

HONG KONG / JUDGMENT

WU WEI v. LIU YI PING

COURT

Court of First Instance

DECIDED

30 January 2009

CASE / FILE NUMBER

HCA1452/2004

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bjbj g, SC in Chambers Date of Hearing: 13 May 2008 Date of Decision: 30 January 2009

D E C I S I O N

THE APPLICATION BEFORE THE COURT By a Summons issued on 22 January 2008 and re-amended pursuant to leave granted at the hearing before me on 13 May 2008, the Plaintiff applies pursuant to s.21L of the High Court Ordinance, Cap.4 and Order 29, rule 2(3) of the Rules of the High Court for an Order:

- (1) that the Defendant shall pay into court within 14 days
 - (a) a sum of HK\$2,173,537 with interests at half judgment rate from 3 April 2004 until payment; or
 - (b) alternatively, the sum of USD150,000; or
 - (c) in the further alternative, such sum deemed just and sufficient by the court; or
- (2) alternatively, that the Defendant shall
 - (a) cause the sum of USD150,000 to be remitted to a personal account held by her with a bank located in Hong Kong within 14 days;
 - (b) be restrained, whether by herself or through her agents including her parents, from using, dissipating, removing and/or otherwise dealing with such sum without leave of this court pending the final disposal of this action; and
 - (c) disclose all relevant documents relating to the remittance within 7 days thereof. In addition, both parties have, after the hearing on 13 May 2008, applied for leave to adduce further evidence and made submissions on such applications on 2 October 2008 (the Defendant), 31 October 2008 (both the Plaintiff and the Defendant), 4 November 2008 (the Defendant) and 10 November 2008 (the Plaintiff). THE UNDERLYING DISPUTES & THE CLAIM &

COUNTERCLAIM ARISING THEREFROM The parties relationship The Plaintiff, Mr WU Wei, and the Defendant, Madam LIU Yi Ping, both residents of the PRC, were married in the PRC in June 1998. They remained husband and wife until their divorce was finalized by an order made on 7 April 2006 (the PRC Judgment) by the Guangdong Province Guangzhou Municipal Intermediate People s Court (the Guangzhou Court) in proceedings commenced by the Defendant s petition presented in May 2004 (the PRC Proceedings). The Defendant s withdrawals from a joint bank account The Plaintiff and the Defendant were the only shareholders and directors of Knight Advertising Service Limited (the Company), a Hong Kong private company incorporated on 13 March 1998 which has since been struck off by the Registrar of Companies. More particularly, the shares in the Company were registered as being held as to 90% by the Plaintiff and 10% by the Defendant. The Company held an account No.582-190740-838 (the Company Account) with The Hong Kong and Shanghai Banking Corporation Limited (HSBC). Between October 1998 and December 2000, sums totalling HK\$3,200,234 were transferred from the Company Account to an account No.582-207189-888 (the Joint Account) opened and maintained in the joint names of the Plaintiff and the Defendant with the same bank, which account could be operated by the single signature of either the Plaintiff or the Defendant. The Company Account was closed on 1 December 2000. On 11 March 2004, the Plaintiff and the Defendant signed a one page document which set out what appeared to be an agreement for the division of their assets consequent upon their marriage having ended (the Agreement). Pursuant to the Agreement, insofar as it is material to this action, the Plaintiff and the Defendant were entitled to the monies in the Joint Account (the Deposits) in the respective sums of RMB1,202,000 (held in Hong Kong dollar savings deposit) and RMB2,862,000 (held in New Zealand dollar time deposit). As at 29 March 2004, the Joint Account held a credit balance of HK\$4,135,350.17 (made up of deposits in different currencies). Unknown to the Plaintiff, the Defendant made the following withdrawals leaving a balance of HK\$468,597.63 only in the Joint Account : Date of Withdrawal Amount of Withdrawal 29 March 2004 HK\$ 5,000.00 HK\$ 640,952.13 3 April 2004 NZ\$ 578,644.78 (= HK\$2,893,223.90 at HK\$5 to NZ\$1) HK\$ 3,539,176.00 (the Withdrawn Monies) I pause to note that as at 3 April 2004, HK\$3,539,176 was equivalent to RMB3,766,745 (at HK\$1=RMB1.0643). That is to say, the Defendant had taken from the Joint Account more than what she was entitled to under the Agreement. The Defendant had attempted to withdraw what remained in the Joint Account but failed, HSBC having placed a temporary hold on the Joint Account on 14 May 2004 upon receiving conflicting instructions from the Plaintiff and the Defendant on 3 April, 7 May and 10 May 2004 as to how to dispose of the Deposits. There were cross reports to the police by the parties against each other with the Plaintiff accusing the Defendant of thefts of the Withdrawn Monies and the Defendant charging the Plaintiff with having forged her signature in an attempt to withdraw a sum of HK\$483,840.45 from the Joint Account. Claim and defence before December 2006 Against the aforesaid background, what was in issue in this action was initially just the beneficial ownership of the Deposits. More particularly, the Plaintiff puts forward an agreement whereby the Deposits (after defraying expenses of the Company, if any) are to be shared between him and the Defendant in proportion to their

respective shareholdings in the Company so that they hold the Deposits as joint trustees on trust for the Plaintiff as to 90% and the Defendant 10%. He disputes the enforceability of the Agreement, claiming that he did not voluntarily sign the same but was coerced to do so by duress and that the Agreement was extorted from him by improper and illegal pressure and threats and undue influence and without any proper and/or legal consideration for the same. According to the Plaintiff, the Defendant and her parents had taken away and withheld from him various important documents of a PRC company owned by the Plaintiff, sent threatening messages to the mobile phones of the Plaintiff and his father and brought along two menacing men to compel the Plaintiff to sign the Agreement. However, if the court should find the Agreement to be valid and binding on him, the Plaintiff asserts entitlement to the Deposits to the extent of RMB1,202,000 as per the Agreement. The Plaintiff claims against the Defendant a declaration that she holds the Deposits on trust for him to the extent of 90% thereof (HK\$3,721,815 as at 29 March 2004) or alternatively, the amount of RMB1,202,000 and various consequential relief including orders for account, tracing and payment. In defence, prior to the amendment of her Defence in December 2006 following the PRC Judgment, the Defendant asserted, in paragraph 11(ii), entitlement to remove the Withdrawn Monies because she was the beneficial ownership of all the Deposits but did not state the basis upon which she so claimed. Though admitting the making of the Agreement, the Defendant denied in paragraph 15 (again without any explanation) that her entitlement to the Deposits was confined by the Agreement to the sum of RMB2,862,000. Interlocutory injunctive order against Defendant By an Order made herein by Deputy High Court Judge Gill on 24 January 2005 (the HK Injunction Order) upon the Plaintiff's application based on his proprietary claim to the Deposits, the Defendant was

