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# newsletter

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# ICAC's powers of investigation reviewed

by Gloria Poon, Trainee Solicitor

There have been a number of high-profile ICAC decisions recently reconfirming a Defendant's fundamental rights that will have significant impacts on the conduct of future ICAC investigations and corruption cases. This article seeks to review and summarize the significance of these cases.

Is a warrant required prior to the conduct of secret surveillance? Kwong Hing International case:- HKSAR v. Li Man Tak and Nicholas Tan (unreported, 22nd April 2005)

On 22nd April 2005, District Court Judge Sweeney ruled that the use of secret surveillance by the ICAC is in breach of Article 30<sup>1</sup> of the Basic Law, which protects individuals' privacy of communication.

Judge Sweeney did allow the secret recordings of conversations between Kwong Hing International chairman, Li Man Tak, and former UBS financial analyst, Nicholas Tan, to be admitted as evidence despite the fact that they were gathered by the ICAC unlawfully in that particular case, on the basis that the content of these conversations were authentic, expressed voluntarily and therefore vital to the trial. He considered that the ICAC were unaware of the



breach of Basic Law Article 30 at that time and had conducted the surveillance in good faith.

However, he expressly warned that any further such activity after his judgment will be seen by the courts as a wilful breach.

Judge Sweeney's reasoning is that Article 30 clearly provides that the privacy of communication shall be protected by law and a relevant authority may only infringe upon that privacy in accordance with legal procedures to meet the needs of public security or investigation into criminal offences.

The Judge ruled that ICAC standing orders do not qualify as legal procedures as they are not subject to public scrutiny and there is no reference to an outside body to see whether the Standing Orders have been complied with. A system requiring the application of a search warrant from the Court prior to such a covert surveillance operation will be considered as a proper legal procedure.

It is interesting to see whether Judge Sweeney's ruling will cover secret phone tapping as well. The Chief Executive, or the Chief Secretary is presently empowered under Section 33 of the Telecommunications Ordinance (Cap. 106) to order that, whenever he considers that public interest requires it, any message transmitted, received, or being transmitted by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order.

The terms of the Chief Executive's power under this section and its exercise by the Chief Executive or authorized public officers have been criticized as arbitrary, secretive and susceptible to abuse. The precondition of "public interest" is again wide and vague, which means the proper exercise of this unfettered

<sup>1</sup> Article 30 reads, "The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures."

and unsupervised power depends on the good faith of the person exercising the discretion. There is no indication as to under what circumstances and conditions can this power to interfere with privacy of communication be exercised. It is under such circumstances that the Law Reform Commission concluded that section 33 of the Telecommunication Ordinance was inconsistent with the Hong Kong Bill of Rights Ordinance<sup>2</sup> in force at that time and recommended that the exercise of this power of intercepting of communications be regulated under a warrant system by applications to the High Court. An Interception of Communications Ordinance 1997 has been enacted but regrettably has yet to come into operation.

It would seem that the reasoning of Judge Sweeney on the absence of legal procedures to review procedures and the criteria for conducting secret surveillance may arguably apply to an order for phone tapping granted by the Chief Executive under Section 33 of the Telecommunication Ordinance.

The existence of a provision in the Ordinance granting such arbitrary power to the Chief Executive is equally insufficient to protect such vulnerable basic rights.

It would be interesting to see whether there will be any such successful challenges in future phone tapping cases so that one day a warrant would be required prior to the conduct of any phone tapping.

### Your right to have Legal Representation

The very first thing to do when one is either “invited” or “arrested” to the ICAC is to call a lawyer. It is one of the Defendant’s fundamental rights to have legal advice before interviews are conducted by the investigating agencies. This has been confirmed in the recent case of *HKSAR v. Chan Sai Ming*

(unreported, 4th June 2004). Universal Music ex-president Alex Chan Siu-po was released after District Court Judge Derek Pang Wai-cheong found that Chan was wrongly denied access to his mobile phone which was said to contain his lawyer’s telephone number and held that there was no case to answer.

### What the Prosecution has to disclose for the purpose of Defence case preparation

In the recent case of *HKSAR v. Chan Kau-tai* (unreported, 28th January 2005), the former chief government building engineer and father of famous pop singer, Eason Chan was released on bail pending appeal against a 7 year bribery sentence, on the ground

of non-disclosure of a past drink-driving conviction of an ICAC officer, who was a key witness in the trial. The Appellate Counsel suggested the wilful non-disclosure might undermine his credibility.

