

HONG KONG / JUDGMENT

NINH DIEP v. LUIGI FERRINI

COURT

District Court

DECIDED

27 July 2007

CASE / FILE NUMBER

DCPI1152/2006

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bjbj DCPI 1152/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION PERSONAL INJURIES ACTION NO. 1152 OF 2006

BETWEEN NINH DIEP (alias) NEAN DIEP Plaintiff and LUIGI FERRINI Defendant

Coram: His Honour Judge Thomas Au in Chambers (open to public) Date of Hearing: 17, 19 July
2007 Date of Delivering Brief Reasons for Decision: 19 July 2007 Date of Handing Down Reasons
for Decision: 27 July 2007

REASONS FOR DECISION

This is the Defendant's application to set aside the prohibition order (the Prohibition Order)
granted against him on 8 June 2007 on an ex parte basis. Alternatively, the Defendant applies to
discharge the Prohibition Order under Order 44A, Rule 4, on the basis that he has a substantial
defence. At the same time, the Plaintiff applies to renew the Prohibition Order for another
month. The renewal application is also before me. Obviously the Defendant opposes the
application.

Background

Before I proceed to deal with the parties submissions on these applications, it is necessary for me
to set out some of the essential background matters relating to the application for the Prohibition
Order. On 6 December 2005, the Plaintiff and the Defendant were playing against each other with
their respective teams in a five-a-side football match. It is the Plaintiff's case that during the
match there were a few incidences where the Plaintiff and the Defendant were engaged in some
heated tackles. Towards the end of the match, it is also the Plaintiff's case that he was forcefully
kicked at his left thigh from behind by the Defendant, which broke the Plaintiff's left femur. In

July 2006, the Plaintiff brought the present action against the Defendant claiming damages in the sum of HK\$339,204 for his injury. The Defendant filed a defence on 20 November 2006, denying effectively that he kicked the Plaintiff's thigh or any breach of duty as claimed. He also prays in aid the defence of *volenti non fit injuria*. The Plaintiff is a Chilean national and has been working in Hong Kong for a multinational shipping company, Norasia Container Lines Limited (Norasia) as Vice President. He came to Hong Kong in 2000 and has since been living here with his wife and children. It is common ground that on 4 May 2007 there was a without prejudice meeting between the Plaintiff and the Defendant discussing the possibility of a settlement. It is the Plaintiff's case that during this meeting, the Defendant said to the Plaintiff that he (meaning the Defendant) had already applied to his employer for overseas transfer. I will call this the 1st Statement. The Defendant also said he had been in Hong Kong for too many years and that the cost of living was getting too high in Hong Kong. I will call this the 2nd Statement. Five weeks after this without prejudice meeting, the Plaintiff made an *ex parte* application for a prohibition order under Order 44A, Rule 2, on the principal basis that the 1st and 2nd Statements showed that the Defendant was about to leave Hong Kong which would delay or obstruct the enforcement of a judgment. The application was coupled with the fact that there was no information as to the Defendant's assets and income in Hong Kong. As mentioned above, the Plaintiff successfully obtained the Prohibition Order. On 28 June 2007, the Defendant took out the present application seeking to set aside or discharge the Prohibition Order. The issues It is common ground that under O. 44A r2, the Plaintiff has to satisfy the following requirements before a prohibition order would be granted: There is a good cause of action; The person against whom the order is sought incurred the alleged liability, which is the subject of the claim, in Hong Kong while he was present in Hong Kong; or carries on business in Hong Kong; or is ordinarily resident in Hong Kong. That person is about to leave Hong Kong; and By reason of paragraph (3), any judgment that may be given against that person is likely to be obstructed or delayed. The Defendant contends that the Prohibition Order should be set aside as the Plaintiff has failed to satisfy requirements (1), (3) and (4) above whether at the *ex parte* stage or now. In particular, the Defendant argues that the 1st and 2nd Statements are privileged under the without prejudice rule and are thus not admissible as evidence. Alternatively, even if they are admissible, the Defendant says they do not constitute sufficient evidence to show that the Defendant is about to leave Hong Kong. Further, the Defendant contends that: Even if the Plaintiff were able to satisfy all the above requirements, he is in any event guilty of delay in making the *ex parte* application only 5 weeks after hearing the 1st and 2nd Statements and/or material non disclosure, which should disentitle them from the benefit of the Prohibition Order. Given the quantum of damages claimed by the Plaintiff, it is disproportionate to grant the Prohibition Order in any event. The evidence presently available shows that he has a substantial defence and thus the Court shall discharge the Prohibition Order as provided under O. 44A rule 4. The Plaintiff contends otherwise. In the premises, for the purpose of these applications before me, there are now seven main issues that call for my determination. They are namely: Whether the Plaintiff has established a good cause of action at the *ex parte* stage as well as now. Whether the 1st and 2nd Statements are admissible evidence at the *ex parte* stage or now for the purpose of showing that the Defendant is about to leave Hong Kong. Whether the 1st and 2nd Statements read together with the circumstances and