- (1) restrained from further dealing with the Withdrawn Monies (paragraph 1);
- (2) required to disclose and verify on oath and with supporting documents what had become of such monies within 7 days (paragraphs 2, 3 and 4). The Defendant's appeal against the HK Injunction Order (CACV 47/2005) was dismissed by the Court of Appeal on 14 September 2005. Delay in disclosure by Defendant The time for the Defendant to comply with paragraphs 2, 3 and 4 of the HK Injunction Order expired on 31 January 2005. By a Summons filed on 2 February 2005, the Defendant applied for a stay of paragraphs 2, 3 and 4 pending her appeal against the HK Injunction Order. On 7 February 2005, Deputy Judge Gill dismissed the application but extended time for the Defendant to comply with paragraphs 2 and 3 (for disclosure in writing and by a list of documents) to 28 February 2005 and paragraph 4 (for a verifying affidavit) to 7 March 2005. On 17 February 2005, Messrs Tang, Wong & Cheung (), solicitors for the Defendant, sent to Messrs Christine M Koo & Ip (CMKI), former solicitors for the Plaintiff, a 2 page letter enclosing 3 bank statements. By further letters dated 16 and 17 March 2005 from TWC to CMKI, the Defendant provided to the Plaintiff an Affirmation she made before a notary in Guangzhou, a list of documents and some more bank statements and various other supporting documents. There is no need to repeat herein the contents of the Defendant's said letters, affirmation, list and documents. It is sufficient to say that the Defendant had not thereby discharged her obligations under

paragraphs 2, 3 and 4 of the HK Injunction Order. By a Summons filed on 22 March 2005, the Plaintiff applied for the striking out of the Defence and the entry of judgment against the Defendant unless paragraphs 2, 3 and 4 were complied with within 7 days. Meanwhile, the Defendant had, by a Summons filed on 15 March 2005, sought a stay of all proceedings in this action (save and except for her appeal against the HK Injunction Order and the taxation of costs previously awarded) pending the conclusion of the PRC Proceedings. On 13 May 2005, the Defendant amended her application to one for a general stay of this action, save and except for her appeal against the HK Injunction Order and the taxation and enforcement of costs previously awarded but including proceedings for the enforcement of paragraphs 2, 3 and 4 of the HK Injunction Order, provided that the stay in relation to paragraphs 2, 3 and 4 should be lifted in the event of the dismissal of the Defendant's appeal against the HK Injunction Order. On 13 June 2005, Recorder Kenneth Kwok, S.C. dismissed the Defendant's stay application and ordered that judgment be entered in favour of the Plaintiff against the Defendant for HK\$3,721,815 with interest unless the Defendant should comply with paragraphs 2, 3 and 4 of the HK Injunction Order by 4 pm on 4 July 2005. Whereabouts of the Withdrawn Monies as disclosed by Defendant By reason of the matters set out under the preceding heading, the Defendant did not make disclosure as required by paragraphs 2, 3 and 4 of the HK Injunction Order until 4 July 2005. Even then, I note that the Defendant did not say what became of the sum of HK\$5,000 withdrawn by her in cash on 29 March 2004. As for the sums of HK\$640,952.13 and NZD578,644.78 withdrawn on 29 March and 3 April 2004, according to the Defendant's 2nd Affirmation filed on 4 July 2005 and the documents exhibited thereto:

- (1) the Defendant had prior to the making of the HK Injunction Order spent HK\$320,370.23 and USD90,080 (inclusive of USD45,480 to pay the premium on 2 insurance policies on the Defendant's life, the ownership of which had been transferred to the Defendant's mother in October 2004); and
- (2) through a series of transfers and investments through not just the Defendant's own bank accounts but also bank accounts maintained in the name of her father, what remained came to be kept as follows as at 4 July 2005 : (A) in Hong Kong, with HSBC: Account No. Account Holder Form held Amount 625-016514-888 Defendant Unit trusts USD 30,659.45 (=HK\$238,414.02) Deposit HK\$324,956.37 Deposit USD 887.31 (=HK\$6,899.90) Deposit NZD 3,772.33 (=HK\$20,856.75) 593-472012-833 Defendant Deposit USD 5,000.29 (HK\$38,883.26) (B) in the PRC:
 - (a) with HSBC, Guangzhou Branch: Account No. Account Holder Amount 009-060096-406 Defendant USD 100,033.49 009-067075-406 Defendant's father HK\$1,000,000.45
 - (b) USD50,420.70 said to have been held by the Defendant in cash. Pursuant to the HK Injunction Order, in addition to what is left in the Joint Account (HK\$468,597.63 as at 3 April 2004), the deposits and investments mentioned in paragraph 28(1) above (HK\$630,010.30 as at 4 July 2005) have also been frozen in Hong Kong. My attention has also been drawn to the fact that the sum of USD50,420.70 said to have been held by the Defendant in cash had been

withdrawn from the Defendant's father's said account with HSBC, Guangzhou Branch in various sums after the Plaintiff issued the Summons for the HK Injunction Order on 31 December 2004. Indeed, the last instalment (USD1,420.70) was taken out on 25 January 2005, the day after the making of the HK Injunction Order. The PRC Judgment In the meantime, the Plaintiff and the Defendant had proceeded with the prosecution and defence of the PRC Proceedings, resulting in the PRC Judgment being given on 7 April 2006 after hearings on 23 September 2004, 13 October 2004, 6 April 2005 and 22 June 2005. Insofar as it is material to this action, the Plaintiff also disputed the validity of the Agreement in the PRC Proceedings. One of the grounds upon which he did so was that he signed the Agreement under duress by, inter alia, the Defendant. The Guangzhou Court rejected the Plaintiff's allegation of duress as unsubstantiated. The Guangzhou Court upheld and enforced the Agreement. Hence, in addition to granting the parties a divorce, the PRC Judgment also held that they were entitled to the family's assets as per the Agreement. Insofar as the Defendant is concerned, she got:

- (1) 3 landed properties;
- (2) proceeds of an insurance policy in a sum of RMB25,000;
- (3) foreign currency to the value of RMB52,000;
- (4) a sum equivalent to RMB2,862,000 out of the Deposits;
- (5) cash in the amount of RMB1,852,000. The Defendant was further awarded RMB150,000 by way of damages. The Plaintiff was given 30 days from the date on which the PRC Judgment took effect to pay the said sums of RMB1,852,000 and RMB150,000 but not any of the other sums mentioned in paragraph 33 above. Lastly, the Plaintiff was ordered to share the bulk of the court fees in the sums of RMB157,992 (out of RMB197,490) and RMB21,648 (out of RMB27,060). These 2 sums added up to RMB179,640. There is an issue between the parties as to whether these sums attributable to court fees are payable by the Plaintiff to the Defendant or to the Guangzhou Court. According to the last paragraph of the PRC Judgment, the time for appeal against such judgment expired after 15 days from the service of the judgment. Steps taken by parties in PRC on PRC Judgment The Defendant did initially appeal to the Higher People's Court of Guangdong against the PRC Judgment but applied to withdraw her appeal on 9 May 2006, which application was allowed on 17 July 2006. Thereafter, the Defendant applied to the Guangzhou Court to execute the PRC Judgment. On 8 March 2007, upon the Defendant's application to execute the PRC Judgment, the Guangzhou Court restrained some of the assets apportioned to the Plaintiff under the PRC Judgment which included bank deposits and company shares to the value of RMB530,166.62. As for the Plaintiff, following a complaint made by the Defendant, he was convicted in the PRC of the offences of bigamy (in having co-habited with another woman before the divorce between him and the Defendant had been finalized) and of obtaining and using a forged birth certificate in relation to a child born to the Plaintiff's co-habitee on 10 April 2006. He was sentenced to and served a term of imprisonment until 21 February 2007, credit having been