It should be noted that generally once a person is convicted, the presumption of innocence no longer operates and therefore a bail pending

appeal would only be granted either when there is (1) a likelihood that a majority of sentence would have been served by the time of the appeal is heard; or (2) an arguable case of appeal. Therefore, regardless of the actual result of the appeal, the granting of the bail in the Chan case seems to suggest that the ground of material non-disclosure was at least considered to be an arguable ground of appeal. From this one can see how important such duty of disclosure is on the part of the prosecution.

The scope of the prosecution’s duty of disclosure has been thoroughly reviewed in the recent case of *HKSAR v. Wu Wing Kai and Lau Tung Chee, Alan* (unreported, CACC457/2003, 21st April 2005). Some of the important principles cited in the judgment are recited as follows for readers’ reference:

“*The prosecution’s duty is to disclose relevant material which may undermine its case or advance the defence case.*”

*HKSAR v. Lee Ming Tee and Securities and Futures Commission* [2004] 1 HKLRD,  
per Sir Anthony Mason NPJ (with emphasis added):-

- “143. The prosecution’s duty of disclosure has its foundation in the right of the defendant to a fair trial.”
- “161. The prosecution’s duty is to disclose to the defence material (including information) in its possession or control. That will ordinarily include materials that have been gathered by the investigating agency (the police) and it is the responsibility of the prosecution to make the investigating agency aware of the need to make available all relevant materials. In this sense, the prosecutor’s duty is to disclose to the defence all relevant material in its possession or control and in the possession or control of the investigating agency.”
- “170. The prosecution’s duty is to disclose to the defence relevant material (including information) which may undermine its case or advance the defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible : *Reg v. Preston* [1994] 2 AC 130 at p.163-164, *per* Lord Mustill. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit.”
- “171. The *Melvin* categories may be accepted as a broad statement of what, on a sensible appraisal by the prosecutor, is subject to disclosure. The *Melvin* formulation and the recognition that the credibility of a prosecution witness is relevant for the purpose of the *Melvin* categories have the consequence that disclosable material relevant to the cross-examination of a prosecution witness cannot be restricted to the three instances of disclosable material<sup>3</sup> relevant to the credibility of a prosecution witness sanctioned by authority and referred to by Steyn LJ in *R. v. Brown* [1994] 1 WLR 1599 at 1607A-C. It extends to other significant material which a reasonable jury could regard as tending to shake confidence in the credibility of the witness.”

In the appeal to the House of Lords in *R. v. Brown (Winston)* [1998] A.C. 367 at 377E, Lord Hope says:

“The prosecution is not obliged to lead evidence which may undermine the Crown case ..... Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed.”

It should be noted that the scope of the prosecution’s duty of disclosure is broad and it is likely that materials relating to the incidences where a prosecution witness was disbelieved in either court cases, tribunals, or even SFC/Stock Exchange Regulatory Committee or Panel will be covered.

Therefore, it is always in the Defendant’s interest to request for disclosure of such materials for cross-examination purposes, especially when a case is based on the credibility of key witnesses.



<sup>3</sup> The three instances to which Steyn LJ referred as arising from the duty of the Crown to give disclosure of significant material which may affect the credibility of a Crown witness were 1) previous statements of prosecution witnesses : Archbold’s Criminal Pleading, Evidence and Practice, 1994 ed., paragraph 4-279; 2) a request for a reward by a prosecution witness : *Reg. v. Taylor* (unreported), 11 June 1993; *Reg. v. Rasheed* (unreported), 17 May 1994; and 3) previous convictions of a prosecution witness.

# Mental Health

## – who makes the decisions?

by David H.C. Wan, Associate Solicitor

*Take this scenario..... Mr. Chan Tai Man is self employed and owns a business in Hong Kong. He has a wife and young family. Mr. Chan meets with a road traffic accident and suffers serious injuries. He recovers from the physical injuries but is mentally incapacitated and is not able to manage his affairs. This article will discuss what options are available to Mr. Chan and his family under current Hong Kong legislation.*

