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HCA 2438/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 2438 OF 2006

BETWEEN

TV PRODUCTS (H.K.) LTD	Plaintiff
and	
KALYANARAMAN TIRUVIL WAMALA RAMACHANDRAN also known as KALYANARAMAN, T. RAMACHANDRAN	Defendant

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Before: Deputy High Court Judge Carlson in Chambers

Date of Hearing: 22 December 2006

Date of Handing Down Reasons for Judgment: 29 December 2006

R E A S O N S F O R J U D G M E N T

Introduction

1. On 22 December, I dismissed an application to discharge these injunctions and indicated that I would provide my reasons in due course, which I now do.

2. On 1 November this year, I granted the Plaintiff *ex parte* an injunction in *Mareva* form as well as *Anton Piller* orders against the Defendant which he now seeks to have discharged by reason of material non-disclosure by the Plaintiff on the *ex parte* hearing.

3. There have already been *inter partes* hearings in which the original orders have been adjusted, effectively by consent, this being the first occasion when sufficient time has been made available for Mr Maurellet, who appears for the Defendant, to argue for the discharge of the injunctions.

4. It is right to say that the Defendant has thus far complied with the injunctions, as a result of which further evidence has come to light which is said to strengthen the Plaintiff's case. Be that as it may, Mr Maurellet submits that I must examine the matter as at 1 November when these orders were first obtained without the Defendant having had a chance to be heard.

Background

5. A brief account of the nature of the action is essential. This can be obtained from the affirmation of Mr Samtani in support of the *ex parte* applications (*ex parte* bundle divider D) dated 1 November 2006. He is a director and major shareholder of the Plaintiff which is described [para. 6] as "an exporter, manufacturer and promoter of as-seen-on TV products, made to order products (i.e. original design manufacturing) and mail order products". As such it has several hundred customers and suppliers from

around the world. It employs 40 people, 27 of which including the Defendant, are based in Hong Kong and the rest are in Mainland China.

6. The Defendant who is a friend of a Mr Golani, a fellow director and shareholder of Mr Samtani's in the Plaintiff, was introduced to the Plaintiff by Mr Golani and was employed by it as a Sales Manager in 1996 until he resigned on 16 October 2006 which is also the date when he left the company's Tsim Sha Tsui offices for the last time. As Sales Manager, the Defendant dealt with the Plaintiff's customers in Australia, Eastern Europe, South Africa and Asia. He would not usually have to deal with its suppliers save on the few occasions that he had to in trying to obtain a price reduction for its customers.

7. As one might expect he was supplied with a computer in order to perform his work, as well as a personal computer so that he might also work from home. Inevitably, given his pivotal position in the Plaintiff's operations, he came into possession of much of the Plaintiff's confidential information.

8. The Plaintiff is in a substantial way of business. Starting at paragraph 19, Mr Samtani has set out its recent annual turnover figures. In 2002 US$57 million of which US$9.8 million was produced by the Defendant, in 2003 US$84.9 million of which US$15 million was generated by the Defendant, in 2004 US$86.7 million with US$9.3 million coming from the Defendant's efforts and in 2005 US$102 million of which US$5.3 million was contributed to by the Defendant. For the first nine months of 2006, the figures were US$87.1 million and US$2.8 million

respectively. A point made by Mr Samtani is that the Defendant's percentage of turnover from 2002 has declined steadily from a peak of nearly 18% in 2003 to only 3.19% in 2006.

9. Set out in considerable detail in Mr Samtani's affirmation is the confidential information which the Defendant is said to have come into possession of, including customer and supplier lists and pricing. Taken by itself, it will need to be read carefully as I have done before the *ex parte* hearing and for subsequent *inter partes* hearings; it establishes a very impressive case for saying that by virtue of his use of this confidential information the Defendant has been diverting business away from the Defendant to its rivals, he first having provided this information to them as well as making secret profits for himself. The evidence includes an analysis of the Defendant's office computer by a forensic computer expert. All of this activity by the Defendant was done as a prelude to his intended resignation prior to his being engaged by a rival of the Plaintiff. I have now seen his terms of employment with that company which are considerably more generous than what he was receiving when employed by the Plaintiff.

