

October 7, 2020

HONG KONG CASE UPDATE: THE COURT OF APPEAL CONFIRMED THAT PRE-TRIAL DISCOVERY AGAINST A NON- PARTY WITNESS FOR USE IN A FOREIGN COURT IS NOT PERMISSIBLE

To Our Clients and Friends:

The Hong Kong Court of Appeal (Court of Appeal) recently reaffirmed^[1], in the context of an application for an examination order of individuals (Respondents) residing in Hong Kong to obtain information which may enable partial satisfaction of a judgment debt under a judgment in proceedings in a foreign court to which neither the Respondents nor the companies of which they are officers were parties, that pre-trial discovery against non-party witness is not permitted, save within the limited scope of *Norwich Pharmacal* discovery.

1. Background Leading to the Application in Hong Kong

The applicants for the Hong Kong examination order (Applicants) obtained a judgment for US\$100,738,980 (Judgment Debt) in the United States District Court, Western District of Washington at Seattle (Federal Court) against a number of judgment debtors.

The Applicants' case was that based on the unaudited balance sheet of one of the judgment debtors (Judgment Debtor), there were receivables owed by some third parties to the Judgment Debtor, being US\$18.9 million by an exempted limited partnership registered in Cayman Islands, and US\$4 million by a company incorporated in the British Virgin Islands (respectively, the Two Sums and the Third Parties).

The Applicants were appointed by the King County Superior Court, State of Washington (State Court) as collecting agent to collect the receivables of the Judgment Debtor, including the Two Sums. Such receivables were to be applied to satisfy the Judgment Debt. The State Court subsequently clarified that it did not have jurisdiction over the Third Parties (as they had no place of business in the State of Washington) and it did not adjudicate on the issue of whether the Two Sums were owed by them to the Judgment Debtor, and held that the collection orders only placed the Applicants in the shoes of the Judgment Debtor for collection purposes and such orders could be made even though the State Court had no jurisdiction over the Third Parties.

Of importance to note is that the collection orders were not garnishee orders, and there is no evidence to suggest that the Federal Court and the State Court had the requisite personal jurisdiction over the Third Parties for garnishee proceedings. Further, the relevant transaction agreements between the Judgment Debtor and the Third Parties respectively had an exclusive jurisdiction clause, which provided that the

agreements were governed by the laws in Hong Kong and subject to resolution solely in the Hong Kong Courts.

The Two Sums were disputed by the Third Parties, and their case was that it was the Judgment Debtor which owed them monies instead.

The Respondents, being the subjects of the examination order, are officers of the Third Parties, who reside in Hong Kong.

2. Procedural History in the Hong Kong Courts

The Federal Court issued two Letters of Request for an examination of the Respondents, the purpose of which was to allow the Applicants to obtain information regarding the Two Sums that may enable them to collect the monies owed to the Judgment Debtor which could be utilised to satisfy the Judgment Debt.

An *ex parte* application by way of an Originating Summons supported by the two Letters of Request to examine the Respondents were made by the Applicants and Master Lai of the Court of First Instance (CFI) granted an examination order (Examination Order).

The Respondents applied to set aside the Examination Order and/or to strike out the Applicants' *ex parte* Originating Summons. Both applications were allowed by Recorder Yvonne Cheng SC (Judge) of the CFI.

The Applicants appealed against the decision of the Judge, which decision was upheld by the Court of Appeal.

3. Requirements under the Evidence Ordinance (Cap. 8) (Ordinance) in the Context of Evidence for Civil Proceedings in Other Jurisdictions

Whilst both sections 75(b) and 76(3) of the Ordinance are relevant in the circumstances^[2], the Court of Appeal upheld the Judge's decision based on section 76(3) alone. The analysis under paragraph 3.2 below on section 75(b) is included for completeness.

3.1 Section 76(3) – Pre-Trial Discovery Against Non-Party Witness Prohibited

Section 76 provides for the power of the Court of First Instance to give effect to an application for assistance in obtaining evidence for civil proceedings in foreign courts. Section 76(3) states that:

An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates)...” (emphasis added)

The Judge held that the proposed examination was for pre-trial discovery against non-party witnesses, which is not permitted under Hong Kong law and prohibited by section 76(3), since the allegations of

fact relied upon by the Applicants (in short, the Third Parties owed monies to the Judgment Debtor) were not live issues before and to be resolved by the Federal Court where the main action was concluded, and enforcement proceedings (i.e. garnishee proceedings) in which such allegations could be raised had not been instituted. As to the Applicants' alternative case that after the examination of the Respondents they would "plot a course for collection depending on the evidence so obtained", the judge held that the proposed examination was a fishing exercise.

The Court of Appeal agreed with the Judge's decision, and made, *inter alia*, the following remarks:

- Hong Kong has adopted the common law position that there is no pre-trial discovery against non-party witnesses other than those falling within the limited scope of *Norwich Pharmacal* discovery (i.e. discovery against third parties who got innocently mixed up in the wrongdoings of others);
- whether the assistance request falls foul of section 76(3) on account of fishing must be a matter for the judge in Hong Kong by reference to Hong Kong laws rather than US laws under which the permissible scope of discovery is wider. Whilst examination which is investigatory in nature (in contrast to eliciting admissible evidence) is allowed under US laws, it is not permitted under Hong Kong laws; and
- obtaining information from a non-party witness by way of post-judgment discovery in aid of execution, whilst permissible under US laws, is not a permissible procedure in Hong Kong, noting that if a judgment creditor has sufficient ground to support the application for a garnishee order in respect of a debt due to a judgment debtor, the judgment creditor has to commence garnishee proceedings first before he can obtain directions for determination of the liability of the garnishee (including directions for discovery as necessary)[3].