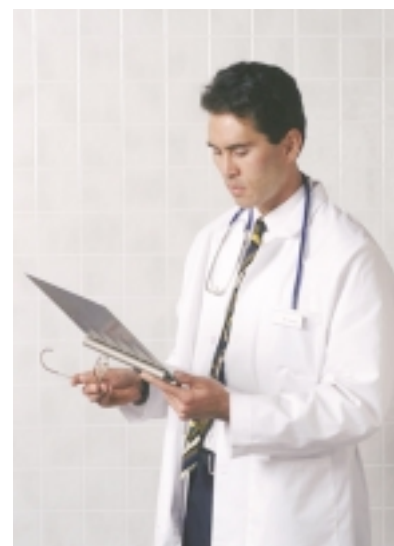
### Appointment of a Guardian

Generally in Hong Kong, to ensure Mr. Chan's immediate needs are met, that is housing and medical treatment, someone can apply to become his Guardian pursuant to Part IV B of the Mental Health Ordinance, Cap 136 Laws of Hong Kong ("the Ordinance"). The applicant can be a relative, social worker or medical practitioner. However, having said this, it is not in every case that a Guardianship Order is needed. Where Mr. Chan's needs are being met and he is being looked after by his family, a Guardianship Order is not normally required.

There is a statutory body called the Guardianship Board which is responsible for making Guardianship Orders. This is a multi-disciplinary Board consisting of the Chairperson and a panel of 56 part-time persons, including members who have personal experience of mentally incapacitated persons; lawyers, doctors, social workers, and psychologists.

If appointed, a Guardian has the legal power to make important personal decisions in support of an adult who is mentally incapacitated, such as decisions about his/her accommodation or consenting to medical treatment. The Guardian may also manage a limited amount of that person's money, which currently is a maximum of HK\$10,000 per month.

In the case of *The Hospital Authority v C*, HCMP 479/2003, the Hospital Authority applied to the High Court for a declaration to authorize doctors to carry out an emergency caesarean section on a pregnant patient who had been in a deep coma for the previous 4 months. This was necessary because the father of the patient, against medical advice, objected to the caesarean section being carried out immediately because his spiritual guide, a person who was not named, had urged that to ensure the health of both mother and child, the operation be delayed by 10 - 14 days. According to the spiritual guide time was required to bring together metaphysical healing powers. Due to the urgency of the matter no



Guardian was appointed for the patient and the declaration was granted resulting in the delivery of a healthy baby girl. The Judge dealing with the case, Mr. Justice Hartmann, decided that it was in the best interest of the patient to have the caesarean and that her best interest included what she would have wished, i.e. for her baby to be born alive.

### Appointment of a Committee of Estate

Returning to our Mr. Chan. As mentioned, he has a business to run. His wife or other family members may be appointed to act as a committee of his estate to run the business as an on-going concern. A committee has more powers than that of the Guardian. The committee may also be authorized to deal with other financial interests of Mr. Chan including bank accounts, securities accounts and landed properties. The basis of their authority to act would come from a court order.

The procedure for applying to appoint a committee is governed by Part II of the Ordinance. In the matter of appointment of a committee of the estate of Madam A, in HCMP No.44 of 2004, Mr. Justice Lam of the High Court gave his views on how such an application should be made:

- There is a two stage process. The first stage is to seek directions for an inquiry to be held. This is

to define the scope of the inquiry that could encompass inquiries concerning the nature of the property belonging to the mentally incapacitated person (“MIP”), the MIP’s relatives and other questions. The second stage is for the enquiry to take place. If satisfied that the person is in fact a MIP, the court can then make an order regarding the affairs and property of the MIP, including but not limited to the appointment of a committee.

- The author has been involved in a case where the directions and inquiry took place at the same time. Mr. Justice Lam’s interpretation of Part II of the Ordinance is that it should be a two stage process.
- The application can be made on an *ex parte* basis. There is often no respondent. Notice of the proceedings should be given to the relatives of the MIP.
- Evidence in the form of an affidavit needs to be filed on the relatives of the MIP and his property.
- There is a requirement for two medical reports to be filed, one of which must come from a doctor approved by the Hospital Authority in the diagnosis and treatment of mental health patients. The reports should mention that the MIP is incapable by reason of their condition of managing and administering his property and affairs. The



author has been involved in a case where this requirement was not met by the other side and the application was dismissed by the Court partly for this reason.

- With regard to the committee, the Court will need to have information about the suitability of the proposed appointees having considered the affairs and properties of the MIP that they are going to administer.
- Finally, it is good practice to give a set of the application papers to the Official Solicitor to ascertain whether he has any views on the intended applications. If there are any complications, e.g. no suitable candidates to act as the MIP's committee, then the Court will have the power to direct that the Official Solicitor be notified or joined as a party.