given to the periods from 19 May to 31 December 2005 and from 5 to 10 April 2006 during which the Plaintiff had been remanded in custody. As a result of his incarcerations, the Plaintiff was absent from and therefore deprived of the right to testify or make oral representation at the last hearing of the PRC Proceedings on 22 June 2005. Although he was represented by lawyers at such hearing, the Plaintiff claims, in paragraphs 5(d)(ii) and (iii) of his 4th Affirmation dated 7 April 2008 and paragraph 5 of his 5th Affirmation filed on 6 May 2008,

- (1) that he had been unable to obtain advice from or give instructions to those representing him for more than a month prior to the hearing;
- (2) that he was allowed to see his family and lawyers only some days after transfer to a different prison on 18 June 2006; and
- (3) that he did not receive the PRC Judgment until after his release from prison, i.e. after 21 February 2007. The last-mentioned complaint is, however, somewhat inconsistent with the fact that the Plaintiff applied to the Guangzhou Court for a re-trial of the PRC Proceedings on 10 January 2007 before his release from prison. Notwithstanding his said application for a retrial, the Plaintiff had also applied to the Guangzhou Court to execute that part of the PRC Judgment that is in his favour. On 12 February 2007, upon the Plaintiff's application, the Guangzhou Court restrained the 3 landed properties apportioned to the Defendant under the PRC Judgment. These properties were, however, released by the Guangzhou Court in April 2007 upon the Defendant's application dated 19 April 2007. The Plaintiff claims not to have received any notice of or been heard on this application by the Defendant and seems to question the authenticity of the order for release produced by the Defendant. More importantly, on 8 March 2007, i.e. the date on which the Guangzhou Court restrained some of the assets apportioned to the Plaintiff under the PRC Judgment towards the enforcement of the PRC Judgment in the Defendant's favour, the Plaintiff attended a meeting with an official of the Guangzhou Court. According to the transcript (copied by the Defendant from the records of the Guangzhou Court), this meeting was called by the Guangzhou Court to ascertain if the Plaintiff had any new proposal to make to the Defendant to settle the proceedings that had been issued by him and the Defendant to enforce the PRC Judgment in their respective favour. The Plaintiff is recorded to have acknowledged the following:
 - (1) According to his reckoning, under the PRC Judgment, he should pay the Defendant about RMB2.18 million (RMB1.852 million cash + RMB150,000 damages + RMB180,000 for litigation costs).
 - (2) After setting off the values of the deposits and company shares that had been restrained by the Guangzhou Court (RMB530,166.62) and his share of the Deposits under the Agreement (about RMB1.2 million), he still owed the Defendant RMB400,000 odd, which he intended to repay with the use of some shop premises. In response to a question as to the state of this action, the Plaintiff said that the same could be withdrawn if the Defendant agreed to settle. The meeting was concluded on this basis. This meeting was followed by 2 sessions of

mediation between the Plaintiff and the Defendant under the supervision of the Guangzhou Court on 5 April and 17 May 2007 at which the Plaintiff put forward a proposal for settlement of all legal proceedings between him and the Defendant (including the present action and the PRC Proceedings). Such proposal acknowledged that under the PRC Judgment, the Plaintiff should pay the Defendant about RMB2,220,820 (RMB1,852,000 + RMB150,000 + RMB166,870 for litigation costs + RMB52,000) and that he still owed the Defendant RMB490,000 after setting off the values of the deposits and company shares that had been restrained by the Guangzhou Court (RMB530,166.62) and his share of the Deposits under the Agreement (about RMB1,202,000). The later meeting was left on the basis that the parties should try to dispose of the present action and revert to the Guangzhou Court within half a month's time. However, according to paragraph 11 of the Defendant's 6th Affirmation dated 12 March 2008, the Plaintiff disappeared after the mediation meeting on 17 May 2008. In consequence, the Defendant proceeded with the execution of the PRC Judgment in her favour. There is no dispute that on 22 August 2007, the Defendant received a sum of RMB530,166.62 realized by the Guangzhou Court out of the Plaintiff's frozen deposits and company shares in partial satisfaction of the PRC Judgment in her favour. On 19 September 2007, upon the Defendant's application, the Guangzhou Court issued a notice to the effect that it would, in the absence of objections lodged by interested parties within 5 days, deal with the 3 landed properties allocated to the Plaintiff in execution of the PRC Judgment in favour of the Defendant. The Plaintiff re-appeared sometime in September 2007 and the parties attempted another round of mediation before the Guangzhou Court on 28 September 2007. The stumbling block was the pendency of this action or, more precisely, the costs of this action. The Plaintiff would only discontinue this action with no order as to costs. The Defendant wanted her costs. The parties were, however, able to agree that execution of the PRC Judgment by either party should be withheld pending the determination of this action. On 7 November 2007, the Guangzhou transferred the PRC Proceedings to the Conghua People's Court for execution of the PRC Judgment. On 8 January 2008, upon the Defendant's application, the Conghua People's Court stayed the execution of the PRC Judgment pending determination of the Plaintiff's claim in this action. In the meantime, the Plaintiff's application to the Guangzhou Court for a re-trial had been dismissed. On 20 December 2007, the Plaintiff appealed to the Guangzhou Higher People's Court for the setting aside of the allocation of assets under the PRC Judgment and for a re-trial of the PRC Proceedings. Such appeal was dismissed on 27 July 2008. The last-mentioned fact was brought to the court's attention by the Defendant's application for leave to adduce further evidence made on 19 September 2008. At the hearing on 13 May 2008, the Plaintiff invited the Court to answer the question as to whether the PRC Judgment is final and conclusive (see paragraphs 94 to 102 below) in the negative for, inter alia, the reason that he had applied for a re-trial and his application was still being considered by the Guangdong Province Higher People's Court. A notice dated 20 March 2008 to such effect is put in evidence. The fact of the dismissal of the Plaintiff's application for a retrial by the Guangdong Province Higher People's Court on 17 July 2008 is therefore relevant but could not have been available to the Defendant at the hearing on 13 May 2008. Leave was given to the Defendant to adduce evidence of the

