way ensuring that no application could be made to stay the NP Order and frustrate publication of what had been disclosed by the Respondent. This was, as is accepted, a deliberate well judged tactic to produce maximum effect and embarrassment. Whilst the Respondent and the Interveners may be aggrieved and angered by these publications and the prejudice caused to them must sound in the court's sanctions, the court itself sitting in judgment is also entitled to have regard to the effect on its reputation as a result of the abuse of its process. This too must now sound in the way that I dispose of this matter. Norwich Pharmacal proceedings, of their very nature are exceptional. They may result in orders being made against innocent 3rd parties who are in no way involved with any contemplated action by an applicant and whose confidential and sensitive documents may come into the hands of an applicant for a Norwich Pharmacal order. Equally orders may be made in respect of documents which relate to companies and individuals that have a direct involvement in the main dispute and any contemplated action which the applicant wishes to bring. This is the case here. Nevertheless, the nature of the jurisdiction, where the court is acting at the margins of its powers, as it does in Anton Pillar and Mareva proceedings for example, requires the court to be astute to ensure that it controls the use to which such information is put. It seems to me that the court must have the last and only say in whether disclosed information can be used for purposes outside the avowed purpose for which the orders have been applied for and obtained. It may seem a harsh thing to say of Mr Hunsworth, a practitioner of the highest reputation and probity, but what appears to have happened is that having come to the view that once a document had been referred to or read in court the embargo on disclosure would be lifted, he has ensured that the most embarrassing and therefore damaging documents were referred to during the contested hearing for the second Norwich Pharmacal order which I made consequent to my judgment of 31 May.

That was perfectly unobjectionable if he wished to engineer a situation where on his view of the law the applicant would be entitled to disseminate the documents as it has done. What is lamentable is the fact that having obtained both Norwich Pharmacal orders, the Applicant did not come to court for leave to use these documents in this way. This would have given the Respondent and the Interveners an opportunity to state their objections and for the court to rule on the application, as happened before Langley J. It seems to me that given the absence of precedent in Hong Kong on this type of 3rd party disclosure in Norwich Pharmacal proceedings and, so far as I can determine in England as well prior to the judgment of Langley J in which leave had been asked for from him, the only reasonable and prudent course for the Applicant to have taken was to come before me to ask for leave. It did not it decided to shoot first and ask questions later. In the circumstances, it has, in my judgment, played fast and loose with the court's orders. This cannot be tolerated. It strikes me that conduct of this type tends to diminish the standing of the court it may have the effect of adversely affecting its reputation because it may be seen, both domestically and overseas, from where so many commercial litigants come before our courts, that the court is not to be trusted to ensure that sensitive disclosed information is not adequately protected from unauthorised publication.

Orders

Any such impression should be disabused by an appropriately severe sanction. I have decided that this breach should be visited by a very strong order. I will direct that these Norwich Pharmacal proceedings should be dismissed. The Respondent will not therefore be required to comply with my order of 31 May. Any lesser sanction would not adequately reflect the abuse of the court's process by this disclosure. I will also direct that as between these parties the Applicant will now be prohibited from making any fresh Norwich Pharmacal application. The order for costs, which will inevitably be to the Respondent and the Interveners, must be taxed on an indemnity basis. This order for costs will be an order nisi in the usual way. Whilst the remarks that I am about to make do not reflect any doubt on my part as to the correctness of my judgment of 30 June, nor of these orders, it seems to me that it would be extremely useful if these orders were to go on appeal so as to obtain from an appellate court a judgment as to whether disclosure of this sort is permissible in Hong Kong where the documents have been read by or to the court or in other way referred to the court. Given the importance of this judgment and that of the 30th June I propose to allow publication of both unless within 14 days I receive objections to the contrary by any of the parties following which I will decide whether publication should still be made. (Ian Carlson) Deputy High Court Judge Nicholas Hunsworth, of Messrs Johnson, Stokes & Master, for the Applicant Roger Beresford, instructed by Messrs Robertsons, for the Respondent Simon Westbrook SC and Roxanne Ismail, instructed by Messrs Laracy Gall, for the 1st, 2nd, 3rd and 7th Interveners Nicholas Cooney, instructed by Messrs Tanner De Witt, for the 4th and 8th Interveners Andrew Sheppard, instructed by Messrs Kennedys, for the 5th and 6th Interveners No search, inspection or publication without the leave of the court PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk Carlson-HCMP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc

Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=58269

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/kensington-international-ltd-v-ics-secretaries-ltd-2007>

Prepared on 29 October 2026 · Esheria