In addition to the appointment of a committee, the Court has powers to direct that an asset of the MIP be used for the maintenance of the MIP and his family. This could also be an alternative to the appointment of a committee. For example, the Court could decide that the business of Mr. Chan should be sold if it considers for example that it is not viable to continue running it in his absence. The proceeds of sale could be used to maintain Mr. Chan and his family.

Therefore the range of options open to the Court are wide.

### Enduring Powers of Attorney

Enduring Powers of Attorneys are usually completed by those who wish to prevent future problems with financial and health management. This would avoid relatives having to make time consuming and stressful applications outlined above in order to have power

*It will be the duty of the solicitor who receives instructions from a relative of a client to draft an Enduring Power of Attorney to maintain objectivity and interview the client on his or her own to rule out undue influence.*

to manage the MIP's business, income and bank accounts.

Under the Enduring Powers of Attorney Ordinance, Cap 501, an Enduring Power of Attorney must be executed before a doctor, preferably a specialist who can certify that the patient has sufficient capacity to execute such a document.

An Enduring Power of Attorney continues to have legal effect even if the client becomes mentally incapable of making financial

decisions and generally managing his affairs. The form of wording can specify when the powers are to begin - immediate on a particular date or on a particular occasion. If the client does not specify a date or event then it takes effect from the day the client signs it. It will be the duty of the solicitor who receives instructions from a relative of a client to draft an Enduring Power of Attorney to maintain objectivity and interview the client on his or her own to rule out undue influence. The solicitor must ensure that this is the client's wish and not that of the relative.

In conclusion, to avoid the worry and stress for relatives in the event a person becomes mentally incapacitated and being unable to manage his own affairs, and in the light of Hong Kong's ageing population, the focus should be on planning for this unexpected event. The author takes the view that Enduring Powers of Attorneys will become more prevalent and rightly so for the reasons given above.



# Sales Commission: is it wages ?

by Li Chung Nam, Associate Solicitor



Most employers may well understand that wages include contractual commission as defined under the Employment Ordinance (Cap. 57) (the “Ordinance”). Some employers may have never thought of the issue as to whether or not commission has to be included in working out the statutory holiday pay and/or annual leave pay. As employees may simply assume that they are only entitled to holiday pay and annual leave pay based on their “basic” salary, they may never realise or complain about the method of calculation of those payments.

## Commission Defined

Commission is a contingent payment. An employee has to find his own source of customers and/or complete a sale transaction and most importantly, only when the customers make payment to the employer company does commission become payable as a contractual reward to the employee.

## The Law

Sections 41 and 41C of the Ordinance provide that holiday pay and annual leave pay shall be a sum equivalent to the wages which the employee would have earned if he had worked during the respective period of holiday and annual leave (“fixed salary situation”). Where an employee is employed on piece rates or where the daily wages of an employee vary from day to day, the holiday pay and annual leave pay shall be a sum equivalent to the average daily wage earned by the employee, i.e. the average of the daily wage of the employee on each day he worked in the last month, comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the

first day of the holidays or the annual leave respectively (“unfixed salary situation”).

## Prospective Arguments for Employers

An employee who is contractually entitled to both a basic salary and commission may arguably not be able to rely on either the fixed salary situation or the unfixed salary situation to include commission into the formula of calculating holiday pay and annual leave pay. As the employee may make no sales during full working days, the employer should not be out of pocket for contingent commission while making those payments.

Section 42 of the Ordinance also provides that if an employee is paid his “ordinary wages” in respect of any holiday or annual leave, the employee shall not, in addition to such ordinary wages, be entitled to his holiday pay or annual leave. The issue then is whether or not an employee who received holiday pay and annual leave pay based on his basic salary can be regarded as having been paid his “ordinary wages”, this is unfortunately not expressly defined in the Ordinance.

## Case Study

The above arguments were put forward by an employer in the recent case of *Liang & Ors v Lisbeth Enterprises Ltd* [2004] 3 HKC 548, a Labour Tribunal Appeal case heard at the Court of First Instance. In accordance with the contract entered into between the parties, the employee’s basic salary was HK\$5,600.00 and she was additionally entitled to commission. She was only given holiday pay and annual leave pay by reference to her basic



salary only, while her average monthly income was over HK\$50,000.00 most of which was contractual commission.