dismissal of the Plaintiff's application for a retrial by the Guangdong Province Higher People's Court on 25 September 2008. Leave was also given to the Plaintiff with the intention that he could respond to this new fact. The following facts are properly within such leave and I do receive them in evidence: On 22 September 2008, the Plaintiff applied to the Supreme People's Court for a re-trial. Further, on 27 September 2008, the Plaintiff petitioned the Guangdong Province Procuratorate to initiate a re-trial. Amendment and re-amendment of pleading by Defendant after PRC Judgment Following the withdrawal of her appeal against the PRC Judgment, the Defendant amended and re-amended her pleading in this action on 13 December 2006 and 14 November 2008 respectively. In summary, the Defendant no longer denies that under the Agreement she is only entitled to a sum equivalent to RMB2,862,000 out of the Deposits but claims to be entitled to set off so much of the sums counterclaimed by her in extinction or reduction of the Plaintiff's claim. The Defendant's counterclaim is founded upon the PRC Judgment. In short, the Defendant seeks to enforce payment of the various monetary amounts to which she says she is entitled under the PRC Judgment, including the Plaintiff's said shares of the court fees, insofar as they have remained unsatisfied by the Plaintiff. In so counterclaiming, it is the Defendant's case that the PRC Judgment is final and conclusive. EVENTS WHICH PROMPTED THE PRESENT APPLICATION The sum of HK\$2,173,537 stated in paragraph 1 of the Plaintiff's Amended Summons is made up of the sums of HK\$1,000,000.45, USD100,033.49 and USD50,420 (converted at the rate of US\$1=HK\$7.8) which are the amounts of the deposits and cash that were supposed to have been kept by the Defendant as set out in paragraph 28(2) above:

- (1) with HSBC, Guangzhou Branch: Account No. Holder Form held Amount 009-060096-406 Defendant Deposit USD 100,033.49 009-067075-406 Defendant's father Deposit HK\$1,000,000.45
- (2) USD50,420 in cash in the hands of the Defendant. In addition to being subject to the HK Injunction Order, the deposits of USD100,033.49 and HKD1,000,000.45 held in the respective names of the Defendant and her father with the Guangzhou Branch of HSBC were, at the time of the Defendant's 2nd Affirmation dated 4 July 2005, also frozen by the order of the Guangzhou Court (the PRC Freezing Order) as security for an interlocutory injunction which the Defendant had obtained in restraint of the Plaintiff's assets in the PRC pending the conclusion of the PRC Proceedings. The Plaintiff became unhappy for these sums to remain out of the jurisdiction because:
 - (1) According to a notice issued by the Guangzhou Court to the Defendant on 24 March 2006, the Defendant had on an unspecified date or dates withdrawn the sum of HK\$1 million from her father's account No.009-067075-406 with HSBC Guangzhou in breach of the PRC Freezing Order. She was required by the Guangzhou Court to re-deposit such sum within 3 working days from 27 March 2006, failing which the interlocutory injunction in restraint of the Plaintiff's assets in the PRC in her favour would be discharged.

- (2) It appears that the Defendant did re-deposit HK\$1 million but into accounts different from those disclosed in her 2nd Affirmation dated 4 July 2005. This is so because according to a notice issued by HSBC, Guangzhou Branch to the Guangzhou Court on 2 November 2006, upon the discharge of the PRC Freezing Order, the sums of HK\$776,000 and HK\$224,000 (adding up to HK\$1 million) were respectively held in accounts No.009-096603-250 and No.009-096603-526 opened and maintained in the Defendant s father s name. The Defendant had never disclosed these 2 accounts to the Plaintiff.
- (3) According to another notice issued by HSBC, Guangzhou Branch to the Guangzhou Court on 2 November 2006, upon the discharge of the PRC Freezing Order, only a sum of (USD65,807.09 + USD106.26) was left of the sum of USD100,033.49 originally held in the Defendant s account No.009-060096-406 with HSBC, Guangzhou Branch. That is to say, a sum of USD34,120.14 (USD100,033.49 USD65,807.09 USD106.26) had gone missing. Further, the said sum of USD65,807.09 was kept in an account No.009-060096-250 and not account No.009-060096-406 as disclosed by the Defendant in her 2nd Affirmation dated 4 July 2005. The Defendant had either made false disclosure or moved the monies after 4 July 2005 in breach of both the HK Injunction Order and the PRC Freezing Order. By her 4th Affirmation which was made on 14 December 2007 at the request of the Plaintiff made by CMI s letters dated 27 November and 5 December 2007, the Defendant
- (1) admitted having spent approximately RMB400,000 of the Withdrawn Monies that was also subject to the PRC Freezing Order on living expenses and legal costs ;
- (2) stated that there remained a sum of approximately USD150,000 in the bank account under the name of her father which would shortly be transferred into the Defendant s own bank account;
- (3) claimed (A) that she erroneously but honestly believed that she was free to use the monies once it was released by the Guangzhou Court and that the monies belonged to her; (B) that she had not notified her solicitors in Hong Kong that she had dealt with the monies; (C) that she did not realize that she may not deal with the monies under the HK Injunction Order notwithstanding the discharge of the PRC Freezing Order; (D) that she had never intentionally meant to disobey the HK Injunction Order; and
- (4) undertook not to further deal with what remained of the monies in her father s account until after the discharge of the HK Injunction Order. The Defendant s 5th Affirmation filed herein on 21 February 2008 repeated the same explanation for breaching the HK Injunction Order and also claimed inability to transfer such as a large sum of money from the PRC to Hong Kong due to foreign exchange control in the PRC. PLAINTIFF S FAILED MOTION FOR CONTEMPT Prior to taking out the present Summons on 22 January 2008, having obtained leave from Deputy High Court Judge Gill on 12 December 2007, by a Notice of Motion filed herein on 14 December 2007, the Plaintiff moved for an order that the Defendant be committed to prison for contempt of this court in that she had breached the HK Injunction Order. This motion was dismissed with costs to the Defendant by Yam J on 16 April 2008.