the other evidence support a case that the Defendant is about to leave Hong Kong which would obstruct or delay the enforcement of judgment, if any, by the Plaintiff against the Defendant. Whether in light of the circumstances of this case, including the quantum of damages claimed, it is disproportionate to grant the Prohibition Order whether at the ex parte stage or now. Whether there are material nondisclosure by the Plaintiff when he made his ex parte application and if so whether that should result in setting aside the Prohibition Order. Whether the delay of five weeks by the Plaintiff to make his application for the Prohibition Order should result in the setting aside of the Prohibition Order. Whether the Defendant has in any event shown a substantial defence so that the Prohibition Order must be discharged under Order 44A, Rule 4. My decision for these issues are as follows. Whether there is a good cause of action The Plaintiff relies on evidence coming from various persons and players who witnessed the incident causing his injury to show that the Defendant acted in such a way which is far below the conduct of what a reasonable player in such games would have acted, or that the Plaintiff could not reasonably be expected to have consented to in a contact sport like the present. See the test as expounded in *Pitcher v. Huddersfield* (unrep., Westlaw transcript, 17 July 2001, Hallett J), pp 13 to 15. The Defendant, however, submits that the evidence as adduced by the Plaintiff is contradictory as to what actually happened at the time of the injury, and do not clearly support the Plaintiff's case. The Plaintiff has thus, so argued by the Defendant, failed to show a good cause of action. We are now only at the preliminary and interlocutory stage of the proceedings. I have also reminded myself that I should not engage in conducting a mini-trial on the affidavit evidence. In light of the evidence provided by the Plaintiff, suffice for me to say that I am satisfied that the Plaintiff has shown a good cause of action for the purpose of applying for the Prohibition Order. Whether the 1st and 2nd Statements are admissible evidence The Plaintiff submits that these statements, although made in the course of a without prejudice meeting, are admissible as evidence because they do not relate or amount to any admission of liability or on the merits of the dispute. They are thus, the plaintiff submits, not protected by the general without prejudice rule which, as a matter of public policy, only covers admission statements. The Plaintiff relies principally on the decision of Aldous LJ in *Dora & Simper* [2000] 2 BCLC 561, which suggests that, an alleged threat, which was the subject of the issue in that case, made in the course of a without prejudice meeting did not constitute part of the negotiations and thus fell outside the cover of the privilege as it was not capable of being treated as admission. On the other hand, Mr Toms for the Defendant submits that subject to some established or clear exceptions, the scope of the without prejudice rule should be interpreted widely and to cover anything said or uttered in a without prejudice negotiation, without any distinction as to whether they amount to an admission of liability or not. He cites in support of the decision of Robert Walker LJ in *Unilever & Proctor & Gamble* [2000] 1 WLR 2436 at 2448H 2449B. The learned Lord Justice says this, after reviewing the authorities: Without prejudice: conclusion In those circumstances I consider that this court should, in determining this appeal, gave effect to the principle stated in the modern cases, especially *Cutts v Head*, *Rush & Tompkins Ltd v Greater London Council* and *Muller v Linsley & Mortimer*. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admission against interest is the most important

practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of the without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: to speak freely about all issues in the litigation both factual and legal when seeking compromise, for the purpose of establishing a basis of compromise, admitting certain facts. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders. For my part, I prefer the analysis of Robert Walker LJ in *Unilever* to that of Aldous LJ in *Dora*. It appears to me that Robert Parker LJ's interpretation falls more in line with the underlying spirit of the public policy in the without prejudice rule, which is to facilitate the parties to talk freely in a negotiation for settlement without any fear, subject to the exceptions such as blackmail and unambiguous impropriety where there would be a cloak of justice if the rule is allowed to apply. I am comforted to note that (as Mr Toms has drawn my attention to) the learned editors of *Phipson on Evidence* (16th Edition) have come to the same view at paras 24-37 and 24-38. In the premises, I have come to the view that the 1st and 2nd Statements, being statements made in the course of a without prejudice meeting, are covered by the privilege and not admissible as evidence in support of the Plaintiff's application for a prohibition order unless it could be shown that the exceptions apply. Mr Laracy for the Plaintiff further submits that the making of the 1st and 2nd Statements by the Defendant in the without prejudice meeting amounts to an unambiguous impropriety as they were used solely as a threat to force the Plaintiff to settle. I do not agree. In making the statements, it is equally open to the interpretation that the Defendant was only indicating to the Plaintiff that he wanted to have the matter resolved as soon as possible by way of a settlement instead of engaging in a dragged on litigation. As observed by Robert Walker LJ in *Unilever* at 2444A-B, it is not unusual for parties engaged in a without prejudice settlement to make references to future plans and possibilities. I therefore have also come to the conclusion that the 1st and 2nd Statements do not fall within any of the exceptions to the without prejudice rule. Other than denying that he had in fact made the 1st and 2nd Statements, the Defendant's supporting affirmation to set aside the Prohibition Order also deposes to what he says to have said at the meeting, which are effectively these: (a) that he had been in Hong Kong for seven years and that due to the changes in both the economy and his present situation, he believed Hong Kong was no longer quite as profitable an employment posting as previously, (b) as a result, firstly, he did not plan to stay in Hong Kong forever, and secondly, whatever judgment (if any) the Plaintiff might obtain, he would not necessarily be able to pay it because he did not have unlimited resources. It is argued before me by the Plaintiff (upon my invitation), that the Defendant's own disposition as to what was said in the without prejudice meeting amounts to a waiver of privilege and thus the Plaintiff is now at liberty to use the 1st and 2nd Statements as evidence. I do not agree. A waiver of privilege has to be made unequivocally. I do not regard the fact that the Defendant has disclosed for the present purpose what he says to have said at the meeting amounts to an unequivocal waiver. It is so because firstly, the Defendant mounts his forefront challenge to the ground of the Prohibition Order on the basis that the 1st and 2nd Statements are not admissible under the without prejudice rule. This sits inconsistently with any