The Court held that commission should be taken into account when calculating the employee's holiday pay and annual leave pay. By enacting sections 41 and 41C, the legislature provides specific provisions to cater for two common types of unfixed salary situations in which a worker's remuneration is not fixed, i.e. employment on piece rates and daily fluctuating wages. They provide a statutory formula for working out the holiday pay and annual leave pay in the above mentioned two specified types of unfixed salary situation to settle all possible arguments. This does not mean that apart from these two types of unfixed salary situations, other types of situations in which the employees' wages are contingent or fluctuating in nature are not covered by the sections.

The Court also explained that the employee who was only paid remuneration calculated by reference to her basic salary only had not been paid her "ordinary wages". There is no justification in construing "ordinary wages" as equating with or limited to "basic salary" or "fixed wages". "Ordinary wage" which is not defined in the Ordinance, should be construed as "wages" that an employee would have earned under normal circumstances in the ordinary course of her employment.

### **The Excuse of Silent Acceptance**

One may argue that if an employee had never complained about the method of calculating holiday pay and annual leave pay (until her employment contract was terminated), there was an implied agreement in regard to the calculation method which prevented the employee from asserting her legal rights under sections 41 and 41C.

This argument was rejected by the Court because mere silence and inaction of the employee as to the method of calculation during her years of employment

did not prevent the employee from later asserting her legal rights. Furthermore, it would be unfair and inequitable to prevent an employee from exercising her statutory and legal rights against the employer when her silence was actually caused by the misleading representation made to her by her employer.

### **Practical Problems to be faced by Employers**

Applying the principles from the above case, "wages" as defined under the Ordinance include all remuneration, earnings, traveling allowances, attendance allowances, attendance bonus, commission, overtime pay, tips and service charges which are capable of being expressed in terms of money, payable to an employee in respect of work done under the contract of employment. All these need to be included in working out the holiday pay and annual leave pay and must be made by reference to the average daily wage earned by the employee during a month immediately preceding the first day of holiday or annual leave.

An employment contractual clause which restricts the above method of calculation is void as it will seek to reduce the protection and benefits conferred by sections 41 and 41C in terms of calculating holiday pay and annual leave pay.

Employers who are unaware of their employees' statutory entitlement or believe that they can rely on contractual clauses or silent acceptance of their employees may have to in the future, if challenged, compensate their employees with an unexpected lump sum payment when terminating employment contracts.



# Discovery of documents: **what is privileged?**



*In the recent case of Goldlion Properties Ltd & Others v Regent Enterprises Ltd<sup>1</sup> the Court ordered discovery of certain legal advice referred to by the Defendant in its evidence. The case involved the breakdown of an Agreement for Sale and Purchase of a hotel wherein the Plaintiff had paid a deposit but the Defendant failed to complete the Sale.*

*by Emi Cheng, Associate Solicitor*

In its defence, the Defendant submitted that they had obtained legal advice and based on that legal advice, had decided not to proceed with the Sale.

Deputy High Court Judge Saunders found that the Defendant's conduct in this case was a "clear example of cherry picking by taking a portion of the advice out of context" and by "exposing portions of the advice it has received in order to justify the position it has taken, the Defendant has deployed [emphasis added] the advice in its defence."

What is the significance of the word "deployed" in this context?

First, let us examine the position on legal professional privilege.

## **Legal Professional Privilege - what exactly does it cover?**

The purpose of legal professional privilege, in summary, is to encourage a litigant to confide in his/her legal advisers without the fear of having the communications disclosed.

Communications made to and from a legal adviser (which, in this context, includes Barristers, Solicitors and legal executives) for the purposes of obtaining

legal advice, are generally protected from disclosure in the course of legal proceedings.

This general rule is subject to the following principles<sup>2</sup>:-

- (1) the legal adviser must be acting in his/her capacity as a legal adviser i.e. communication between friends would not be covered unless the "friend" was acting in his/her professional capacity;
- (2) where the information provided amounts to some fraudulent or illegal purpose;
- (3) when the privilege is waived by the client and the client permits disclosure;
- (4) where the communication is made for the purpose of being repeated to another party.

Waiver of privilege will not be inferred lightly; the general rule is that a document once privileged is always privileged. For example, privilege does not cease in respect of communications between a legal adviser and a client relating to an action which is not ultimately proceeded with nor does it cease upon the death of a client as the deceased's privilege can be claimed by his successor in title.<sup>3</sup>

## So when is privilege - in particular, legal advice - waived?

The Courts have taken the view that where a legal advice is referred to in an Affidavit, a distinction must be made as to whether or not the contents of the legal advice is being relied upon or the effect of it.