This completes the background to the present application. PRELIMINARY POINTS Before I turn to the application, I would like to address and dispose of a couple of preliminary matters raised by the parties. Res judicata or issue estoppel Ms Angela Gwilt, Counsel for the Defendant, relies on the dismissal of the Plaintiff's motion for contempt as barring the present application on the ground of res judicata or issue estoppel. Such an argument is premised upon Yam J having decided the same issue raised by the present application. Ms Gwilt identifies that issue to be why the Defendant had used that part of the Withdrawn Monies that was also subject to the PRC Freezing Order. The rules relating to res judicata and issue estoppels in interlocutory matters are less stringent than those generally applicable: per Mayo V-P in *Chu Hung Ching v Chan Kam Ming* [2001] 1 HKC 396 at 402D-E. In support, his Lordship referred to what the Alberta Court of Appeal said in *Pocklington Foods Inc v R in right of Alberta* (1995) 123 DLR 141 at 144: Res judicata and issue estoppel do not apply to procedural interlocutory motions. While in the judgment of Clement J.A. in *Talbot*, there is considerable discussion of the position where a decision is made on the adequacy of the material rather than on the merits of the application, when read as a whole the decision supports the position taken by McDonald J. in this case. However, the court is not powerless to deal with attempts to re-litigate issues already decided by it. In *Talbot*, after refusing to apply res judicata to an interlocutory procedural application, Clement J.A. stated at p. 112: I am of the opinion that the principle does not apply to an interlocutory application of the nature now before us; rather, the second application is subject to control by the exercise of judicial discretion in determining whether it is frivolous or vexatious in all the circumstances then appearing. McDonald J. went on to consider the reasoning which should apply in controlling abuse of process. He cited from the decision of Lord Maugham L.C. in *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.* [1939] A.C. 1 (H.L.) at p. 20 (cited with approval in *Talbot*) as follows [at p. 282]: If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them. He continued: Thus the *raison d'être* of the principle of res judicata or issue estoppel lies in what is just and reasonable. Applying that notion to an assertion that a ruling on an interlocutory application is res judicata when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust or unreasonable to allow the second application to be heard, for what is involved is not relitigation of an identical issue of law or fact:

- (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection
- (b) if upon the first application the applicant had failed to prove essential facts from mistake or inadvertence
- (c) if there is new evidence that seriously justifies reconsideration of the issue;

- (d) if there is a material change of circumstances of a non-evidentiary nature. In dismissing the Plaintiff's motion for the committal of the Defendant, Yam J found that [the Defendant] cannot be said to know those facts which are said to make her act contemptuous. On my reading of the short Reasons for Judgment dated 8 May 2008, his Lordship so found because he accepted the Defendant's evidence that she had been led to believe that she was entitled to use that part of the Withdrawn Monies that was also subject to the PRC Freezing Order after the discharge of that order by, inter alia, the Plaintiff's conduct after the PRC Judgment (including the Plaintiff's failure to lodge any complaint against the release of such monies to the Defendant and his admissions of indebtedness to the Defendant at the Mediation Hearings). It is true that the Defendant gave the same explanation for her conduct, whether before Yam J or before me. However, that explanation does not say when exactly the Defendant had spent RMB400,000. To my mind, Yam J's said finding which exonerates the Defendant from contempt of court, based as it is on the acceptance of the Defendant's explanation, must necessarily relate only to expenditure that occurred after the discharge of the PRC Freezing Order. It does not and cannot cover any of the following acts by the Defendant before the discharge of the PRC Freezing Order, which acts (as the Plaintiff rightly submits) amount to breaches of the HK Injunction Order:
- (1) the withdrawal of the sum of HK\$1 million in the HSBC Guangzhou account No.009-067075-406 held in her father's name before 24 March 2006;
 - (2) the re-deposit of the HK\$1 million into accounts different from those disclosed in her 2nd Affirmation dated 4 July 2005;
 - (3) the transfer of the funds originally held in the Defendant's account No.009-060096-406 with HSBC Guangzhou (USD100,033.49) as disclosed by the Defendant in her 2nd Affirmation dated 4 July 2005 to an account No.009-060096-250; and
 - (4) the disappearance of USD34,120.14 from those funds. Yam J's decision does not deal with or mention any of these acts by the Defendant. In any event, Yam J was concerned with the question whether the Defendant had the necessary mens rea to be liable in contempt whereas the question before me is whether further protection of the Withdrawn Monies or what is left of it is called for. In the circumstances, I do not regard the issues raised by the present application to have been decided or comprehensively decided by Yam J on the Plaintiff's motion to commit the Defendant for contempt. Admissibility of the contents of the Mediation Meetings Ms Gwilt also relies heavily on what the Plaintiff said at the mediation meetings mentioned in paragraphs 43, 44 and 46 above (the Mediation Meetings). It will be recalled that not only did the Plaintiff make proposals for the satisfaction of the PRC Judgment, he also volunteered terms on which he would discontinue this action. On the other hand, Mr Kent Yee, Counsel for the Plaintiff, objects to the reception in evidence of the contents of the Mediation Meetings on the ground that they are without prejudice. As I see it, what the Plaintiff had said at the Mediation Meetings can be and are used by the Defendant for dual purposes:

- (1) first, to explain the conduct that has given rise to this application, which explanation had been accepted by Yam J (see paragraph 65 above); and
- (2) second, to prove the Plaintiff's acceptance of the PRC Judgment and the Agreement that it upheld and enforced and hence the lack of merits of the Plaintiff's claim in this action to 90% of the Deposits. Regarding the latter, the Defendant goes so far as attributing to the Plaintiff the motive of using this application as well as the committal proceedings, without any or any genuine belief in their merits, to exert pressure on the Defendant to settle this action with no order as to costs as he had proposed at the last Mediation Meeting. It is trite law that genuine negotiations with a view to settlement, however conducted, are protected from disclosure whether or not the without prejudice stamp has been applied expressly to the negotiations: *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 (HL). The underlying policy is to encourage parties so far as possible to settle their disputes without resort to litigation and the way to so courage a litigant is to protect him from being embarrassed by any admission made purely in an attempt to bring about a settlement. See, for example, *Cutts v Head* [1984] Ch 290, per Oliver LJ (as he then was) at 306 and *Rush & Tompkins Ltd v Greater London Council*, supra, per Lord Griffiths at 1300. In *Muller and Muller v Linsley and Mortimer* (1996) 1 PNLR 74, Hoffmann LJ (as he then was) said that the public policy rationale was directed solely at admissions. The same principle should apply to interlocutory applications where the merits of a party's case is or might be a relevant issue. For example, the normal without prejudice rule applies in respect of things said and done by a defendant who applies for security for costs against the plaintiff. As reasoned by HH Judge Newey QC Official Referee in *Simaan General Contracting Company v Pilkingtons Glass Ltd* [1987] 1 WLR 516 at 520, defendants sued by plaintiffs resident abroad or by companies likely to get into financial difficulties would otherwise be deterred from exploring possibilities of settlement and making sensible offers for fear of prejudicing their prospects of obtaining security for costs. This reasoning was approved by the Court of Appeal in *Kristjansson v R Verney & Co Ltd*, unreported, 18 June 1998. With regard to the use of alternative dispute resolution (ADR) such as mediation to achieve settlement, as noted in *The Law and Practice of Compromise*, 6th Edition (2005), p.590, 43-16, [s]ince any mediation taking place against the background of actual or threatened litigation will almost invariably be designed to achieve a settlement, either in whole or in part, of the underlying disputes, the discussions forming part of the mediation will be impliedly without prejudice. In *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, at 14, the English Court of Appeal recognized the importance of respecting the integrity and confidentiality of the mediation process: We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement. Hence, I agree with Mr Yee to the extent that the admissions made by the Plaintiff at the Mediation Meetings are inadmissible in this application on the issue of merits of the case. That said, the rule is not absolute and

