

HONG KONG / JUDGMENT

T v. SHIU WAI TUEN

COURT

Court of First Instance

DECIDED

7 November 2007

CASE / FILE NUMBER

HCA2229/2007

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bjbj HCA 2229/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 2229 OF 2007

BETWEEN T Plaintiff and SHIU WAI TUEN Defendant

Before: Deputy High Court Judge Carlson in Chambers Date of Hearing: 2 November 2007 Date of
Judgment (Handed Down): 2 November 2007 Date of Reasons for Judgment: 7 November 2007

REASONS FOR JUDGMENT

Introduction

On 26 October last Wright J granted the Plaintiff a Mareva injunction ex parte. On the 2 November, I had before me the inter partes hearing to continue that injunction until the trial of the action or further order. The Defendant has resisted the application and by a summons of his own he has applied for a stay of the action until after the trial of a criminal prosecution brought against him arising out of the subject matter of these proceedings. Having heard the argument I continued the injunction as asked for, subject to some small variations which I will mention in a moment, and dismissed the Defendant's application for a stay. I told the parties that I would give my reasons for doing so in due course which I now do. The Nature of the Claim This can be stated very briefly. The Plaintiff certainly was, until these events, and I believe still is a lady of considerable means. The Defendant is a private investigator who she engaged to gather information for her about her boyfriend who she suspected was seeing another woman. This was in early 2005. By May or June 2005, she decided that she no longer wished the Defendant to pursue the investigation for her. She had paid him an initial fee of \$70,000 and thereafter \$400,000 in two instalments. Although these amounts were to cover a longer engagement of the Defendant

s professional services, she did not ask for a refund of some of these fees because she had terminated his professional services prematurely. Despite the fact that she no longer required his services as a private investigator the Defendant and she continued to see each other socially resulting in them developing a sexual relationship which they enjoyed at various hotels. Shortly after they began having sex, he asked her to lend him money to invest in a business venture. She has set out in considerable detail in her affirmation of 25 October how he persuaded her to lend him amounts totalling \$17,800,000. Her case is that the first three loans, which amounted to \$9,500,000, were made when she was infatuated with him as a result of which, it is submitted on her behalf, she was prepared to trust him. Her affirmation goes on to support a case that the remaining loans of \$8,300,000 were advanced to him on the basis of threats made by him that he would expose their sexual relationship to her boyfriend, a well-known businessman by whom she has two children, by sending him photographs and video recordings that he had secretly made whilst they were engaged in sexual activity. He had previously told her, when she had initially engaged him professionally, of his expertise in making such secret recordings. There is compelling evidence to suggest that the defendant has spent some of the money to purchase expensive motor cars for his use and on gambling. Based on this evidence, Wright J was persuaded to grant the ex parte injunction. The Defendant's Reply Wisely, in the circumstances, the Plaintiff reported what had happened to her to the police who have arrested and charged that the Defendant with inter alia offences of blackmail. He has appeared at the Magistrates Court and is bailed to appear there again in December. The police are currently taking advice as to which level of court the trial should take place. In his affirmation of 1 November, the Defendant has related how the relationship had developed between the two of them. He says that apart from having a sexual relationship he also, at her request, continued to investigate her boyfriend. These investigations continued until August 2007 as did their personal relationship. He says that he married his present wife in June 2007 and that this has made the Plaintiff jealous and caused her to report him to the police and bring these proceedings. As to the money paid over to him, he affirms that the first \$9,500,000 comprises three interest free loans with no fixed repayment date. These payments were from October 2005 to February 2006. The remaining \$8,500,000 comprises five interest free loans between June 2006 and August 2007, again with no fixed repayment date. He denies any of the threats. As to repayment his businesses have failed and he cannot repay. Because of the criminal prosecution, he has made the deliberate decision not to set out his case in detail in respect of the various allegations that she has made in her affirmation. He wishes to keep his power dry for the criminal trial. He does not want to show his hand to her nor to the prosecuting authorities until he needs to, presumably when his counsel comes to cross-examine her and any other relevant prosecution witnesses. It is this which underpins his summons for a stay which I must now turn to. Should the Action Be Stayed? Mr Alan Ng, for the Defendant, has relied on the Court of Appeal's decision in *Petroliam Nasional Berhad v George Tan* [1990] 1 HKLR 4 in which the judge at first instance had stayed civil proceedings to await the conclusion of the Defendant's criminal trial. That decision was affirmed by the Court of Appeal. In coming to their decision, the Justices of Appeal recognised that the principles governing the exercise of the court's discretion to take that step were those laid down by the English Court of Appeal in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898. The headnote to the report in that case sufficiently

reflects the position: Held, allowing the appeal and dismissing the cross-appeal, (1) that there was no principle of law that a plaintiff in a civil action was to be debarred from pursuing his action in accordance with the normal rules merely because so to do would or might result in the defendant, if he wished to defend the action, having to disclose his defence by taking some necessary procedural step, and so give an indication of what his defence was likely to be in contemporaneous criminal proceedings (post, pp.904H-905B). *Wonder Heat Pty. Ltd. v Bishop* [1960] V.R. 489 considered.