3.2 Section 75(b) – Obtaining Evidence for the Purposes of Civil Proceedings

Section 75 provides for the requirements to be fulfilled in an application for assistance. Section 75(b) provides that:

“Where an application is made to the Court of First Instance for an order for evidence to be obtained in Hong Kong and the court is satisfied that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the Court of First Instance shall have the powers conferred on it by this part.” (emphasis added)

The central issue under this section is therefore whether evidence is to be obtained for the purposes of civil proceedings, instituted or contemplated, before the requesting court.

The Judge, without the benefit of expert evidence on US law from the Applicants which was set out in an affirmation[4], ruled that the requirement was not satisfied because the evidence was not obtained for the purposes of civil proceedings which either have been instituted before the Federal Court or whose institution was contemplated.

The Judge rejected that the very application for discovery leading to the Federal Court’s request for evidence could constitute civil proceedings within the meaning of section 75(b) as a matter of construction, since it would render the section redundant. Further, since there was no evidence that the Applicants could establish the Federal Court’s jurisdiction over the Third Parties, it could not be said that proceedings against the Third Parties in the said court for enforcement of the judgment were contemplated.

The Court of Appeal, however, left the issue open, since it disagreed with the Judge on the admissibility of the Applicants’ expert evidence on US law.^[5]

Notwithstanding such disagreement and that it was prepared to assume that under US law, the obtaining of information to facilitate the “plotting of the next course of action” would be regarded as obtaining evidence for use in the Federal Court proceedings, the Court of Appeal took the view that it also had to be established that the relevant proceedings were proceedings in a civil or commercial manner in the requested jurisdiction, i.e. Hong Kong court, in addition to the requesting jurisdiction.

In this regard, the Court of Appeal considered that the mere facilitation of the Applicants to act as collection agent did not qualify as civil proceedings in Hong Kong. Whilst discovery procedure is a form of civil proceedings in Hong Kong, such discovery would not be permitted against non-party witnesses, other than the limited form of *Norwich Pharmacal* discovery.

4. Conclusion

It is clear from the decisions of the Judge and the Court of Appeal that to obtain an order for assistance in obtaining evidence for civil proceedings in a foreign court, such obtaining of evidence must be permissible under the laws of Hong Kong. It is not sufficient that it is only permissible under the laws of the requesting jurisdiction (which may be implied by the Letter of Request issued by the foreign court). On this note, pre-action discovery against non-party witness is not permitted in Hong Kong save for *Norwich Pharmacal* discovery.

[1] *Re a civil matter now pending in United States District Court for the Western District of Washington at Seattle under No 2:13-CV-1034 MJP* ([2020] HKCA 766). The presiding judges were Hon Lam VP, Chu JA and G Lam J. A copy of the judgement of the Court of Appeal is available [here](#). The judgment of the Court of First Instance ([2019] HKCFI 1738) is available [here](#).

[2] The Respondents also argued that (1) there were material non-disclosures on the Applicants’ part when they took out the *ex parte* application for the Examination Order and (2) the Examination Order contravened section 6 of the Protection of Trading Interests Ordinance (Cap. 471). However, these were not the focus of the Judge or the Court of Appeal and accordingly, are not the focus of this alert.

[3] The Applicants did not commence garnishee proceedings against the Third Parties since the Federal Court did not appear to have personal jurisdiction over the Third Parties and they were also unable to say that the Two Sums were actually due from these entities to the Judgment Debtor. Further,

the Applicants also faced the difficulty of the exclusive choice of forum clauses in the agreements governing the transactions between the Judgment Debtor and the Third Parties. However, these issues were not put before the Federal Court in the application for the Letters of Request and accordingly, the Federal Court had no opportunity to address it. The Court of Appeal remarked that if the Applicants wished to rely on the use of evidence of the Respondents in garnishee proceedings against the Third Parties, they should have at least alluded to such basis in their motion for application for the Letters of Request.

[4] The Judge ruled that such evidence was not admissible on the basis that there was no expert declaration in accordance with Order 38 Rule 37C of the Rules of the High Court (RHC). The expert for the Applicants, being the general counsel of the Applicants (who was heavily engaged in the present dispute), felt that he was unable to give an expert declaration.

[5] The Court of Appeal was inclined to take the view that the prohibition against admissibility for lack of expert declaration under Order 38 Rule 37C of the RHC does not apply automatically to expert evidence set out in affidavits or affirmations adduced under Order 38 Rule 2(3) (as opposed to expert reports filed for trial pursuant to directions given under Order 38 Rule 6 regarding proceedings commenced by, *inter alia*, Originating Summons), being an exception under Order 38 Rule 36(2) .



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors and the following lawyers in the Litigation Practice Group of the firm in Hong Kong:

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