suggestion that the Defendant is waiving the privilege. Secondly, he is disclosing what is allegedly said in the meeting in response to the Plaintiff's allegations. He needs it in case he fails in his forefront challenge. Looking at the matter as such, the fact that he now discloses what he believes to have said at the meeting cannot be regarded as an unequivocal waiver of the privilege. For the above reasons, I conclude that the 1st and 2nd Statements are not admissible as evidence to support the Plaintiff's application for the Prohibition Order. On this ground alone, I would allow the Defendant's application to set aside the Prohibition Order. However, given that the other issues have been fully argued before me and in case I am wrong above, I will now go on to set out my views and ruling on the other issues. Whether the evidence is sufficient to show that the Defendant is about to leave Hong Kong It is fairly accepted by the Plaintiff that in order to satisfy the requirement that the Defendant is about to leave Hong Kong, there should be evidence to show that the Defendant's departure should be imminent, although not necessarily permanent. See also: Hong Kong Civil Procedure 2007, para 44A/2/5. In my view, the 1st and 2nd Statements, even admitted, do not constitute sufficient evidence to show that on a balance of probabilities the Defendant was about to leave Hong Kong on an imminent basis. Fairly read, these statements could equally and reasonably be interpreted to mean that, all that the Defendant was indicating was that he might leave Hong Kong some time in the foreseeable future but the timing and plan were not yet ascertained. I do not think the facts that Defendant is a foreign national and that he worked for a multinational firm add anything to that. Those may make it more likely that he would not stay in Hong Kong permanently, but they do not per se add any immediacy of the Defendant's departure, if any. For the above reasons, I conclude also that the 1st and 2nd Statements, even if admitted as evidence, do not show, on a balance of probabilities, that the Defendant is to leave Hong Kong imminently. In the premises, I would also set aside the Prohibition Order on this basis. I should also mention that, in determining this question, I have not put any weight to the letter dated 27 June 2007 written under the letterhead of Norasia and signed by someone as Camilla for and on behalf of Norasia, which states effectively that there are at present no firm arrangements to relocate the Defendant overseas. Given that the letter was drafted in rather vague terms and that there is no indication as to who this Camilla is within Norasia, I do not find it appropriate to put any weight to this piece of evidence. Whether it is proportionate to grant the Prohibition Order Had I found that the 1st and 2nd Statements were admissible evidence and that they constituted sufficient evidence to show that the Defendant was to leave Hong Kong imminently, I would have come to the view that the granting of the Prohibition Order is not disproportionate as submitted by the Defendant. The rules on the granting of the prohibition order and the relief are precisely there to prevent a defendant from leaving Hong Kong to obstruct the enforcement of a judgment. However, the defendant has a way to avoid being fixed with a prohibition order even if the plaintiff can satisfy the requirements for granting it: the defendant could always put up the necessary security for the claimed sum. In the present case, it is the Defendant's own submission that the quantum of the claimed damages is not of a significant sum (and hence the disproportionality as argued). As such, the Defendant could always put up security to the extent of the damages to have the Prohibition Order removed. There is no evidence that such a condition, if imposed, would cause any hardship on the Defendant. In the circumstances, I see no disproportionality in granting the