resort may be had to without prejudice material for a variety of reasons when the justice of the case requires it: per Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council*, supra, at 1300. So, for instance, on applications for dismissal for want of prosecution, the existence of without prejudice negotiations (and sometimes the content of the negotiations) may be referred to in order to rebut any inference of delay or laches that might otherwise arise. As explained by the Court of Appeal in *Family Housing Association v Michael Hyde & Partners* [1993] 1 WLR 354 (CA), the willingness of parties to discuss the merits of their case with a view to settlement, without fear of any concessions made being used later as admission of liability, which underlay the policy excluding the use of without prejudice correspondence at trial or during post-trial proceedings, would not be inhibited by the disclosure of such evidence on an application to strike out for want of prosecution, since the correspondence would not be available at any subsequent trial and that the prevailing need on applications to strike out is for evidence relevant to the question of delay and the conduct of the parties to be available. The instant application is premised upon the existence of a need to buttress up the HK Injunction Order by requiring the Withdrawn Monies hitherto kept in the PRC to be moved back to Hong Kong. Such a need is said to have arisen from acts in breach of the HK Injunction Order which would, if unexplained, have to be taken as having been committed with the intention of breaching the HK Injunction Order. The Defendant claims to have an explanation. Justice requires that she be allowed to explain. Whether her explanation is adequate is another matter. I will therefore take into account what the Plaintiff had said at the Mediation Meetings and the impact that it might have had on the Defendant's state of mind in assessing the Defendant's breaches of the HK Injunction Order. CASE FOR FURTHER PROTECTION However, as noted in paragraph 66 above, the discharge of the PRC Freezing Order and the release of the monies the subject-matter of that order to the Defendant without protest by the Plaintiff and the admissions made by the Plaintiff at the Mediation Meetings does not and cannot explain the breaches of the HK Injunction Order committed before November 2006. These unexplained breaches do in my view give the Plaintiff just cause to become concerned about the security of what is left of the Withdrawn Monies kept by the Defendant in the PRC. And that concern may have justifiably been further fuelled by the following: The Defendant withdrew from the Joint Account more than what she now admits to be her entitlement under the Agreement. There had been prolonged delay by the Defendant in complying with paragraphs 2, 3 and 4 of the HK Injunction Order. The Defendant has remained silent as to the updated whereabouts of what remained of the Withdrawn Monies in the PRC save that it is kept in some unidentified bank account(s) maintained in the name of her father who is not a party to this action.

- (4) (A) In paragraph 4 of her 4th Affirmation filed on 14 December 2007, the Defendant said her father would transfer the monies into her bank account within those few days. (B) Notwithstanding such statement, by the date of her 5th Affirmation (15 February 2008), the monies was according to the Defendant still sitting in her father's bank account. (C) The situation remained unchanged up to the date of the Defendant's 6th Affirmation (12 March 2008). This time the Defendant mentioned some difficulty caused by the fact that monies is

kept in US dollars. Due to foreign exchange control in the PRC, the bank would require proof that the Defendant was the daughter of the account holder before it would effect a transfer of the monies in the account in the name of the Defendant's father to the Defendant. The necessary proof could only be obtained from the Hu Nan Police Bureau because that is where the Defendant's personal records are kept. There is no explanation why the Defendant was not advised to apply for such proof until 3 March 2008. PRINCIPLES UPON WHICH MANDATORY INTERLOCUTORY INJUNCTIONS ARE GRANTED Ms Gwilt however argues that the Plaintiff has not shown merits to the high degree of assurance required before the court would grant a mandatory interlocutory injunction. In support of this requirement, I have been referred to the following passage in the judgment of Ma J (as he then was) in *Music Advance Ltd v Incorporated Owners of Argyle Centre Phase 1*, HCA 2574/2002, unreported, 20 August 2002:

11. The applicable principles for interlocutory injunctions are well-known and do not need repetition. Generally, one needs to look no further than *American Cyanamid v. Ethicon Ltd* [1975] AC 396 and the relevant text in *Hong Kong Civil Procedure 2002 Volume 1* at paragraphs 29/1/8-29/1/50.
12. I would, however, only highlight one aspect. Where, as in the present case, the plaintiffs seek an interlocutory mandatory injunction (that is, an order requiring the defendant to do something, in contrast to a prohibitory injunction which restrains the defendant from doing something), the following matters should be borne in mind as being the court's approach -
 - (1) In the case of interlocutory mandatory injunctions, it is often said or assumed that a court will not grant one unless it feels a high degree of assurance that at the trial of the action, it will be shown that the injunction was rightly granted: see *Shepherd Homes Ltd v. Sandham* [1971] Ch 340 at 351. This has been explained and sometimes understood as meaning that in the case of an interlocutory mandatory injunction, the applicant's case on the merits has to be made out to a higher standard of proof than in the case of prohibitory injunction: see the Court of Appeal's observations in *TKI Limited v. New Happy Limited* [1995] 1 HKC 551 at 554 B D.
 - (2) Broad statements such as the above must, however, be properly put in context.
 - (3) The basic approach to interlocutory injunctions, whether mandatory or prohibitory, is the same. Section 21L of the High Court Ordinance, Chapter 4 makes no distinction between these two types of injunctions and simply states that interlocutory injunctions may be granted if it appears to be just or convenient to do so.
 - (4) At the interlocutory injunction stage, the principal concern of the court is that it might make a wrong decision in the sense that after trial, the party to whom an interlocutory injunction has been granted may lose or the party who has been refused one, may win. The court will therefore take whichever course appears to carry the lower risk of injustice if it should turn out that it is wrong. This fundamental principle is the source of the guidelines that have evolved for the determination of interlocutory injunctions (included are, of course, the

American Cyanamid guidelines) and therefore, in the application of any guidelines, sight must not be lost of this principle. See here: *Films Rover International Ltd v. Cannon Films Sales Ltd* [1987] 1 WLR 670 at 680 G, in a passage from the judgment of Hoffman J which was approved by the House of Lords in *R v. Secretary of State for Transport ex parte Factortame Limited (No.2)* [1991] 1 AC 603 and recently reiterated in the English Court of Appeal decision of *Zockoll Group Ltd v. Mercury Communications Ltd* [1998] FSR 354 (which Mr Au was kind enough to place before me).