10. Suffice to say that on the strength of that evidence I was persuaded to make the *ex parte* orders that had been asked for. Now, in making this application, based as it is only on material non-disclosure, Mr Maurellet accepts that he is not able to remove these injunctions on their evidential merit. If he fails to show material non-disclosure he will have to content himself with having to wait for the trial before the merits can be probably tested in the conventional way by cross-examination.

The Grounds

11. At this stage, I propose to briefly state what Mr Maurellet says amounts to material non-disclosure, then I will say something about the law which is now very well settled and then go on to examine, in more detail, the alleged failure to make the necessary disclosure.

12. As to the *Mareva*, Mr Maurellet submits that there has been material non-disclosure as well as an absence of sufficient evidence to show a real risk of dissipation of assets by the Defendant. As to the *Anton Piller* order, the complaint is non-disclosure and/or that in the circumstances, the Plaintiff has failed to show a real possibility that the Defendant would destroy any relevant material before an *inter partes* application could be made.

The Law

13. Although I have had referred to me a number of cases, both here and in England, which bear on these matters it is not necessary to go beyond what has now become the standard work in this area being *Gee — Commercial Injunctions 5th Edition*. It is trite that an applicant to the court for *ex parte* relief "*must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms.*" [*Gee* at 9.001 page 239]

14. As to the effect of non-disclosure this can be taken from what is regarded as the authoritative judgment of Gibson LJ in *Brinks Mat Ltd v*

Elcombe (1988) 1 WLR 1350 at 1356, a summary of which is set out in *Gee* at 9.016 page 253:

> "*(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see Rex v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton L.J.
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> *(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p.504, citing Dalglish v Jarvie (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in Thermax Ltd v Schott Industrial Glass Ltd [1981] F.S.R 289, 295.*
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> *(3) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] F.S.R 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries.*
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> *(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v Nikpour [1985] F.S.R. 87, 92-93.*
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> *(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by the breach of duty': see per Donaldson L.J. in Bank Mellat v Nikpour, at p.91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.*
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> *(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the*

application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus penitentiae may sometimes be afforded', per Lord Denning M.R. in Bank Mellat v Nikpour [1985] F.S.R 87,90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> *'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed': per Glidewell L.J. in Lloyd's Bowmaker Ltd v Britannia Arrow Holdings Plc [1988] 1 W.L.R. 1337 at pp.1343H–1344A.*"

Whilst this was said in connection with *Mareva* relief the learned author makes clear that the same will apply to an *Anton Piller* order.

15. The other matter to which reference should be made is, really in order to underline the importance which the law attaches to full disclosure on such occasions, that it has been said on more than one occasion that *Mareva* and *Anton Piller* orders are at the extremities of the court's jurisdiction. They amount to relief of the strongest possible kind; "nuclear weapons" which make it absolutely essential for an applicant to make the fullest possible disclosure.

16. This therefore is the benchmark which I need to apply in determining whether there has been proper disclosure in this case.

The Quality of the Ex parte Application

17. Before I come to the particular complaints made by Mr Maurellet, it is useful to briefly examine what has been disclosed. At the *ex parte* stage the judge, not knowing what the other party has to say about the matter, can I believe be forgiven for thinking that the applicant has on the face of his evidence given a very full account of the case. It is only when the disclosure, or lack of it, is being challenged that he begins to see the other side of the coin. On this occasion, the Plaintiff had filed a very full main affirmation from Mr Samtani, and it is only his affirmation that is being challenged on this occasion, as well as an affirmation from the computer expert and other shorter supporting factual evidence. Mr Samtani's affirmation, insofar as it seeks to present a comprehensive factual picture, is impressive. It comes with exhibits which put in the raw evidence. The case was, as it should have been, supported by a full skeleton argument prepared by counsel, not Mr Lee on that occasion, making the application which, amongst other matters, sought to anticipate and draw attention to possible defences that could be raised by the Defendant. Insofar as an applicant should present a balanced case this skeleton succeeded. On the face of it therefore what was placed before the court appeared to be a full and fair presentation of the evidence, providing a compelling case for the grant of these orders which in the event succeeded. I can now turn to Mr Maurellet's complaints. He makes them in support of what is the only way in which, at this stage, he can remove these orders accepting, as he must, that at this interlocutory stage the strength of the evidence is more than sufficient to support the grant of these orders.