Prohibition Order had I come to the conclusion that one should be so granted. Whether there is material nondisclosure It is the Defendant s case that the Plaintiff s purported summary of the effect and contents of Mr Molina s (who was the captain of the Defendant s team at the time of the injury) email at paragraph 20 of his first Affirmation, and the purported summary of the Defence at paragraph 22 of his first Affirmation are simply incorrect and twisted so as to inflate the Plaintiff s claim to a good cause of action: The Defendant submits that the Plaintiff purports to give the Court the wrong impression by way of his summary that the Mr Molina s email supports the Plaintiff s case that the Defendant kicked the Plaintiff s thigh with intention and in retaliation. The Defendant also says it is incorrect for the Plaintiff to purportedly summarise the Defence to say that the Defendant does not deny colliding with the Plaintiff. Mr Toms says these amount to material non disclosure and misleading the Court on the part of the Plaintiff. However, properly read, I do not see any practical incorrectness or twisting in the Plaintiff s respective summary of Mr Molina s email and the Defence. It is important to note that it was specifically spelt out at paragraph 20 of the Plaintiff s first Affirmation that Mr Molina s email was made in defence of the Defendant. Further, it is also a correct reading of the Defence (as summarized by the Plaintiff in his affirmation) that the Defendant does not deny colliding with the Plaintiff. In the circumstances, I am not satisfied that the Plaintiff is guilty of any material nondisclosure as submitted by the Defendant. Delay There is no dispute that there is a five weeks delay between the time the Plaintiff heard about the 1st and 2nd Statements and the time he made the ex parte application for the Prohibition Order. However, the Plaintiff has not provided any evidence to explain for the delay. At the adjourned hearing of these applications, Mr Laracy seeks to explain the delay by setting out at paragraphs 13 and 14 of his supplementary skeleton (filed for the purpose of the adjourned hearing): a quote of the Law Society Circular No. 00-241 (PA) dated 14 August 2000 advising the members that it would be of assistance to the Immigration Department to include in an application for a prohibition order various personal information, such as date of birth and passport number, of the defendant or judgment debtor, a chronology on the Plaintiff s purported effort to obtain the Defendant s HKID details. Mr Laracy then submits that time had been spent by them to obtain from the Defendant s solicitors the Defendant s personal information. What have been set out in the skeleton and in oral submissions are not evidence. I therefore do not accept these as providing any explanation to the delay. Moreover, even if I accepted what are now set out at paragraphs 13 and 14 of the Plaintiff s supplementary skeleton, I still do not regard them as offering a reasonable explanation for the delay. First, there is still no explanation for the three weeks delay between 4 May and 25 May when the Plaintiff purportedly repeated his earlier request for information from the Defendant s solicitors. Secondly, if the Plaintiff seriously believed that the Defendant was to leave Hong Kong imminently, I do not find it reasonable for him to wait for four weeks solely to wait for the collection of personal information of the Defendant, something which is not even required by the rules but are only suggested by the Law Society by way of a circular. In the circumstances, I conclude that the Plaintiff is guilty of an inexcusable delay in making this application. On this ground alone, I would also have discharged the Prohibition Order and would not have re granted it, since such unexplained delay amounts to an abuse. See: *So Po Tong v Richard & Patterson* (unrecorded, 9 October 1987, HCA 6993/1987), para 4 per Godfrey J (as he then was). Substantial defence Both parties submit that

there seems to be no authorities to suggest what is the proper test for a substantial defence under O 44A rule 4. At my suggestion, Mr Laracy submits that I should adopt the test of a real prospect of success. He says given that the successful grant of a prohibition order requires the plaintiff to show a good cause of action, the Court should require the defendant to show a defence which bears a real prospect of success before it should be required to discharge the order mandatorily. Mr Toms on the other hand submits that I should adopt the test of a fair and reasonable defence. I do not find it necessary for me at this stage to rule on which test I should adopt, since I do not find that the evidence now appears before me provides the Defendant either a reasonable defence or a defence which has a real prospect of success. It is important to note that the Defendant has not provided any evidence to support his defence. I have already mentioned above that I am satisfied that the present evidence shows a good cause of action for the Plaintiff. For these reasons, I am not satisfied that the Defendant has shown a substantial defence. I therefore would not have discharged the Prohibition Order under O 44 r 4.

Conclusion

Given my above ruling, I will make an order that the Prohibition Order be set aside. It goes without saying that the Plaintiff's application to renew the Prohibition Order fails. That now leads to the question of costs. (Discussion re costs) I make an order that costs of and occasioned by the Defendant's summons dated 28 June 2007, including the costs incurred for perusing the Prohibition Order and the materials in support of its application be to the Defendant, to be taxed if not agreed and to be paid forthwith. I also make an order that the costs reserved under the ex parte order for the hearing on 8 June 2007 be made to be no order as to costs. (Thomas Au)

District Court Judge Mr Damien Laracy of Messrs Laracy Gall, for the Plaintiff Mr Jason Toms, of Messrs Stephenson Harwood & Lo, for the Defendant

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