At first sight, it would appear that such distinction is rather artificial and difficult to comply with in practice.<sup>4</sup> One has to bear in mind that under the Rules governing Civil Procedure in Hong Kong, a deponent to an Affidavit must always identify the source and grounds of his information which he/she intends to rely upon for the evidence to be admitted as admissible. Further, one has to question what good it would do to simply refer to legal advice (for example, who provided the legal advice and when it was provided) and not refer to its contents.

The cases however seem to indicate that where an Affidavit quotes the contents of the legal advice or summarises them, then the Courts would be more inclined to conclude that the Affidavit has “deployed” the advice.

“When a party is deploying in Court material which would otherwise be privileged, the opposite party and the Court must have an opportunity of satisfying themselves what the party has chosen to release from that privilege represents the whole of the material relevant to the issue in question. [emphasis added] To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.”



The rationale behind this is summarized in the decision of Mr Justice Mustill in the case of *Nea Karteria Maritime Co., v. Atlantic & Great Lakes Steamship Co*<sup>5</sup> where he stated:

So if a deponent decides to quote and/or summarise the legal advice in his/her evidence, then he/she would have been taken to waive the privilege accorded to that document, otherwise it would be unjust for the opposing party to have a glimpse of what the legal advice was about and not have the opportunity to review the whole advice.

This principle has been followed in the recent decision of *Goldlion* (mentioned above) and other authorities decided in England.<sup>6</sup>

In conclusion, it is quite clear that clients and legal advisers must make a conscious decision as to whether or not to rely upon the contents of the legal advice to advance their claim/defence with the risk that it may need to be disclosed to the other party, or to simply rely upon the “effect” (albeit a limited one at that) of the legal advice or to delete reference to the legal advice in its entirety.

<sup>1</sup> [2005] HKEC 518

<sup>2</sup> *Halsbury's Laws of Hong Kong Volume 5(1) Paragraphs [90.0581] and [90.0582]*

<sup>3</sup> *Haslbury's (as above) [90/0595]*

<sup>4</sup> *Matthews and Malek on Discovery 1992 Edition Paragraph 9.15*

<sup>5</sup> [1981] Com LR 138

<sup>6</sup> e.g. *Great Atlantic Insurance Co v. Home Insurance Co and others* [1981] 2 All ER 485 and *Derby & Co Ltd v. Weldon and others (No 10)* [1991] 2 All ER 908

# Compliance with **Mandatory Injunctions**



by Thomas Feld, Associate Solicitor

Suppose you enter into a contract with a Hong Kong based or registered company for the construction and delivery of a pleasure yacht that will be manufactured in China.

The construction takes much longer than anticipated and ends up costing much more than contractually agreed. The yacht is eventually completed and you rightfully ask for its delivery to Hong Kong with the ownership document, and shipbuilder's certificate to be issued to you, as per the terms of your contract.

The building company refuses. What can you do?

## **Mandatory Injunction - A last Resort**

Litigation usually is a matter of last resort.

When gentle reminders and formal letters have brought no results and your yacht remains in China at the hands of a local entity of the Hong Kong company, the only sensible avenue to get the builder to perform his part of the contract is to apply to the High Court for an interlocutory mandatory injunction. This takes the form of an Order from the Court enjoining one party to do some act or to perform his obligations under a contract.

High Court judges have wide powers and discretion to grant mandatory injunctions and do what is just and equitable in all circumstances, subject to established principles which have been developed by precedent. For a mandatory injunction to be granted at an interlocutory stage, the Court needs a high degree of assurance that it will appear at trial and that the injunction is rightly granted.

In considering whether to grant an interlocutory injunction the Court is primarily concerned with whether the injustice suffered by the defendant if the

injunction is granted and the plaintiff later fails at trial is greater than the injustice to the plaintiff if the injunction is not granted and he later succeeds at trial.<sup>1</sup> It is a balancing exercise and all relevant factors such as urgency and justice and convenience will be considered.

There are now well established principles applied for an interlocutory mandatory injunction to be granted:<sup>2</sup> -

- The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' (i.e. if the injunction is granted and the Defendant later succeeds at trial, or it is not granted and the Plaintiff later succeeds).
- Secondly, the Court must keep in mind that an order which requires a party to take some positive steps at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.
- Thirdly, it is legitimate to consider whether the Court feels a high degree of assurance that the Plaintiff will be able to establish this right at the trial. That is because the greater the degree of assurance that the Plaintiff will ultimately establish his right, the less risk of injustice that will be caused if the injunction is granted.
- Finally, even where the Court is unable to establish high degree of assurance that the Plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted.