- (2) That the court controlling the proceedings in a civil action had a discretion under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 to stay the proceedings if it appeared to the court that justice between the parties so required having regard to concurrent criminal proceedings arising out of the same subject matter and taking into account the defendant right of silence in the criminal proceedings, but the right of silence did not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings as it gave in the criminal proceedings (post, p.904G-H). It is very plain that the exercise of the discretion is one which must turn on the facts of the particular case before the court. I do not think that it would be correct to impose a stay in this action, certainly not at this stage and certainly not in the circumstances of this particular application for an injunction where, if the Plaintiff is successful, she will at least preserve some assets of the Defendant which she can execute upon if she ultimately obtains judgment. It may be that later on in the action, the defendant may be able to argue more persuasively for a stay, for example when it comes to exchanging witnesses statements. But any application would have to be judged at the time having regard to a number of factors including the prospective timetable for the disposal of the criminal prosecution. If it was due to be heard shortly after the hearing of any future stay application then that factor would clearly sound heavily in the discretion favouring the imposition of a stay. At present both this action and the criminal prosecution have barely started. I need to balance the justice between the parties. At this stage it would not be right for a Defendant who is alleged to have obtained money unlawfully, as in this case, and who has been prosecuted to be able to put up his hands and say sorry you can't have an injunction preserving my assets because I am being prosecuted. Such a course could have the effect of piling injustice upon injustice on an allegedly innocent victim. What Mr Ng has pointed out is that because the Defendant is being prosecuted he has not felt able to set out his case on affirmation traversing the Plaintiff's account and that this means that he is unable to properly contest the application for the injunction. What he has done of course is to set out the nature of his case denying the intimidation and setting up a defence of interest free loans with no settled dates for repayment. For her part at this interlocutory stage, all the Plaintiff needs to show is that she has a good arguable case and that there is a real risk of dissipation of assets by the Defendant. He therefore only needs to respond to this more limited range of issues than he would in a witness statement which is to be used at trial where he would be obliged to set out his evidence in chief in its entirety. In defending an injunction of this sort addressing, relatively speaking, restricted issues any inroads into the Defendant's right silence are likely

to be more limited and these considerations need to be balanced against a refusal to grant an injunction which would otherwise be granted but for the stay asked for by a Defendant. It strikes me that in these current circumstances I ought to refuse the stay. As to the merits of the application for the injunction, on a contested inter partes basis, the Plaintiff must succeed. She has amply demonstrated by detailed affirmation a highly arguable case. As to the risk of dissipation two aspects in particular trouble me. Firstly, the Defendant has a penchant for gambling in Macau, as his bank statements amply demonstrate and secondly, having purchased expensive cars, he has already disposed of two of them in short order. It strikes me that faced with this sort of individual there is every prospect of the Plaintiff obtaining a hollow judgment if she were to succeed at the trial. In any event, as presently advised the Defendant s assets appear to be far below the level of \$17,800,000 that he has received from the Plaintiff. I therefore propose to continue Wright J s order until trial or further order subject to limited variations. I will increase the Defendant s living expenses to \$10,000 a month and allow for a ceiling of \$150,000 for his legal expenses. If need be this amount can be reviewed in future. His mortgage repayments are \$15,000 a month but I have seen no proper evidence of that. His solicitors should present that evidence to the Plaintiff s solicitors. Mr Lin has said that his client will not be difficult about this provided that is where the payment goes to. It may be that the parties can arrange for some mechanism that ensures that any extra \$15,000 a month released to the Defendant does in fact go to the mortgagees. If this cannot be agreed, the Defendant will need to apply for a variation of my order. Costs As to costs on the injunction, I will say Plaintiff s costs in the cause and on the dismissed application for a stay Plaintiff s costs in any event. These orders are agreed. The Identity of the Plaintiff Because this is a blackmail case and is currently proceeding as such in the Magistrates Court, I have already ordered that the Plaintiff should be referred to as Miss X during court hearings and that her name should not be published without leave of the court. I also direct that her name in future pleadings, orders and judgments should appear under the initial T. (Ian Carlson) Deputy High Court Judge Kenny Lin, instructed by of Messrs Sam Fu & Co., for the Plaintiff Alan M S Ng and Sylvia Tung, instructed by Messrs K M Cheung & Co., for the Defendant PAGE - 1udk 1udk 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 i\$&`G Gill-HCA.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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