The Complaints

18. Mr Maurellet puts his case on the *Mareva*, on three bases. Firstly, that Mr Samtani has failed to provide a full picture as to the strength of the Defendant's links and connections with Hong Kong. He says that it is essential to have made clear that he was a permanent resident, that his family was here with him and that his children were at school here. Had such a picture emerged it would have been a matter which I, as the judge, would have had to weigh in deciding what the risks of his decamping from Hong Kong were and of dissipating his assets. Secondly, it is suggested that the figure of HK$3 million, as to the potential size of the claim against the Defendant, is a figure plucked out of the air, there being no evidential basis for such an amount. In the circumstances, this had the effect of "talking up" the claim which had the effect of making the case appear graver and more urgent than it actually was. Lastly, there were other matters raised by Mr Samtani in his affirmation which made the Defendant's conduct appear to be suspicious which, if properly analysed, are simply not borne out. It is the combination of these features, being acts of omission and an unjustified "talking up" of the case to an impermissible degree which provide good reason to set aside the orders without a consideration of the merits. I will examine these in turn.

The Defendant's Links to Hong Kong

19. A true analysis of Mr Samtani's affirmation shows that there is really nothing in this point. Although he has not said in terms that the Defendant has a permanent identity card, the fact that he had been employed by the Plaintiff for 10 years, lived here and was a member of the

Kowloon Cricket Club and was living at one address in Kowloon and was about to move to another address in Kowloon provide ample evidence of his anchors to the jurisdiction. In the circumstances, it was hardly necessary to go further and provide evidence that his wife also lived here and what his children's schooling arrangements were. There is more than enough to show that the Defendant is a member of the very large Indian sub-continental business community in Hong Kong. The fact that he was about to move flat to another flat in Kowloon more than provides evidence of a present and settled intention to remain here. There is therefore nothing in this point.

HK$3 Million "plunked out of the air"

20. Mr Maurellet submits that there is no basis to put this amount forward and that this being the case the court may have been misled into thinking that the matter had an urgency and gravity about it which required an urgent and grave response in the form of the orders that it made. Mr Lee, for the Plaintiff, says that $3 million was an honest estimate and that this figure was never elevated to anything more than an estimate. The Plaintiff was doing the best it could in the urgent situation that it found itself in. I agree with Mr Lee's analysis. Given the strength of the evidence at the *ex parte* stage and the turnover figures and the Defendant's past contribution to those figures, I am satisfied that the way that the estimate was pitched was entirely reasonable and so in this regard as well the contrary argument must fail.

Other Suspicious Circumstances

21. This is something of a "rolled up plea" by Mr Maurellet by which he seeks to criticize the way in which certain aspects of the Defendant's movements and conduct over his last critical days prior to his resignation have been orchestrated by the Plaintiff's advisors to make the case appear far more suspicious than it actually was and creating a false fear in the mind of the court that this was a man who was about to abscond and transfer or dissipate his Hong Kong assets, putting them beyond the reach of the Defendant and of the courts effective remedies in such circumstances.

22. I am bound to say that whilst the Defendant may have had perfectly sensible explanations for what he was doing in going early to Las Vegas and returning early from there and for his reasons for being in the Plaintiff's offices immediately after his return, that does not mean that the Plaintiff, in drawing attention to such matters, has fallen below the exacting standard required of it in terms of full disclosure and in the way that it presents its evidence. When one stands back and looks at the way that the matter was placed before the court, I am satisfied that it was done in impressive detail, was properly balanced and did not exaggerate the worth or weight of its evidence in such a way that it should suffer the peremptory consequences of the discharge which Mr Maurellet is asking for. It is for these reasons that I had decided to refuse the orders that have been asked for by the Defendant.

23. I should also say that had I been persuaded to discharge the *ex parte* orders, that it is highly likely, given the current state of the

evidence, that I would have in substance reinstated the injunctions. I should make clear that this can only be a provisional view, simply because I have not been put to it to make that decision and, even more importantly, because I have not heard argument on the issue of reinstatement.

Costs

24. It seems to me where the Defendant has failed to get his discharge that he should bear the costs of the application. Other previously reserved costs will be cost in the cause. In the usual way these will be orders *nisi*.

(Ian Carlson)
Deputy High Court Judge

Thomas Lee, instructed by Messrs Haldanes, for the Plaintiff

Jose-Antonio Maurellet, instructed by Messrs Barlow Lyde & Gilbert, for the Defendant