<sup>1</sup> House of Lords decision in *Co-operative Insurance Limited v. Argyll Stores Limited* [1998] AC 1

<sup>2</sup> *Chadwick J in Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 at 474

In practical terms, an Order for specific performance will depend on the following considerations<sup>3</sup>:

- (a) Is there a sufficient definition in the contract in question of what has to be done in order to comply with the Order of the Court or should this be supplied by the terms of the Order?
- (b) Will enforcing compliance involve superintendence by the Court to an exact degree?
- (c) What are the respective prejudices or hardships that will be suffered by the parties if the Order is made or not made?

You applied for mandatory injunction and the Court, having decided that the balance of justice weighs in your favour has granted you the interlocutory mandatory injunction. The Court Order sets out a timetable for the yacht building company to comply with the Order.

However, at the expiry of the time given for that company to deliver the yacht to Hong Kong and to issue the shipbuilder's certificate, you have been given a useless piece of paper and there is no trace of your yacht in Hong Kong.

What can you do?

### Court Powers of enforcement - Contempt Proceedings

Orders of the Court must be observed and complied with. The purpose of contempt proceedings, which can either be of a civil or of a criminal nature, is to maintain the supremacy of the law and the due and unobstructed administration of justice<sup>4</sup>. It must be shown not only that the Defendant did not comply with the terms of the Order, but also that he had no intention of doing so and the Court must be satisfied that contempt has been proved "beyond reasonable doubt".

The intention behind the disobedience does not need to amount to wilful disobedience. It is sufficient to prove that the alleged 'Contemnor' knew the facts which are said to make his act or omission a contempt and that such omission was not casual, or accidental and unintentional.<sup>5</sup>

When the Court makes an Order for disclosure of information and/or documents or to deliver up listed items, it requires not only an honest but also an accurate response from the Defendant. If an Affidavit is filed by the Defendant to verify compliance of the Court's order, it must be made in good faith and true to the best of the deponent's knowledge. Thus, if the response given is inaccurate, there is *prima facie* a contempt which may only be rebutted or excused if it can be shown that the inaccurate response was given in good faith and after all reasonable steps have been taken by the deponent to ascertain the true position.<sup>6</sup>

The question is to what extent can a director of a company be held liable for contempt committed by the company? Order 45 rule 5 of the Rules of the High Court expressly provides that where a body corporate disobeys a judgment or order to do an act within a specified time, then the Judgment or Order may be enforced by an Order of committal against an officer of the body corporate.

The only condition precedent to the enforcement of an Order is that the said Order shall be served on the company and on his officers personally together with the penal notice.<sup>7</sup>

The Hong Kong Court of Appeal held that there are two routes by which a director may be committed for contempt. The first one is under Order 45. The second one is by aiding and abetting the company in defying the Court Order. A director may be committed for contempt under Order 45 even though

<sup>3</sup> *Mervyn Davies J in Posner & Ors v Scott-Lewis & Ors* [1987] 1 Ch.25 at pp.34-35

<sup>4</sup> *Ruby Moy & Ors v. Chan Luen Ying & Another* [1964] HKLR 579 at 587-588

<sup>5</sup> *Director General of Fair Trading v. Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 at 478-481

<sup>6</sup> *Ebewe Arznemittal Ges.m.b.H & Another v. Lai Shu Lam trading as Forest Offset Printing Company* HCA No. 16387 of 1998 (unreported)

<sup>7</sup> *Cartier International BV & Ors v. Kaybee International Ltd* [1985] HKLR 127, *Huggins VP at 129 followed in Nicolas Pappadiis and Another v. Chan Shing-sheung, Barry and Others* [1989] 2 HKLR 511 at 519

he acted innocently; no moral blame or guilty knowledge is necessary.

There is a very big difference between these two approaches. Under Order 45, no moral blame or guilty knowledge need be shown in the director. It is sufficient to show that the Order was made against the company and served upon him. Then it is the director's personal obligation to ensure that that Order is complied with. When you are dealing with a situation of aiding and abetting, the test is quite different. What has to be shown is personal misconduct on the part of the director. The two routes for committing a director for contempt are aimed at serving different purposes: one is for punishment and the other is for enforcement of the Court Order.

In our situation, the building company was required to deliver a shipbuilder's certificate and the yacht. Playing on the terms of the Order, the Defendants alleged compliance by issuing a piece of paper that was clearly worthless.