- (5) Two common guidelines are of course the consideration of the merits of the plaintiffs claim and the balance of convenience. Here, it is of course easy to see at once how they are linked to the fundamental principle: there must be a risk of injustice if the plaintiff cannot even establish a serious question to be tried or that one or the other party will be put to substantial inconvenience or prejudice if an interlocutory injunction were or were not granted.
- (6) In the case of interlocutory mandatory injunctions, the risk of injustice (being wrong in the sense referred to above) can be quite acute. In *Films Rover International Limited*, it was put thus by Hoffman J at 681 B In *Shepherd Homes Ltd. v. Sandham*, Megarry J. spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage : they usually go further than the preservation of the status quo by requiring a party to take some new positive step or undo what he has done in the past; an order requiring a party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do; a mandatory order usually gives a party the whole of the relief which he claims in the writ and makes it unlikely that there will be a trial. One could add other reasons, such as that mandatory injunctions (whether interlocutory or final) are often difficult to formulate with sufficient precision to be enforceable. In addition to all these practical considerations, there is also what might be loosely called a due process question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial.
- (7) This passage in my view explains just why it is that generally a court will have to feel a high degree of assurance that at the trial of an action it will be shown that the interlocutory injunction was rightly granted before an interlocutory mandatory injunction will be given; all this being an exercise in assessing the strength of the plaintiffs case: see sub paragraph(1) above. However, I emphasize that this is only generally the court s approach. Where it is shown, as an exception to this general approach, that the case is one in which the withholding of on interlocutory mandatory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel the high degree of assurance as aforesaid, it would be right to grant an interlocutory mandatory injunction: see *Films*

Rover International Limited at 681 B.

- (8) This of course brings into focus the balance of convenience. Thus, if a plaintiff in seeking an interlocutory mandatory injunction cannot demonstrate more than a serious question to be tried, it will have to show that the balance of convenience tilts so much in its favour that justice requires such an injunction to be granted, even taking into account those aspects of an interlocutory mandatory injunction expressed by Hoffman J in *Films Rover International Limited*.
- (9) At no stage, however, in the consideration of the matter does the court lose sight of the practical realities of the situation to which the injunction will apply : see *NWL Limited v. Woods* [1979] 1 WLR 1294 at 1306C per Lord Diplock. If I may further summarise from the above passage and the cases referred to therein:
- (1) The difference between the grant of a mandatory interlocutory injunction and a negative interlocutory injunction is not one of principle.
 - (2) The ultimate question is: what is the course to adopt which involves the least injustice in case the grant or refusal of interlocutory relief, as the case may be, turns out to be wrong.
 - (3) The balance of convenience test is in reality a balance of the risk of doing an injustice. See also *Leisure Data v Bell* [1988] FSR 367 (CA) at 375-376; *Newport Association Football Club Ltd* [1995] 2 All ER 87 at 97a-b and *Re Chime Corporation Ltd* [2003] 2 HKLRD 905, 13.
 - (4) The more assured the court is on the merits of the applicant's case, the less will be the risk of injustice.
 - (5) However, if the circumstances are that justice requires the grant of the mandatory injunction at an interlocutory stage, then such an injunction should be granted irrespective of whether the court has a high degree of assurance as to the merits of the applicant's case.
 - (6) Nor does the court lose sight of the practical realities of the situation to which the injunction will apply. Much depends on what mandatory injunction is sought. Where the injunction sought is not expensive to comply with, or is not irreversible or would not effectively pre-empt the trial, the court may well grant the injunction without requiring a high degree of assurance even if the injunction is mandatory in effect (*Newport Association Football Club Ltd v Football Association of Wales Ltd*, supra). In *Leisure Data v Bell*, supra, Dillon LJ said at 372 : The court has to keep firmly in mind the risk of injustice to either party. Beyond that, there are many cases where there is a salvage element involved, and where it is necessary that some form of mandatory order shall be made to deal with a situation which cannot on the practical realities of the situation be left to wait until the trial. Here the court will act whether or not the high standard of probability of success indicated by Megarry J. [in *Shepherd Homes Ltd*] is made out. **BALANCE OF RISK OF INJUSTICE IN THIS CASE** Applying the aforesaid principles, this case seems to me to be one in which the court may well grant the mandatory injunction sought without requiring a high degree of assurance. What the Defendant is being required to do is to transfer back to Hong Kong until the trial of

this action the Withdrawn Monies that she has been keeping in the PRC or what is left of it. It is not irreversible. Indeed, the Defendant is already enjoined by the HK Injunction Order from dealing with such monies anyway so that there is no question of the trial of this action being effectively pre-empted. Subject to the difficulty anticipated by the Defendant on account of foreign exchange control in the PRC, I can see little or no risk of injustice to the Defendant even if this court errs in the sense described by Hoffmann J in *Films Rover International Ltd*, i.e. in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial). This is particularly so if she is ordered to transfer back just what she still has which is about US\$150,000 on her own evidence. Turning then to the difficulty anticipated by the Defendant on account of foreign exchange control in the PRC, the Defendant adduces in evidence a PRC Legal Opinion dated 25 March 2008 by Dr Priscilla MF Leung, an Associate Law Professor of the City University of Hong Kong specializing in Chinese Law. On this issue, Dr Leung's opinion reads as follows:

14. Under Chinese law, the Plaintiff's application is very difficult for the Defendant to comply with (if such order of Hong Kong is given) because there is stringent foreign exchange control in China.
15. Even if the Defendant wants to comply with the Plaintiff's demand to transfer the sum of HK\$2,173,537.00 back to Hong Kong, she would have great difficulties to do so as the process for applying to transfer the said funds to Hong Kong would be very lengthy and complicated and in my experience the chances of the relevant authority giving approval to such transfer of funds all at one time is minimal if not impossible.
16. Thus, I would say if an injunction in the form as asked for by the Plaintiff is given, the Defendant would not be able to transfer the funds required back to Hong Kong within the 7 days period as set out in the Plaintiff's summons.
18. In relation to the Plaintiff's application for mandatory injunction asking the Court to direct the Defendant to transfer a sum of HK\$2,173,537.00 back to Hong Kong, I am of the view that according to Chinese Law, it would be very difficult for the Defendant to comply with the same if the Court grants such an order as the RMB is not a freely convertible currency. Due to the foreign exchange control, even if the Defendant makes an application to do so, and even if such approval is to be granted, the whole process will definitely take a very long time and definitely cannot be completed within 7 days from the order as the Plaintiff asks for in the summons. The Plaintiff chose not to place before the court any expert evidence to rebut Dr Leung's opinion at the hearing on 13 May 2008. He was then contented with dealing with Dr Leung's opinion on the basis that it was demonstrably unreliable and with just putting before the court a copy of the Rules for the Administration of Foreign Exchange Control for Individuals promulgated by the State Administration of Foreign Exchange on 5 January 2007 (the SAFE Rules). If the circumstances so warrant, the court is entitled to reject uncontradicted expert evidence of foreign law (*Traffic Stream Infrastructure Co Ltd v Full Wisdom Holdings Ltd* [2005] 1 HKLRD 740, CFA). I think I will be forgiven for not deriving any assistance from Dr Leung's above quoted opinion. It contains nothing but assertions.