On this particular occasion, the Court decided to take a practical approach: the yacht was in China and considering the difficulties that the Plaintiff would encounter in attempting to recover his yacht by other means than through the Hong Kong legal system, the priority was to have the yacht brought into the Hong Kong waters so that it would be within the jurisdiction of Hong Kong. A ruling as to whether there had been contempt would be the subject of a further hearing.

The Judge therefore decided to vary the terms of the Order and enjoin the Defendants to deliver the yacht and certificate under the name of the Chief Bailiff of the High Court and gave the Defendants another 28 days to comply with the varied Order.

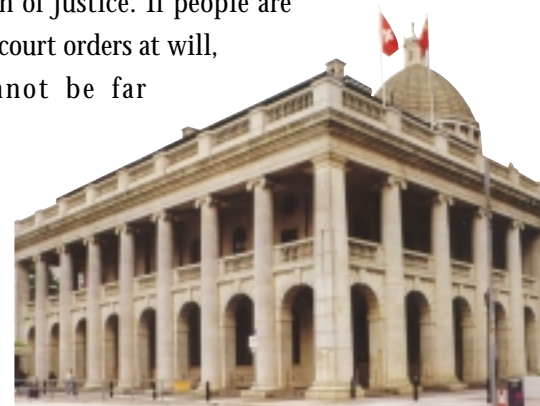
It subsequently took another hearing and a clear and express indication from the Judge that there would

be no further tolerance for failure to comply with the Order, i.e for, the yacht to be brought to Hong Kong. As to the outcome of the contempt proceedings, the case is still pending...

The penalty to be imposed by the Court for contempt, usually in the form of committal to prison for a term or a fine, depends on the facts of the individual case, the nature of the breach involved, the seriousness of the breach, the culpability of the Defendant's conduct and all the circumstances.<sup>8</sup>

One of the circumstances to be taken into account is whether the Plaintiff has or has had to incur substantial costs in enforcing the injunction. This will be a significant factor that the Court will take into account in deciding the appropriate penalty. A Defendant should be deterred from taking advantage of the fact that the breach of the Order is difficult to detect or costly to enforce. The penalty, if it is a fine, goes to the public revenue and not to the Plaintiff. The costs of the proceedings are usually awarded on an indemnity basis if the Court finds the Defendant guilty of contempt.

The purpose of the committal proceedings is clearly punitive, to punish the Defendant and its directors for breach of the Order. As such, the proceedings must be final and not interlocutory. "An order of the court must be and will be maintained and treated with seriousness. This forms the basis of our system of administration of justice. If people are free to ignore court orders at will, anarchy cannot be far behind."<sup>9</sup>



<sup>8</sup> *In Abu Dhabi National Tanker Co v Lam Ming Chi & Anor* [1998] 4 HKC 320, Stone J fined the defendant \$100,000 for failing to comply with an interlocutory mandatory order providing for payment of a certain sum of money

<sup>9</sup> *Axa China Region Insurance Company Ltd and Ors v Li Yu Ping, Helen* [2002] CACV217/2002

# In Brief

Robertsons was honoured to be one of the sponsors for the Hong Kong Soccer 7's



Robertsons donated to and participated in the 2005 Hong Kong Society for the Protection of Children Charity Golf Day



Mary Wong, Committee of HKSPC presented a trophy to our Michael Lintern-Smith.



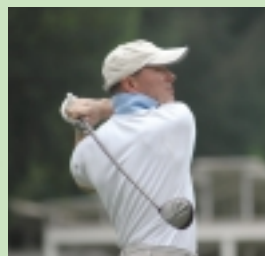
The 'Robertsons Team'



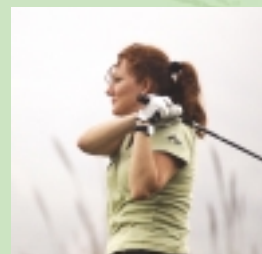
Christopher Gordon



David Wan



Barry Hoy



Kim Lintern-Smith



The 'Robertsons Hole'



The 'Pen Speaker', Mark Clifford



The 'Wig Speaker', Martin Lee



The 'Pen Speaker', Tim Noonan



The 'Wig Speaker', Margaret Ng and Michael Lintern-Smith



(from left) Ted Thomas, Emi Cheng and Claire Saunders



Raymond Sears and Stephen Mosely



(from left) Ian Candy, Barry Hoy, Kevin Steel and Simon Jenkins



(from left) John Wright, Christopher Gordon and David Lindsay

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