There is no analysis whatsoever to speak of. The relevant Chinese law and the precise restrictions are not identified. Dr Leung simply claims, without giving any particulars, experience from which she can say that the relevant PRC authority is unlikely to grant approval for the usual control to be departed from even if the order sought be made against the Defendant. Indeed, to take Dr Leung's opinion to its logical end, if she be right, the Plaintiff could well be deprived of the fruits of his judgment even if he should succeed in his claim to 90% of the Deposits because the part thereof that is kept in the PRC would still be subject to foreign exchange control there. One should approach a proposition that has such implication with caution. On the material available to me, I am not satisfied that the remittance of the Withdrawn Monies that the Defendant still holds in the PRC will be difficult or as difficult as the Defendant would have me believe. On my reading of the SAFE Rules: An individual in the PRC can sell/purchase foreign currencies at banks upon production of valid identification documents up to an annual limit which is currently set at the value of USD50,000 (Article 2). Articles 10 to 12 contain provisions in accordance with which foreign currency exceeding the annual limit can be sold/ purchased by individuals within the PRC for various purposes of a non-capital nature at banks upon production of valid identification documents and documents in proof of the purpose for which the foreign currency is required. One of the purposes is others under Article 9(9). Foreign currencies purchased in accordance with the rules can be remitted out of the PRC (Article 3). In the circumstances, I am of the view that the Defendant should be ordered to pay into court USD150,000 (which she admittedly still holds) provided that there is a serious issue to be tried. IS THERE STILL A SERIOUS ISSUE TO BE TRIED? The HK Injunction Order was granted by Deputy Judge Gill and upheld by the Court of Appeal on the basis that the Plaintiff had raised serious issues to be tried. I have already ruled inadmissible the Plaintiff's admissions at the Mediation Meetings on the issue of merits. In any event, the trial judge would not have them. The Defendant questions whether there is still a serious question to be tried on the ground that the PRC Judgment has been rendered. As said earlier, the Defendant is seeking to enforce the PRC Judgment by counterclaim in this action. Further or alternatively, although this has not been raised by the Defendant, I am mindful that it may be argued that the PRC Judgment to which the Plaintiff and the Defendant were parties and which ruled on the very issue raised by the Plaintiff's claim herein (namely, the validity of the Agreement) operates as a *res judicata*. The argument before me is focused on whether the PRC Judgment is final and conclusive. In this regard, to be enforceable in Hong Kong, a foreign judgment has to be final and conclusive. Likewise, to be operative as a *res judicata*, a foreign judgment has to be final and conclusive (Spencer Bower, Turner & Handley, *The Doctrine of Res Judicata*, 3rd Edition (1996), p.74, 165). In evaluating such argument, it is important to bear in mind that at this interlocutory stage, the court is not called upon to determine conclusively whether the PRC Judgment is final and conclusive. All that the court is required to decide is whether the finality or otherwise of the PRC Judgment is a serious issue to be tried. The Defendant again relies on Dr Leung's opinion which is that the PRC Judgment is a final judgment in the PRC and has conclusively adjudicated on the disputes between the parties because the Plaintiff did not appeal within time and that the Defendant

has executed such judgment against the Plaintiff's assets in the PRC. Further, Dr Leung considers that the PRC Judgment falls within the Arrangement for Mutual Recognition and Enforcement of Mainland Monetary Judgments in Hong Kong signed by the Vice-President of the Supreme People's Court and the Secretary for Justice on 14 July 2006 (the Arrangement). As said earlier, the Plaintiff chose not adduce any rebuttal expert evidence at the hearing on 13 May 2008. However, I agree with Mr Yee that Dr Leung's conclusion of the applicability of the Arrangement to the PRC Judgment is fundamentally flawed. The Arrangement affects only judgments given after the effective date of the Arrangement. Article 19 of the Arrangement provides that the Arrangement is to become effective on a date to be announced by the Supreme People's Court and the HKSAR after the former has promulgated judicial interpretation of the Arrangement and the latter has completed the relevant legislative amendment procedure. That date is 1 August 2008. Further, the Arrangement covers only enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement in writing (Article 1). The PRC Judgment is clearly not such a judgment. Secondly, whether a judgment is final and conclusive does not depend on whether it is final for the purposes of appeal. A judicial decision otherwise final is not less so because it is appealable. A judgment is final and conclusive if it is not amenable to challenge except by way of appeal. See *Nouvion v Freeman* (1890) LR 15 App Cas 1 applied in *Lee Yau Wing v Lee Shui Kwan* [2007] 2 HKLRD 750 (CA) (in which the defendant's appeal from the PRC judgment sought to be enforced against him in Hong Kong had been dismissed in the PRC). And the same criterion of finality applies whether a foreign judgment is to be recognised for enforcement or its preclusive effect in subsequent proceedings brought or continued in the local forum (Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgments*, 2001, pp.49-52). In the context of a PRC judgment, what may potentially render the judgment not final and inconclusive is the trial supervision system under Chapter 16 of the PRC Civil Procedure Law under which in addition to a party to the case, the People's Court or the Supreme People's Procuratorate can, under specified circumstances, apply to the People's Court before whom the original trial took place or to a higher level People's Court for a re-trial. Essentially, those circumstances were where the judgment were erroneous or based on insufficient evidence, where the judgment was obtained in violation of the prescribed procedure and the judicial officers conducting the original trial were guilty of embezzlement, corruption or other malpractice (*Lee Yau Wing v Lee Shui Kwan*, supra). Hence, it appears to me that the dismissal of the Plaintiff's application for a re-trial by the Guangdong Province Higher People's Court is not a complete answer. Dr Leung's opinion has not addressed the trial supervision system at all. In any event, in *Lee Yau Wing v Lee Shui Kwan*, supra, the Court of Appeal held by a majority (Cheung and Yuen JJA) that whether the existence of the trial supervision system per se rendered a PRC judgment inconclusive and not final involved complicated legal questions that could not be determined in the absence of trial. In the circumstances, the PRC Judgment merely adds to the serious issues to be tried in this action.

PARTIES APPLICATIONS TO ADDUCE FURTHER EVIDENCE As mentioned above, both parties have, after the hearing before me on 13 May 2008, applied for leave to adduce further

evidence. I have allowed such applications and received further evidence to the extent stated in paragraph 50 above. In particular, I have not acceded to the Plaintiff s application for leave to adduce a Legal Opinion dated 21 May 2008 and a Supplemental Legal Opinion dated 10 October 2008 by Dr. Zhang Xianchu, Professor of Law & Associate Dean, Faculty of Law, University of Hong Kong, covering principally the issue of the finality of the PRC Judgment because, for reasons that should be apparent from the above judgment, such further evidence is unnecessary at this stage of the proceedings. ORDER For the foregoing reasons, I order the Defendant to pay into Court USD150,000 but give her 21 days to allow her time to comply with the SAFE Rules with liberty to apply. I also make an order nisi that the costs of this application should be the Plaintiff s costs in the cause, to be taxed if not agreed. (Lisa K.Y. Wong, SC) Deputy High Court Judge Mr. Kent Yee, instructed by Messrs. Christine M. Koo & Ip (before 23 May 2008) and Messrs. K.Y. Lo & Co. (from 23 May 2008), for the Plaintiff Ms. Angela Gwilt, instructed by Messrs. Tang Wong & Cheung, for the Defendant

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